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# ALL'S NOT FAIR FOR ART IN WAR: A PROPOSAL FOR THE EQUITABLE EXCHANGE OF SOVIET AND GERMAN ART PILLAGED IN WORLD WAR II

*Susan H. Rothstein\**

## I. INTRODUCTION

In February of 1993, representatives of Germany and Russia met in Dresden to discuss the mutual return of art<sup>1</sup> pillaged during, and immediately following, World War II. The meeting marked the end of forty years of Soviet denial that any pillaging by the Soviets ever took place, and the beginning of stronger amity between Germany and Russia. As of yet, the mechanism and specifics of repatriation have not been decided. The fact that much Soviet art has found its way into private hands indicates that a one-for-one swap would be impossible, and raises the question of how the trade can be conducted equitably. The dissolution of the Soviet Union further complicates the issue.

Part II of this paper summarizes the events of World War II that gave rise to this conflict. Part III describes the Post-World War II and Cold War period, including the Nuremberg Trials and the 1954 Hague Convention and Protocol. Part IV updates the reader to the February 1993, meeting in Dresden between the Germans and the Russians, and briefly describes the continuing hostility on the part of many Russians toward the return of art to Germany. Part V summarizes the general prohibition on retaining or demanding art or other cultural property as war reparations, while Part VI reviews further arguments upon which Russia and the other former Soviet republics might be able to base a legitimate claim for retaining at least a portion of German art. Part VII shifts the focus from arguments for retaining German art to possible mechanisms for maximizing the amount of Soviet art available for repatriation to the former republics, and for

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Susan would like to thank Sam Youakim for his invaluable assistance, and Professor E.L. Roy Hunt for his infinite wisdom.

1. For purposes of this article, "art," "artwork," and "cultural property" will be used interchangeably. As renowned art law professor John H. Merryman noted in his article *Two Ways of Thinking About Cultural Property*, 80 AM. J.INT'L.L. 831, Oct. 1986, "The entire question of the proper definition of cultural property for legal and policy purposes is a large and unruly one." *Id.* at 831, n. 1. Such a definition is not necessary to an understanding of this article and, therefore, "cultural property," "art," and "artwork" are used in their general, lay sense, rather than as terms of art, as it were.

distributing that art, or any compensation offered in its stead, upon return to the former Soviet Union. Part VIII waxes somewhat poetic about the significance of the return of art to its place of origin.

## II. THE SECOND WORLD WAR

The beginning of the Second World War found Germany and the Soviet Union, if not allies, then at least not enemies. On August 23, 1939, the Germans and Soviets entered into a non-aggression pact.<sup>2</sup> The pact gave the Soviets control over land in Europe, the potential for more control in Europe, and immunity from direct German aggression.<sup>3</sup> The pact gave the Germans confidence that the Soviets would not interfere with their imperialist goals. In 1939 and early 1940, the two countries continued to enter into treaties and economic agreements with each other.<sup>4</sup> However, by the middle of 1940, it became clear that direct competition between Germany and the Soviet Union for control of Europe would be inevitable, and both parties began to show dissatisfaction with their prior agreements.<sup>5</sup> On December 18, 1940, Adolph Hitler issued Directive 21, code name "Operation Barbarossa," in preparation for an attack on the Soviets, and on June 22, 1941, without a formal declaration of war, Germany invaded the Soviet Union.<sup>6</sup>

A branch of the German war machine was the Einsatzstab-Reichsleiter Rosenberg (ERR), headed by Alfred Rosenberg.<sup>7</sup> The ERR's purpose was to rob defeated countries of their artwork, which was ultimately to be included in a grand "Führermuseum".<sup>8</sup> Over time, the ERR also became the personal collector for a number of high-ranking Nazi officials, including Hermann Goring.<sup>9</sup>

Artwork from Czechoslovakia, Poland, France, Belgium, and every other subjugated country poured into Germany.<sup>10</sup> Although the Soviet Union never fell to the Germans, the ERR made significant inroads there as well.<sup>11</sup> Important cities such as Minsk, Kiev, Smolensk, and Kharkov were stripped of their art.<sup>12</sup> During and after the Allied liberation of Europe, much of the German-confiscated art was either stolen by Allied troops or returned to the rightful owners. By that time, however, a good deal of Soviet art had already passed into private German hands.<sup>13</sup>

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2. 2 Werner Hilgemann and Hermann Kinder, *THE ANCHOR ATLAS OF WORLD HISTORY 197* (Ernest A. Menze, trans., 1978) (1966).

3. Earl F. Ziemke, *STALINGRAD TO BERLIN: THE GERMAN DEFEAT IN THE EAST*, 24 (1988).

4. HILGEMANN AND KINDER, *supra* note 2, at 199.

5. ZIEMKE, *supra* note 3, at 24.

6. HILGEMANN AND KINDER, *supra* note 2, at 207.

7. Charles de Jaeger, *THE LINZ FILE: HITLER'S PLUNDER OF EUROPE'S ART*, 54 (1981).

8. *Id.*

9. *Id.* at 70.

10. *Id.*

11. Bruce Clark, *Looted Tsarist Treasure Found at Soviet Base*, *THE TIMES*, Nov. 20, 1991.

12. *Id.*

13. *Germany and Russia Talk About Returning Art Stolen in War*, *THE REUTER LIBR. REP.*, Feb.

Soviet troops also did their share of looting during the war. However, one commentator has suggested that actual wartime looting of Germany was done on an individual level, with little or no direction from commanding officers.<sup>14</sup> It was not until the war ended that Stalin had his own "treasure collectors," the Committee of Arts of the Council of Peoples Commissars, whose duty was to strip Germany of its art in punishment for damage to the Soviet Union.<sup>15</sup> Stalin, confident in the Soviets' right to take German art as reparations, openly displayed it throughout the Soviet Union immediately following the war.<sup>16</sup> Soon after, most of it disappeared.<sup>17</sup>

### III. POST-WORLD WAR II & THE COLD WAR

#### A. Nuremberg

At the end of the war, the victorious allies held the Nuremberg Trials, at which Rosenberg was a defendant.<sup>18</sup> His crimes included participating in the destruction and looting of Soviet art:

##### 2. Eastern Countries:

During the occupation of the Eastern Countries the German Government and the German High Command carried out, as a systematic policy, a continuous course of plunder and destruction . . . .

The Germans destroyed 427 museums, among them the wealthy museums of Leningrad, Smolensk, Novgorod, Poltava, and others.

In Pyatigorsk the art objects brought there from the Rostov museum were seized.

Stealing of huge dimensions was typified in Kiev. A large number of artistic productions and valuables of different kinds were stolen and carried away. Many valuable art productions were taken away from Riga.<sup>19</sup>

As a result of his participation in the looting of Europe, Rosenberg was executed.<sup>20</sup> Stalin, with his hidden cache of German art, went unpunished.

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10, 1993.

14. DE JAEGER, *supra* note 7, at 150.

15. Geraldine Norman, *Collecting: Memories of the World's Greatest Art Pillage Linger On*, THE INDEPENDENT, Apr. 27, 1991 at 45; Helen Womack, *Old Masters Unearthed in the Soviet Union*, THE INDEPENDENT, Apr. 28, 1991 at 13.

16. Norman, *supra* note 15; Eleanor Randolph, *The Soviet Stonewall on Nazi Art*, WASH. POST, Oct. 26, 1991 at D1.

17. Womack, *supra* note 15.

18. 1 ALBERT E. ELSEN AND JOHN H. MERRYMAN, LAW, ETHICS, AND THE VISUAL ARTS 20 (2d ed. 1987). The Nuremberg Trials were held from 1945 to 1946, during which 24 major war criminals were tried by Allied judges. HILGEMANN & KINDER, *supra* note 2, at 249.

19. INDICTMENT IN THE NUREMBERG TRIALS, TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (Nuremberg, 1948) Vol. 1, pp. 29, 55-56, 58-60. quoted in MERRYMAN & ELSEN, *supra* note 18, at 21-22.

20. *Id.* at Vol. 22, pp. 469-470, 484-486, 539-541, 588; quoted in MERRYMAN & ELSEN, *supra*

*B. The 1954 Hague Convention and Protocol*

International disgust over the rampant looting and destruction of art during World War II, coupled with the realization that existing international law was no longer adequate to protect cultural property from belligerence,<sup>21</sup> paved the way for the 1954 Hague Convention and Protocol for the Protection of Cultural Property in the Event of an Armed Conflict. The German Democratic Republic, The Federal Republic of Germany, and the Soviet Union were among the signatories to the Convention and Protocol.<sup>22</sup> Article 4 of the Convention provides, in pertinent part:

2. The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.<sup>23</sup>

Article I of the Protocol provides:

2. Each High Contracting Party undertakes to return, at the close of the hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle [laid down earlier]. Such property shall never be retained as war reparations.<sup>24</sup>

However, the Convention and Protocol apparently were not viewed as retroactive by the Soviet Union, which refused to even admit any knowledge of German art looted by Red Army soldiers or other instruments of the Soviet Union.<sup>25</sup> Although the Soviets occasionally returned certain pieces of art to Germany, such as Khrushchev's returning the Pergamon Altar and some art taken from Dresden,<sup>26</sup> they continued their official denial for almost forty years.<sup>27</sup>

IV. ACKNOWLEDGEMENT

It was not until 1991 that the policy of denial came to an end.<sup>28</sup> When Russian President Boris Yeltsin visited Germany in November of that year, he agreed to discuss the issue of stolen art.<sup>29</sup> In doing so, he essentially ratified the

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21. John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM.J.INT'L. L. 831, 835 (1986).

22. Convention for the Protection of all Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 2040 [hereinafter Hague Convention].

23. *Id.*, quoted in MERRYMAN & ELSEN, *supra* note 18, at 29.

24. *Id.*

25. Paul Taylor, *New Hope for Return of Art Treasures Now That the Cold War Over*, THE REUTER LIBR. REP., July 11, 1991.

26. Karl Meyer, *Editorial Notebook: The Lost Spoils of Hitler's War*, N.Y. TIMES, Sept. 2, 1990, §4, at 12.

27. Adrian Bridge, *Rare Books Close Chapter of Plunder*, THE INDEPENDENT, July 28, 1991, at 10; Taylor, *supra* note 25.

28. *Id.*

29. *Germany and Russia to Discuss Return of Art Treasures*, AGENCE FRANCE PRESSE, Feb. 9,

spirit of the 1990 German-Soviet Friendship Treaty,<sup>30</sup> which had been signed in November of 1990, ratified by the Soviets in March of 1991,<sup>31</sup> and ratified by the Germans on April 25, 1991.<sup>32</sup> The treaty provided, *inter alia*, for the return of missing or illegally deported treasures of art on the two sides' respective territories.<sup>33</sup> The fact that Soviet historians were increasingly revealing details of German treasures hidden in secret vaults may have influenced Yeltsin's decision to support the treaty.<sup>34</sup> In December, 1991, Yeltsin's commitment to the treaty was guaranteed when the leaders of the Commonwealth of Independent States — which at that time consisted of Russia, Belarus, and Ukraine — declared that they would fulfill "international obligations from treaties and agreements of the former U.S.S.R."<sup>35</sup>

In February 1993, in further endorsement of the treaty, Germany and Russia met in Dresden to discuss the return to Germany of thousands of pieces of art pillaged at the end of World War II.<sup>36</sup> On February 10, German Interior Minister Rudolf Seiters and Russian Culture Minister Yevgeny Sidorov agreed to set up a joint commission to locate these works and facilitate their return to Germany.<sup>37</sup> However, some Russians do not take kindly to any return of art to Germany. They have denounced Yeltsin as treasonous for planning to return "war trophies paid for with precious Russian blood."<sup>38</sup>

Such statements are not surprising, considering how deeply the memory of World War II runs in the Russian psyche. Estimates of Soviets killed during the war range from twenty to thirty million.<sup>39</sup> Signs instructing people on which side of the street to stand during an air raid are still posted along Nevsky Prospect, the main street in St. Petersburg.<sup>40</sup> Every May, there is a parade in Red Square commemorating the allied victory over the fascists.<sup>41</sup> While the end of the Cold War might diffuse some of this obsession with the past, it is unlikely

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1993.

30. Treaty on Good-Neighborliness, Partnership and Cooperation, Nov. 9, 1990, F.R.G. - U.S.S.R., 30 I.L.M. 504 [hereinafter Friendship Treaty].

31. *Germany, Soviet Union Ready to Talk About Swapping Seized Art*, THE REUTER LIBR. REP., Apr. 23, 1991.

32. *Art Treaty*, THE INDEPENDENT, Apr. 27, 1991, at 8.

33. Friendship Treaty, *supra* note 30. Article 16 of the Friendship Treaty provides:  
The Federal Republic of Germany and the United Soviet Socialist Republic will advocate the preservation of cultural treasures of the other side in their territory.

They agreed that lost or unlawfully transferred art treasures which are located in their territory will be returned to their owners or their successors.

34. Clark, *supra* note 11.

35. *Text of Declarations by 3 Republic Leaders*, N.Y. TIMES, Dec. 9, 1991, at A4.

36. *Germany and Russia to Discuss Return of Art Treasures*, *supra* note 29.

37. *Id.*

38. *Russia Admits it has Treasures Taken from Germany During War; Nations Hope to Exchange Thousands of Priceless Works*, OTTAWA CITIZEN, Feb. 11, 1993, at A7.

39. ZIEMKE, *supra* note 3, at 500.

40. The author witnessed this while studying in the U.S.S.R. in 1989.

to do away with it, especially among the older generation. The sense of betrayal and hatred lingers. As former Soviet Cultural Minister Nikolai Gubenko said, "I should say I'm sorry to those who shot my father down and hanged my mother?"<sup>42</sup>

As to Soviet art, Russians claim that at least 200,000 works were plundered before the Nazis were driven out of the Soviet Union, and that those works are still missing.<sup>43</sup> This presents a special problem, since, unlike German art which was mostly hidden in Soviet museums, pillaged Soviet art was often sold to private collectors, making it almost impossible to locate.<sup>44</sup> Although the 1990 treaty provided that neither side would demand compensation for the theft,<sup>45</sup> Germany might consider offering Russia financial compensation for the lost works.<sup>46</sup> However, given the amount of economic aid Germany has already given to the former Soviet republics, some diplomats have hinted that Russia should not seek more.<sup>47</sup>

Some Russians have no desire to seek financial compensation for lost art. Instead, they see German art as the only satisfactory compensation. This sentiment is reflected in the statements of Russia's Vice-Minister of Culture, Tatyana Nikitina: "Our position could change if Germany returns everything that was taken illegally from our country and compensates us for our losses. Not with sausages, of course, but with masterpieces . . . We did not invite the Germans to attack and occupy our country, so for them it is a well-deserved punishment."<sup>48</sup>

The fact that much of the art the Nazis pillaged from the Soviet Union is now virtually untraceable — making a one-to-one swap impossible — creates sympathy for the position that retention of at least some German artwork is only fair. The currently severe problem with smuggling<sup>49</sup> could also intensify support for this position. Resources are currently inadequate to cope with the massive black market in artwork from the former Soviet bloc.<sup>50</sup> As of February 1992, Russian customs officials reported that only about ten percent of "cultural contraband" is stopped at the Russian border.<sup>51</sup> Sometimes, the art leaves in the luggage of diplomats or other officials.<sup>52</sup> The smuggling networks are quite extensive,<sup>53</sup> and, to add insult to injury, much of the art is funnelled through Germany.<sup>54</sup>

42. Randolph, *supra* note 16.

43. *Germany and Russia Talk About Returning Art Stolen in War*, *supra* note 13.

44. *Id.*

45. Bonn, *Moscow to Swap Art Stolen in WW II*, CHI. TRIB., Feb. 11, 1993, at 4.

46. *Germany and Russia Talk About Returning Art Stolen in War*, *supra* note 13.

47. *Sleazy Icons*, THE ECONOMIST, Sept. 19, 1992, at 105.

48. *Id.*

49. *Valuable Antiques "Emigrating" From Russia*, TASS, Feb. 12, 1992.

50. *Sleazy Icons*, *supra* note 47.

51. *Valuable Antiques "Emigrating" From Russia*, *supra* note 49.

52. *Id.*

53. *Id.*

54. *Art Hemorrhage in the East*, WASH. POST, Mar. 1992 at A2.

## V. ART AS REPARATION

While the hostility toward repatriation is understandable, there is little support for it in international law. As exemplified by the 1954 Hague Convention and Protocol, the general position is that cultural treasures may not be kept or demanded as war reparations.<sup>55</sup> When the Western Allies demanded war reparations from Germany, art was not among them.<sup>56</sup> Even Soviet art experts insisted on returning artwork pillaged during World War II, denouncing the notion that it should serve as some sort of compensation for suffering as "morally groundless."<sup>57</sup> Other commentators agree with this position, stating, for example, "[i]t would be reasonable to require reparations for lost treasures, but to *use* treasures as reparations is contrary to the principles of international law, violates the Hague Conventions of 1907, and makes the United Nations no better than the Nazis."<sup>58</sup>

Despite the general distaste for using art as war reparations, there has been at least one occasion on which a country has been forced to make "restitution by replacement."<sup>59</sup> At the end of World War I, Germany was required under the Treaty of Versailles to replace items lost in the burning of the library of Louvain with its own, comparable property.<sup>60</sup> However, when Poland sought to effectuate a similar result immediately after World War II, its request was denied.<sup>61</sup> Perhaps Germany's reaction to the demoralization it suffered after World War I made the Allies think twice about again exacting reparations so inextricably entwined with the country's morale.<sup>62</sup>

## VI. OTHER ARGUMENTS FOR RETAINING POSSESSION

A. *Meyer and The Human Past*

Even if Russia cannot legitimately claim the art as war reparations, other arguments can be made for retaining at least some of it. Consider Karl E. Meyer's three views of the human past: the Collector's view, the Curator's view, and the Byronic (nationalist) view.<sup>63</sup>

55. Hague Convention, *supra* note 22.

56. MERRYMAN & ELSEN, *supra* note 18, at 43.

57. M. Murzina, *Art Experts Want Account Settled*, RUSSIAN PRESS DIGEST, Nov. 7, 1991, available in LEXIS, Nexis Library.

58. MERRYMAN & ELSEN, *supra* note 18, at 43.

59. Treaty of Peace with Germany, June 28, 1919, 225 Consol. T.S. 188 [hereinafter Treaty of Versailles].

60. *Id.*

61. 3 P.J. O'Keefe & Lyndel V. Prott, *LAW AND THE CULTURAL HERITAGE*, 828-829 (1989).

62. See generally Douglas Rigby, *Cultural Reparations and a New Western Tradition*, 13 AM. SCHOLAR, No. 3, pp. 273, 278-284, reproduced in part in MERRYMAN & ELSEN, *supra* note 18, at 41-42.

Cultural property apparently was not among the reparations the Western allies sought from Germany after World War II. MERRYMAN & ELSEN, *supra* note 18, at 43, citing "Berlin (Potsdam) Convention" from TREATIES AND OTHER INTERNATIONAL ACTS SERIES 3 (Washington D.C.: U.S. Department of State, 1945: 1213, 1231.)

63. Karl E. Meyer, *THE PLUNDERED PAST: THE STORY OF THE ILLEGAL INTERNATIONAL TRAFFIC*

The defining characteristic of Meyer's Collector, besides the need to satisfy his desire for personal ownership, is the idea that he must protect and preserve what would otherwise be neglected.<sup>64</sup> The proposition that art should remain with the party that will better protect it, even if that party took possession, at least arguably, illegally, is often associated with the Elgin Marbles controversy.<sup>65</sup> The general consensus seems to be that had the Marbles not been removed from Greece, they might very well have been destroyed, either by war or pollution.<sup>66</sup> Therefore, the argument in favor of keeping the Marbles in England is that England has the capacity to better protect them. This argument loses ground as Greece increasingly demonstrates it is now capable of taking care of the Marbles.

As former Soviet Cultural Minister Gubenko noted when asked if the Soviet leadership would apologize to the Germans for the theft, "Britain ha[s] not apologized for the Elgin Marbles."<sup>67</sup> However, as much as Gubenko would like to characterize the situations as comparable, they are not. Whereas England has — or, at least, had — a legitimate position from the Collector's perspective, the Russians do not. In general, cultural property stored in the Soviet Union has not been well protected.<sup>68</sup> Books and artwork that have not disintegrated have been otherwise damaged by rodents and the elements.<sup>69</sup> Because the Russians have failed in what the Collector sees as the ultimate task, they would not be justified in retaining the German art in the collector's eyes.

The Russians likewise would be unable to justify retaining the art to Meyer's Curator. "The Curator's commitment is to the public,"<sup>70</sup> but German art in Russia has been kept far from the public. Many pillaged treasures, including books and gold, as well as artwork, have been stored in churches, warehouses, and the basements of museums and universities, while others have adorned the dachas of high-ranking government officials since the end of the war.<sup>71</sup> Had the art been prominently displayed in the Soviet Union, accessible to all interested, an argument for retention could perhaps be made. However, considering that accessibility to the Soviet Union itself, let alone to the art in its museums, was

IN WORKS OF ART, 179 (1977).

64. *Id.* at 187.

65. The Elgin Marbles are sculptures which were removed from the parthenon between 1801 and 1812 and shipped to England where they have remained ever since. John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1882. They are so named for the person who commissioned their removal, Thomas Bruce, seventh Earl of Elgin, who was British Ambassador to the Ottoman Empire of which Greece was then a part. *Id.* Greece has repeatedly sought the marbles' return. *Id.*

66. MERRYMAN & ELSÉN, *supra* note 18, at 13.

67. William Millinship, *USSR: Moscow Seeks Deal With Germany on Art Loot*, OBSERVER, Oct. 27, 1991.

68. Murzina, *supra* note 57.

69. Womack, *supra* note 15.

70. Meyer, *supra* note 26, at 191.

71. Womack, *supra* note 15; Helen Womack, *Stalin's Art Plunder Traced in Secret Video*, THE INDEPENDENT, Apr. 28, 1991, at 1; *Bonn and Moscow Negotiate Over Return of World War II Stolen Art*, AGENCE FRANCE PRESSE, Feb. 10, 1993; Randolph, *supra* note 16.

narrowly restricted during the Cold War, any hope the Russians might have of relying on past action to satisfy the Curator would be ill-founded.

Byron<sup>72</sup>, himself, would probably be appalled by the very idea of the Russians failing to return all of Germany's art, for the precise reason that it is still *Germany's* art. The nationalist views cultural property as part of a national cultural heritage.<sup>73</sup> This view is the basis upon which repatriation is presumed legitimate and desirable.<sup>74</sup> Even disregarding major German cultural treasures, such as the first edition Gutenberg Bibles,<sup>75</sup> the thousands of pieces of German art looted at the end of World War II have never lost their identity as part of Germany's cultural history. Unlike the Elgin Marbles — and perhaps only because German art has not been in the Soviet Union and Russia for as long as the Marbles have been in England — the looted art has not become part of the Soviet or Russian cultural heritage. For that reason, Byron's nationalist would, in true Byronic fashion, vociferously condemn a refusal to repatriate the art to Germany.

The counter to the nationalist's position is that of the internationalist, a position shaped by Francis Lieber, a professor at Columbia College, who, during the United States Civil War, proposed a code of conduct for belligerent forces.<sup>76</sup> The preamble to the 1954 Hague Convention illustrates Lieber's philosophy:<sup>77</sup>

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;  
Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection . . . .<sup>78</sup>

Art, then, is the birthright of all humanity. It follows that the identity of the party with actual, physical possession of art would be immaterial because art belongs to everyone. The internationalist would probably be satisfied to have German art remain in Russia, appropriately displayed and accessible, with finances and other resources contributed by Germany, if not by the entire international community. The internationalist's view is thus the one most favorable to Russia's retention of German art, but, by the same token, it favors letting Germany keep and display, with the same international support, art taken from the Soviets. The internationalist view, while having its moment in the spotlight in

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72. Lord Byron (born 1788, died 1824) was an English poet who wrote two poems condemning Elgin for his removal of the marbles, "The Curse of Minerva" and "Childe Harold". MERRYMAN & ELSEN, *supra* note 18, at 12-13, comment 1.

73. Merryman, *supra* note 21, at 832.

74. *Id.*

75. Anna Tomforde, *Germans Aim to Recover Treasures in Russia*, THE CALGARY HERALD, Feb. 11, 1993, at C1.

76. Merryman, *supra* note 22, at 833.

77. *Id.*

78. Hague Convention, *supra* note 22.

1954, has not enjoyed continued support.<sup>79</sup> Subsequent pronouncements of international law and policy have returned to a more nationalist perspective.<sup>80</sup>

### B. Challenging Russian Authority to Return the Art

Rather than suggesting that the Russians have the right to keep the art, one might argue that they lack the authority to return it. Such an argument is especially useful for other former Soviet republics. As indicated above, damage to, and pillage of, cultural property was extensive throughout the entire Soviet Union. Therefore, the former republics could argue that the art that Yeltsin is now committed to returning to the Germans is not, or at least is not exclusively, Russia's to return. This particularly applies to artwork currently located in republics other than Russia, over which Yeltsin and the Russian government have no legal authority. However, the Ukraine and Belarus are likely precluded from making such a claim, as they were part of the Commonwealth of Independent states at the time Yeltsin indicated the Commonwealth's commitment to all Soviet treaties.<sup>81</sup>

Those republics that joined the Commonwealth after the declaration are also arguably bound by the declaration. These republics include all of the former Soviet republics except Georgia.<sup>82</sup> Such an argument is based on the idea that, in joining the Commonwealth, the republics assented to being bound by its terms, including those terms that were agreed upon before they joined. Unless it could be shown that a particular republic explicitly refused upon joining to be bound by this pledge, it is unlikely that a Commonwealth member state could escape obligation.

As to Georgia and, because they too were dominated by Soviet-backed communist regimes, the Baltic States, the argument that they should be bound by the Commonwealth's pledge is as difficult to make as the argument that the other republics should be bound is easy. By never joining the Commonwealth, this former republic and formerly-controlled regions have clearly manifested an intent not to be bound by the Commonwealth's actions. Therefore, the actions of the Commonwealth as a whole, or of any one of its leaders, could not reasonably be said to bind Georgia or the Baltic States.

However, the question remains whether these groups could be bound to the 1990 German-Soviet Friendship Treaty, which the Soviets ratified in March of 1991.<sup>83</sup> The Baltic States declared their independence from the Soviet regime in

79. Tomforde, *supra* note 75, at 846.

80. *Id.*

81. See *supra* text accompanying note 29.

82. Azerbaijan's membership in the Commonwealth, previously intermittent, is now solidified. *Azerbaijan Now Officially CIS Member*, AGENCE FRANCE PRESSE, Sept. 24, 1993. Azerbaijan's first post-Soviet era leader, Ayaz Mutalibov, signed a Commonwealth membership treaty in December, 1991. *Id.* In October, 1992, the Azeri parliament, under the leadership of pro-Turkish president Abulfaz Elchibey, refused to ratify the treaty. *Id.* Since then, however, the leadership of Azerbaijan has again changed, and the country is an official member of the Commonwealth. *Id.*

83. Friendship Treaty, *supra* note 30.

1989, so in no way could they be bound by a Soviet obligation incurred after that date. Georgia is also free from obligation under the treaty because, theoretically, only the successor to the Soviet Union's power could potentially be automatically bound to the Soviet Union's obligations. Considering Georgia in the role of successor to the Soviet Union is irrational. Georgia does not have a great deal of influence over the social or economic development of the Soviet Union and, thus, does not have legitimate claim to what remains of the Soviets' broad power and authority. Since Georgia is not heir to the Soviets' power, it is not heir to the Soviets' responsibilities. Therefore, Georgia is not bound by any agreements with Germany except for those which it enters into or ratifies on its own behalf.

Georgia and the former Baltic States are thus the only formerly-controlled Soviet areas that may be able to challenge Russia's authority to return German art. In this case, the Baltic States' challenge is weaker than that of Georgia. Originally, the intent behind taking German art, according to Stalin, was to compensate for the suffering of the *Soviets* during World War II. However, the Baltic States were never internationally accepted as part of the Soviet Union nor ever truly considered "Soviet."<sup>84</sup> Therefore, the intended exchange of art between former republics and Germany should be none of their concern, something from which they neither benefit nor suffer. They are free to enter into their own agreements for the return of pillaged art, whether by Germany or anyone else.

As a former Soviet republic, Georgia could challenge the return of German art or argue that it should receive compensation for art repatriated without its permission. However, because international law dictates that Georgia should return any pillaged art, even absent a treaty, its arguments would likely fall on deaf ears. Consequently, it would behoove Georgia to take advantage of the existing agreement if at all possible.

## VII. BRINGING SOVIET ART HOME (WHEREVER THAT MIGHT BE)

The fact that multiple republics are involved in the exchange of art between Germany and the former Soviet Union raises the following questions: 1) how to distribute any financial or other forms of compensation among the republics and 2) how to distribute recovered Soviet art. The first question is best answered in conjunction with the second question. Of course, the second question presumes that a significant amount of Soviet art will be recovered. Given the difficulty in tracing pillaged Soviet art in Germany, it is questionable whether any significant amount of Soviet art will actually find its way back to the former Soviet Union.

Up to this point, we have looked at ways to protect the former Soviet republics, especially Russia, from an inequitable exchange of pillaged art by preventing some German art from going back to Germany. Under international law, the arguments for that position are few and weak. However, we now look at the

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84. The international community recognized that the areas were administered by the Soviets, but the West refused to recognize them as legally part of the Soviet Union.

prospects of resolving the inequality by maximizing the amount of Soviet art available for repatriation.

#### A. *Private Actions for Recovery*

One way to recover Soviet art from Germany is on an individual basis. The typical scenario would be as follows: a citizen of one of the republics discovers the location of pillaged art in which he or she has an interest. According to some international law commentators, military occupation and seizure alone do not extinguish original title in property.<sup>85</sup> Therefore, it is certainly possible that the citizen of a former Soviet republic would still have title to artwork taken by the Nazis. The citizen would then bring an individual suit demanding return of the artwork. However, bringing individual suits would probably not be an efficient way to recover large quantities of Soviet art. First, there is the possibility, albeit very slight, that suits based on the illegality of the Nazis' actions would be barred under some type of Act of State Doctrine since the Soviet Union recognized and dealt with the Nazi regime as the legitimate government of Germany. Because it has its roots in principles of international equality and sovereignty,<sup>86</sup> the former Soviet republics probably observe some version of the doctrine. However, even if they do, a consideration of all factors would likely lead to the conclusion that the doctrine is inapplicable to the Nazi confiscation of Soviet art. Second, although the suit presumably could be brought, the Soviet system, unlike the American system, did not encourage private legal actions; this tradition may be difficult to overcome. Third, the chances are remote that all, or even most, of the art will eventually be recovered through private discovery and action. While one might be hard-pressed to hide the Amber Chamber<sup>87</sup> in one's closet, icons and other works of art are easy to conceal. Unless the art is publicly displayed in Germany, it is doubtful that a stolen piece will ever come to the attention of an interested party.

#### B. *Public Action*

Another option is for government representatives of the former republics to undertake their own investigations into the whereabouts of Soviet art in Germany. However, even if the governments were to work closely together, such action might quickly encroach upon the territory of the German authorities and

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85. *Menzel v. List*, 267 N.Y.S. 2d 804, 816 (Sup. Ct. 1966), *citing* 35 AM. J. INT'L. L., 666, 667 (Oct. 1941).

86. MERRYMAN & ELSÉN, *supra* note 18, at 26.

87. The Amber Chamber is a collection of amber wall panels, furniture and other ornaments given to Peter the Great by King Fredrick the First of Prussia in the early 18th Century. Stephen Kinzer, *Yeltsin says Lost Czarist Treasure is Traced*, N.Y. TIMES, Nov. 24, 1991, sec. 1, col. 1, pg. 16. It disappeared from Catharine's Palace in St. Petersburg toward the end of World War II. Bruce Clark, *Looted Tsarist Treasure Found at Soviet Base*, THE TIMES, Nov. 20, 1991.

Even though the collection was made in Prussia, it has become one of Russia's cultural treasures. *Id.*

cool relations between the countries. Furthermore, such a strategy would lead to the problem of determining which former republic would be entitled to certain pieces of recovered art. For example, if the Ukrainian delegation found something known to have been taken from Russia, who would be entitled to possession of the piece? The problem becomes especially thorny if a particularly valuable piece is recovered. A hands-on approach by the republics is therefore not desirable.

Another way to return Soviet art to the former Soviet Union would be for German authorities to take it upon themselves to search for Soviet art. Of course, this, too, is limited by the fact that German authorities cannot go from house to house searching for artwork. The bottom line is that if the German owner of Soviet art does not want it to be discovered, it will not be. Therefore, any effective mechanism for coaxing Soviet art out from German basements and back to the former republics would have to be one that encourages Germans to bring Soviet art to the proper German authorities. One possibility is to offer a percentage of the art's value as a "finder's fee." However, considering the nature of some of the art — the Amber Chamber, for instance — this could prove prohibitively expensive. Another, more realistic alternative, is to offer tax incentives. Finally, a flat-out appeal to human decency is always worth a try.

### C. *Whose Art?*

The next question is to whom would the German authorities relinquish the art? One possibility is to set up a central authority, consisting of representatives from all the former republics, to distribute the art. This would be the most efficient mechanism for distribution and would ensure that each republic's interests would be represented. Furthermore, because it would have a limited purpose, the authority would not prompt any fears of a resurgence of the centralized government that characterized the former Soviet Union.

Once a piece of Soviet artwork comes under the control of this authority, it must somehow be distributed. One option is to distribute the art to the former republics alternatively, i.e., Russia gets this piece, Ukraine gets the next piece, and so on. The fact that this scheme is arbitrary is both its strongest and weakest point. No one could claim that any former republic is getting preferential treatment, but there is no guarantee that a republic will receive something of significance to its cultural heritage. The basis for wanting Soviet art returned is not that the former republics just want more art; they want *their* art. This attitude reflects the dominance of the Byronic perspective in human nature, and goes to the heart of "cultural property." A system which could conceivably award the ubiquitous Amber Chamber to the Kirghiz, even if the Kirghiz promised to have it prominently displayed, is not a system which would enjoy much support.

The distribution system must therefore attempt to connect a particular piece of art to a particular former republic if at all possible. For the most part, this should not be as difficult as it sounds, considering that many of the former republics have distinct languages, artistic styles, cultural influences, and religions. For those cases in which classification is difficult, there should be an arbitration

proceeding by which interested parties can state their positions and present evidence to support them.

As mentioned earlier, there remains the question of how financial and other forms of compensation for unrecoverable art would be distributed among the former republics. Once again, for efficiency and equitability, the money should initially be channelled through a central authority. However, the process of distributing money is much more complicated than the process of distributing art because money is not inherently designated for a particular former republic. Dividing the money equally among the former republics to use at their own discretion is one possibility. Another possibility is to place all money into a general fund for the former republics to use to facilitate preservation of any artwork that is returned. Any other forms of aid would also be imputed to this general fund. From an artistic standpoint, the latter is more desirable. However, considering the current economic needs of the individual former republics, distribution of unencumbered funds might carry the day.

#### *D. What is to be Done? - A Summary of Strategy*

The key to successfully and equitably carrying out the provisions of the agreement between Russia and Germany is to go all out. All of the former Soviet republics should garner their resources to collect state-held art and return it to Germany. For its part, the German government should cooperate with the former republics by offering incentives for German individuals to come forward with Soviet art and notifying the proper authorities when Soviet art is found on the German market. Once the art is returned to a centralized authority, distribution must also be carried out equitably. For the former Soviet republics, this means that art which can be attributed to a particular former republic should be returned to that republic. Financial and other forms of compensation for lost art should be equally divided among the former republics or equally accessible to them. In this way, all parties share the obligations and rewards, and the chance of undue hardship or unjust enrichment for any party is minimized.

### VIII. CONCLUSION

Ill-will still exists between Germany and the former Soviet republics. The suffering of World War II is not easily forgotten by either side. That is one reason why their exchange of pillaged art is so important. Returning pillaged art restores the dignity and cultural integrity of the country pillaged; it symbolizes the end to an ongoing hostility. To return art to a country is to recognize, or be forced to recognize, the validity of that country's existence and its cultural heritage and to acknowledge, or be forced to acknowledge, that country as an equal. Returning pillaged art from a war almost fifty years ended would bring Germany and the former republics one step closer to putting their past behind them. Perhaps art might satisfy some people as war reparations, but that does not come close to the reward of a lasting peace and trust.