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Trey G. Elmer

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A QUESTION OF DIGNITY: AN EQUITABLE SOLUTION TO THE TROPHY ART DEBATE

I. INTRODUCTION

On April 14, 1998, Russia's Constitutional Court ordered President Boris Yeltsin to sign the highly controversial bill "On Cultural Valuables Transferred to the USSR as a Result of the Second World War and Now Located on the Territory of the Russian Federation."¹ This bill, known as the "Trophy Art Law,"² is the culmination of over three years of heated debate in the Russian government, and over fifty years of equally emotional debate in the international community.³ This debate centers on Russia and Germany's tug-of-war over \$65 billion worth of art treasures stolen during World War II.⁴

During the Second World War, Nazi brigades confiscated artworks from museums and private collections of conquered countries.⁵ The Nazis then systematically shipped the looted works back to Germany.⁶ Immediately after the War, Russia formed its own brigades to seize artwork in Germany.⁷ These "trophy brigades" secretly looted German museums, private collections, and hidden depositories in retaliation against the destruction Germany had caused to Russia's cultural heritage.⁸ The world thought these artworks were missing or destroyed.⁹ However, after

1. Jamey Gambrell, *Yeltsin Forced to Sign Trophy Law*, ART AM., June, 1998, at 27.

2. *Russia's Constitutional Court to Consider Legitimacy of Trophy Art Law*, INTERFAX RUSSIAN NEWS (Interfax, Moscow), July 1, 1998.

3. Genine Babakian, *Russian vs. Germany: The Battle is Over Stolen Art*, USA TODAY, May 21, 1997, at A4.

4. *Id.*

5. HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART 3* (1997).

6. *Id.* at 3.

7. Babakian, *supra* note 3, at A4.

8. *Id.*

9. 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.

almost five decades, the works surprisingly resurfaced.¹⁰ In early 1995, two Russian exhibitions revealed these treasures to the world.¹¹

Although the two exhibitions¹² delighted the art world,¹³ they once again ignited the international controversy concerning stolen art.¹⁴ Since then, politicians, legal scholars, art enthusiasts, and journalists have written about the uncertain fate of the trophy art.¹⁵ Some argue that Russia should return the art to Germany.¹⁶ Others argue that Russia should keep the art.¹⁷ This Note argues neither position; instead, this Note proposes that Russia and Germany should take guidance from a recently settled dispute over a Degas landscape alleged to have been stolen during W.W.II.¹⁸ This heralded compromise between pharmaceutical magnate Daniel Searle and the Goodman family¹⁹ demonstrates how two opposing sides, each with justifiable yet disparate interests, can agree to an equitable solution that allows all parties to claim victory.²⁰

Part II of this Note briefly describes the history behind the trophy art controversy. Part III outlines the international laws and treaties involved. Part IV focuses on the respective arguments of Russia and Germany. Part V discusses the inadequacies of previously proffered solutions and suggests guidance from the Searle/Goodman settlement. Part VI concludes that only an equitable solution, such as the one proposed, can resolve this complex dispute and allow both Russia and Germany to save face in the international community.

10. *Id.*

11. *Id.*

12. On February 27, 1995, the Pushkin Museum of Fine Art in Moscow opened the exhibition "Twice Saved." See Hughes, *supra* note 9, at 64. On March 25, 1995, the Hermitage Museum in St. Petersburg unveiled "Hidden Treasures Revealed." *Id.*

13. Christopher Knight, *Displaying the Spoils of War*, L.A. TIMES, Mar. 20, 1995, at A1.

14. Hughes, *supra* note 9.

15. See, e.g., Gambrell, *supra* note 1; FELICIANO, *supra* note 5.

16. Elissa S. Myerowitz, Comment, *Protecting Cultural Property During A Time of War: Why Russia Should Return Nazi-Looted Art*, 20 FORDHAM INT'L L.J. 1961 (1997).

17. Sylvia L. Depta, Comment, *Twice Saved or Twice Stolen: The Trophy Art Tug-of-War Between Russia and Germany*, 10 TEMPLE INT'L & COMP. L.J. 371, 372 (1996).

18. Kevin M. Williams, *Degas Settlement Lands in Uncharted Territory*, CHI. SUN-TIMES, Aug. 16, 1998, at 43.

19. *Id.*

20. Kevin M. Williams, *Deal Here Ends Degas Dispute*, CHI. SUN-TIMES, Aug. 14, 1998, at 2.

II. HISTORICAL BACKGROUND

The sordid history behind the trophy art began with Adolf Hitler.²¹ Under Hitler's orders during World War II, German troops plundered art from conquered nations to display in a museum to be created in Linz, Austria, as a "showpiece of Nazism."²² Hitler designed this "supermuseum" to reflect not only his personal artistic tastes, but also to glorify his views of the Aryan race.²³ In Eastern Europe, the Nazis undertook to annihilate the region's identity and cultural heritage through mass murder and "forced Germanization."²⁴ Germany's siege on Russia began in 1941,²⁵ and for nearly three years the Nazis demolished more than 1200 churches, 500 synagogues, and 500 museums.²⁶ Believing Russians to be an inferior race, the Nazis destroyed most of the artwork they found in Russia.²⁷

After the Nazi defeat, the Russian commander, Joseph Stalin, and the Russian Emergency State Committee authorized the massive removal of cultural property in Germany to Russia.²⁸ Stalin believed that because the Russian people suffered so greatly during the War,²⁹ they deserved some

21. See generally, FELICANO, *supra* note 5.

22. *Id.* In twelve years, as many works of art were displaced as during the entire Thirty Years War or all of the Napoleonic Wars. *Id.* at 23.

23. LYNN H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* 3 (1994). Hitler's vision was to build a model city in Linz, Austria. See *id.* at 10-11. Hitler's grand scheme for a monumental "supermuseum" was to be composed of several museums, each dedicated to a different artistic discipline. *Id.* at 43.

24. Hitler's plan for world domination was to completely devastate conquered nations, including a nation's cultural heritage, in order to facilitate the injection of Nazi ideology. *Id.* at 16. As Hitler stated, "[t]he paintings in my collections...were not assembled for any personal gain, but for the creation of a museum in my native city of Linz on the Danube." FELICIANO, *supra* note 5, at 23.

25. Karl E. Meyer, *Who Owns the Spoils of War?*, *ARCHEOLOGY*, July—Aug. 1995.

26. *Unplundering Art*, *THE ECONOMIST*, Dec. 20, 1997, at 126.

27. Knight, *supra* note 13. However, the Germans kept some Russian artwork—the Russian Ministry of Cultures estimates that German troops confiscated approximately 500,000 works of art worth millions of dollars. Babakian, *supra* note 3.

28. Karl E. Meyer, *Who Owns the Spoils of War?*, *ARCHEOLOGY*, July—Aug., 1995, at 48.

29. Along with destroying much of Russia's cultural heritage, including the infamous Amber Room at the palace of Catherine the Great, the Nazis annihilated approximately twenty-six million Russian citizens. *Russia Debated Returning Nazi Loot: Yeltsin May Buck Possessive Lawmakers on Sensitive Issue*, *CHI. TRIB.*, April 17, 1997, at 20.

type of reparation.³⁰ He ordered a group of art historians, museum officers, artists, and art restorers to develop a list of price and quality equivalents of the artworks destroyed or removed from Russia during the War.³¹ Stalin then assembled Trophy Brigades³² to comb German museums, castles, and caves in which the Nazis had stored their own art treasures as well as hidden looted foreign art.³³ A flood of art subsequently poured into Russia.³⁴ The Trophy Brigades removed an estimated 2.5 million objects from Germany.³⁵ The Russians had their own plan to build a "Museum of World Art,"³⁶ similar to Hitler's plans of a "supermuseum."³⁷ Ultimately, the Soviets gave up that plan,³⁸ or so it seemed.³⁹ In 1958, following the United States' return of over 200 German masterpieces to Germany,⁴⁰ Russia returned approximately 1.6 million trophy items to Germany.⁴¹ After that, the world seemed to have

30. Margaret M. Mastroberardino, Comment, *The Last Prisoners of World War II*, 9 PACE INT'L L. REV. 315, 321—322 (1997).

31. *Id.*

32. Mastroberardino, *supra* note 30 at 322.

33. Meyer, *supra* note 28, at 48.

34. *Id.* at 49.

35. Pietila, *supra* note 30.

36. Meyer, *supra* note 28, at 50. After the Trophy Brigades were formed and the treasures came into Russia, Moscow had a vision of "the post-war creation of a great Museum of World Art to be filled with works seized as compensation for Nazi vandalism." *Id.* The Russian vision of a "World Museum" paralleled Hitler's plans for a "supermuseum" in that the museum was to house the greatest works of art the world had to offer. *Id.*

37. LEONARD F. DUBOFF & SALLY H. CAPLAN, *THE DESKBOOK OF ART LAW*, D-17 to D-21, (1993).

38. Meyer, *supra* note 28, at 50. At the end of World War II, some American officials proposed keeping German art as war reparations. Nicholas, *supra* note 23, at 385. In response, several officers drafted the Wiesbaden Manifesto. *Id.* The Manifesto warned that the removal for any reason of a nation's cultural heritage would cause much justified bitterness and grievance. *Id.* at 394. After the highly publicized Wiesbaden Manifesto, "[n]othing more was said about establishing a Museum of World Art, with its embarrassing resemblance to Hitler's plans for Linz." *Id.*

39. *Id.*

40. Meyer, *supra* note 28, at 50. Several shipments of German art were removed to the United States and put on display in the National Gallery. *Id.* Due in large part to the public outcry over the Wiesbaden Manifesto, President Harry S. Truman returned the 202 masterpieces to Germany in 1955. *Id.* at 50.

41. Pietila, *supra* note 30.

forgotten about the trophy art.⁴² For decades, this multi-billion dollar cache sat untouched in the basements of Russian museums.⁴³ Russia claims that the works were stored for safekeeping; in effect, Russia believes that it “saved” the works.⁴⁴

In 1991, amid rumors about hidden war treasures, Russia’s Minister of Culture, Nikolai Gubenko, officially admitted that depositories filled with trophy art existed in Russian museums.⁴⁵ He said that President Gorbachev was ordering the establishment of a Commission on Restitution.⁴⁶ However, there was a catch: the Soviet government would only return the trophy art if it received “objects of equivalent artistic quality” stolen by the Germans.⁴⁷

After Russia and Germany failed to reach an agreement on restitution,⁴⁸ the Hermitage and Pushkin museums each unveiled portions of the hidden treasure.⁴⁹ On February 28, 1995, the Pushkin opened “Twice Saved,” which exhibited sixty-three paintings lost or destroyed.⁵⁰ These paintings constituted merely one-sixth of the Pushkin’s collection of the trophy art.⁵¹ Exactly one month later, the Hermitage presented “Hidden Treasures Revealed” and displayed more treasures thought to have

42. Mastroberardino, *supra* note 30 at 323.

43. Mark Almond, *The Art of Cashing in on Nazi Treasures*, DAILY MAIL, Oct. 21, 1995, at 12. “Much of the plunder was hidden behind a steel door in the Pushkin’s basement.” *Id.* Some of the paintings were exhibited in two galleries in the Pushkin Museum; however, “special passes” were required to gain access for viewing. Knight, *supra* note 13.

44. *Id.* The Russians emphasize that war enemies commonly destroy each other’s cultural property, yet the Soviet Union actually preserved these works. *Id.*

45. KONSTANTIN AKINSHA & GRIGORII KOZLOV, BEAUTIFUL LOOT; THE SOVIET PLUNDER OF EUROPE’S ART TREASURES, 239 (1995).

46. *Id.*

47. *Id.*

48. *Id.* at 251. In 1992, a joint Russian-German Commission was formed to consider restitution. *Id.* One reason that no agreement was reached is that Russia refused to reveal war archives because they also contained details of Russia’s activities during the war. *Id.*

49. The Pushkin exhibit included works by Degas, Van Gogh, Seurat, Courbet, Cezanne, and Renoir. Stanley Meisler, SMITHSONIAN, Mar. 1995, at 40. 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. . . .” Hughes, *supra* note 9, at 66.

50. Jamey Gambrell, *Displaced Art*, ART IN AM., Sept. 1, 1995, at 91-93.

51. *Id.* at 91.

been lost or destroyed.⁵² Both exhibitions ignited debate about the legality and morality of Russia's possession of the art.⁵³

III. INTERNATIONAL LAWS AND AGREEMENTS BETWEEN RUSSIA AND GERMANY GOVERNING CULTURAL PROPERTY

In 1945, the Soviets joined the Allies at the Nuremberg Trials in classifying the plunder of art as a war crime.⁵⁴ The Hague Regulations of 1907 were key to these trials,⁵⁵ and specifically Article 56 of the Regulations, which provides:

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 or destruction of, or willful damage to, institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.⁵⁶

The Soviets and the Allies enforced the Hague Regulations in convicting Nazi war criminals.⁵⁷ In concurring with the prosecutors at the Nuremberg trials, the Soviets themselves supported the mandate of Article 56.⁵⁸

Forty-five years later, in an effort to improve the relationship of the two nations,⁵⁹ the Soviet Union and Germany signed the Treaty on Good-

52. *Id.* at 94. "German cultural officials, foreign museum director's ... and various heirs to the German private collection who were in St. Petersburg to press their claim, were all invited to a gala opening banquet." *Id.* The paintings exhibited included works by such masters as Delacroix, Cezanne, Corot, Courbet, Degas, Fantin-Latour, Renoir, and Monet. *Id.*

53. Hughes, *supra* note 9.

54. Meyer, *supra* note 28, at 50.

55. *Id.*

EDMUND JAN OSMANCIK, *1907 Hague Regulations*, in *ENCYCLOPEDIA OF THE U.N. AND INTERNATIONAL AGREEMENTS*, 326 (1985).

57. Meyer, *supra* note 28, at 50.

58. *Id.*

59. Shawn Stephens, *The Hermitage and Pushkin Exhibits: An Analysis of the Ownership Rights to Cultural Property Removed From Occupied Germany*, 18 *HOUS. J. INT'L L.* 59 (1995).

Neighborliness, Partnership and Cooperation.⁶⁰ Article 16 of the Good-Neighborliness Treaty provides:

The Federal Republic of Germany and the Union of Soviet Socialist Republics will advocate the preservation of cultural treasures of the other side in their territory. They agree that missing or unlawfully transferred art treasures which are located in their territory will be returned to their owners or their legal successors.⁶¹

However, when Chancellor Helmut Kohl of Germany and President Mikhail Gorbachev of the Soviet Union signed the treaty, the Germans did not know of the existence of the trophy art.⁶²

In 1992, a second treaty, the Russia-Germany Cultural Agreement,⁶³ reaffirmed the commitments of the Good-Neighborliness Treaty.⁶⁴ Article 15 of the Cultural Agreement provides that “the contracting parties agree that missing or unlawfully removed cultural property which is located in their territory will be returned to the owners or their successors.”⁶⁵ Though these provisions relate to the return of cultural property, Russia and Germany each interpret the language of these provisions differently.⁶⁶

IV. RESPECTIVE ARGUMENTS OF GERMANY AND RUSSIA

The language in the German-Russian treaties presents two poignant questions. One question is whether the treaties' language refers to cultural property taken prior to 1990, or to cultural property taken after the Treaty on Good-Neighborliness was signed.⁶⁷ Naturally, Germany argues that the language was meant to include art taken during and after World War II.⁶⁸ Although the Germans admit that the Nazi plunder was wrong, they believe that they are entitled to the return of looted works, not just their

60. Treaty on Good-Neighborliness, Partnership and Cooperation, Nov. 9, 1990, F.R.G.-U.S.S.R. 30 I.L.M. 504. (“Good-Neighborliness Treaty”).

61. *Id.*

62. AKINSHA & KOZLOV, *supra* note 45, at 234.

63. Stephens, *supra* note 59, at 80-83.

64. *Id.*

65. *Id.* at 81.

66. Depta, *supra* note 17, at 381.

67. *Id.* at 383.

68. *Id.*

own cultural property.⁶⁹ Their arguments are founded upon the general international prohibition of looting art during wartime, as expressed in the 1907 Hague Convention.⁷⁰ Germany contends that the Soviet Union subscribed to this prohibition not only by signing the 1907 Hague Convention, but also by signing the Good-Neighborliness Treaty and the subsequent Cultural Agreement.⁷¹ Germany further argues that the bilateral treaties were intended to reconcile the past. Therefore, Germany contends that the treaties should be read as retroactive.⁷²

Russia, on the other hand, contends that the terms of its treaties with Germany should be scrutinized in light of the circumstances that surrounded the treaties' ratifications.⁷³ Russia argues that the language of its treaties with Germany should be read as prospective, not retroactive.⁷⁴ To support its contention, Russia relies on the terms of the 1970 UNESCO Convention, whose treaty prohibited theft of cultural property through illicit import, export, and transfer of ownership.⁷⁵ Russia argues that the express terms of the Convention provide for a prospective application.⁷⁶ Similarly, Russia claims that the language in both the Good-Neighborliness Treaty and the subsequent Cultural Agreement is inapplicable to art taken before the ratification of the treaties.⁷⁷ The Russians believe the crucial date was when the treaties were enacted, not when the art was taken.⁷⁸

A second question concerning the language of the treaties is the meaning of the terms "missing" and "unlawfully removed." The treaties state in clear terms that "missing. . .cultural property. . .will be returned to the owners"⁷⁹ and that "unlawfully removed cultural property. . .will be

69. *Id.*

70. Gambrell, *supra* note 50, at 38. The Hague Convention of 1907 codified international law that defined the law applicable to land warfare, including sections on the protection of cultural property. *Id.* The Convention conflicted with ancient practices by formally forbidding the pillage of cultural property. *Id.*

71. Depta, *supra* note 17, at 386.

72. Sylvia Hochfield, *Nobody Knows What to Do Next*, ARTNEWS, May 1995, at 65.

73. Stephens, *supra* note 59, at 103. This is the principle of intertemporal law. *Id.*

74. *Id.*

75. *Id.* UNESCO stands for "United Nations Educational, Scientific and Cultural Organization." Depta, *supra* note 17 at 385.

76. Stephens, *supra* note 59, at 103.

77. *Id.*

78. *Id.*

79. See Good-Neighborliness Treaty, *supra* note 60, art. 16.

returned to the owners.”⁸⁰ Germany contends that the trophy art was both “missing,” because it had no knowledge of where the art was located,⁸¹ and “unlawfully removed,” because of the international prohibition against the removal of cultural property during war time.⁸² However, whose knowledge is required concerned the whereabouts of the art in order to be “missing?” And, was the art legally removed according to international law?

Russia argues that the art was never “missing” because the Russian government knew where the art was all along.⁸³ In its view, “missing” means that no one knew the whereabouts of the art.⁸⁴ Russia also argues that other countries knew Russia was storing the art.⁸⁵ In addition, Russia uses several arguments to uphold its position that the works were never “unlawfully removed.”⁸⁶ First, it contends that the Allied Control Council, the governing body of defeated Germany, had recognized the “compensation principle of restitution.”⁸⁷ Russia contends, therefore, that it had a legally recognized right to take German property as compensation for the destruction of Soviet property by the Nazis.⁸⁸ Historically, when a nation is not the aggressor in a war, general international law has supported the concept of reparation.⁸⁹ The Soviet Union did no more than compensate itself for the losses it had sustained during the War.⁹⁰

Russia’s second argument is that because no German state existed after Hitler’s defeat, the Soviet Union was a legitimate governing power during its occupation of Germany after the War.⁹¹ Because of the doctrine of *uit*

80. *Id.*

81. Depta, *supra* note 17, at 386.

82. *Id.* at 386.

83. Stephens, *supra* note 59, at 99.

84. *Id.*

85. According to Russia, Poland and Austria knew of the Trophy Art’s location. *Id.* at 99.

86. AKINSHA & KOZLOV, *supra* note 45, at 253.

87. *Id.*

88. *Id.*

89. *Id.* Though this general principle of reparation for war devastation exists, the French and Dutch governments are pressuring Russia to uphold the country’s bilateral agreements with Germany. See Gregory Katz, DALLAS MORNING NEWS, Mar. 28, 1995, at 1A. However, at the end of World War II, several countries believed that Germany should be forced to make reparations for its destruction of other countries’ cultural properties. *Id.*

90. AKINSHA & KOZLOV, *supra* note 45, at 253.

91. Meyer, *supra* note 28, at 47.

possidetis,⁹² Russia argues that it was entitled to the cultural property within the zone it occupied.⁹³ Coincidentally, the zone Russia occupied just happened to be where the artworks were found.⁹⁴ It follows that since "everything was legally removed, Russia was not obliged to return anything."⁹⁵ Russia also argues the Act of State Doctrine, which enforces a foreign sovereign's actions, regardless of whether or not the actions were legal under the occupied territory's laws.⁹⁶

Germany counters these arguments by contending that the Soviet occupation of Germany did not eliminate its government's status as the sovereign government.⁹⁷ The Soviets, therefore, illegally removed the art from Germany.⁹⁸ According to the Germans, the Soviet military occupation of Germany after World War II did not strip Germany of its sovereignty because military occupation of a country only suspends sovereignty; it does not extinguish it.⁹⁹ Thus, the Soviet confiscation of the trophy art did not transfer the rights in the art to the Soviets.¹⁰⁰ It follows that the Soviets obtained the trophy art in violation of international law, and that they must return the art to Germany.¹⁰¹

Russia's strongest argument, however, is historical precedent.¹⁰² The Soviets did only what others have done since the Ancient Romans paraded their looted treasures through the streets of Rome.¹⁰³ In addition to the Romans, Napoleon, Hitler, and even the Americans and the English, have all plundered the cultural property of conquered nations as a sign of

92. Stephens, *supra* note 59, at 92. The historical doctrine of *uit possidetis* provides that the capture of a State during wartime gave the victor valid title to all property within the defeated country. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. JOHN H. MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS AND THE VISUAL ARTS*, xvi (2nd ed. 1987). Germany counters the Act of State Doctrine argument by stressing that when it found out that Russia possessed the supposed missing art, Germany initiated rectification talks with Russia. Stephens, *supra* note 59, at 68.

97. Stephens, *supra* note 59, at 68.

98. *Id.* at 69.

99. *Id.* at 6.

100. *Id.*

101. *Id.*

102. DUBOFF & CAPLAN, *supra* note 37, at D-3.

103. *Id.* at D-6. The ancient Romans seized cultural property not for its value, but as a symbol of the victory. *Id.*

victory.¹⁰⁴ Throughout history, conquerors have justified cultural plunder by evoking the classic belief that the strong naturally have the right to dominate over the weak.¹⁰⁵ To the Romans, wartime booty was not admired for its inherent value, but rather symbolically worshiped as Roman triumph.¹⁰⁶ Following the Roman example, Napoleon paraded looted masterpieces through the streets of Paris, especially after his conquest over Rome itself.¹⁰⁷ During the Turkish rule over Greece, Lord Elgin of Great Britain acquired the infamous Parthenon Marbles under dubious circumstances.¹⁰⁸ As Russia argues, history dictates that international law has customarily recognized title by conquest.¹⁰⁹ Under this argument, international law does not require that Russia return the art because it has been a consistent practice or custom for conquering states to legally own the cultural property of the defeated.¹¹⁰

Ultimately, this controversy boils down to one question—who should keep the trophy art? To make matters worse, Russia and Germany are not the only interested parties.¹¹¹ Other countries¹¹² and private individuals¹¹³ also have valid ownership claims to the trophy treasures.

104. *Id.*

105. RUSSEL CHAMBERLAIN, *LOOT! THE HERITAGE OF PLUNDER* 151 (1983).

106. *Id.* at 134.

107. *Id.*

108. Lord Elgin took “seventeen figures from the Parthenon pediments, fifteen metopes, and fifty-six slabs of the temple’s friezes.” Depta, *supra*, note 17 at 378. At the time, Greece was part of the Ottoman Empire, which made the Marbles an “indirect” spoil of war. *Id.* at 377.

109. Alan Riding, *Are Finders Keepers?*, N.Y. TIMES, Mar. 12, 1995, section 4, at 3.

110. Stephens, *supra* note 59, at 101. In fact, the United States intended to keep the art it looted from the zone it occupied in Germany. Depta, *supra* note 17, at 376. However, the American public demanded the return of the German works, in large part due to the publication of the Wiesbaden Manifesto in *The New Yorker*. *Id.*

111. Katz, *supra* note 89.

112. Turkey, Hungary, and Poland all have claims involving the Trophy Art. See Alexandra Peers, *Art World is Unnerved by Cries for Return of War Booty*, WALL ST. J., Feb. 16, 1995, at C1. Turkey claims that the Germans illegally took the Trojan Gold from it over a century ago. *Id.* The Soviet armies seized the treasure from the Berlin Museum of Pre- and Early History. *Id.* The Hungarian government has asked Russia to return two important Jewish-Hungarian collections consisting of one hundred and thirty two paintings, including works by Degas and Renoir. *Id.*

113. For example, Daniela Brabner-Smith, daughter of a German art collector, recognized two works at the Hermitage exhibition allegedly stolen from her family’s home. Richard Beeston, *War Booty Row Over Russian Exhibition*, THE TIMES OF LONDON, Mar. 30, 1995.

V. INADEQUACIES OF PREVIOUS SOLUTIONS

A. *Russia Should Return the Trophy Art to Germany*

If the trophy art is returned, where will the line be drawn on the repatriation of other art works?¹¹⁴ Will a floodgate of demands from other countries be opened?¹¹⁵ Could Britain validly continue to refuse demands from Greece for the return of the Elgin Marbles?¹¹⁶ Russia's return of the trophy art may cause an enormous controversy in the art world, with demands expanding beyond artwork stolen during World War II.¹¹⁷ As one art historian stated:

Repatriation claims may come to include any work with a murky or missing export history, ancient treasures unearthed by archaeologists, Asian art that may have left its country of origin around the time of the Vietnam War, or art works deemed retroactively-national treasures or property of the states.¹¹⁸

Additionally, Andre Emmerich, president of the Art Dealers Association of America, believes that a repatriation movement could eventually halt international collecting and exhibitions.¹¹⁹ As he stated, "[w]hen the owners of art are too afraid of legal repercussions to trade or show their art, the real losers are the members of the public, who are denied the opportunity to ever see the art."¹²⁰

Many view the solution as a simple matter of morality; if artwork was acquired through questionable circumstances, then it should be returned to its original country.¹²¹ Under this approach, the British Museum, the Metropolitan, and the Louvre would be required to return substantial portions of their collections to the countries of origin.¹²² For example, after Napoleon's defeat, France returned much of its war booty to the

114. *Unplundering Art*, *supra* note 26, at 126.

115. *Id.*

116. *Id.*

117. Riding, *supra* note 109, at 3.

118. Peers, *supra* note 112, at C1.

119. *Id.*

120. *Id.*

121. Depta, *supra* note 17, at 392.

122. *Id.*

rightful owners, but a large amount still remains in the Louvre.¹²³ In fact, few nations have “truly clean hands” when it comes to their art collections.¹²⁴ The return of the trophy art could create an un-welcomed precedent and leave museum collections vulnerable to mass litigation.¹²⁵ It follows that “[o]nly Egyptians would then have ready access to the mummies, only Greeks to the *kouros* statues, only Italians to the mosaics of Pompeii and Herculaneum.”¹²⁶ In the private sector, litigation over art misappropriated during World War II has recently become prevalent. Unfortunately, there is no standardized solution.¹²⁷

For Russia, the dispute is more political than legal.¹²⁸ With such an emotional debate, any government must pay attention to its citizens.¹²⁹ For example, “it seems unimaginable for the British government to declare to its people that it simply decided to return the Elgin marbles.”¹³⁰ Similarly, the trophy art is important to Russian pride.¹³¹ Many Russians believe that the retention of the art is a symbol of power.¹³² Russian Nationalists “regard the trophies as the last fruits of victory—the only ones the nation hasn’t lost yet—and they believe that by refusing to return them, Russia demonstrates that it is still a great power that can’t be ordered around or humiliated by the West.”¹³³

For many Russians, the trophy art has become a deeply personal issue.¹³⁴ To them the retention of these works is just compensation for

123. CHARLES DE JAEGER, *THE LINZ FILE: HITLER’S PLUNDER OF EUROPE’S ART* (1981).

124. Meyer, *supra* note 28, at 52.

125. *Id.*

126. *Unplundering Art*, *supra* note 26, at 126.

127. For example, in *DeWeerth v. Baldinger*, the plaintiff brought suit for the return of a painting stolen from the plaintiff’s family castle during WWII. *DeWeerth v. Baldinger*, 38 F.3d 1266 (2nd Cir. 1994). The court found in favor of the defendant, who had purchased the painting at a reputable New York gallery. *Id.* at 1268. The court found that the plaintiff did not exercise due diligence in locating the painting and that her action was thus untimely. *Id.*

128. Karl E. Meyer, *Russia’s Hidden Attic: Returning the Spoils of World War II*, N.Y. TIMES, Feb. 1, 1995, at A20.

129. *Id.*

130. Depta, *supra* note 17, at 391.

131. Gambrell, *supra* note 1, at 27.

132. *Id.*

133. AKINSHA & KOZLOV, *supra* note 45, at 255.

134. *Id.*

the destruction of Russian culture during World War II.¹³⁵ Raisa Lyashenko, a Russian pensioner, wrote in the *Sovietskaya Rossiya* newspaper, "You, Mr. Kohl demand the return of 'stolen' museum pieces? In that case, I have a demand for Germany. Return to me the 36 relatives who were killed by German occupiers."¹³⁶ Similarly, Natalya Tsedina wrote, "I think Germany owes us a lot more than what we took. They are the ones who invaded our country. Besides, even in civilized England they do not want to give anything back."¹³⁷ Even Sergei Krylov, Russia's ambassador to Germany, stated that the trophy art debate is "a very emotional subject" and "a question of dignity of both countries;" but he added, "[w]e must not forget the reasons behind what happened. One often refers to the need to return these treasures, but it is a two-way process and a lot of Russian cultural works have been lost since World War II."¹³⁸

B. *Russia Should Keep the Trophy Art*

If Russia keeps the art and denies its obligations under international law or its bilateral agreements with Germany, there could be a chilling effect not only on its relations with Germany, but also with the international community.¹³⁹ As Armin Hiller, the head of the German Ministry of Foreign Affairs, questions, "[h]ow [is] . . . Russia going to integrate itself in the European Union where cultural identity is indispensable and following the rule of law is critical?"¹⁴⁰ In addition to concerns of integration with the European Union, Yeltsin wants to maintain and strengthen Russia's relationship with Germany.¹⁴¹ If the trophy art is not returned, will the world ostracize Russia?

Nationalists in Russia's Parliament appear less interested in strengthening ties with the European Union and Germany than in trying to even the score for the Soviet lives and property lost in World War II.¹⁴²

135. Babakian, *supra* note 3, at A4.

136. *Id.*

137. *Id.*

138. Mark Rice-Oxley, *Packed Programme for Yeltsin in 20-Hour Visit to Bonn*, AGENCE FRANCE PRESS (Bonn), June 7, 1998.

139. *Id.*

140. Catherine Foster, *Stolen Art as War Booty: Hostages or Harbingers of Peace?*, THE CHRISTIAN SCIENCE MONITOR, Feb. 8, 1995, at A18.

141. Babakian, *supra* note 3, at A4.

142. *Cultural Treasures Issue Cuts Both Ways, Russia Insists*, AGENCE FRANCE PRESS

For two years, the Russian Parliament and President Yeltsin fought over the signing of the "Trophy Art Law."¹⁴³ The Russian Parliament voted three times to nationalize the trophy art.¹⁴⁴ Yeltsin vetoed the bill twice, arguing that it was contrary to general international law and the Russian-German Treaty of Good-Neighborliness.¹⁴⁵ Because the Russian Constitution mandates that a president cannot veto a bill three times,¹⁴⁶ the Russian Constitutional Court told Yeltsin that he must sign the bill into law.¹⁴⁷ After Yeltsin signed the bill, he simultaneously sent it back to the Constitutional Court to consider whether the law is in fact constitutional.¹⁴⁸ The law as it stands makes all trophy art Russian property.¹⁴⁹ The return of any work would require separate legislation, thereby making it virtually impossible for anyone to recover their property.¹⁵⁰ Through this law, Russia is in effect refusing to return the trophy art.

Because of the stalemate, some have suggested that the International Court of Justice ("ICJ") should resolve the debate.¹⁵¹ However, Russia cannot be forced to appear before the ICJ.¹⁵² According to the ICJ charter, a state cannot be forced to participate in negotiations, treaties, or proceedings before the ICJ without that state's consent.¹⁵³ As with any state appearing before the ICJ, Russia would have to first sign a Declaration of Compulsory Acceptance to consent to ICJ jurisdiction.¹⁵⁴ It is doubtful that Russia would consent to participate in proceedings or

(Bonn), June 5, 1998.

143. Geraldine Norman, *The Arts: The Trojan War That Is Going On Right Now*, THE DAILY TEL., June 25, 1998, at 29.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* To date, the Russian Constitutional Court has not decided this issue. *Id.*

149. *Id.*

150. *Id.*

151. *See, e.g.,* Myerowitz, *supra* note 16, at 1998. *See also,* Margaret M. Mastroberardino, Comment, *The Last Prisoners of World War II*, 9 PACE INT'L L. REV. 315, 355 (1997).

152. COVEY T. OLIVER, ET AL., THE INTERNATIONAL LEGAL SYSTEM, 61- 65 (1973).

153. *Id.*

154. *Id.*

negotiations before the ICJ.¹⁵⁵ As a result of these difficulties, many scholars, curators, and diplomats have realized the need to explore different approaches to settle this dispute.¹⁵⁶

VI. THE SEARLE/GOODMAN SETTLEMENT

In July 1996, Nick and Simon Goodman, along with their aunt Lili Gutmann, sued Chicago business man Daniel Searle for the return of a work of art.¹⁵⁷ The dispute centered on an Edgar Degas pastel that was allegedly stolen from the private collection of a Dutch Jewish couple, Friedrich and Louise Gutmann, the parents of Lili Gutmann.¹⁵⁸ The Goodmans claimed that the Degas had been stolen from a Paris warehouse, where Friedrich and Louise Gutmann had sent it for safekeeping during World War II.¹⁵⁹ Unfortunately, the Gutmanns were killed during the Holocaust,¹⁶⁰ and the family thought the Nazis had either stolen the pastel or destroyed it.¹⁶¹ However, they were wrong. Over fifty years after the War, the Goodman family discovered their Degas in the collection of an American businessman.¹⁶²

In 1987, Daniel Searle, a pharmaceutical magnate and art collector, paid \$850,000 for the Degas entitled "Landscape with Smokestacks."¹⁶³ Searle asked few questions about the landscape's past ownership; instead, he relied on experts from Chicago's Art Institute.¹⁶⁴ The experts, however, missed flaws in the Degas' provenance, especially the fact that

155. *Id.* It is unusual for a nation to submit to compulsory ICJ jurisdiction, and Russia has never done so.

156. Mikhail Piotrovsky, the Director of the Hermitage Museum, stated that, "[f]rankly, the issue will never be resolved if we leave it up to the politicians." Richard Beeston, *Treasure House of Art Offers War Booty Deal*, THE TIMES OF LONDON, July 12, 1997, at 20. He also stated that, "[w]e will never get anywhere if we have the 'I won, you lost' mentality." *Id.*

157. Williams, *supra* note 18, at 2.

158. Walter V. Robinson, *Nazi Victims' Heirs Win Battle Over Degas Pastel*, THE BOSTON GLOBE, Aug. 15, 1998, at C3.

159. Williams, *supra* note 18, at 43.

160. Robinson, *supra* note 159, at C3. Friedrich Gutmann was beaten to death at Theresienstadt in Czechoslovakia; his wife died in the gas chambers at Auschwitz in Poland. *Id.*

161. *Id.*

162. *Id.*

163. Searle purchased the Degas from New York art dealer Margo Schab. *Id.*

164. *Id.*

it was once owned by Hans Wendland, a successful wartime fence for Nazi looted art.¹⁶⁵

After two years of legal and emotional battle, the Goodmans and Searle amicably resolved the dispute.¹⁶⁶ Under the agreement, two third-party evaluators will appraise the painting, and the average of the appraisals will be accepted as the work's actual value.¹⁶⁷ The Art Institute of Chicago will acquire legal ownership of the work and will compensate the Goodman family by paying them half of the works appraised value.¹⁶⁸ Searle will donate his half of the pastel's appraised worth to the Art Institute of Chicago.¹⁶⁹ As a result, both sides avoided a drawn-out legal battle, which likely would have outstripped the painting's actual worth.¹⁷⁰

Part of the agreement includes an attribution plaque that will hang next to the Degas in the Art Institute, identifying the work as a "Purchase from the Collection of Friedrich and Louise Gutmann and a Gift of David C. Searle."¹⁷¹ According to Barry Rosen, the Goodmans' lead attorney, "It's a win-win-win situation. The Art Institute gets a painting [that] they have wanted for a long time. The public gets to view a gorgeous painting. And the Goodman family gets vindication on their claim that it was stolen by the Nazis."¹⁷²

If there is to be a "win-win-win situation" in the current trophy art debate, Russia and Germany would need to take guidance from the Goodman/Searle settlement. Since both Germany and Russia appropriated the art for plans to build a "supermuseum" or a "Museum of World Art,"¹⁷³ respectfully, that is exactly what should be done. Under this solution, each country would "donate" their respective interests in the trophy art to a museum solely created to house these treasures. The museum would compensate legitimate private owners of any trophy art by

165. *Id.*

166. Williams, *supra* note 18, at 2.

167. *Id.*

168. *Id.* At the time of the settlement, experts estimated the painting's worth to be about \$800,000-900,000. *Id.* However, current fair market value is estimated at \$437,500, based on appraisals of \$300,000 by Christie's, and \$575,000 by New York dealer Richard Feigen. Lee Rosenbaum, *Nazi Loot Claims: Art with a History*, WALL ST. J. EUR., Jan. 29, 1999.

169. *Id.*

170. *Id.*

171. *Id.*

172. See *supra* notes 157-170 and accompanying text.

173. See *supra* notes 22-38 and accompanying text.

paying them one-half of the appraised value. Additionally, an attribution plaque similar to that in the Goodman/Searle settlement could also be displayed next to the piece in the museum and identify the names of the legitimate owners.¹⁷⁴ Under this solution, everyone involved wins something—Russia and Germany would save face in the international community; private individuals whose art was stolen would be recognized and vindicated; and the public would be able to enjoy important works of art. At the same time, the settlement would remind the world that nations can peacefully work together to solve their disputes. Hopefully, the new museum would be a symbol of Peace and of closure to the world's most heinous war.

VI. CONCLUSION

Due to the overwhelming amount of legal issues, interpretations, arguments, and obstacles, reaching a fair solution to the Trophy Art debate is an arduous task. Both Russia's and Germany's actions were morally wrong.¹⁷⁵ Germany initiated this controversy during World War II with the Nazis' systematic looting of Europe's most prominent art collections.¹⁷⁶ Russia, in turn, looted Germany after the War, and then hid the treasures from the world for fifty years.¹⁷⁷ However, both states have strong legal arguments to keep the trophy art. Germany's strongest argument lies in the international prohibition against wartime pillage of cultural property.¹⁷⁸ On the other hand, Russia has the compensation principle of restitution¹⁷⁹ and historical precedent¹⁸⁰ to bolster its position. This tension between morality and legality is what makes this debate so passionate even today.

To date, the only resolutions that have been put forward are that either Russia should keep the art, or that it should return the art to Germany.¹⁸¹ Either of these solutions could result in chaos throughout the international art world.¹⁸² Obviously, the solution cannot be as cut-and-dry as one country wins and one country loses. There are other interests involved that

174. *See supra* note 169 and accompanying text.

175. *See supra* note 172.

176. *See supra* note 21 and accompanying text.

177. *See supra* notes 28-43 and accompanying text.

178. *See supra* note 70 and accompanying text.

179. *See supra* note 87.

180. *See supra* note 102 and accompanying text.

181. *See supra* notes 16-17.

182. *See supra* notes 115-121.

cannot be ignored. A compromise, such as one guided by the Goodman/Searle settlement, would balance the interests of Russia, Germany, legitimate claimants, and the public.¹⁸³ Ultimately, only a creative solution can enable all parties to benefit and put a much-needed end to this debate.

Trey G. Elmer

183. See *supra* notes 164-170 and accompanying text.

