

MUST RUSSIA RETURN THE ARTWORK STOLEN FROM GERMANY DURING WORLD WAR II?

. *Steven Costello**

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I. INTRODUCTION

In February 1995, the Pushkin museum in Moscow exhibited sixty-three paintings, including paintings from German private and museum collections prior to World War II.¹ One month later, the Hermitage in St. Petersburg exhibited seventy-four paintings, of which almost all were owned by the German government or its citizens before the war.² These exhibits have created friction between Germany and Russia because these works of art can be considered cultural property. Under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, a country's cultural property includes works of art.³ Since the German paintings in the Hermitage and Pushkin museums were forcibly wrested from Germany during and after World War II, there is the question of whether these cultural objects can be returned to Germany.

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1. Jamey Gambrell, *Displaced Art; Art Seized From Nazi Germany by the Soviet Union After World War II*, ART IN AM., Sept. 1995, at 88.

2. *Id.*

3. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 1, 249 U.N.T.S. 215 [hereinafter 1954 Convention].

To understand the present problem, one must return to the point where the controversy began. Near the end of World War II, as the Red Army plowed through the German Reich, *trophy brigades* were created for the sole purpose of taking as many objects of value from Germany as they could.⁴ As a result of looting, it is estimated that some 2.5 million artworks, ten million books, including Gutenberg Bibles, and gold from the unearthing of Troy was taken back to Russia.⁵ Also, much of the German art fell into the private hands of Soviet soldiers and generals. Soviet soldiers were allowed to take a certain amount of baggage from Germany, while Soviet generals were allowed to take train carloads of spoils home with them.⁶ For many years Stalin kept the stolen German art hidden, but this widescale looting by the Russians in Germany was never a well kept secret.⁷ There was even a certain degree of acknowledgement on the part of the Soviets, when in 1955, some 1.5 million items were returned to East German museums.⁸ Although there is relief that these artworks survived the war, the art's return to the international spotlight has created the problem of whether under international law the artworks should be returned to their rightful owners in Germany.

The fact that the Russian museums and government are in possession of paintings which were taken from Germany during and after World War II poses questions that this article will attempt to answer. First, what treaties between Russia and Germany address the question of the possible return of the art to Germany? Next, what international agreements or conventions could the Germans use to initiate the return of German artistic or cultural property? Also, can one hold Russia to the treaties created by its former entity, the Union of Soviet Socialist Republics? Finally, there is the problem of what to do if German cultural property is bought by United States nationals or galleries from the Russian black market.

II. BILATERAL AGREEMENTS BETWEEN GERMANY AND THE FORMER SOVIET UNION

In 1990, the Treaty of Good-Neighborliness, Partnership and Cooperation was signed in Bonn. The Treaty addressed the issue of the

4. *Who Owns This Art?*, PROVIDENCE J. BULL., May 9, 1995, at 12A.

5. Robert Hughes, *The Spoils of War: Russia's New Displays of Art Looted From Germany Reignite a Debate Over Who Rightfully Owns Such Plunder*, TIME, Apr. 3, 1995, at 64.

6. Catherine Foster, *Stolen Art As War Booty: Hostages Or Harbingers of Peace?*, CHRISTIAN SCI. MONITOR, Feb. 8, 1995, at 1.

7. Yardley Rosemar, *Who Owns the Art Loot?*, NEWS & REC., Mar. 31, 1995, at A11.

8. Hughes, *supra* note 5, at 64.

return of cultural property taken during the war with both parties agreeing that "lost or unlawfully transferred art treasures which are located in their [German or Russian] territory will be returned to their owners or their successors."⁹ In 1992, after the fall of the U.S.S.R., a cultural agreement was signed which also stipulated that German cultural property in Russia should be returned to Germany.¹⁰ Therefore, it has been recently acknowledged by the Russian government that German cultural property taken during and after the war should be returned.

With the present internal instability of the Russian government, however, the immediate return of the stolen artworks to Germany does not appear likely. In March 1995, the Russian Parliament reviewed a draft law declaring that the art taken from Germany during and immediately after World War II, would be the "sole property of the Russian Federation."¹¹ In April 1995, the Russian parliament took a step further by adopting a resolution imposing a moratorium for the return of cultural items which were transferred during the years of the Great Patriotic War.¹²

These acts of the Russian Parliament are not widely opposed by the Russian populace since the legislature's acts are not inconsistent with the feelings of many Russians, especially those Russians who fought the Germans or lived under the Nazi occupation of Russia. As a result of World War II, Russia had over forty million people killed or wounded, had 3000 of its cities destroyed, hundreds of its museums looted, over 1000 of its Orthodox churches razed, millions of its books stolen, and hundreds of thousands of its works of art taken.¹³ Many Russians feel that the possession of these German cultural objects is part of compensation for the horrors the country experienced in its war against the Third Reich.

The present German government views any stall in the restitution of their cultural objects as unacceptable. The Germans feel that theirs is a different government now, and point to the fact that over fifty billion Deutschmarks in aid have already been given to Russia.¹⁴ As to the restitution of Russian objects stolen by the Nazis, some 500,000 objects were returned to the Soviets by the British and Americans after finding

9. Treaty on Good-Neighborliness, Partnership and Cooperation, Nov. 9, 1990, F.R.G.-U.S.S.R. art. 16, 30 I.L.M. 504, 512.

10. Tape of Conference on Russian Museum Exhibits Art Taken From Nazi Germany, held by National Public Radio Broadcast (Apr. 1, 1995)(transcript #1117-9).

11. Jean MacKenzie, *Controversy Greets New Exhibit of 'Trophy Art,'* MOSCOW TIMES, Mar. 29, 1995, No. 680.

12. *Russian Parliament Bans Return of Stolen Art Works*, DEUTSCH PRESSE-AGENTUR, Apr. 21, 1995.

13. See Tape of Conference on Russian Museum Exhibits Art Taken From Nazi Germany, *supra* note 10.

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

stolen objects in their sectors of occupied Germany. This shows Russia has received some restitution of cultural objects taken by the Nazis.¹⁵

The 1990 and 1992 agreements between Germany and Russia stipulated that Russia should return the German art objects. In certain situations there has been some restitution with respect to German cultural objects still in Russia. One example of this restitution was the recent return of 13,500 books from Moscow's library to the Berlin library.¹⁶ Considering the Russian Parliament's present actions, the feelings of the Russian people, and the past historical experiences of World War II, enforcement of these agreements is unlikely. Therefore, the German government should next look to multilateral treaties to see if international law proscribes a return of Germany's cultural objects.

III. MULTILATERAL CONVENTIONS AND TREATIES WITH REGARD TO CULTURAL PROPERTY

As far back as 1899, there have been agreements which address the importance of safeguarding a nation's cultural property. The following multilateral treaties encompass stipulations on the illicit trade of cultural objects and the responsibility warring nations have to one another's cultural property.

The 1899 Convention with Respect to the Laws and Customs of War on Land, signed by both the German and Russian Empires, applies to the issue of the Russian possession of German artwork. Under Section III, regarding military authority over hostile territory, "pillage is formally prohibited."¹⁷ Also, "private property cannot be confiscated."¹⁸ The Convention went on to categorize that property of "religious, charitable, and education institutions, and those of arts and science, even when State property, shall be treated as private property."¹⁹ This 1899 Convention helped to create a guide to subsequent treaties with respect to cultural property.

The 1907 Convention on Respecting the Laws and Customs of War on Land replaced the 1899 Convention, but kept the Section III articles regarding an occupying nation's authority over an occupied state.²⁰ Unfortunately, World War II proved that the tenets of the 1899 and 1907

15. Gambrell, *supra* note 1.

16. Foster, *supra* note 6.

17. Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, art. 47, 32 Stat. 1803, 1822, T.S. No. 539.

18. *Id.* art. 46.

19. *Id.* art. 56.

20. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 1803, T.S. No. 403.

Hague Conventions' articles prohibiting the pillaging and confiscation of private property were not followed.

After World War II, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict was enacted, supplementing the 1907 Convention. Both the U.S.S.R. and F.R.G. are signatories to the Convention. The Hague Convention notes that "damage to cultural property means damage to the cultural heritage of all mankind."²¹ The 1954 Convention also stipulates that "jurisdiction to try offenses against cultural property is not limited to the government of the offender."²² The problem with the 1954 Convention regarding the present issue of Germany trying to regain its artwork is that the Convention does not discuss the question of restitution.²³

The 1970 Convention for Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property was promulgated by the United Nations Educational, Scientific, and Cultural Organization, and is referred to as the UNESCO Convention.²⁴ The UNESCO Convention prohibits member countries from importing cultural property stolen from a museum and states that a member country should take steps to return property taken from another state, provided that the bona fide purchaser receives just compensation.²⁵ Russia continues to be a signatory to the Convention, however, the Federal Republic of Germany is not a signatory.

In 1972, the Convention for the Protection of the World Cultural and Natural Heritage adopted the UNESCO rules and created a system for the collection and organization of important cultural and natural heritage properties.²⁶ This Convention, however, limits objects of cultural heritage to monuments, groups of buildings, and natural heritage.²⁷ The 1972 Convention does not appear applicable to the return of German artwork since it seems to be a request that nations inventory their cultural heritage

21. Claudia Fox, Comment, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U.J. INT'L L. & POL'Y 225, 247 (1993).

22. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 842 (1986).

23. Fox, *supra* note 21, at 248.

24. Fox, *supra* note 21, at 248.

25. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, art. VII, 823 U.N.T.S. 231.

26. Paige L. Margules, *International Art Theft and the Illegal Import and Export of Cultural Property: A Study of Relevant Values, Legislation, and Solutions*, 15 SUFFOLK TRANSNAT'L L. REV. 609, 612 (1992).

27. Convention Concerning the Protection of World Cultural and Natural Heritage, Nov. 23, 1972, arts. I & II, T.I.A.S. No. 8226.

and submit the information to the United Nations in hopes of safeguarding a nation's cultural property in the future.

Most recently, in June 1995, a final draft of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Items was produced.²⁸ The purpose behind this Convention is to promote international claims regarding the restitution of stolen cultural objects.²⁹ This Convention would allow both government and private claimants to bring causes of action to the courts of a country where the contested artwork is located.³⁰ Unfortunately, the Convention applies only to those cultural objects which are stolen after the Convention enters into force.³¹ In the drafting of the UNIDROIT Convention, one of the main concerns was the issue of retroactivity. After much discussion, the drafters followed the rule of treaty interpretation and concluded that UNIDROIT would remain nonretroactive.³² However, the Convention acknowledged that prior takings of cultural property were not absolved by the nonretroactivity of the Convention. Article 10(3) states that illegal takings before this Convention are not now legitimized and that States or people should continue to make claims other ways for the return of prior stolen cultural objects.³³ The UNIDROIT Convention would appear a favorable instrument for the Germans to use since it affords States and their nationals ways to regain stolen cultural items. The Convention, however, does not provide the legal impetus to demand restitution of the German cultural objects taken during World War II.

In 1993, the United Nations General Assembly directly addressed the question of the restitution of cultural property to its country of origin.³⁴ The General Assembly declared that such restitution contributes to the strengthening of international cooperation.³⁵ The General Assembly went on to state that member states should concede bilateral agreements to return cultural properties to their countries of origin.³⁶

28. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 7-24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention].

29. UNIDROIT Convention, *supra* note 28, art. I.

30. Nina R. Lenzer, Comment, *The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?*, 15 U. PA. J. INT'L BUS. L. 469, 493-94 (1994).

31. UNIDROIT Convention, *supra* note 28, art. X.

32. *See id.*

33. UNIDROIT Convention, *supra* note 28, art. X(3).

34. G.A. Res. 15, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/15 (1993).

35. *Id.*

36. *Id.*

In conclusion, there appears in the preceding treaties a common theme that one country may not rob another country of its cultural property. Since the 1899 Hague Convention, subsequent conventions have included articles prohibiting the looting of a country's cultural property. By robbing a nation of its cultural property in times of war, aggressor countries are not only stealing, they are depriving and even destroying a country's roots, its history. The German artwork which Russia has stored in the many vaults of the Hermitage is a reflection of what Germany has given artistically to the community of nations.

IV. TREATY OBLIGATIONS OF THE RUSSIAN FEDERATION AS SUCCESSOR TO THE U.S.S.R.

With the dissolution of the U.S.S.R on December 25, 1991, the immediate question was whether the Russian Federation could be held to treaties prior to that date which involved the U.S.S.R. as a party.³⁷ Russia attempted to answer this question in its note to the United States government on January 13, 1992, that Russia continues to perform the rights and fulfill the obligations following from the international agreements signed by the U.S.S.R.³⁸ The General Consul of Russia has also stated that Russia is the continuation of the U.S.S.R.³⁹

The Vienna Convention on Succession of States in Respect of Treaties, which was opened in 1978 but is not yet in force, declares that if a predecessor state continues to exist, it is "generally bound by the treaty rights and obligations in force prior to the break-up of the state."⁴⁰ Under the Restatement of Foreign Relations Law, the predecessor state continues to be bound by the treaty rights and obligations in force prior to the break-up of the state.⁴¹ Russia seems to fall into the category of a predecessor state, as it has taken the position that it is the continuation of the former Soviet Union and will fulfill the treaty obligations of the former Soviet Union.⁴²

Since Russia has proclaimed itself the continuation of the Soviet Union, under a continuity theory, any treaty that was in force for the entire territory of the predecessor state is presumed to continue in force for each

37. See generally Agreement on Trade Resolutions Between the U.S. and U.S.S.R., June 1, 1990, U.S.-U.S.S.R., 1992 WL 466079.

38. *Id.*

39. Paul R. Williams, *The Treaty Obligations of the Successor States of the Former Soviet Union, Yugo., and Czech.: Do they Continue in Force?*, 23 DENV. J. INT'L L. & POL'Y 1, 18 (1994).

40. *Id.*

41. RESTATEMENT (THIRD) ON FOREIGN RELATIONS § 210 (1987).

42. Williams, *supra* note 39, at 36.

separating state.⁴³ Prior historical examples of the continuity theory involve the 1903 secession of Panama from Colombia and the 1830 secession of Belgium from the Netherlands.⁴⁴ In both cases, Colombia and the Netherlands were held to their bilateral treaties, while the seceding states of Panama and Belgium were allowed a *clean slate*. Under a *clean slate* theory, new states “wipe their individual slates clean and choose whether or not to join treaties brought by their predecessor states.”⁴⁵ Thus it would appear that the states that broke away from the U.S.S.R.: the Baltic states, the Ukraine, Belarus, and the Caucasus states, would not be bound by the treaties of the former U.S.S.R. Russia, however, as the continuation of the U.S.S.R., would appear bound by the treaties of the former Soviet Union. In accordance with this interpretation, Switzerland, considering Russia to be the continuity of the former U.S.S.R., has merely “replaced the designation of U.S.S.R. with Russia on all multilateral treaties for which it was a depository.”⁴⁶

The United States State Department’s view of the break-up of states found that with the dissolution of the U.S.S.R., “the stability of legal rights and obligations are, on balance, better served by adopting a presumption that treaty relations remain in force,” and acknowledged the prior treaties of the U.S.S.R. as binding on Russia.⁴⁷ The Department of State then took into account the fact that Russia retains much of the territory of the former U.S.S.R., contains the majority of the former U.S.S.R.’s population, resources, and armed forces, and occupies the same seat of government (Moscow) as the former U.S.S.R. The conclusion was that the State Department found that Russia has inherited the legal identity of the former Soviet Union, and could retain the memberships the U.S.S.R. had in international organizations.⁴⁸

Therefore, as the continuation of the Soviet Union, Russia appears to be bound to the bilateral and multilateral agreements the Soviet Union made prior to its 1991 break-up.

V. WHAT TO DO IF GERMAN ARTWORK APPEARS ON UNITED STATES TERRITORY?

Immediately after World War II, the Russians were not the only occupying power that acquired German artworks. Some 202 paintings

43. *Id.* at 2.

44. *Id.* at 11.

45. *Id.* at 2.

46. *Id.* at 18.

47. *Id.* at 21.

48. Williams, *supra* note 39, at 21.

were shipped from Germany to the United States after the war.⁴⁹ What followed was a twelve city United States tour of the paintings, which finally ended in 1949 after American art historians and museums condemned the tour as being no better than the Nazi's actions of looting Europe's museums.⁵⁰ Today, in the event that German artwork stolen by the Russians appears on United States soil, there is case and statutory law that could favor restitution of the paintings to Germany.

The cases of *Kunstammlungen zu Weimar v. Elicofon* and *Deweerth v. Baldinger* both dealt with Germans trying to recover paintings taken by American soldiers during the occupation of Germany.⁵¹ In *Kunstammlungen*, two paintings were stolen from a German castle by American soldiers.⁵² Eventually, the paintings ended up in the hands of an art collector who years later discovered the German origins of the paintings.⁵³ When a German museum discovered that the paintings were in the hands of the American art dealer, they sued for the paintings' return. At trial, the art dealer argued that the statute of limitations had run. The Second Circuit Court of Appeals, however, applied the "demand and refusal" rule, whereby the statute of limitations would start to run after the museum had requested the art dealer return the paintings, and ruled that the paintings must be returned to Germany.⁵⁴

The *Deweerth* case involved the stealing of a Monet painting from a home in Bavaria where American soldiers were being housed.⁵⁵ The court in *Deweerth*, however, held for the bona fide American purchaser, due to the fact that Ms. Deweerth did not use reasonable diligence in attempting to locate her missing painting.⁵⁶ The reason behind the requirement of reasonable diligence on the part of the victim is to protect future good-faith purchasers and to encourage the original owners to actively seek out their stolen property.⁵⁷

Besides case law, the National Stolen Property Act "criminalizes the knowing transportation, sale, or receipt in interstate or foreign commerce stolen artwork."⁵⁸ Under this statute, Germany would have to

49. Gambrell, *supra* note 1, at 88.

50. *Id.*

51. *Deweerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987); *Kunstammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982).

52. *Kunstammlungen*, 678 F.2d at 1152.

53. *Id.* at 1153.

54. *Id.* at 1161.

55. *Deweerth*, 836 F.2d at 105.

56. *Id.*

57. Margules, *supra* note 26, at 618.

58. National Stolen Property Act, 18 U.S.C. §§ 2314-15 (1988).

"acknowledge the ownership rights to the cultural property and have existing domestic legislation prohibiting the export, transfer, removal, or excavation of the cultural property at issue."⁵⁹ Therefore, in the event that an American art dealer obtains a German painting from a Russian national, and knows that the property had been stolen, Germany would have recourse to try to obtain the cultural property.

With the collapse of the Soviet Union and the stagnation of the present Russian economy, it would not be surprising if Russian citizens and museums try to turn the German artwork they have into hard currency. It would thus be advantageous for the Germans to keep watch over the American art market, since many of the German cultural objects in Russia may cross from the Russian black market into American galleries, museums, and private collections. By remaining diligent in tracing the movement of artwork into the American marketplace, American law could be used to expedite the return of German artwork rather than waiting for Russia to fulfill its bilateral and multilateral agreements.

VI. CONCLUSION

Legally, the Federal Republic of Germany should be allowed to receive the artwork taken by the Russians during and after World War II. The 1990 bilateral treaty between the U.S.S.R. and Germany stipulates that each country should return the cultural objects that rightfully belong to the other nation. Multilateral treaties that both countries are signatories to, such as the 1899, 1907, and 1954 Hague Conventions also include provisions that the taking of a country's cultural property by an occupying power is illegal. Treaties such as the 1970 UNESCO Convention and the 1995 UNIDROIT Convention continue the spirit of the Hague Conventions by requiring that countries aggressively combat the trade of stolen cultural property, and return the stolen property to the country of its origin. Finally, even the United Nations has promulgated a resolution declaring that countries should return stolen cultural objects to their country of origin.

Whatever rights the Germans may have legally under international law, the emotions regarding the paintings remain an issue. One cannot over emphasize the vast destruction caused by World War II, which is why it is so hard for many Russians to acknowledge that they may have to return the paintings to Germany. By returning the paintings to Germany, Russia would be seen as admitting that the taking of the German artwork was wrong. But how can Russia acknowledge its own guilt under the fact that tens of millions of its citizens died and thousands of its own treasures

59. Margules, *supra* note 26, at 621.

were destroyed as a result of the Nazi invasion of Russia? Perhaps the future will hold some compromise culminating in the return of the paintings to Germany. For as the generation of those Russians who experienced the “Great Patriotic War” die out, the remaining generations of Russians may learn to see that returning Germany’s artwork will not be an acknowledgement of guilt, but will help to close a painful chapter in the history of World War II.