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# COMMENT

## THE LAST PRISONERS OF WORLD WAR II<sup>1</sup>

Margaret M. Mastroberardino

### I. INTRODUCTION

“To the victor belong the spoils of the enemy.”<sup>2</sup> The Romans exhibited treasures captured from their prisoners; Napoleon did the same almost two thousand years later.<sup>3</sup> Throughout world history, looting treasures belonging to enemies in times of war has been a constant.<sup>4</sup> Looting occurred as recently as the Persian Gulf War, where Saddam Hussein removed collections of cultural property from Kuwait. At the end of the 19th century, an idea emerged that cultural objects should be protected from armed, military conflict.<sup>5</sup> As a result, the Hague Conventions of 1899 and 1907 included provisions designed to “protect cultural institutions, historical monuments and works of art from premeditated seizure, destruction, or damage.”<sup>6</sup>

During World War II, Adolph Hitler and his Nazi soldiers wrought havoc on Europe. In their quest to establish a superior

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<sup>1</sup> “They are the last prisoners of World War II, about to emerge from the dark rooms where they were locked away 50 years ago.” Jack Kelly, *The Spoils of War / Show Ignites Debate Over Ownership*, USA TODAY, March 3, 1995 at 1D.

<sup>2</sup> WILLIAM LEARNED MERCY, *LIFE OF JACKSON* 378 (1860).

<sup>3</sup> See KONSTANTIN AKINSHA AND GRIGORII KOZLOV, *BEAUTIFUL LOOT: THE SOVIET PLUNDER OF EUROPE’S ART TREASURES XI* (1995).

<sup>4</sup> See Catherine Foster, *Stolen Art As War Booty: Hostages or Harbingers of Peace?*, THE CHRISTIAN SCIENCE MONITOR, Feb. 8, 1995 at 1.

<sup>5</sup> See *id.*

<sup>6</sup> The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954 249 U.N.T.S. 215.

society,<sup>7</sup> they attempted to destroy anything that did not fit the Aryan ideals.<sup>8</sup> However, Hitler was an art lover<sup>9</sup> and was determined to make his new Germany the cultural center of Europe.<sup>10</sup> To ensure this end, he formed special troops which confiscated pieces of artwork from museums, art dealers and private citizens. These brigades raided Poland, Belgium, Luxembourg, France, Russia,<sup>11</sup> Italy and the Netherlands<sup>12</sup> searching for treasures to bring back to Germany. The Russians retaliated toward the end of World War II by establishing 'trophy brigades' who seized pieces from Germany and brought them back to Russia.<sup>13</sup> On March 30, 1995,<sup>14</sup> the Hermitage Museum<sup>15</sup> in St. Petersburg, Russia unveiled a new and highly controversial art exhibit. The exhibit features seventy-four paintings<sup>16</sup> by the masters of the Impressionist and Post-Im-

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<sup>7</sup> See *The Charlie Rose Show*, (WNET Educational Broadcasting Company, May 12, 1995) (Transcript on file with *Journal Graphics* Transcripts, Transcript # 1376-3). This is a television interview program.

<sup>8</sup> See LYNN H. NICHOLS, *THE RAPE OF EUROPA*, 11-12, (1994). For further discussion, see *infra*, Part II, A.

<sup>9</sup> See Antero Pietila, *Soviet Loot — Stolen, Destroyed, Saved*, THE BALTIMORE SUN, Oct. 1, 1995 at 5F.

<sup>10</sup> See *id.*

<sup>11</sup> The Union of Soviet Socialist Republic was dissolved on December 25, 1991. The newly created Russian Federation stated in the Alma Alta Declarations that it intended to honor all international obligations concluded by the former U.S.S.R. S. Shawn Stephens, *The Hermitage and Pushkin Exhibits: An Analysis of the Ownership Rights to Cultural Properties Removed From Occupied Germany*, 18 Hous. J. Int'l L. 59, 84 (1995); See also Alma Alta Agreements, U.N. Doc. A/47/60 (1991), reprinted in 31 I.L.M. 138, 148-49 (1992). Hereinafter, the former U.S.S.R. and the new Russian Federation will be referred to as "Russia."

<sup>12</sup> David Masie, *Spoils of War; Display of Art Seized in Battle Sparks Debate*, CHI. TRIB., Feb. 19, 1995 at 21.

<sup>13</sup> See AKINSHA AND KOZLOV, *supra* note 3 at x.

<sup>14</sup> See Kelly, *supra* note 1.

<sup>15</sup> "The Hermitage Museum, [in St. Petersburg, Russia] is one of the most opulent sites on Earth, for it includes the Winter Palace of the Romanov czars, who lived on a scale of lavish luxury that rivaled only by the Bourbons and Habsburgs." Stanley Meisler, *The Hermitage. Hermitage State Museum, St. Petersburg, Russia*, SMITHSONIAN, Mar. 1995, at 40. Catherine the Great first set aside rooms in the Winter Palace for paintings she collected. See *id.* She called the rooms her "hermitage," from the French word "ermitage", literally meaning a home for hermits, a refuge. See *id.* As her collection grew larger, she added connecting annexes to the palace which became known as the Small Hermitage, the Old Hermitage and the Hermitage Theatre. See *id.* Czar Nicholas I added the new Hermitage in the 19th century. See *id.*

<sup>16</sup> The pieces in the exhibit are as follows: "Flowers" by Eugene Delacroix (after 1833); "Rocks" by Jean-Baptiste-Camille Corot c. 1828; "Landscape with a Boy

in a White Shirt" by Jean-Basptiste-Camille Corot c. 1855-60; "The Burden" by Honore Daumier c. 1850-53; "Still Life of Flowers" by Gustave Courbet 1863; "Reclining Woman" by Gustave Courbet c. 1865-66; "Flowers" by Henri Fantin-Latour 1860; "Peonies in a Vase" by Henri Fantin-Latour c. 1864; "Lemons, Apples and Tulips" by Henri Fantin-Latour 1865; "Still Life: Flowers, Dish with Fruit, and Carafe" by Henri Fantin-Latour 1865; "Petunias" by Henri Fantin-Latour 1881; "Girl in a Wing Collar" by Edouard Manet c. 1879-80; "Portrait of Mademoiselle Isabelle Lemonnier" by Edouard Manet c. 1879-80; "Interior with Two Figures" by Hilaire-German-Edgar Degas c. 1869; "The Dancer" by Hilaire-German-Edgar Degas c. 1874; "Place de la Concorde" by Hilaire-German-Edgar Degas 1875; "Seated Dancer" by Hilaire-German-Edgar Degas c. 1879-80; "Two Dancers" by Hilaire-German-Edgar Degas c. 1898-99; "Man on a Stair" by Pierre-Auguste Renoir c. 1876; "Woman on a Stair" by Pierre-Auguste Renoir 1877; "Roses and Jasmine in a Delft Vase" by Pierre-Auguste Renoir c. 1880-81; "Low Tide at Yport" by Pierre-Auguste Renoir 1883; "In the Garden" by Pierre-Auguste Renoir 1885; "Woman Arranging Her Hair" by Pierre-Auguste Renoir 1887; "Young Girls at the Piano" by Pierre-Auguste Renoir c. 1892; "Young Woman in a Flowered Hat" by Pierre-Auguste Renoir 1892; "Young Girl in a Hat" by Pierre-Auguste Renoir c. 1892-94; "Apples and Flowers" by Pierre-Auguste Renoir c. 1895-96; "Party in the Country at Berneval" by Pierre-Auguste Renoir 1898; "Landscape at Beaulieu" by Pierre-Auguste Renoir 1899; "Bouquet of Roses" by Pierre-Auguste Renoir c. 1909-13; "Roses in a Vase" by Pierre-Auguste Renoir c. 1910-17; "The Seine at Rouen" by Claude Monet 1872; "The Seine at Asnieres" by Claude Monet 1873; "The Grand Quai at Havre" by Claude Monet 1874; "Woman in a Garden" by Claude Monet 1876; "The Garden" by Claude Monet 1876; "Garden in Bordighera" by Claude Monet 1884; "Barges at Billancourt" by Alfred Sisley 1877; "Town Park in Pontoise" by Camille Pissarro 1873; "Still Life with a Coffepot" by Camille Pissarro 1900; "The Tuileries Gardens" by Camille Pissarro 1900; "The Fair in Dieppe, Sunny Morning" by Camille Pissarro 1901; "Quai Malaquais, Sunny Afternoon" by Camille Pissarro 1903; "Jas De Bouffan, the Pool" by Paul Cezanne c. 1876; "Apples, Peaches, Pears, and Grapes" by Paul Cezanne c. 1879-80; "Houses Along a Road" by Paul Cezanne c. 1881; "Self-Portrait" by Paul Cezanne c. 1880-81; "Still Life with Apples" by Paul Cezanne c. 1890; "Bathers" by Paul Cezanne c. 1890-91; "Mont Sainte-Victoire" by Paul Cezanne c. 1897-98; "View of Fort Samson" by Georges-Pierre Seurat 1885; "The Large Pine, Saint-Tropez" by Paul Signac c. 1892-93; "AAt The Window" by Paul Gauguin 1882; "ABouquet" by Paul Gauguin 1884; "APiti Teina (Two Sister)" by Paul Gauguin 1892; "ATaperaa Mahana (Late Afternoon)" by Paul Gauguin 1892; "Portrait of Madame Trabuc" by Vincent van Gogh 1889; "Landscape with House and Ploughman" by Vincent van Gogh 1889; "Morning: Going Out To Work (After Millet)" by Vincent van Gogh 1890; "AThe White House At Night" by Vincent van Gogh 1890; "AWoman With an Umbrella (Berthe The Deaf In the Garden of Monsiuer Forest)" by Henri de Toulouse-Lautrec 1889; "Young Woman in a Room" by Edouard Vuillard c. 1892-93; "Old Woman in an Interior" by Edouard Vuillard c. 1893; "Old Woman Near a Mantlepiece" by Edouard Vuillard c. 1895; "Absinthe (Girl in a Cafe)" by Pablo Picasso 1901; "Avenue in the Luxembourg Gardens" by Albert Marquet 1901; "Quai Du Louvre, Summer" by Albert Marquet c. 1906; "Landscape With A Bridge" by Albert Marquet c. 1917-19; "Nude With Raised Arm" by Georges Rouault 1906; "Path in a Park With a Figure" by Andre Derain c. 1911-13; "The Road to Castel Gandolfo" by Andre Derain c. 1921; and "Ballerina"

pressionist periods.<sup>17</sup> Many of these paintings have never been seen before by the public<sup>18</sup> and were thought to have been destroyed or lost during World War II.<sup>19</sup> These pieces are part of a collection of approximately 829,561<sup>20</sup> artworks held by the Hermitage.<sup>21</sup> Since brought to light in 1991, this trophy art<sup>22</sup> has been the subject of international controversy.<sup>23</sup>

An issue which arose is the controversial ownership of the art. Germany claims rightful ownership asserting that the Russians confiscated the pieces. However, it was the Nazis who originally confiscated the art from museums and private collections.<sup>24</sup> Specifically, this exhibit is comprised of works stolen from the private collections of Otto Krebs<sup>25</sup> and Otto Gersten-

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by Henri Matisse c. 1927. ALBERT KOSTENEVICH, *HIDDEN TREASURES REVEALED* (1995).

<sup>17</sup> See Lee Hockstader, *Russia Previews Exhibit of French Art, Plundered from Germans During War*, THE HOUSTON CHRONICLE, February 10, 1995, at A21. Perhaps one of the richest periods for painters was the late 19th century. This period, known as the Impressionist Period, gave birth to a new school of painting. The artists who created this approach are some of the most famous of all time: Claude Monet, Pierre August Renoir, Paul Cezanne, Edgar Degas, Paul Gauguin and Mary Cassat. <http://watt.emf.net/louvre/paint/glo/impressionism/>. The next wave of artists altered Impressionism, and became known as the Post-Impressionists. These artists are just as well known in their own right: Georges Seraut, Paul Gauguin and Vincent Van Gogh. <<http://www-leland.stanford.edu/~golnas/impressionism/post.html>>.

<sup>18</sup> Most of these pieces were owned by private citizens, not displayed in museums. See Lee Hockstader, *Russia Previews Exhibit of French Art, Plundered from Germans During War*, THE HOUSTON CHRONICLE, February 10, 1995 at A21.

<sup>19</sup> See ALBERT KOSTENEVICH, *HIDDEN TREASURES REVEALED*, 11 (1995). The paintings have been in storage in the attics of the Hermitage Museum since 1945. See *id.*

<sup>20</sup> These objects were looted by the trophy brigades and hidden in the Hermitage. AKINSHA AND KOZLOV, *supra* note 3, at 206.

<sup>21</sup> See *id.*

<sup>22</sup> Trophy art consists of paintings, drawings and other cultural loot taken from German private and public collections by soldiers in the Soviet army during the ending days of World War II. See Christopher Knight, *Palace Intrigue: A German Couple has Donated 139 Picassos and Other Treasures to Russia's Marble Palace, An Ironic Gift in Light of a Continuing Post-Cold War Art Squabble*, THE LOS ANGELES TIMES, May 7, 1995 at 6.

<sup>23</sup> See AKINSHA AND KOZLOV, *supra* note 3, at 234.

<sup>24</sup> See Pietila, *supra* note 9.

<sup>25</sup> Otto Krebs owned most of the paintings in the exhibit. He was born in Wiesbaden Germany in 1873, his full name was Josef Karl Paul Otto Krebs. He died in 1941, leaving his money to a cancer research institution in the city of Mannheim. Krebs was a businessman who started his career as the manager of the Strelbel factory that produced steam boilers. In the 1920's, as his factory prospered, he bought various paintings from the Impressionist era. He continued to

berg.<sup>26</sup> Russia claims they are entitled to keep the artworks as reparation for war atrocities committed against them by the Germans in World War II.

The ownership issue poses difficult questions. The Hague Conventions of 1907<sup>27</sup> and 1954<sup>28</sup> prohibit the confiscation of personal and cultural property during war.<sup>29</sup> In addition, Russia and Germany signed two treaties in the 1990's that provide for the return of "unlawfully transferred treasures."<sup>30</sup> Thus the issue also involves retribution for war crimes committed against Russia and against the citizens of Germany.<sup>31</sup> Resolution of the situation requires consideration of international law and property rights as well as political relations between the two governments. It is an especially sensitive matter because Russia and Germany, both in the midst of reconstruction, are attempting to work closely together toward building a new future.<sup>32</sup>

This note consists of four parts. Part I presents the background information regarding Russian-German conflict over

collect until the 1930's. The last picture he bought was Matisse's *Ballerina*, only three or four years after it was painted. KOSTENOVICH, *supra* note 19, at 15-16.

<sup>26</sup> Otto Gerstenberg was perhaps one of the best known German collectors of the twentieth century. Born in 1848, Gerstenberg studied mathematics and philosophy. In 1925, he joined the Railroad Insurance Society in Berlin. In 1877 he was made Executive Director. He did not begin collecting art until he was in his forties. His great passion became the French painters, from the Romantic Era to the Impressionists. He owned the world's finest collection of Daumiers. After his death in 1935, his collection went to his daughter, Frau Margaret Scharf. During the war, from 1943, the greater portion of his collection was stored in the Nationalgalerie in Berlin. What was stored in the museum was later shipped to Germany. KOSTENOVICH, *supra* note 19, at 17-18.

<sup>27</sup> The Hague Convention Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

<sup>28</sup> The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 1, 249 U.N.T.S. 215, 242.

<sup>29</sup> The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 1, 249 U.N.T.S. 215, 242. "the term 'cultural property' shall cover, irrespective of origin or ownership: (a) Movable or immovable property of great importance to the cultural heritage of every peoples, such as . . . works of art" *Id.*

<sup>30</sup> Treaty on Good-Neighborliness, Partnership and Cooperation, Nov. 9, 1990, F.R.G. - U.S.S.R., 30 I.L.M. 504.

<sup>31</sup> See Lynnley Browning, *Art Stolen From Nazi Germany shown in St. Petersburg*, REUTERS, LIMITED, February 9, 1995.

<sup>32</sup> See Andrew McCathie, *Germany: Bonn and Moscow Enter a Changed Relationship*, AUSTRALIAN FINANCIAL REVIEW, October 4, 1990.

cultural property and also specifically addresses the dispute over the "Hidden Treasures Revealed" exhibit. It examines the claims of the Gerstenberg and Krebs heirs. Part II of this note discusses international cultural property rights of governments and private citizens. Part III addresses and analyzes the treaties and historical precedents that are applicable to the current international conflict. Part IV, the conclusion, discusses possible resolutions of the claims of the heirs.

## II. THE RUSSIA-GERMANY CONTROVERSY OVER THE "HIDDEN TREASURES"<sup>33</sup>

### A. World War II

Part of Adolf Hitler's plan for building an Aryan nation included a nation-wide fine arts program. In 1933, he created the Ministry of Public Enlightenment and Propaganda<sup>34</sup> to organize this program.<sup>35</sup> Hitler also sought to establish the finest art museum in the world in his hometown of Linz, Austria.<sup>36</sup> To that end, when World War II actually broke out, he instructed his soldiers to "methodically loot museums and cultural institutions in occupied territories".<sup>37</sup> The museums of Poland,

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<sup>33</sup> This is the name the Hermitage has bestowed on the exhibit.

<sup>34</sup> See MATILA SIMON, *THE BATTLE OF THE LOUVRE: THE STRUGGLE TO SAVE FRENCH ART IN WORLD WAR II*, at 8 (1971).

<sup>35</sup> In 1936, a law authorized the confiscation of any "degenerate" art that was hanging in any German museums. SIMON, *supra* note 34, at 12.

Degenerate Art included the following items:

1. Any art, no matter in what style, created by Jews.
2. Art with Jewish themes, even if painted by non-Jews. Under this heading such works as Rembrandt's ghetto scenes and portraits and some religious paintings were 'degenerate.'
3. Art advocating pacifism or showing war as ugly.
4. Art with Marxist or Socialist themes.
5. Art portraying ugly or deformed people, since these were members of an inferior race.
6. All Expressionist art, even if Nordic and racist in concept.
7. All abstract art (Cubist, Futurist, Constructivist) and anything not strictly realistic." *Id.*

The list covered all major art movements and styles from 1850 forward. *See id.* Nazi soldiers raided Germany's museums; entire collections were destroyed. Over 4,000 pieces were lost, some forever. Art Dealers and private collectors were forced to give up "degenerate" works as well. *See id.* at 13. This was an attempt to develop, on a national level, a jurisdictional justification for the confiscation.

<sup>36</sup> Pietila, *supra* note 9.

<sup>37</sup> *Id.*

France, the Netherlands, Belgium, Luxembourg, Italy and Russia<sup>38</sup> were all victims of Nazi devastation and confiscation.<sup>39</sup> Thirty-four thousand art objects were stolen from the Peterhof Museum, including the famous Amber Room from the Catherine Palace in Tsarkoe Selo<sup>40</sup> and 30,000 objects from the Yekaterinsky Palace.<sup>41</sup> The city of Kiev alone lost four million books, magazines and manuscripts.<sup>42</sup> Approximately 1,418 truckloads of objects were shipped out of Russia back to Germany.<sup>43</sup> The total number of objects destroyed, damaged or stolen during the German occupation was estimated to be 564,723 pieces.<sup>44</sup>

The Russian commander, Joseph Stalin, was determined not to allow the Germans to succeed.<sup>45</sup> Stalin believed that be-

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<sup>38</sup> The impact on the Soviet Union was devastating. Fortunately, the museums and the palaces were able to box some of their items and send them to secret hiding places. However, Hitler was not only focused on destroying Soviet culture, he believed the "Slavic peoples were like Jews, an inferior race to be killed and their culture destroyed." Interview with Amei Wallach, *Transcript of The MacNeil / Lehrer Newshour*, May 29, 1995. He wanted Leningrad and Moscow destroyed, to relieve the troops of having to feed people through the winter. See *id.* The Soviets not only faced cultural annihilation, but also the possibility of eradication. The Nazis destroyed "nearly 2,500 buildings and national monuments; including churches, the Tchaikovsky Museum at Kiln and the Repin Museum at Penaty." Jo Durden-Smith, *Russia Deserves Art Booty*, THE MOSCOW TIMES, April 18, 1995. The chapel at Tsarkoye Selo was used as a motorcycle garage; horses were stabled in the Pavlosk. See *id.*

<sup>39</sup> See David Mazie, *Spoils of War; Display of Art Seized in Battle Sparks Debate*, CHI. TRIB., February 19, 1995, at 21. Dr. Otto Khmmel, director of the Berlin Museums, was recruited by Hitler to compile a list of items to be targeted in each country to be confiscated for Hitler's supermuseum. See NICHOLS, *supra* note 8, at 121-123.

<sup>40</sup> See *id.* The Amber Room was an important cultural symbol of the Soviet people. The Room was presented to Peter the Great by King Frederick of Prussia in 1716. The room was lined entirely with amber, hand crafted for twelve years by German craftsmen. It was eventually transferred to the Winter Palace by Empress Elizabeth and was used as a reception room for meeting foreign ambassadors. It was famous throughout Europe. AKINSHA AND KOZLOV, *supra* note 3, at 12-13.

<sup>41</sup> See Durden-Smith, *supra* note 38.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* Additionally, approximately 1 million people were killed by gunfire or starvation during the 900 day siege of Leningrad. Wallach, *supra* note 7. This represents only a fraction of the 20 million Russian lives lost in total. Knight, *supra* note 22, at 6.

<sup>45</sup> There is controversy over whether or not Stalin himself had plans to establish his own supermuseum. Robert Hughes, with reporting by Constance Richards,

cause the Russian people had suffered so greatly at the hands of the Nazis, they deserved some type of reparation.<sup>46</sup> He ordered his experts to develop price and quality equivalents of the artworks the Nazis had either destroyed or removed from Russia.<sup>47</sup> These experts actually used catalogues from German museums to pinpoint the paintings, sculptures and collections they wanted.<sup>48</sup> Special task forces, known as the Trophy Brigades, were assembled to accomplish the goal.<sup>49</sup> These task forces consisted of art historians, museum officials, artists and art restorers.<sup>50</sup> The brigades were given Russian officers' uniforms to wear and were sent to Germany to locate the specified objects and send them back to Russia.<sup>51</sup> Their mission was described as "participation in selection and transportation to Moscow of trophy property for cultural organizations."<sup>52</sup> The brigades captured an estimated 2.6 million objects and archeological materials.<sup>53</sup> Some of the paintings were exhibited in the Pushkin Museum in two galleries that required special passes to gain access.<sup>54</sup> Another exhibition was scheduled to take place in the fall of 1946.<sup>55</sup> However, the opening was first delayed and ultimately canceled due to political reasons.<sup>56</sup> Two years later, in 1948, the Russians began the campaign against "cosmopolitanism;"<sup>57</sup> Jewish people, people with pro-Western sympathies,

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Moscow and Rhea Schoenthal, Bonn, *The Spoils of War; Russia's New Displays of Art Looted from Germany Reignite a Debate Over Who Rightfully Owns Such Plunder*, TIME, April 3, 1995, at 64. But it is primarily thought to have been driven by anger at the destruction of Russian culture. *See id.*

<sup>46</sup> *See "The Charlie Rose Show"*(WNET Educational Broadcasting Company, Journal Graphics Transcripts, Transcript #1479-3, October 4, 1995).

<sup>47</sup> *See Pietila, supra* note 9.

<sup>48</sup> *See id.*

<sup>49</sup> *See id.*

<sup>50</sup> *See AKINSHA AND KOZLOV, supra* note 3, at x. The brigades were established in 1945 and operated until approximately May, 1946. *See id.* at 43, 154.

<sup>51</sup> *See AKINSHA AND KOZLOV, supra* note 3, at x.

<sup>52</sup> *Id.* at 45.

<sup>53</sup> *See id.* at 206.

<sup>54</sup> *See id.* at 183.

<sup>55</sup> *See id.* at 184.

<sup>56</sup> *See AKINSHA AND KOZLOV, supra* note 3, at 184. The establishment of the German Democratic Republic was beginning, which was based on "fraternal" communism. *See Pietila, supra* note 9.

<sup>57</sup> *See AKINSHA AND KOZLOV, supra* note 3, at 186. Cosmopolitan (adj): 1: having worldwide rather than limited or provincial scope or bearing 2: having wide international sophistication: worldly, - cosmopolitanism (noun). WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 295 (1990).

writers, artists and scientists came under attack.<sup>58</sup> Literary magazines, theaters and museums were closed. Paintings were sent to secret depositories in the Pushkin Museum and the Hermitage.<sup>59</sup> It became apparent that "total secrecy was the new order of the day."<sup>60</sup>

In 1958,<sup>61</sup> the majority of the material confiscated by the Trophy Brigades was returned to Germany.<sup>62</sup> Art works belonging to Poland, which were stored in the Pushkin Museum, were also returned to their homeland.<sup>63</sup> The Russians portrayed themselves as the saviors of German art from United States soldiers.<sup>64</sup> In a speech, Mikhailov boasted that "the masterpieces had been saved twice: first from damp caves by the heroic Red Army and, second, by museum officials and restorers."<sup>65</sup> A compromise was eventually reached between Russia and East Germany.<sup>66</sup> After the fall of Krushev, trophy art was all but forgotten.<sup>67</sup> However, approximately one million objects remained hidden.<sup>68</sup> Some works did surface and were either

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<sup>58</sup> See AKINSHA AND KOZLOV, *supra* note 3, at 186.

<sup>59</sup> See *id.* at 183.

<sup>60</sup> *Id.* at 186.

<sup>61</sup> See Pietila, *supra* note 9, at 5F. In the decade following World War II any artistic and religious valuables were returned to their nations. Angela Joy Davis, *Beyond Repatriation: A Proposal for the Equitable Restitution of Cultural Property*, 33 UCLA L. REV. 642, 647-648 (1985). "As early as 1945, the United States undertook to return improperly imported cultural property to its rightful owners." *Id.* at 648. "International efforts also contributed to the repatriation of dispersed cultural treasures. The U.S. Department of State enlisted the cooperation of universities, museums, libraries, art directors and booksellers in the recovery of displaced cultural property." *Id.*

<sup>62</sup> See *The Charlie Rose Show*, *supra* note 46, at # 1479-3. Approximately 1.6 million trophy items were returned to Germany. See Pietila, *supra* note 9. This action was initiated primarily by Georgy Alexandrov, an academian appointed the Soviet Minister of Culture in 1954. See AKINSHA AND KOZLOV, *supra* note 3 at 193. He was a liberal, who in 1945 published an article that urged soldiers to treat the population of occupied Germany with humanity. See *id.* However, it became apparent that Alexandrov was becoming more popular than the current leader, Krushev. See *id.* at 194.

<sup>63</sup> See AKINSHA AND KOZLOV, *supra* note 3, at 194.

<sup>64</sup> See *id.* at 195. The Americans "had mercilessly bombed the palace and museums of Dresden." *Id.*

<sup>65</sup> *Id.* at 196.

<sup>66</sup> See *id.* at 214-215. Three hundred freight cars full of trophy art were sent to East Germany. See *id.* at 216.

<sup>67</sup> See *id.* at 216.

<sup>68</sup> See *id.* at 216.

traded legally or illegally on the art market.<sup>69</sup> These items were primarily objects that had belonged to private collectors or to countries other than Germany.<sup>70</sup> The amount of German art that remained hidden was kept secret for almost fifty years.<sup>71</sup>

### B. *Hidden Treasures are Revealed*

In 1984, a scholar, Konstantin Akinsha, began working at the Museum of Western and Oriental Art in Kiev.<sup>72</sup> While employed there, he noticed that the libraries contained several rare books marked with seals and stamps of the Berlin Academy of the Arts.<sup>73</sup> When he asked about them, he was told they were war trophies.<sup>74</sup> In 1986, Akinsha left the Museum to pursue post-graduate studies.<sup>75</sup> It was an exciting time in Russia. Perestroika<sup>76</sup> was flourishing, people were reading books that were formerly banned, and magazines openly wrote about the transgressions of the past.<sup>77</sup> Akinsha thought the time was right to go public with his findings of the trophy art.<sup>78</sup> He approached the Culture Fund, a new organization formed in 1987, which aimed to support cultural initiative.<sup>79</sup> Unfortunately, the group was only interested in recouping Russian art, not in returning art to Germany.<sup>80</sup> Akinsha then went to the press, but no one would publish his story, not even the liberal magazine, *Ogonyok*.<sup>81</sup>

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<sup>69</sup> See *id* at 217.

<sup>70</sup> See *id*.

<sup>71</sup> See *id*.

<sup>72</sup> See *id* at 229.

<sup>73</sup> See *id* at 230.

<sup>74</sup> See *id* at 229. One of the curators actually took him to a secret depositories in the basement of the Museum. See *id* at 230. The room held works by Rubens, Goethe and others marked with the seals of the Berlin Academy of the Arts and the Dresden Kupferstichkabinett. See *id* at 230.

<sup>75</sup> See *id*. at 231.

<sup>76</sup> Perestroika is defined as "The reform of the economic and political system of the former USSR, first proposed by Leonid Brezhnev in 1979 and actively promoted under the leadership of Mikhail Gorbachev from 1985. THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2158 (4th ed. 1993).

<sup>77</sup> See AKINSHA AND KOZLOV, *supra* note 3, at 231.

<sup>78</sup> See *id* at 231.

<sup>79</sup> See *id*.

<sup>80</sup> See *id* at 232.

<sup>81</sup> See *id* at 233.

At the same time Akinsha was making his discoveries in Kiev, a former classmate, Grigorii Kozlov was making similar findings at the Pushkin Museum.<sup>82</sup> The two joined forces in 1987 to continue to investigate trophy art.<sup>83</sup> In 1991, Akinsha and Kozlov wrote several articles that appeared in *ARTnews*, discussing trophy art, the operations of the brigades and even included names of some of the works hidden in Russia.<sup>84</sup> The government refused to address the situation, claiming they had no information.<sup>85</sup> Finally in October, 1991, the Minister of Culture, Nikolai Gubenko, made an official admission that secret depositories filled with looted art existed in Russian museums and that President Gorbachev was ordering the establishment of a Commission on Restitution.<sup>86</sup> However, the government would only return cultural trophies if it received, in return, objects of equivalent "artistic quality" stolen from Russia by the Germans.<sup>87</sup> A joint Russian-German commission to consider Restitution was set up in 1992.<sup>88</sup> Each side provided the other with a list of objects they believed to be in the other's country. But there were no agreements as to settling the issue.<sup>89</sup> The two countries remain far apart on reaching a solution.

On February 9, 1995, a press conference was held in the Imperial Theatre at the Hermitage Museum.<sup>90</sup> Three works were displayed that were part of an exhibition of seventy-four Impressionist and Post-Impressionist paintings scheduled to begin on March 30, 1995.<sup>91</sup> The three works shown, Degas' *Place de la Concorde*, van Gogh's *White House at Night* and Gauguin's *Piti Teina*, represented pieces thought to have been lost or destroyed during World War II.<sup>92</sup> The exhibit not only stirred up the art community but also provoked the issues of restitution between Germany and Russia that remain unset-

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<sup>82</sup> *See id.*

<sup>83</sup> *See id.* at 234.

<sup>84</sup> *See id.*

<sup>85</sup> *See id.*

<sup>86</sup> *See id.* at 239.

<sup>87</sup> *See id.* at 239-240.

<sup>88</sup> *See id.* at 251.

<sup>89</sup> *See id.*

<sup>90</sup> Hockstader, *supra* note 18.

<sup>91</sup> *See id.*

<sup>92</sup> *See id.*

tled.<sup>93</sup> The paintings in this particular exhibit were mainly from the private collections of Otto Krebs and Otto Gerstenberg, German citizens.<sup>94</sup>

The countries are now faced with deciding the rightful ownership of the paintings. Germany believes they should be returned to them. The paintings were stolen from Germany during the closing days of World War II.<sup>95</sup> Russia disagrees, claiming the paintings belong to them as compensation for the crimes committed by the Germans.<sup>96</sup> At Museum Director Mikhail Piotrosky's press conference, he told the audience that the Russians feel the crime Russia committed was not removing the paintings from Germany, but rather keeping them hidden from the world for so long.<sup>97</sup>

The fact that these paintings were originally owned by private collectors complicates the issue. In fact, in 1993, Piotrovsky made an agreement with the heirs of Otto Gerstenberg.<sup>98</sup> The pieces from the Gerstenberg collection were to be divided, with the heirs receiving one-half, plus Degas' masterpiece, *Place de la Concorde*.<sup>99</sup> The remainder was to stay with the Hermitage.<sup>100</sup> Unfortunately, Piotrovsky did not have the power or the authority to carry out the agreement,<sup>101</sup> leaving the resolution of the situation to international treaties and policies.

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<sup>93</sup> See *id.*

<sup>94</sup> See KOSTENEVICH, *supra* note 16, at 16-19.

<sup>95</sup> See Will Englund, *Russia Unveils Seized Masterpieces*, THE BALTIMORE SUN, February 10, 1995 at 1A.

<sup>96</sup> See *Who Owns This Art?*, THE PROVIDENCE JOURNAL-BULLETIN, May 9, 1995 at 12A.

<sup>97</sup> See AKINSHA AND KOZLOV, *supra* note 3, at 257.

<sup>98</sup> See *id.*

<sup>99</sup> This painting alone is estimated to be worth as much as \$100 million. See AKINSHA AND KOZLOV, *supra* note 4, at 257.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

### III. INTERNATIONAL CULTURAL PROPERTY RIGHTS

#### A. *Protection of the Rights of Governments Regarding Cultural Property Protection*

From the earliest days of world history, war was viewed as a means for acquiring territory and property.<sup>102</sup> War was also a great threat to cultural property, for what was not stolen was often destroyed.<sup>103</sup> Views at the time held that "any means justified the end, that everything done against the enemy was lawful and that an unlimited right was acquired over his person and property."<sup>104</sup>

However, in the 19th Century a change began to emerge. In 1844, E. de Vattel<sup>105</sup> wrote in the Law of Nations, that during war "we have a right to deprive our enemy of his possession, of every thing that may augment his strength and enable him to make war."<sup>106</sup> However, E. de Vattel also noted that works of art belong to the common cultural heritage of mankind and should not be destroyed.<sup>107</sup> International scholars began to recognize this view. Henry Wheaton<sup>108</sup> wrote in 1846:

By the ancient law of nations, even what was called *res sacrae* were not exempted from the capture and confiscation. . . . But by the modern usage of nations, which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war.<sup>109</sup>

Thus, attempts to codify these concepts began. The earliest attempt occurred in the United States under the Lieber Code of

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<sup>102</sup> See SHARON A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY A COMPARATIVE STUDY*, 5 (1978).

<sup>103</sup> *See id.*

<sup>104</sup> *Id.* at 5.

<sup>105</sup> Emmerich de Vattel (1714-1767) was a Swiss diplomat and international lawyer. CLIVE PARRY, JOHN P. GRANT, ANTHONY PARRY AND ARTHUR D. WATTS, *PARRY AND GRANT ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW* (1988). His principle work was *THE LAW OF NATIONS*. *See id.*

<sup>106</sup> WILLIAMS, *supra* note 102.

<sup>107</sup> *See id.*

<sup>108</sup> Henry Wheaton (1795-1848) was an American maritime jurist, diplomat and author of *Wheaton's Elements of International Law*, which became a standard work on International Law. *THE NEW ENCYCLOPAEDIA BRITANNICA*, Vol. 12, 15th Edition, 618 (1992).

<sup>109</sup> WILLIAMS, *supra* note 102, at 15.

1863.<sup>110</sup> This document contained instructions for governing the armies of the United States in the battlefield.<sup>111</sup> It was written by Dr. Francis Lieber,<sup>112</sup> a prominent international lawyer, under order of the United States Secretary of War.<sup>113</sup> The Lieber Code served as the basis for the Hague Conventions of 1899 and 1907 which addressed issues of cultural property.<sup>114</sup> The Code provides for the protection of property belonging to hospitals, museums, churches and educational institutions.<sup>115</sup> It also provides additional protection for classical works of art, libraries, scientific collections and precious instruments, which are to be secured against all avoidable injury.<sup>116</sup> However, the Code allowed for works of art in a war zone to be relocated when possible:

If such works of art, libraries, collections of instruments belonging to a hostile nation or government can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace. In no case shall they be given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.<sup>117</sup> The rules of the Lieber Code are still considered valuable and relevant today in cases of internal strife.<sup>118</sup>

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<sup>110</sup> See *id.*

<sup>111</sup> See *id.* at 16.

<sup>112</sup> Francis Lieber was a German emigre professor at Columbia College in New York. John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 833 (1986). He had assisted Henry Wager Halleck, General-in-Chief of the Union Armies, in defining guerilla warfare. See *id.* At the request of Halleck, Lieber prepared a "proposed code of conduct by belligerent forces in war to apply to the conduct on the Union forces in the American Civil War." See *id.* The code was issued by Union command as General Orders No. 100 on April 24, 1863. See *id.* The Instructions for the Governance of Armies of the United States in the Field, also known as the Lieber Code, contains 157 articles. *Id.* Articles 34 through 36 deal with protection of cultural property. See *id.*

<sup>113</sup> See WILLIAMS, *supra* note 102, at 16.

<sup>114</sup> See *id.* at 17.

<sup>115</sup> See *id.* at 16. The Lieber Code, Article XXXIV, 1863.

<sup>116</sup> See *id.* The Lieber Code, Article XXXV, 1863.

<sup>117</sup> *Id.* The Lieber Code, Article XXXVI, 1863.

<sup>118</sup> See *id.*

### B. 20th Century Views

The Hague Conventions of 1899 and 1907<sup>119</sup> codified international law that defined the law applicable to land warfare, including sections on the protection of cultural property.<sup>120</sup> The Code conflicted with ancient practices, but kept in line with evolving law that “private property cannot be confiscated” and “pillage is formally forbidden.”<sup>121</sup> Article 23(g) forbids armies to “destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”<sup>122</sup> “It was the intent of the drafters to provide a regime to shield works of art from destruction or appropriation.”<sup>123</sup>

After World War I, Germany and the central powers signed the Treaty of Versailles, in which they agreed to return objects seized during the war.<sup>124</sup> Under the terms of the Treaty, Germany and the central powers accepted complete responsibility for the Allied losses.

World War II subsequently devastated Europe both through the loss of lives and the destruction of its cities.<sup>125</sup> This was the first war in which technology played such a major role.

<sup>119</sup> Convention Concerning the Laws and Customs of War on Land (1907), 100 B.S.P. 338, LIV L.N.T.S. 437, LXXII L.N.T.S. 458; CLX L.N.T.S. 456.

<sup>120</sup> See WILLIAMS, *supra* note 102, at 17.

<sup>121</sup> *Id.* at 17.

<sup>122</sup> Convention Concerning the Land Customs of War on Land (1907), 100 B.S.P. 338, LIV L.N.T.S. 437, LXXII L.N.T.S. 458; CLX L.N.T.S. 456.

<sup>123</sup> WILLIAMS, *supra* note 102, at 18.

<sup>124</sup> See *id.* at 19. The Treaty of Versailles was a peace treaty signed after World War I between the Allies and Germany on June 28, 1919. *Versailles, Treaty of*, available in COMPUSERVE, THE HUTCHINSON ENCYCLOPEDIA, (1995). In addition to establishing the League of Nations, the agreement provided for the German surrender of Alsace-Lorraine to France, areas in the east to Poland and cessions to Czechoslovakia, Lithuania, Belgium and Denmark. *Id.* “The Rhineland was demilitarized, German rearmament was restricted, and Germany agreed to pay reparations for war damage.” *Id.*

<sup>125</sup> In loss of lives, World War II was the costliest war in history. No adequate figures exist, and estimates can be only roughly approximated. An estimated 15 to 20 million military personnel were killed in action. For the Axis powers, Germany lost about 3.5 million military, Japan 1.5 million and Italy 200,000. The Allies sustained greater casualties: USSR, as many as 7.5 million dead, China 2.2 million, Britain more than 300,000, the United States 292,000 and France 210,000.

Civilian dead numbered approximately 25 million in total. The USSR lost more than 10 million, China at least 6 million, France 400,000, Britain 65,000 and the United States 6,000. The Axis powers did not suffer as great a loss: Germany 500,000, Japan 600,000 and Italy 145,000. In addition, about 6 million Jews, mostly from Eastern Europe, were put to death by the Nazis.

Due to technological advances,<sup>126</sup> the armies used long-range weapons, such as planes that were equipped with bombs, and could both fly farther and carry more cargo.<sup>127</sup> As a result, European cities and civilians came under attack.<sup>128</sup> Attempts were made by governments to gather valuable museum pieces and ship them to safety.<sup>129</sup> Nevertheless, this was not always completed before enemy forces moved into the cities.<sup>130</sup> Private citizens, as well, attempted to hide their collections wherever possible.

After World War II ended, the Nazis' cultural plundering activities were not only determined to be in violation of the Hague Convention, but were also deemed criminal acts under the Nuremberg Charter.<sup>131</sup> The Nuremberg Tribunal<sup>132</sup> "expressed the conscience of the civilized world against the 'plunder of public or private property, wanton destruction not justified by military necessity.'"<sup>133</sup> Among many offenses, Alfred Rosenberg, Hitler's head of the Center for National Ideolog-

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Expenditures for war materials and armaments totaled at least \$1.154 trillion. The United States alone spent about \$300 billion on its war effort, Germany about \$231 billion. Added to these enormous costs incurred by governments was the tremendous material damage done to property of all kinds, any estimate of which would be futile. See *World War II - Encyclopedia Britannica* vol 29 pg 988 15th ed. (1992).

<sup>126</sup> See *World War II - Encyclopedia Britannica* vol 29 pg 988 15th Ed. (1992).

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> France and Russia instituted programs to pack up pieces from museums and to ship them to safe areas, to ensure the security of the collections. See NICHOLS, *supra* note 8, at 188.

<sup>130</sup> See *id.*

<sup>131</sup> The Nuremberg Tribunal was set up by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis signed by the United States, the Soviet Union, the United Kingdom and the Provisional Government of France on August 8, 1945. CLIVE PARRY, JOHN P. GRANT, ANTHONY PARRY AND ARTHUR D. WATTS, PARRY AND GRANT ENCYCLOPAEDIA DICTIONARY OF INTERNATIONAL LAW (1988). The Charter of the Tribunal set up a Tribunal of four members. See *id.* "It was empowered to try and punish the major European Axis war criminals as designated by the prosecution." *Id.*

<sup>132</sup> See John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 836 (1986).

<sup>133</sup> WILLIAMS, *supra* note 102, at 28. An International Military Tribunal composed of representatives of the United States, Britain, France and the USSR conducted the international trial of both the Nazi party and German military leaders for crimes against humanity and world peace during World War II. The Nuremberg Trials were conducted from November 1945 to October 1946 and resulted in the sentencing of 12 men to death. *World War II, War-Crimes Trials*, available in

ical and Educational Research, was found guilty by the Nuremberg Tribunal for offenses against cultural property.<sup>134</sup> He was subsequently hanged for his crimes.<sup>135</sup> The Tribunal held:

Rosenberg is responsible for a system of organized plunder of both public and private property throughout the invaded countries of Europe. Acting under Hitler's orders of January, 1940, to set up *Hohe Schule*, he organized and directed the *Einsatzstab*<sup>136</sup> Rosenberg, which plundered museums and libraries, confiscated art treasures and collections, and pillaged private houses. His own reports show the extent of the confiscations. In "Action M" (Mobel), instituted in December, 1941, at Rosenberg's suggestion, 69,619 Jewish homes were plundered in the West, 38,000 of them in Paris alone, and it took 26,984 railroad cars to transport the confiscated furnishings to Germany. As of 14th July, 1944, more than 21,903 art objects including famous paintings and museum pieces, had been seized by the *Einsatzstab* in the [W]est.<sup>137</sup>

For the first time, "responsibility was imposed on an individual official of the offending belligerent power for acts against cultural property committed in its name."<sup>138</sup>

After World War II, it became quite clear that the Hague Conventions of 1899 and 1907 did not offer enough protection for cultural property.<sup>139</sup> "Thus, a major effort was undertaken to provide a more sophisticated form of protection for cultural property in periods of belligerency."<sup>140</sup> "The United Nations Educational, Scientific and Cultural Organization [hereinafter "UNESCO"] took up the work of the International Museums Office, the International Commission on Intellectual Co-operation and the League of Nations and established a Museums and Monuments Division . . . in Paris."<sup>141</sup> As a result, the Convention for the Protection of Cultural Property in the Event of

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COMPUSERVE, The Online Edition of Grolier's Academic American Encyclopedia, Grolier Electronic Publishing, (c) 1994 (Compuserve).

<sup>134</sup> See Merryman *supra*, note 132 at 836.

<sup>135</sup> See *id.*

<sup>136</sup> *Einsatzstab* translates to "Special Staff." See Merryman, *supra* note 132, at 835-836.

<sup>137</sup> WILLIAMS, *supra* note 102, at 29.

<sup>138</sup> Merryman, *supra* note 132, at 836.

<sup>139</sup> See WILLIAMS, *supra* note 102, at 34.

<sup>140</sup> See *id.*

<sup>141</sup> See *id.*

Armed Conflict was opened for signature on May 14, 1954.<sup>142</sup> To date, the agreement has been ratified by seventy-five countries, including Russia and Germany.<sup>143</sup>

The Hague Convention of 1954 was the first of its type to provide for protection of cultural property. However, its purpose was to supplement, not supplant the Hague Conventions of 1899 and 1907.<sup>144</sup> The two aims of the agreement were "protection" and "respect."<sup>145</sup> The document notes that "it is of paramount importance that the said parties recognize that damage to cultural property situated in one nation state means damage to the cultural heritage of mankind 'since each people makes its contribution to the culture of the world.'"<sup>146</sup> Another aim of the signing parties was to establish mutual respect among member states for property located in another member or non-member state, and to encourage states to protect such property.<sup>147</sup>

Since every object can not be given the same protection, the Convention distinguishes between simple 'protection' and 'special protection.'<sup>148</sup> Simple 'protection' extends to all cultural

<sup>142</sup> See *id.*

<sup>143</sup> See David A. Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law*, 11 B.U. INT'L L.J. 349, 352. (1993).

<sup>144</sup> See WILLIAMS, *supra* note 102, at 34.

<sup>145</sup> *Id.* at 36.

<sup>146</sup> *Id.*

<sup>147</sup> "Further, it is the aim of the parties to create mutual respect among states for property situated on one another's territory or on the territory of a third state who is a non-party, by refraining from using the property and its immediate surroundings 'for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property'". WILLIAMS, *supra* note 102, at 37.

<sup>148</sup> "Special protection" is described in The Convention for the Protection of Cultural Property in the Event of Armed Conflict, Chapter II, Article 8 as:

1. There may be placed under "special protection" a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centers containing monuments and other immovable cultural property of great importance, provided that they:
  - (a) are situated at an adequate distance from large industrial center or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway
  - (b) are not used for military purposes.
2. a refuge for movable cultural property may also be placed under 'special protection', whatever its location, if it is so constructed that, in all probability, it will not be damaged by bombs.

property, except where military necessity demands waiver.<sup>149</sup> Under certain circumstances, 'special protection' is given to refuges or depositories that store movable cultural property.<sup>150</sup> Article 12, Chapter III of the Convention provides for the transport of property under 'special protection'.<sup>151</sup> These transports are immune from seizure, capture or placing in prize.<sup>152</sup> If the transport is to be made to a foreign country, Article 12 of the Convention and Article 17 of the regulations must be followed.<sup>153</sup>

Additionally, Article 18 of the Regulations is applicable:

- (a) while the cultural property remains on the territory of another state, that State shall be its depository and shall extend to it as great a measure of care as that which it bestows upon its own cultural property of comparable importance;
- (b) the depository State shall return the property only on the cessation of the conflict; such return shall be ef-

3. A center containing monuments shall be deemed to be used for military purposes whenever it is used for the movement of military personnel or material, even in transit. The same shall apply whenever activities directly connected with military operations, the stationing of military personnel or the production of war material are carried on within the center.

4. The guarding of cultural property mentioned in paragraph 1 above by armed custodians specially empowered to do so, or the presence, in the vicinity of such cultural property, of police forces normally responsible for the maintenance of public order shall not be deemed to be used for military purposes.

WILLIAMS, *supra* note 102, at 37.

<sup>149</sup> WILLIAMS, *supra* note 102, at 37 (citing The Convention for the Protection of Cultural Property in the Event of Armed Conflict, Chapter II, Article 8).

<sup>150</sup> See WILLIAMS, *supra* note 148, at 37.

<sup>151</sup> Chapter III. Article 12 of The Convention for the Protection of Cultural Property in the Event of Armed Conflict reads:

1. Transport exclusively engaged in the transfer of cultural property, whether within a territory or to another territory, may, at the request of the High Contracting Party concerned, take place under "special protection" in accordance with the conditions specified in the Regulations for the execution of the Convention.

2. Transport under "special protection" shall take place under the international supervision provided for in the aforesaid Regulations and shall display the distinctive emblem described in Article 16.

3. The High Contracting Parties shall refrain from any act of hostility directed against transport under 'special protection'.

WILLIAMS, *supra* note 102, at 39.

<sup>152</sup> See *id.* at 39.

<sup>153</sup> See *id.*

fectured within six months from the date on which it was requested;

- (c) during the various transfer operations, and while it remains on the territory of another State, the cultural property shall be exempt from confiscation and may not be disposed of either by the depositor or by the depository. Nevertheless, when the safety of the property requires it, the depository may, with the assent of the depositor, have the property transported to the territory of a third country, under the conditions laid down in the present article;
- (d) the request for special protection shall indicate that the State to whose territory the property is to be transferred accepts the provisions of the present Article.<sup>154</sup>

The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,<sup>155</sup> provides a more inclusive definition of cultural property.<sup>156</sup> The provisions of the Convention are to apply in the event of declared war or any other armed conflict

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<sup>154</sup> The Convention for the Protection of Cultural Property in the Event of Armed Conflict, Chapter III, Article 18.

<sup>155</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (1972).

<sup>156</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (1972) Article 1:

For the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) element of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:

by two or more contracting parties.<sup>157</sup> It applies to actions involving a contracting party and a non-contracting party.<sup>158</sup>

The Convention also applies to conflicts of a non-international nature.<sup>159</sup> "The signatories have agreed to safeguard and protect property which is of importance to the cultural heritage of all people within their own territory as well as in the territory of other states."<sup>160</sup> The agreement stresses that artistic works are important to the entire world.<sup>161</sup> These works belong to mankind; therefore, each state is "merely the custodian of its treasures for the human race at large."<sup>162</sup>

UNESCO has implemented and inspired several conventions relating to the protection of cultural property through the years.<sup>163</sup> The Organization has addressed protection of Archaeological Heritage,<sup>164</sup> Illicit Import, Export and Transfer

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- (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
  - (ii) original works of statuary art and sculpture in any material;
  - (iii) original engravings, prints and lithographs;
  - (iv) original artistic assemblages and montages in any material;
  - (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
  - (i) postage, revenue or similar stamps, singly or in collections;
  - (j) archives, including sound, photographic and cinematographic archives;
  - (k) articles of furniture more than one hundred years old and old musical instruments.

See also, WILLIAMS, *supra* note 102, at 224-5.

<sup>157</sup> See WILLIAMS, *supra* note 102, at 40.

<sup>158</sup> See *id.*

<sup>159</sup> See *id.*

<sup>160</sup> WILLIAMS, *supra* note 102, at 44. See also *supra* note 6, The Hague Convention of 1954, Article 19.

<sup>161</sup> See WILLIAMS, *supra* note 102, at 44.

<sup>162</sup> *Id.*

<sup>163</sup> Some of the agreements are the following: UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Adopted by the General Conference at Its Sixteenth Session, Paris, 14 November 1970; European Convention on the Protection of the Archaeological Heritage 1969; Treaty Between the United States and Mexico Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties 1970; Quebec Cultural Property Act; and The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995.

<sup>164</sup> The European Convention on the Protection of the Archaeological Heritage, May 6, 1969, *reprinted in* European Conventions and Agreements, Volume II, at 389 (published by the Council of Europe 1972).

of Ownership of Cultural Property,<sup>165</sup> and World Cultural and Natural Heritage.<sup>166</sup> The Convention Concerning the Protection of the World Cultural and Natural Heritage,<sup>167</sup> signed in Paris in 1972, stresses the world-wide common heritage concept.<sup>168</sup> It states "the deterioration or disappearance of any item of the Cultural or Natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world."<sup>169</sup>

In 1990, Chancellor Helmut Kohl of Germany and President Mikhail Gorbachev of the USSR signed the Treaty on Good-Neighborliness, Partnership and Cooperation.<sup>170</sup> Article 16 of this treaty states:

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 lost or unlawfully transferred art treasures which are located in their territory will be returned to their owners or their successors.<sup>171</sup> The agreement was signed on November 9, 1990, before the Russians revealed just how vast a collection of treasures were hidden in their museums. In 1992, the German-Russian Cultural Agreement signed by Chancellor Kohl and President Yeltsin, reaffirmed the 1990 treaty.

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<sup>165</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, 823 U.N.T.S. 231. Article 7(b)(ii) establishes a method of recovery. However, the request for recovery must be made by the state of origin, private parties are left two remedies under existing laws if their state will not espouse their claim. WILLIAMS, *supra* note 102, at 184.

<sup>166</sup> The Convention concerning the Protection of the World Cultural and Natural Heritage, 1972.

<sup>167</sup> See WILLIAMS, *supra* note 102, at 54.

<sup>168</sup> See *id.*

<sup>169</sup> *Id.* (quoting the preamble to The Convention concerning the Protection of the World Cultural and Natural Heritage, 1972).

<sup>170</sup> See AKINSHA AND KOZLOV, *supra* note 3, at 234.

<sup>171</sup> See Treaty on Good-Neighborliness, Partnership and Cooperation, Nov. 9, 1991, F.R.G.-U.S.S.R., 30 I.L.M. 505, 512.

C. *Protection of the Rights of the Private Owner of Cultural Property*

An item of cultural property has two significant aspects:<sup>172</sup> the property aspect and the cultural aspect.<sup>173</sup> The property aspect arises from the fact that "cultural property consists of tangible, moveable objects."<sup>174</sup> They are objects that may be owned, possessed or controlled.<sup>175</sup> The cultural aspect "derives from the cultural significance of the object."<sup>176</sup> This cultural significance gives the object a value to a culture and to a collector.<sup>177</sup>

There are many instances where the owner of an object of cultural property loses possession and/or ownership without his consent.<sup>178</sup> When reasserting their rightful ownership of the property, two issues must be addressed.<sup>179</sup> First, the act and any consequences of deprivation must be identified.<sup>180</sup> Second, the right to ownership by the person who is ultimately found in possession of the item must be determined.<sup>181</sup> Regarding deprivation, "there are some cases where the item is taken without knowledge or consent of the owner and other cases where the owner consents to part with it but as a result of false pretenses or deceit. In the latter cases true consent is lacking."<sup>182</sup> There are three situations in which an owner may be deprived of an object:

1. The owner or person to whom he has entrusted the item, is directly deprived of it by some other person.

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<sup>172</sup> See Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 *FORDHAM INT'L L.J.* 1033, 1037 (1993).

<sup>173</sup> See *id.*

<sup>174</sup> *Id.*

<sup>175</sup> See *id.*

<sup>176</sup> Mastalir, *supra* note 172, at 1037.

<sup>177</sup> See *id.* at 1039.

<sup>178</sup> See P.J. O'KEEFE AND LYNDALL V. PROTT, *LAW AND CULTURAL HERITAGE VOLUME 3 MOVEMENT*, 367 (1989). Ownership may be lost through theft, expropriation or nationalization, good faith acquisition or prescription. See generally *Id.*

<sup>179</sup> See *id.*

<sup>180</sup> See *id.*

<sup>181</sup> See *id.*

<sup>182</sup> O'KEEFE AND PROTT, *supra* note 178.

2. The owner of the item may have entrusted it to another person for various purposes but in no way intending that the person should have the right to dispose of it.
3. The owner may be deprived of an item when it is taken by the state.<sup>183</sup>

However, it is important to note, that deprivation of possession does not necessarily mean deprivation of ownership.<sup>184</sup> Once possession and ownership are separated, problems arise. Due to the fact that personal property is moveable, it is difficult to document title.<sup>185</sup>

“A well-established rule of private international law provides that the validity of a transfer of personal property and the effect of such a transfer on the rights of any person claiming title therein will be governed by the law of the country where the property is situated at the time of transfer.”<sup>186</sup>

This is known as the *lex locus situs* rule.<sup>187</sup> The rule shifts the focus of legal attention “to the conduct or transaction which led to the defendant’s possession.”<sup>188</sup> The rule is applied in cases involving art and cultural property stolen and transported to foreign countries.<sup>189</sup> Although international actions regarding ownership of art have been occurring for many years,<sup>190</sup> cases

<sup>183</sup> *Id.* “When an item is nationalized it is taken by the government of the nationalizing state. The dispossessed owner may seek either to reclaim the item or to have compensation paid. A major consideration is whether he is a national of the State concerned or whether he is a national of another state.” *Id.* at 436.

“The availability of recourse against one’s own national State depends on what rights exist under local law. For example, a number of constitutions preserve a right of private property but allow the government to take it subject to payment of compensation.” *Id.* at 436-437.

<sup>184</sup> See O’KEEFE AND PROT *supra* note 178, at 368.

<sup>185</sup> See Robin Morris Collins, *The Law and Stolen Art, Artifacts and Antiquities*, 36 *How. L.J.* 17, 21 (1993).

<sup>186</sup> *Id.* at 23.

<sup>187</sup> See *id.*

<sup>188</sup> See *id.* The rule is subject to several exceptions, including goods in transit, purchases not made in good faith, foreign law contrary to the public policy of the forum court and goods subject to the laws of succession or bankruptcy. See *id.*

<sup>189</sup> See *DeWeerth v. Baldinger* 38 F. 3d 1266 (2d Cir. 1994), *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp 829 (E.D.N.Y. 1981).

<sup>190</sup> The *Elgin Marbles*: In the early 19th Century, Britain removed sculptures from the Parthenon and shipped it to England. The Greeks want the marbles returned. John H. Merryman, *Thinking About the Elgin Marbles*, 83 *MICH. L. REV.* 1881, (1985), concludes that the Greeks do not have a compelling reason for their return. Lord Elgin sold marbles to the British government. See generally Mer-

involving objects stolen during World War II are becoming more prevalent today.<sup>191</sup> Artworks continue to be uncovered. These cases are important in the analysis of the German-Russian controversy because of the international scope and the World War II implications.

In *DeWeerth v. Baldinger*, the plaintiff brought an action against a defendant art owner and a third party defendant art gallery for the return of a stolen painting.<sup>192</sup> The disputed painting, Claude Monet's *Champs de Ble a Vetheuil*, was previously owned by the plaintiff Gerda Dorothea DeWeerth, a Ger-

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ryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, (1985). "Accordingly it seems fair, and is consistent with the law of all civilized jurisdictions, to suppose that the right of the crown to the marbles was no better than Elgin's right to them." *Id.* at 1896. "If Lord Elgin owned the marbles, he could transfer ownership to the crown." *See id.*

Another case that makes a distinction between theft and export is *King of Italy v. De Medici*, 34 T.L.R. 623 (Ch. 1918). "The case involved Medici family papers that had been illegally removed from Italy." John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1889 (1985). The papers were to be sold by auction by Christie's. The Italian government sought to enjoin the sale because some of the papers were technically the property of the government. *See id.* These papers were barred from sale. "The remaining papers, were not the plaintiff governments's property." *Id.* Though their removal from Italy violated Italian law, the court would not enjoin their sale. *Id.* "Traditional private and public international law thus provide no remedy for the state seeking the return of illegally exported but not state-owned property." *Id.*

*Autocephalous Greek-Orthodox Church of Cyprus and The Republic of Cyprus v. Goldberg and Feldman Fine Arts, Inc. and Peg Goldberg*, 917 F.2d 278 (7th Cir. 1990) awarded possession of mosaics, stolen from a Greek-Orthodox Church and ultimately purchased by a museum, to the Church. *See id.* The mosaics were removed from a church in occupied northern Cyprus after the 1974 Turkish invasion. *See id.* at 281. After learning of the disappearance of the mosaics, the Republic of Cyprus immediately took steps to recover them by notifying international organizations, museums, architects and collectors throughout the world. *See id.* Defendant Peg Goldberg had purchased the pieces in 1988 from a dealer who claimed to have found them in an abandoned church. *See id.* at 282. The District Court held "the Church of Cyprus was entitled to possession of the mosaics under Indiana law under a provision that prevented a buyer of stolen property from acquiring valid title, or a right to possession, and under a Swiss law since Defendant Goldberg could not be considered a good faith purchaser in light of the suspicious circumstances surrounding the sale." M. Christiane Bourloyannis and Virginia Morris, *Cultural Property — Recovery of Stolen Art Works — Choice of Law — Recognition of Governments*, 86 A.J.I.L. 128 (1992). The decision was affirmed by the U.S. Court of Appeals for the Seventh Circuit. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., and Peg Goldberg*, 917 F.2d 278 (1990).

<sup>191</sup> *See supra*, note 190.

<sup>192</sup> *DeWeerth v. Baldinger*, 38 F.3d 1226, (2d Cir. 1994).

man citizen.<sup>193</sup> "It was discovered missing from DeWeerth's family castle after World War II, and was subsequently purchased by defendant Edith Marks Baldinger, a New York resident from, third party defendant, Wildenstein & Co., a New York art gallery."<sup>194</sup> When DeWeerth learned of the painting's whereabouts, she demanded its return<sup>195</sup> and Baldinger refused. DeWeerth then commenced a diversity action to recover it.<sup>196</sup> In 1987, after a bench trial, the court found that DeWeerth had established a superior right to possession.<sup>197</sup> Baldinger's defenses of limitations and laches were rejected.<sup>198</sup> The district court held that the three year statute of limitations did not begin to run until Baldinger refused DeWeerth's demand for the painting's return.<sup>199</sup> The court further concluded that the claim of *laches*<sup>200</sup> was barred because DeWeerth had been diligent in the pursuit of the painting after 1945 and that Baldinger "had not been prejudiced by any delay in the demand for the painting's return."<sup>201</sup> However, on appeal, the appellate court found in favor of the defendant purchaser.<sup>202</sup> It held that the New York law imposed a due diligence requirement, that DeWeerth failed to exercise reasonable diligence in locating the painting for recovery and that her action was untimely.<sup>203</sup> The New York courts impose a duty of reasonable diligence in attempting to locate stolen property, in addition to the duty to make a demand for its return within a reasonable time after the current possessor is identified.<sup>204</sup>

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<sup>193</sup> See *id.* at 1268.

<sup>194</sup> *Id.*

<sup>195</sup> See *id.*

<sup>196</sup> See *id.*

<sup>197</sup> See *id.* at 1268.

<sup>198</sup> See *id.*

<sup>199</sup> See *id.* at 1269. Applying New York law, the District Court found that DeWeerth had superior title and that she had exercised reasonable diligence in finding the painting. *DeWeerth v. Baldinger*, 836 F.2d 103, 106 (2d Cir. 1987).

<sup>200</sup> *Laches* is defined as "neglect to assert a right or a claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity." BLACK'S LAW DICTIONARY 875 (6th ed. 1990)

<sup>201</sup> *DeWeerth v. Baldinger*, 38 F.3d 1226, at 1268 (2d Cir. 1994).

<sup>202</sup> Collins, *supra* note 185.

<sup>203</sup> See *DeWeerth v. Baldinger v. Wildenstein & Co.*, 836 F.2d 103 (2d Cir. 1987).

<sup>204</sup> See *id.* at 107.

In *Kunstsammlungen Zu Weimar v. Elicofon*,<sup>205</sup> the plaintiff museum, sought to recover two Albrecht Durer paintings from defendant Edward I. Elicofon.<sup>206</sup> Elicofon purchased the paintings in New York in 1946 from an American serviceman.<sup>207</sup> The court cited the Restatement Second of Conflict of Laws 246: "A state where a chattel is situated has a dominant interest in determining the circumstances under which an interest in that chattel is transferred. . . ." <sup>208</sup> Here, the court determined that New York law should govern because of New York's dominant interest in determining the validity of a transfer of personal property which occurred within its borders and in protecting infiltration of stolen goods into its marketplace.<sup>209</sup> Although this decision applied the *lex locus situs* rule, "the court's rationale suggests that the overriding policy concern should be the long-term health of the legitimate marketplace for art as well as a state's interest in controlling the commercial norms and standards by which business is done in its jurisdiction."<sup>210</sup>

In July of 1985, the auction house of Sotheby Parke Bernet entered into a settlement with the New York State Attorney General regarding Sotheby's right to auction property formerly owned by a Jewish institution dissolved by the Nazis in 1941.<sup>211</sup> The possessor of the manuscripts was the wife of a rabbinical professor and Holocaust survivor, "Dr. Alexander Guttman."<sup>212</sup> According to Dr. Guttman's affidavit, Dr. Heinrich Veit Simon, a lawyer and chairman of the institution, offered the books to the Professor in exchange for smuggling them out of Germany."<sup>213</sup> Attorney General Abrams challenged Dr. Guttman's right of ownership by attacking Guttman's claim that

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<sup>205</sup> *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981).

<sup>206</sup> *See id.* at 830

<sup>207</sup> *See id.* at 833. In 1943, due to the onset of World War II, the paintings were transported from a museum to a castle for safekeeping. *Id.* at 831. The paintings disappeared in 1945. *See id.*

<sup>208</sup> Collins, *supra* note 202, at 24.

<sup>209</sup> *See id.*

<sup>210</sup> *See id.* at 24-25.

<sup>211</sup> *See* Angela Joy Davis, *Beyond Repatriation: A Proposal for the Equitable Restitution of Cultural Property*, 33 UCLA L. REV. 642 (1985).

<sup>212</sup> *See id.* at 644.

<sup>213</sup> *See id.*

he was given title to the manuscripts rather than entrusted with them, and by questioning Guttman's assertion that Simon had authority to transfer title of the property without the consent of the remaining board members.<sup>214</sup> Although the settlement left these legal issues unresolved, the manuscripts were returned to the Jewish Restitution Successor Organization.<sup>215</sup>

Most recently, three individuals were indicted in Texas on charges of illegally selling two of the stolen Quedlinburg Treasures.<sup>216</sup> Jack Meador and Jane Meador Cook, the brother and sister of Lieutenant Joe Meador, were charged under the National Stolen Property Act with trafficking stolen property.<sup>217</sup> "The indictment comes nearly three years after the German Government paid the heirs \$2.75 million for the entire collection."<sup>218</sup> Consequently, the treasures were returned to Germany, and in September of 1994, were placed in an exhibit in the Quedlinburg Cathedral that is monitored by twenty-four hour guards and a security system.<sup>219</sup>

#### D. *The Claims of the Gerstenberg and Krebs Heirs*

The interests of the heirs of Otto Gerstenberg and Otto Krebs clearly cannot be ignored in this controversy. Five of the seventy-four paintings in the exhibit belonged to Otto Gerstenberg who bequeathed them to his daughter, Margarete

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<sup>214</sup> See *id.*

<sup>215</sup> See *id.* at 642. The auction house agreed to recall the manuscripts, which had sold for \$2.2 million, waive profits from the sale, pay the consignor \$900,000 and return the manuscripts to institutions selected by the Jewish Restitution Successor Organization. See *id.*

<sup>216</sup> See William H. Honan, *3 Are Indicted in Sale of German Art Stolen by a G.I.*, THE NEW YORK TIMES, January 5, 1996 at A10. The Quedlinburg Treasures were part of a group of medieval artworks that were kept for almost one thousand years in the Quedlinburg Cathedral in Central Germany. See *id.* The pieces were moved to a nearby cave for protection during the Allied bombings in 1943. See *id.* Lieutenant Joe Meador stole the items from the cave and shipped them to his parents home in Whitewright, Texas. *Id.* His letters to his parents make it clear that he knew how valuable the objects were that he was stealing. See *id.* After his death in February of 1980, his brother and sister were named his heirs. Marcia Chambers, *One Theft That Brought Big Rewards*, THE NAT'L L.J., March 25, 1991, at 13.

<sup>217</sup> See Marcia Chambers, *One Theft That Brought Big Rewards*, THE NAT'L L.J., March 25, 1991, at 13. The third individual charged was John S. Torigian, the lawyer who represented Meador and Cook in the transactions. See *id.*

<sup>218</sup> Honan, *supra* note 216.

<sup>219</sup> *Id.* at A10.

Scharf.<sup>220</sup> Scharf gave them to Berlin's National Gallery for safekeeping in April 1943.<sup>221</sup> The Russian Army found the paintings in a bunker built in the zoological garden of the museum.<sup>222</sup> In 1993, Mikhail Piotrovsky, director of the Hermitage, and Minister of Culture, Yevgeny Sidorov, made an agreement with Gerstenberg's grandsons, Walter and Dieter Scharf, to divide the collection.<sup>223</sup> The agreement allowed the "gem" of the collection, Degas' *Place de la Concorde*, worth, by some estimates, as much as \$100 million, to be returned to the family.<sup>224</sup> However, Piotrovsky does not have the power to carry out any agreement.<sup>225</sup>

The remainder of the exhibit comes from the collection of Otto Krebs. The Krebs Foundation, which engaged in medical research, received the bulk of his estate.<sup>226</sup> The organization has filed an official claim through the German government.<sup>227</sup>

In 1966, The Supreme Court of the State of New York received a similar case.<sup>228</sup> The plaintiff brought an action *in replevin*<sup>229</sup> to recover a Marc Chagall painting left by her and her husband in their Brussels' apartment in 1941, as they fled from the Nazis.<sup>230</sup> The "Nazi Goering-Rosenberg Group"<sup>231</sup> stole the painting from the plaintiff's former residence. Neither the German nor Belgian Governments compensated the plaintiff.<sup>232</sup> In

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<sup>220</sup> See Christopher Knight, *Displaying the Spoils of War; the Hermitage is About to Exhibit Impressionist Masterpieces the Soviet Army Took Out of Nazi Germany. The Dispute Over Who has a Right to Such 'Trophy Art' is Fueled by the Lure of big Money and the Bitterness of Old Foes*, THE LOS ANGELES TIMES, March 20, 1995 at A1.

<sup>221</sup> See *id.*

<sup>222</sup> See *id.*

<sup>223</sup> AKINSHA AND KOZLOV, *supra* note 3, at 257.

<sup>224</sup> *Id.*

<sup>225</sup> See *id.*

<sup>226</sup> See Knight, *supra* note 220.

<sup>227</sup> See *id.*

<sup>228</sup> See *Menzel v. List*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *aff'd & modified per curiam*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), *rev'd on other grounds*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).

<sup>229</sup> Replevin is "an action whereby the owner or person entitled to repossession of goods or chattels may recover those goods or chattels from one who has wrongfully distrained or taken or who wrongfully detains such goods or chattels." BLACK'S LAW DICTIONARY 1299 (6th ed. 1990).

<sup>230</sup> See *Menzel*, 49 Misc. 2d at 301, 267 N.Y.S.2d at 806.

<sup>231</sup> *Id.* at 302, 267 N.Y.S.2d at 807.

<sup>232</sup> See *id.*

1962, the plaintiff discovered the painting to be in the defendant's possession.<sup>233</sup> Defendant List claimed that he purchased, in October 1955, the painting from third party defendant, Perls Galleries, which "warranted and represented that they were empowered to sell the painting to the defendant."<sup>234</sup> The Perls Galleries claimed they purchased the painting from a Paris art gallery in July, 1955.<sup>235</sup> The jury awarded the painting to the plaintiff.<sup>236</sup>

The court was forced to determine numerous questions of law presented by the defense which were vigorously opposed by plaintiff's counsel.<sup>237</sup> Two issues addressed confiscation of private property during war time.<sup>238</sup> The court held that the seizure of the painting could not be treated as lawful booty<sup>239</sup> of war by conquering armies.<sup>240</sup> If the taking was to be classified at all "it is to be classified as plunder and pillage, as those terms are understood in international and military law."<sup>241</sup> "Where pillage has taken place, the title of the original owner is not extinguished."<sup>242</sup> The court cites the opinion of the Venetian court in *Mazzoni v. Finanze dello Stato*:<sup>243</sup>

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<sup>233</sup> *See id.* at 301, 267 N.Y.S.2d at 807.

<sup>234</sup> *Id.* at 302, 267 N.Y.S.2d at 807.

<sup>235</sup> *See id.* at 303, 267 N.Y.S.2d at 808.

<sup>236</sup> *See id.* at 304, 267 N.Y.S.2d at 808.

<sup>237</sup> *See id.* at 304, 267 N.Y.S.2d at 809.

<sup>238</sup> *See id.*

<sup>239</sup> Booty is "property necessary and indispensable for the conduct of war, such as food, means of transportation, and means of communication; and is lawfully taken." *Menzel*, 49 Misc. 2d at 305, 267 N.Y.S. 2d at 810. The Annex to the Hague Convention of 1907 describes booty as an occupying army's possession of only "cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally all movable property belonging to the State which may be used for military operations." *Id.* at 305-306, 267 N.Y.S. 2d at 810.

<sup>240</sup> *See id.* at 306, 267 N.Y.S.2d at 810.

<sup>241</sup> *Id.* at 305, 267 N.Y.S.2d at 810. Pillage and/or plunder is "the taking of private property not necessary for the immediate prosecution of war effort, and is unlawful." *Id.* at 307, 267 N.Y.S.2d at 811.

<sup>242</sup> *Id.* at 307, 267 N.Y.S.2d at 811.

<sup>243</sup> *See id.* at 307, 267 N.Y.S.2d at 812 (quoting *Mazzoni v. Finanze dello Stato*, LII Il Foro Italiano 960 (Tribunale di Venezia, 1927), as translated and digested in ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES, 1927-1928 (London, 1931) at pages 564-565).

The argument that the property of citizens absent from occupied territory is to be considered *res nullius*, or was booty, cannot be admitted.

The principle based upon the Roman Law according to which property seized during a war is put on an equal footing with the property seized in the air, in the sea or in the earth, and which in a similar way becomes the property of the captor — since the right of war constitutes a just cause of acquisition — may be applicable to things liable or apt to be used for the needs of the army and belonging to the other belligerent. But it cannot be applied to private property which, if it has not become the object of requisition or sequestration, must be restored or compensated. The objects involved in the present case are private property which had not been requisitioned or sequestered as it could not have been used for the needs of the army. Their seizure must be considered as having been effected by pillage.<sup>244</sup> Thus, “the Germans have acquired no title to private movable property . . . which has been acquired by theft, looting, or pillage.”<sup>245</sup>

A second issue addressed by the court involved the assertion the painting “was lawfully requisitioned by German authority, as an occupying power in the prosecution of the law and as confiscation of the property of its nationals.”<sup>246</sup> The court analyzed this issue by applying the Act of State Doctrine.<sup>247</sup> The analysis invokes a four prong test: (1) the taking must be by a foreign government; (2) the taking must be within the territorial limitations of that government; (3) the foreign government must be extant and recognized by this country at the time of the suit; and (4) the taking must not be violative of a treaty obligation.<sup>248</sup>

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<sup>244</sup> See *Menzel*, 49 Misc. 2d at 307, 267 N.Y.S.2d at 812.

<sup>245</sup> *Id.* at 308, 267 N.Y.S.2d at 812.

<sup>246</sup> *Id.* at 304, 267 N.Y.S.2d at 809.

<sup>247</sup> The Supreme Court of the United States held in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964), that the doctrine states that “the Judicial Branch [of the government] will not examine the validity of a taking of property within its own territory by a foreign, sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law”. *Menzel*, 49 Misc. 2d at 308, 267 N.Y.S.2d at 812-813.

<sup>248</sup> See *id.* at 308, 267 N.Y.S.2d at 813.

Under this four prong test, the court found that none of the elements for a valid taking were met. First, the painting was seized by the Nazi party, not a foreign, sovereign government.<sup>249</sup> Second, "since the taking was not by a foreign sovereign, the location of the property as within or without its jurisdiction is moot."<sup>250</sup> Third, "The Third Reich was neither extant nor recognized by the government of the United States at the time of trial."<sup>251</sup>

Finally, the seizure violated treaty obligations to the United States.<sup>252</sup> Both Germany and the United States were parties to the Hague Conventions of 1899 and 1907.<sup>253</sup> Article 56 of the 1907 Convention provides: "the property of municipalities, of religious, charitable, educational, artistic and scientific institutions, although belonging to the state, is to be accorded the same standing as private property. All premeditated seizure, destruction or damage of such institutions, historical monuments, works of art and science is forbidden."<sup>254</sup> Furthermore, Articles 46 and 47 provide for protection of private property and forbid pillaging.<sup>255</sup> The court found that the plaintiff never abandoned the painting, but instead found that it was pillaged and plundered by the Nazis.<sup>256</sup> "No title could have been conveyed by them as against the rightful owners. The law stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors."<sup>257</sup>

Following the reasoning in *Menzel*, the heirs of Krebs and Gerstenberg may bring an action in replevin against the Hermitage to recover the paintings. Here, similar to *Menzel*, the Nazis did not acquire title to the paintings against the rightful owners. The Russian trophy brigades pillaged and plundered Germany in retaliation. Thus, the Russians could not have ac-

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<sup>249</sup> See *id.* at 310, 267 N.Y.S.2d at 815.

<sup>250</sup> *Id.* at 311, 267 N.Y.S.2d at 815.

<sup>251</sup> *Id.* at 311, 267 N.Y.S.2d at 816.

<sup>252</sup> See *id.*

<sup>253</sup> See *id.* at 312, 267 N.Y.S.2d at 816.

<sup>254</sup> *Id.* at 312, 267 N.Y.S.2d at 817.

<sup>255</sup> "Article 46. 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 47. Pillage is formally forbidden." *Id.*

<sup>256</sup> See *Menzel*, 49 Misc. 2d 300, 316, 267 N.Y.S. 804, 820 (1966).

<sup>257</sup> *Id.*

quired title against the private owners or the Nazis, assuming *arguendo*, the Nazis could have had title. Therefore, the Russian government could not have passed good title on to the Hermitage and the paintings must be returned to the heirs of the rightful owners.

#### E. *The German Position*

Germany argues that the taking of art and artifacts from them by Russia after World War II was illegal and in violation of international law, thus requiring the return of the art works.<sup>258</sup> The Russian military occupation of Germany after World War II did not strip Germany of its sovereignty because military occupation of a country only suspends its sovereignty; it does not extinguish it. Thus the confiscation by the Russian Army did not transfer the rights to the art and artifacts to the Russians.<sup>259</sup> Military occupation “does not transfer to the occupier title of a nation’s properties and sovereign rights.”<sup>260</sup> “A sovereign that has not consented to a taking has a right to seek return of property from an enemy.”<sup>261</sup> Here, since Russia obtained the property without Germany’s consent, the taking was violative of international law and the property must be returned to Germany.<sup>262</sup>

International law distinguishes between legally and illegally acquired property. Generally, the taking of a sovereign government’s property without consent is illegal and the equivalent of theft under international law.<sup>263</sup> The only recognized exception to this rule has been taking of property “from a vanquished nation by a conquering nation to prosecute a war

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<sup>258</sup> See S. Shawn Stephens, *The Hermitage and Pushkin Exhibits: An Analysis of the Ownership Rights to Cultural Properties Removed From Occupied Germany*, 18 HOUS. J. INT’L L. 59, 61 (1995).

<sup>259</sup> See *id.* at 68.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 69.

<sup>262</sup> See *id.*

<sup>263</sup> See Stephens, *supra* note 258, at 70. See also 2 D.P. O’CONNELL, INTERNATIONAL LAW 844-45 (1965).

effort.<sup>264</sup> However, as such acts as related to cultural property have never been legal and are considered acts of pillage.<sup>265</sup>

Germany argues that the doctrine of prescription should not apply.<sup>266</sup> Prescription does not "transfer title to these works to Russia."<sup>267</sup> Under customary international law, mere possession does not extinguish natural law property rights absent an owner's consent to transfer title.<sup>268</sup>

Germany holds that the confiscation of these pieces by the Russian trophy brigades violated international law.<sup>269</sup> Pursuant to Article 56 of the Hague Convention of 1907, the acts of the Russians were illegal, either as unlawful reprisal or as a war crime.<sup>270</sup> Not only was the initial looting illegal, but the subsequent failure to return the pieces to Germany has violated the terms of recent treaties.<sup>271</sup>

#### F. *The Russian Position*

Russia claims it has legal title to all artworks acquired in World War II as the Allied victory over Germany "was an act of subjugation resulting in the Allies becoming successors to the German State."<sup>272</sup> Russia, one of the Allies, became the state successor to the portion of Germany where these works were found.<sup>273</sup> "The Allied victory over Germany in World War II . . . extinguished the German State and transferred full territorial sovereignty to the Allies, including, in this particular instance,

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<sup>264</sup> See Stephens, *supra* note 258, at 70. See LEONARD D. DUBOFF, *THE DESK BOOK OF ART LAW* 129 (1977).

<sup>265</sup> See Stephens, *supra* note 258, at 71. See also Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 *NEW ENG. LAW REV.* 63, 99 n. 249 (1993).

<sup>266</sup> See Stephens, *supra* note 258, at 72. Prescription: International Law: Acquisition of sovereignty over a territory through continuous and undisputed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order. *BLACK'S LAW DICTIONARY* 1183 (6th ed. 1990).

<sup>267</sup> Stephens, *supra* note 258, at 72.

<sup>268</sup> See *id.* at 72 n. 81.

<sup>269</sup> See *id.* at 73.

<sup>270</sup> See *id.*

<sup>271</sup> See *supra* notes 6 and 30.

<sup>272</sup> Stephens, *supra* note 258, at 93.

<sup>273</sup> See *id.*

the U.S.S.R.”<sup>274</sup> “As a result, the occupying nation holds valid title to public, moveable property and is endowed with the power of alienation of that property.”<sup>275</sup>

Russia argues the pieces became Russian property by the doctrine of prescription.<sup>276</sup> Since the works entered Russia fifty years ago, Germany has lost the right to claim them.<sup>277</sup> Russia also argues that the pieces belong to them as war reparations. This reprisal was a “response provoked by the German-initiated war and the massive destruction of Russian cultural property.”<sup>278</sup> Russia asserts that the recent treaty provisions are not applicable because the pieces were neither “missing” nor “unlawfully removed” from Germany, as the treaties mandate.<sup>279</sup> The works were taken lawfully, as aforescribed.<sup>280</sup> Moreover, the works were not “missing,” but were kept in storage in Russia.<sup>281</sup> The Russians maintain this is a question of title to property and that international law is not applicable.<sup>282</sup> It is a question which should be settled under Russian law, which does not condemn the way these pieces were acquired.<sup>283</sup>

#### IV. ANALYSIS OF THE CONFLICT

Although it may be true that both Russia and Germany acted in violation of international law, the issue now is the determination of the ownership of the paintings. UNESCO mandates the property be returned. “Article 4 recognizes that all cultural property originally found within a nation’s territory constitutes the cultural heritage property of that country.”<sup>284</sup> This is a difficult question to resolve, in part, because the Germans cite legal arguments and the Russians cite historical

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<sup>274</sup> Stephens, *supra* note 258, at 95, O’Connell, *INTERNATIONAL LAW* (1970).

<sup>275</sup> Stephens, *supra* note 258, at 95 n. 234.

<sup>276</sup> *See id.* at 96.

<sup>277</sup> *See id.* “[W]ith the passage of time, ownership rights in possessed property strengthen.” *Id.* at 97.

<sup>278</sup> *Id.* at 97; *see supra* section II.

<sup>279</sup> *Id.* at 99.

<sup>280</sup> *See id.*

<sup>281</sup> *Id.* at 99.

<sup>282</sup> *See id.* at 100.

<sup>283</sup> *See id.*

<sup>284</sup> *Id.* at 85.

responsibility.<sup>285</sup> Adding to the complexity of the situation are the claims of the heirs of the original, private owners, which cannot be overlooked.

Russia's Ministry of Culture maintains that "Russia has the right to hold the art works because the former Soviet forces committee to manage trophies of war confiscated them legitimately."<sup>286</sup> While the Russians maintain they saved the art works, the Germans claim it was not necessary for the Russians to transport the art works to Russia for conservation.<sup>287</sup> The Russians claim seizures were not "unlawful", but rather a response to Germany's attempt at "cultural genocide."<sup>288</sup> The Germans point to the treaties to which Russia is a party that prohibit the use of cultural property for war reparations.<sup>289</sup> The Russia Duma is contemplating enacting a law that would nationalize all trophy art and permit return of individual pieces only by legislative consent.<sup>290</sup>

Who has priority? The "country of possession," the "country of origin,"<sup>291</sup> or the heirs of the original owners? Who is the country of possession? Each country believes it is the rightful possessor. Russia is in possession today, and for the past fifty years, but Germany was in prior possession. It is difficult to logically and legally conclude that the German government can be considered the country of origin since it acquired the works through the confiscation policies of the Third Reich.

The interests of the heirs of the original owners must not be ignored. The paintings in the exhibit, though removed from the possession of the German government, did not belong to the government. The paintings were acquired by means of confisca-

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<sup>285</sup> See Robert Hughes, with reporting by Constance Richards and Rhea Schoenthal, *The Spoils of War; Russia's New Displays of Art Looted from Germany Reignite a Debate Over Who Rightfully Owns Such Plunder*, TIME, April 3, 1995, at 64.

<sup>286</sup> Motokazu Funyu, *Germany Pushing Russia to return Confiscated Art*, THE DAILY YOMIURI, June 21, 1995, at 7.

<sup>287</sup> See Hughes, *supra* note 285.

<sup>288</sup> *Id.*

<sup>289</sup> See Kelley, *supra* note 1.

<sup>290</sup> See *Who Owns This Art?*, THE PROVIDENCE JOURNAL-BULLETIN, May 9, 1995, at 12A.

<sup>291</sup> James Cuno, *The Rape of Europa: the Fate of Europe's Treasures in the Third Reich and the Second World War*; book reviews, THE NEW REPUBLIC, May 15, 1995, at 40.

tion. Confiscation of property of private citizens during war time only applies to objects that will aid the war effort; items such as automobiles, fuel and food. Art work and other forms of cultural property clearly have no impact on a country's war effort. Thus, there is no legitimate basis for the confiscation of such items. In this case, the Nazis removed objects from private homes and hiding places and took them into their possession. No permission was given by the owners, nor was any compensation paid to them. In essence, the Nazis "unlawfully" removed the objects. Although the heirs of Krebs and Gerstenberg have been deprived of possession, they have not necessarily been deprived of ownership. The Russians argue that the trophy brigades acted in retaliation against the Germans. The goal of the brigades was to recover the objects removed from Russia. Assuming, *arguendo*, that the reparation argument is valid, it has no application in the case at hand. The paintings in the exhibit have been identified as belonging to private German citizens. The paintings did not originally come from Russia, nor were they ever the rightful property of the German government. Therefore, Russia cannot claim these pieces serve as reparation against Germany.

Russia claims that the trophy brigades "saved" the artworks from German destruction. The pieces were stored in Russian museums for safekeeping. When Russia acted to protect the artworks, because of the cultural value, it became nothing more than a bailor of the property. Clearly, the only parties with a right to these particular paintings are the families and heirs of Otto Krebs and Otto Gerstenberg.

Clearly the Nazi's plundering of Europe was in direct violation of The Hague Conventions of 1899 and 1907, to which Germany was a party. The agreements explicitly forbid confiscation of private property, pillaging and destruction and/or seizure of the enemy's property.<sup>292</sup> By the same analysis, the Russian trophy brigades also violate the agreement, to which they were a signatory. The Russians had no authority to remove the art works from Germany; thus, their actions also constitute pillaging. Both sides signed the 1907 agreement that protected 'institutions dedicated to . . . the arts and sciences'<sup>293</sup>

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<sup>292</sup> See *supra* notes 107-08.

<sup>293</sup> See *supra* note 27.

on occupied territory against confiscation. Thus, the early Hague conventions by themselves offer no remedy to the situation.

The Nuremberg Trials conducted in 1945 and 1946 sentenced Alfred Rosenberg to death for his role in the cultural plundering of Europe, among many other war crimes. The International Military Tribunal held Germany criminally responsible for these actions. This is an important fact in analyzing the situation at hand. The tribunal's decisions condemn the actions of the Nazis; finding pillaging and plundering to be a war crime. However, the Russians were not found to be guilty of crimes against cultural property for their removal of the objects from Germany. This supports the theory that the Tribunal did not believe Germany was the rightful owner of any of these pieces, nor was entitled to any of the objects.

Although the Conference on Protection of Cultural Property occurred as a result of conduct of World War II, it is still relevant to the Russia-Germany dispute. The 1954 agreement supplemented the earlier Hague Conventions. Looting of cultural property was still forbidden, but the agreement acknowledged that in certain situations, property could be moved to ensure its safety from destruction.<sup>294</sup> History tells us that Hitler was not concerned about protecting art pieces from destruction, therefore this exception cannot be applied to justify the action of the Nazis. Yet, the Russian brigades were concerned about the safety of the pieces stolen by the Germans. It is true that the Russians wanted their pieces back, but the brigades were formed for reasons that were more aligned with views represented by the Hague Conventions and the Lieber Code recognizing the importance of cultural property. This unquestionably favors the Russian position.

The 1990 and 1992 agreements call for the return of art treasures lost or "unlawfully" transferred.<sup>295</sup> Great controversy arises over the meaning of the word "unlawfully." Black's Law Dictionary defines "unlawful" as "[t]hat which is contrary to, prohibited, or unauthorized by law. . . . [t]he acting contrary to, or in defiance of the law; disobeying or disregarding the law."<sup>296</sup>

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<sup>294</sup> See *supra* note 151.

<sup>295</sup> See *supra* note 30.

<sup>296</sup> BLACK'S LAW DICTIONARY 1536 (6th ed. 1990).

According to the Germans, "the Russian side argues that the Cultural property stolen by the German occupiers in the USSR was 'unlawfully removed' - an assertion which the German side has at no point in time disputed - while the cultural property taken from Germany by their own military and occupation authorities on a large scale was transferred to Russia 'lawfully.'"<sup>297</sup> When the 1992 Treaty was signed, both parties knew of the tremendous quantities of art taken from Germany and hidden by the Russians.<sup>298</sup> A joint commission was set up in 1994 to consider the question of restitution.<sup>299</sup> In a meeting in June of that year, the Germans gave the Russians a list of objects they believed to be in Russia: 200,000 art objects, two million books, and 'three kilometers' of archives; valued at roughly \$6.3 billion.<sup>300</sup> The Russians gave the Germans a list of 39,588 lots (each containing multiple objects) or pieces stolen from museums and palaces.<sup>301</sup> Unfortunately, no agreement has been reached.

Both sides attended the "Spoils of War" conference in New York in January of 1995.<sup>302</sup> The Germans accused the Russians of stalling while the Russians claimed the Germans had no right to make any demands at all, considering how much devastation Germany brought upon Russia during the war.<sup>303</sup> The Germans claim the Hague Conventions and the 1990 and 1992 treaties support the position that the "Russians had no legal basis for taking artworks from Germany and are bound to return them by the treaties they signed."<sup>304</sup>

The Russians base their opinion in the matter on a legal opinion prepared by the Institute of State and Law of the Academy of Sciences.<sup>305</sup> This document states that "the Allied Control Council, the body that ruled the defeated country, had recognized the 'compensation principle of restitution' - the right of countries looted by the Nazis to take German property as

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<sup>297</sup> AKINSHA AND KOZLOV, *supra* note 3, at 253.

<sup>298</sup> *See id.* at 251.

<sup>299</sup> *See id.*

<sup>300</sup> *See id.*

<sup>301</sup> *See id.*

<sup>302</sup> *Id.* at 252.

<sup>303</sup> *See id.*

<sup>304</sup> *Id.* at 253.

<sup>305</sup> *See id.*

compensation. . . . This list of measures . . . proves that the Allied Countries were guided by the same principle, which was one of the basis of the peace agreement . . . the right to take, confiscate or liquidate . . . any enemy property."<sup>306</sup> The Allies agreed at the Tehran meeting in 1943 that countries occupied by Germany could take reparations from Germany for their losses, including Cultural losses.<sup>307</sup>

Yet, perhaps the strongest argument for rightful return belongs to the families and heirs of Otto Krebs and Otto Gerstenberg. These men were private citizens whose collections were targeted by the Nazi party. The Nuremberg Tribunal condemned the acts of the Nazis as criminal, sentencing members of the party to death. Surely this must be taken into account in determining rightful possession. Furthermore, the paintings that can be identified as originally belonging to private citizens, have no place in serving as reparation to the Russians. The crimes against Russia and the rest of Europe were committed by the German government. Thus, property belonging to the German government should serve as reparation, not the property of private citizens, who themselves were victims of Nazi terror.

## V. CONCLUSION

Reaching a fair decision in this matter is an arduous task. The heinous crimes committed by the Nazis remain a sensitive issue today, and will never be forgotten. Russia suffered greatly at the hands of the group, and to this day has not completely recovered from the destruction. The lives of millions of innocent people were affected by World War II. Among the innocent were Otto Krebs and Otto Gerstenberg, private citizens, who collected artistic masterpieces for their own private enjoyment. However, their possessions were seized by the Nazi party for Hitler's own private purposes, not to aid the war effort.

Today, Germany and Russia are attempting to work together towards building a new future. The treaties of friendship signed by both countries in the 1990's recognize the need to build a new, United Europe, to cooperate in all fields and to

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<sup>306</sup> *Id.*

<sup>307</sup> *See id.*

build a relationship between the two countries. To date, Germany has given post-communist Russia more than \$50 billion in aid<sup>308</sup> to assist in reconstruction. Yet, Russia will not return any pieces of the artwork. A solution must be reached. One possible solution is to allow Russia to continue to exhibit the art, although Russia does not own it. Russia would be able to earn revenue to refurbish the Hermitage Museum and add to their collections. This could serve as a form of reparation. A second possible solution is to allow Russia and Germany to divide the pieces equally. Another solution may be to require Germany to set up a fund to help Russia acquire art, or to require Germany to help subsidize the restoration of Russian buildings.

These solutions, however, overlook the interests of the heirs of the original owners. The permission of the heirs should be mandatory for the implementation of any of these proposed solutions. In addition, compensation should be paid to the heirs if they agree to forfeit claims to the paintings.

Perhaps a more viable solution is to place the matter before the International Court of Justice. However, its prestige is low and its jurisdiction is at the option of the parties.<sup>309</sup>

In the alternative, a special international tribunal could be formed to specifically address cultural property issues.<sup>310</sup> The tribunal would be composed of qualified members, acting as a review committee, with equal numbers of representatives from the countries and museums, and the odd member chosen by the Secretary of the Interior.<sup>311</sup> Each side would then submit arguments to the tribunal who would have the ultimate decision making authority.

A third proposal is to apply the law of salvage.<sup>312</sup> The law of salvage as applied to cultural property would work as follows: "the source nation or people would take title to the cultural property held by another subject to the payment of a salvage award to the present holder."<sup>313</sup> However, this would require

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<sup>308</sup> See Delores Tarzan Ament, *A Compelling Portrait of Art, War and Politics*, THE SEATTLE TIMES, December 17, 1995 at M2.

<sup>309</sup> See Mastalir, *supra* note 172, at 1067.

<sup>310</sup> See *id.*

<sup>311</sup> See *id.*

<sup>312</sup> See *id.* at 1069.

<sup>313</sup> *Id.* at 1068.

the heirs of Krebs or Gerstenberg to make a payment to Russia for the return of the artworks. This would not be a fair remedy, as Krebs and Gerstenberg did not lose the property due to their own actions.

The international treaties demonstrate that the rule of *jus cogens*<sup>314</sup> applies here, and requires the return of the property by Russia. Moreover, the doctrine of *pacta sunt servanda*<sup>315</sup> holds a state party to a treaty bound to carry out the duties established by that treaty. Thus, Russia and Germany are both bound by their treaty obligations. "It is therefore in the best interest of both the world's common heritage and items of cultural property themselves that such property be left in the hands of possessors who can protect them from deterioration or damage."<sup>316</sup>

The best solution is one that allows the interests of the heirs of Krebs and Gerstenberg to be recognized and compensated. It is also one that allows the works to be enjoyed by the world. "In the end, however ownership is decided, an international spirit should prevail. Generous exchange agreements should permit works to travel; delicate or unusually precious pieces should go to more accessible sites. In fact, perhaps it is time for several countries to join in creating a world museum of art, with allegiance to no nation but the nation of artists."<sup>317</sup>

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<sup>314</sup> Stephens, *supra* note 258, at 79. This term, connotes a rule of law which is peremptory in the sense that it is binding, irrespective of the will of the parties. PARRY, GRANT, PARRY AND WATTS, *supra* note 105 at 201. These rules exist to satisfy the higher interest of the whole international community. *Id.*; see also Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 58-63 (1966).

<sup>315</sup> Stephens, *supra* note 258, at 83. *Pacta sunt servanda*: "every treaty is in force is binding upon the parties and must be performed by them in good faith." PARRY, GRANT, PARRY AND WATTS, *supra* note 105, at 283-284.

<sup>316</sup> Mastalir, *supra* note 172, at 1060.

<sup>317</sup> See *supra* note 212.