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The Protection of Cultural Property in Armed Conflict

ROGER O'KEEFE

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The Protection of Cultural Property in Armed Conflict

Charting in detail the evolution of the international rules on the protection of historic and artistic sites and objects from destruction and plunder in war, this book analyses in depth their many often-overlapping provisions. It serves as a comprehensive and balanced guide to a subject of increasing public profile, which will be of interest to academics, students and practitioners of international law and to all those concerned with preserving the cultural heritage.

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The Protection of Cultural Property in Armed Conflict

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To my mother and father, parents of heroic virtue

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Table of treaties and other international instruments

List of abbreviations

AD	*Annual Digest of Public International Law Cases*
AIDI	*Annuaire de l'Institut de Droit International*
AJIL	*American Journal of International Law*
AJIL Supp.	*Supplement to the American Journal of International Law*
BFSP	*British and Foreign State Papers*
BYIL	*British Yearbook of International Law*
CICI	Commission Internationale de Coopération Intellectuelle (International Commission on Intellectual Co-operation)
Dept St. Bull.	*Department of State Bulletin*
EJIL	*European Journal of International Law*
FRUS	*Foreign Relations of the United States*
ICA	International Council on Archives
ICBS	International Committee of the Blue Shield
ICC	International Criminal Court
ICCROM	International Centre for the Study of the Preservation and Restoration of Cultural Property
ICJ	International Court of Justice
ICOM	International Council of Museums
ICOMOS	International Council on Museums and Sites
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFLA	International Federation of Library Associations and Institutions
IICI	Institut International de Coopération Intellectuelle (International Institute for Intellectual Co-operation)
IMT	International Military Tribunal

IRRC	*International Review of the Red Cross*
Isr. LR	*Israel Law Review*
Isr. YHR	*Israel Yearbook on Human Rights*
J. Air L.	*Journal of Air Law*
JNA	Jugoslovenska Narodna Armija (Yugoslav National Army)
JORF	*Journal Officiel de la République Française*
LNOJ	*League of Nations Official Journal*
LNTS	*League of Nations Treaty Series*
LRTWC	*Law Reports of Trials of War Criminals*
MFA&A	Monuments, Fine Arts and Antiquities
NOB	Nederlandsche Oudheidkundige Bond (Netherlands Archaeological Society)
Mich. LR	*Michigan Law Review*
OIM	Office International des Musées (International Museums Office)
RAF	Royal Air Force
RCADI	*Recueil des Cours de l'Académie de Droit International*
RDI	*Revue de Droit International*
RDI (Paris)	*Revue de Droit International* (Paris)
RDI (2 sér.)	*Revue de Droit International (2ème série)*
RDI (3 sér.)	*Revue de Droit International (3ème série)*
RDPMDG	*Revue de Droit Pénal Militaire et Droit de la Guerre*
RGDIP	*Revue Générale de Droit International Public*
RHDI	*Revue Hellénique de Droit International*
RICR	*Revue Internationale de la Croix-Rouge*
Riv. Dir. Int.	*Rivista di Diritto Internazionale*
TWC	*Trials of War Criminals before the Nuernberg Military Tribunals*
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNTS	*United Nations Treaty Series*
UNWCC	United Nations War Crimes Commission
USAAF	United States Army Air Forces

Prologue

This book does not set out to prove a point or to make grand claims. It offers a more basic service, namely to give a thorough and accurate account of a body of international law, outlining the relevant rules, setting them in a form of historical context and providing a guide to their interpretation and application by states, in accordance with orthodox positivist methodology.

What emerges, however, in some small way, is also the story of an idea – the idea that cultural property constitutes a universal heritage. What the record shows is that this imaginative construct-cum-metaphysical conviction has inspired the development of international rules and institutions reflective of its logic, has served in its own right as an internal and external restraint on the wartime conduct of states, and continues to inform how they interpret and apply the positive law.

On a less abstract level, the material presented in the following chapters points towards three broad conclusions.

First, states and other past parties to armed conflict have placed more and more sincere value over the last two hundred years on sparing and safeguarding immovable and movable cultural property than might be assumed. Perhaps this is not saying much, given the popular assumption that cultural property has always been deliberately attacked and looted in war, or its protection at best ignored. It is, nonetheless, a useful corrective to such unhistorical thinking. As this book details, states have expended considerable energies over the past two centuries on elaborating an increasingly demanding and sophisticated body of international rules specifically directed towards the protection of cultural property in armed conflict. Nor is this protection just on paper. The fact is that, since the end of the Napoleomic Wars, malicious destruction and plunder by armed forces and flagrant disregard for the wartime fate of cultural

property have been exceptions – devastating and not uncommon exceptions, but exceptions all the same, and condemned by other states on each occasion. Good will, conscientiousness and a consensus that the cultural heritage should, where at all possible, be spared in armed conflict have tended to be the order of the day. Where these qualities have been lacking, a fear of the consequences, especially in terms of public opinion, has generally compelled compliance.

Secondly, the protection of cultural property in armed conflict by means of international law is not a pipe-dream. The signal failure of international law in the Second World War to prevent the levelling from the air of the cultural heritage of Germany and Japan was in many ways anomalous, a function of a specific moment in both the laws of armed conflict and military technology: legally, the classical law on bombardment had been rendered obsolete but the regime that would come to replace it was still underdeveloped; technologically, the massive increase in the explosive yield of ordnance and the capacity to deliver it from the air had not been adequately matched by advances in the precision with which it could be targeted. But thanks to crucial legal and technological developments since 1945, today there is a greater possibility than ever before of sparing cultural property from damage and destruction in wartime. That said, the limits of what international law can do to civilise war leave no room for triumphalism. No rules will ever stop parties to an armed conflict or individual combatants who, motivated by ideology or malice and convinced of their impunity, show contemptuous disregard for law itself. The Nazis' devastation and seizure of the cultural heritage of the occupied East was a phenomenon beyond the power of law to prevent, although not to punish. The same is true of Iraq's plunder of the museums of Kuwait in 1990, and the destruction of historic and religious sites in the former Yugoslavia. Moreover, the gravest threat to cultural property in armed conflict today is its theft by private, civilian actors not bound in this regard by the laws of war. The breakdown of order that accompanies armed conflict and the corrupting lure of the worldwide illicit market in art and antiquities continue to drive the looting of archaeological sites and museums in war-zones and occupied territory. The point to be made, however, is that insofar as the laws of war are capable of changing behaviour, the rules to protect cultural property are as capable as any.

The last conclusion to be drawn is that the common charge that a concern for the wartime fate of cultural property shows a callousness towards the wartime fate of people is misplaced. The argument could be

rebutted as a matter of formal logic: there is no necessary reason why an interest in the one should mean a disregard for the other. One could also have recourse to a sort of metaphysical ethics, in that the ultimate end of protecting the cultural heritage is human flourishing. But the more pragmatic answer suggested by Chapter 2 of this book is that the protection of cultural property in armed conflict is flatly impossible without an equal or greater concern for the protection of civilians. If the civilian population is targeted, the cultural property in its midst will suffer with it. Conversely, as the inhabitants of Rome and Kyoto could attest, a concern to spare the cultural heritage from the destructive effects of war can end up saving the lives of the local people.

It should be made clear at the outset that the following chapters deal with the protection of cultural property in armed conflict from damage and destruction and from all forms of misappropriation. They do not address the distinct, albeit related question of the restitution of cultural property illicitly removed during hostilities and belligerent occupation — a vast topic in its own right implicating, in many instances, both private law and private international law, fields outside the author's expertise. As a consequence, articles 3 and 4 of the First Protocol to the 1954 Hague Convention are merely outlined. The restitution arrangements after Waterloo, the First World War, the Second World War, the first Gulf War and the invasion of Iraq, the restitution provisions of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, UNESCO's Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and the resolutions adopted on the question by the United Nations General Assembly are not considered.

It should also be said that the book does not attempt to catalogue every instance of state practice on point from the sixteenth and seventeenth centuries to the present. This is clearly impossible, and would not always add to the argument: a tally of compliance and breach is a waste of time if it tells us nothing significant about the law. Rather, the book deals with state practice only insofar as it is relevant to the evolution of customary or conventional rules, or to their interpretation, or to their proper or permissible application.

Turning to terminology, the meaning of 'cultural property', as used in this book, depends on the context. In relation to the 1954 Hague Convention and its two Protocols, the term is used in the formal legal

sense embodied in article 1 of the Convention, which defines cultural property to mean 'movable or immovable property of great importance to the cultural heritage of every people'. For all other purposes, it is used in a lay sense. For example, as regards the 1907 Hague Rules, 'cultural property' is shorthand variously for the buildings and historic monuments referred to in article 27 — with the exception of hospitals and places where the sick and wounded are collected — and for the institutions, historic monuments and works of art and science referred to in article 56. As regards article 53 of Additional Protocol I and article 16 of Additional Protocol II, 'cultural property' means the 'historic monuments, works of art and places of worship which constitute the cultural and spiritual heritage of peoples' protected by these provisions. The word 'war' is also used in a lay sense, at least in reference to international law and practice since the 1949 Geneva Conventions. It is used as a synonym for armed conflict, within the meaning of modern international humanitarian law, and is not intended to denote a formal legal state which can only commence with a declaration and end with a treaty of peace. On the other hand, the word 'attack' is used in the special sense given it by article 49 of Additional Protocol I, referring to 'acts of violence against the adversary, whether in offence or in defence'.

Unless otherwise stated, translations from foreign languages are the author's own. Information is given as of 1 February 2006.

1 From the high Renaissance to the Hague Rules

As early as the 1500s, moral theologians and writers on the law of nations were enunciating rules which sought to regulate both the destruction and the plunder of cultural property in war. The same period also saw the birth of the metaphysical vision of such property as a universal estate, later to be termed a 'heritage', common to all peoples, a vision sometimes *ad idem* and sometimes at odds with the international legal position. Modified in the wake of the Napoleonic Wars and challenged by the technological and strategic revolutions of the nineteenth century, the customary international rules regulating the wartime treatment of cultural property came to be codified in the 1907 Hague Rules, which aimed to temper the conduct of war on land.

The classical law

As conceived in the sixteenth and seventeenth centuries, the rationale of the laws governing the conduct of hostilities was to minimise the harm inflicted in a sovereign's exercise of his right to wage just war. The balance of evil and good was sought to be struck by reference to the doctrine of necessity. It was held to be a 'general rule from the law of nature'[1] that as long as the end pursued by the war was just,[2] armed violence necessary

[1] See the heading 'General Rules from the Law of Nature regarding What is Permissible in War . . .', in H. Grotius, *De Jure Belli ac Pacis Libri Tres*, first published 1625, text of 1646, translated by F. W. Kelsey (Oxford: Clarendon Press, 1925), book 3, chap. 1.

[2] The classical rules on the conduct of war were logically premised on the justice of the cause. In this respect, and especially in the specific area of the lawful destruction of enemy property, the wholly artefactual labels '*jus in bello*' and '*jus ad bellum*' are apt to mislead, the latter regulating as it did not simply the legality of the commencement of war but also the legality of each discrete act of armed violence committed therein. In the form of the rule of necessity, what later came to be called the *jus ad bellum* constantly penetrated what was later termed the *jus in bello*.

to achieve that end, including destruction of enemy property, was permissible.[3] No distinction was drawn *per se* between soldiers and civilians, nor between military and civilian property, although reason dictated that the killing of civilians and the destruction of civilian property was usually unnecessary and therefore unlawful. Works of art, grand edifices, monuments and ruins were treated no differently from other civilian property of which they were a species, at least according to the bare law of nations. The destruction of all types of enemy property was permissible, strictly speaking.[4] At the same time, Grotius believed that reason compelled the sparing of 'those things which, if destroyed, do not weaken the enemy, nor bring gain to the one who destroys them', such as 'colonnades, statues, and the like'[5] – that is, 'things of artistic value'.[6] Gentili had earlier come to the same conclusion,[7] as did Textor later.[8]

As well as regulating the infliction of direct injury or damage, the rule of necessity governed the common situation where persons or property to be spared, such as civilians or things of artistic or historic value, were incidentally harmed in the course of destroying permissible targets. Applying scholastic moral philosophy's doctrine of 'double effect', Grotius[9] – along with Suárez,[10] Vitoria[11] and Ayala[12] before him, and

[3] Grotius, *De Jure Belli ac Pacis*, book 3, chap. 1, s. 2. See also, previously, F. de Vitoria, 'De Indis Relectio Posterior, sive De Jure Belli Hispanorum in Barbaros', first published 1557, text of 1696, in *De Indis et De Jure Belli Relectiones*, translated by J. P. Bate (Washington, DC: Carnegie Institution, 1917), p. 163 at para. 18; F. Suárez, 'On Charity', text of 1621, in *Selections from Three Works of Francisco Suárez, S.J.*, translated by G. L. Williams *et al.* (Oxford: Clarendon Press, 1944), p. 797, disputation 13, s. 7, para. 6; and, subsequently, S. Pufendorf, *De Jure Naturae et Gentium Libri Octo*, first published 1672, text of 1688, translated by C. H. and W. A. Oldfather (Oxford: Clarendon Press, 1934), book 8, chap. 6, para. 7.

[4] Grotius, *De Jure Belli ac Pacis*, book 3, chap. 5; S. Rachel, *De Jure Naturae et Gentium Dissertationes*, text of 1676, translated by J. P. Bate (Washington, DC: Carnegie Institution, 1916), second dissertation, para. 48.

[5] Grotius, *De Jure Belli ac Pacis*, book 3, chap. 12, s. 5.

[6] *Ibid.*, s. 6.

[7] A. Gentili, *De Jure Belli Libri Tres*, first published 1598, text of 1612, translated by J. C. Rolfe (Oxford: Clarendon Press, 1933), book 2, chap. 23, p. 270.

[8] J. W. Textor, *Synopsis Juris Gentium*, text of 1680, translated by J. P. Bate (Washington, DC: Carnegie Institution, 1916), chap. 18, para. 33, as regards 'palaces and other fine buildings'.

[9] Grotius, *De Jure Belli ac Pacis*, book 3, chap. 1, s. 4.

[10] Suárez, 'On Charity', disputation 13, s. 7, para. 17.

[11] Vitoria, 'De Indis Relectio Posterior', para. 37.

[12] B. Ayala, *De Jure et Officiis Bellicis et Disciplina Militari Libri III*, text of 1582, translated by J. P. Bate (Washington, DC: Carnegie Institution, 1912), book 1, chap. 4, para. 9.

Textor[13] afterwards — declared, as one of his 'general rules from the law of nature', that things which were unlawful to do directly were lawful if unavoidable in pursuit of a lawful end. In other words, no rule of law was broken if civilians were unavoidably killed or things of artistic or historic value unavoidably destroyed in an attack on a defended position.

Vitoria, however, looked to temper the strict rule by weighing the evil to be caused against the good to be had:

> Great attention, however, must be paid to [this] point . . ., namely, the obligation to see that greater evils do not arise out of the war than the war would avert. For if little effect upon the ultimate issue of the war is to be expected from the storming of a fortress or fortified town wherein are many innocent folk, it would not be right, for the purpose of assailing a few guilty, to slay the many innocent by use of fire or engines of war or other means likely to overwhelm indifferently both innocent and guilty. In sum, it is never right to slay the guiltless, even as an indirect and unintended result, except when there is no other means of carrying on the operations of a just war, according to the passage (*St Matthew*, ch. 13) 'Let the tares grow, lest while ye gather up the tares ye root up also the wheat with them'.[14]

Grotius too sought to limit the wrong inflicted in pursuit of a right by reference to identical scriptural authority:

> [W]e must also beware of what happens, and what we foresee may happen, beyond our purpose, [to ensure that] the good which our action has in view is much greater than the evil which is feared, or, [if] the good and the evil balance, [that] the hope of the good is much greater than the fear of the evil. The decision in such matters must be left to a prudent judgement, but in such a way that when in doubt we should favour that course, as the more safe, which has regard for the interest of another rather than our own. 'Let the tares grow', said the best Teacher, 'lest haply while ye gather up the tares ye root up the wheat with them.' Said Seneca: 'To kill many persons indiscriminately is the work of fire and desolation.'[15]

Suárez, however, rejected this restriction.[16]

[13] Textor, *Synopsis Juris Gentium*, chap. 18, para. 10.
[14] Vitoria, 'De Indis Relectio Posterior', para. 37.
[15] Grotius, *De Jure Belli ac Pacis*, book 3, chap. 1, s. 4. See also Textor, *Synopsis Juris Gentium*, chap. 18, paras. 10—11, seemingly endorsing Grotius.
[16] Suárez, 'On Charity', disputation 13, s. 7, para. 19.

As for the appropriation of enemy property in war, the general view was that the law of nations permitted a belligerent to capture and carry off movable property in pursuit of a just cause 'without limit or restriction'.[17] All chattels captured from the enemy population became the property either of the capturing power or of the individual captor. At the same time, considerations of justice, or at the very least humanity, dictated moderation.[18] As with destruction, when it came to appropriation most early modern writers made no distinction between different types of movables. Gentili expressly included 'statues and other ornaments' within the freedom to capture and remove.[19] If a town was captured by assault after refusing to surrender, a commander was entitled to turn it over to pillage[20] – that is, to every-man-for-himself looting by the soldiery, with each permitted to keep what he laid his hands on. Vitoria, however, thought pillage lawful only 'if necessary for the conduct of the war or as a deterrent to the enemy or as a spur to the courage of the troops'.[21] Either way, it was forbidden for soldiers to pillage other than with express permission.[22]

Nonetheless, while not yet reflected in the law of nations, the notion was already prevalent in the sixteenth century that monuments and works of art constituted a distinct category of property – an emergent consciousness which inspired the earliest domestic examples of historical preservation. In parallel with this, a conviction took shape in the Renaissance among the educated elites of Europe that the learned arts and sciences comprised a transnational common weal. By the end of the seventeenth century, this *respublica literaria* – known in its later francophone incarnation as the 'République des Lettres' or 'republic of letters' – was axiomatic as a metaphysical estate spanning literate

[17] Grotius, *De Jure Belli ac Pacis*, book 3, chap. 6, s. 2. See also, previously, Gentili, *De Jure Belli*, book 3, chap. 6, p. 310 and chap. 7, p. 315; and, subsequently, R. Zouche, *Iuris et Iudicii Fecialis, sive, Iuris Inter Gentes, et Quaestionum de Eodem Explicatio*, text of 1650, translated by J. L. Brierly (Washington, DC: Carnegie Institution, 1911), part 1, s. 8, para. 1; Rachel, *De Jure Naturae*, dissertation 2, para. 48.

[18] Gentili, *De Jure Belli*, book 3, chap. 6, pp. 313–14 and chap. 7, p. 315; Suárez, 'On Charity', disputation 13, s. 7, para. 7; Grotius, *De Jure Belli ac Pacis*, book 3, chap. 13.

[19] Gentili, *De Jure Belli*, book 3, chap. 6, p. 310, quoting Cicero.

[20] Grotius, *De Jure Belli ac Pacis*, book 3, chap. 6, s. 18; Zouche, *Iuris et Iudicii Fecialis*, s. 8, para. 1.

[21] Vitoria, 'De Indis Relectio Posterior', para. 52.

[22] *Ibid*., para. 53; Suárez, 'On Charity', disputation 13, s. 7, para. 7.

European circles. A central feature of this cosmopolitan intellectual domain was the scholarly interest in the fine arts, architecture and antiquities that was the mark of high Renaissance and early modern cultivation. For instance, Pope Pius II, dubbed by Burckhardt 'the personal head of the republic of letters', 'was wholly possessed by antiquarian enthusiasm'.[23] The later French polymath and patron Nicolas-Claude Fabri de Peiresc — the man considered by the seventeenth century historian Pierre Bayle, editor of the journal *Nouvelles de la République des Lettres*, to have rendered more services than any other to the republic of letters (and, coincidentally, Hugo Grotius's chief encouragement and material support during the writing of *De Jure Belli ac Pacis*[24]) — 'used his income to buy or have copied the rarest and most useful monuments', and 'works of art [and] antiquities ... were equally the object of his concern and curiosity'.[25] In turn, it soon came to pass that the vision of a transnational commonwealth of the learned became the vision of a transnational commonwealth of what they were learned in: artworks, architecture and antiquities — that is, the actual paintings and sculptures, grand buildings and monuments, ruins and relics — themselves came to be viewed as a universal metaphysical estate whose well-being was a common human concern.

The Enlightenment was the heyday of the republic of letters, as well as of the specific vision of a pan-continental republic of the fine arts, architecture and antiquities. Indicative of the age, Diderot and Alembert's *Encyclopédie* sought to 'bring together the enlightened of all nations in a single work that [would] be like a ... universal library of what is beautiful, grand [and] luminous ... in all the noble arts'.[26] To this end, '[a]ll the great masters in Germany, in England, in Italy and throughout the whole of Europe call[ed] on all the scholars and artists of the confraternity' of 'belles-lettres and fine arts'[27] to contribute to a single work embracing, *inter alia*, 'Architecture', 'Buildings', 'Sculpture',

[23] J. Burckhardt, *The Civilization of the Renaissance in Italy*, text of 1860, translated by S. G. C. Middlemore (London: Penguin, 1990), p. 147.

[24] See J. Brown Scott, 'La genèse du traité du Droit de la Guerre et de la Paix' (1925) 6 RDI (3 sér.) 481 at 503.

[25] P. Bayle, *Dictionnaire Historique et Critique Par Monsieur Bayle*, 4 vols. (Rotterdam: Reinier Leers, 1697), vol. II, part 2, pp. 767–8.

[26] Andrew Michael Ramsay, quoted in J. Lough, *The Encyclopédie* (London: Longman, 1971), p. 6.

[27] *Ibid*.

'Painting', 'Monuments', 'Antiquities', 'Relics' and 'Ruins'.[28] The eighteenth century also witnessed the discovery of the archaeological sites at Pompeii, Herculaneum and Paestum, as well as the first excavations in Italy and Sicily. Le Roy's *The Ruins of the Most Beautiful Monuments of Greece* (1758), the first volume of Stuart and Revett's *The Antiquities of Athens* (1762) and Winckelmann's *History of Ancient Art* (1767) triggered trips by *érudits* of many nationalities to the cradle of classical European civilisation. A growing number of antiquarians ventured even further, to Egypt, the Sudan and the Middle East.

Writing in the Enlightenment as well, the jurists Vattel, Wolff and Burlamaqui, speaking of the lawful conduct of war, affirmed the general rule maintained by the early moderns that a belligerent had the right to use the armed force necessary to pursue a just end.[29] This included the destruction of enemy property,[30] even if Vattel was at pains to emphasise that '[a]ll harm done to the enemy unnecessarily, every act of hostility not directed towards securing victory and the end of the war, is mere licence, which the natural law condemns'.[31] As for specific types of property, Burlamaqui thought it scarcely necessary to wreck statues after a town had been taken.[32] Nor did Wolff believe there was any gain to be had in destroying ornamental goods.[33] For Vattel, the 'wilful destruction of public monuments, places of worship, tombs, statues, paintings, etc.' was 'absolutely condemned, even by the voluntary law of nations, as never being conducive to the rightful object of war'.[34]

[28] See D. Diderot and J. L. d'Alembert (eds.), *Encyclopédie, ou Dictionnaire Raisonné des Sciences, des Arts et des Métiers, par une Société des Gens de Lettres*, 17 vols. (Paris: Briasson, David, Le Breton, Durand, 1751–7).

[29] E. de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains*, text of 1758 (Washington, DC: Carnegie Institution, 1916), book 3, chap. 8, paras 136–8; C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, first published 1740–9, text of 1764, translated by J. H. Drake (Oxford: Clarendon Press, 1934), chap. 7, paras. 781–2; J.J. Burlamaqui, *Principes du Droit Politique*, 2 vols. (Amsterdam: Zacharie Chatelain, 1751), vol. II, part 4, chap. 5, para. 3 and chap. 6, para. 3.

[30] Vattel, *Droit des Gens*, book 3, chap. 9, paras. 166–7; Wolff, *Jus Gentium*, chap. 7, para. 823; Burlamaqui, *Principes*, vol. II, part 4, chap. 7, para. 8.

[31] Vattel, *Droit des Gens*, book 3, chap. 9, para. 172.

[32] Burlamaqui, *Principes*, vol. II, part 4, chap. 7, para. 8.

[33] Wolff, *Jus Gentium*, chap. 7, para. 823.

[34] Vattel, *Droit des Gens*, book 3, chap. 9, para. 173.

That is, harm to these things was prohibited not just by the law of nature but also by positive law. He declared:

> For whatever reason a country be ravaged, those buildings must be spared which do honour to humanity and which do not contribute to the enemy's strength, such as temples, tombs, public buildings and all works of remarkable beauty. What is to be gained by destroying them? It is the act of a sworn enemy of the human race to deprive it lightly of such monuments of the arts . . .[35]

Yet the doctrine of necessity still cut both ways. If it were 'necessary to destroy buildings of this sort to pursue military operations or to erect siegeworks', a belligerent 'no doubt had the right to do so'.[36] The same rule applied in defence: the besieged were permitted to destroy such buildings when, for example, they found it necessary to set fire to outlying districts in order to deny a siege party ground.[37]

Nowhere did necessity tend more towards permissiveness than in bombardment, the most destructive of prevailing methods of warfare. As classically viewed, bombardment was a means to the occupation, not devastation, of a fortified town or city, to be preceded by siege and, if the terms of surrender were refused, followed by assault. Its usual aim was to damage or destroy the town's perimeter defences (the cannon emplacements, redoubts and battlements), so as to enable troops to enter unopposed. It was considered a last resort to be employed sparingly, on account of its guaranteed killing of civilians and destruction of their property with the grossly inaccurate artillery typical of the times; and given that the rigours of siege often forestalled the need to fire on a town, it was a relatively rare occurrence. As for the rules of warfare regulating the bombardment of towns, it went without saying that it was absolutely impermissible to bombard an unfortified town, since it was unnecessary: the town could be entered and occupied without resistance. As regards defended towns, a debate arose in the eighteenth century over whether it could ever be necessary, and hence permissible, to fire on the civilian quarters. Vattel thought it could be:

> These days the besieger usually bombards the ramparts and everything to do with the place's defence: to destroy a town with bombs and hot shot is a last resort

[35] *Ibid*., para. 168.
[36] *Ibid*.
[37] *Ibid*.

to which one does not go without grave reasons. But it is a resort nonetheless permitted by the laws of war, if there is no other way to break the resistance of an important locale on which the success of the war may hang, or which serves as a base for hazardous strikes against us.[38]

At the same time, his emphasis was on restraint.

All care was to be taken during bombardment not to kill civilians or to damage civilian property, including cultural property; but unavoidable incidental damage, while regrettable, was permissible. There was no call to question whether, in a given situation, the degree of necessity to shell a military position justified the scale of foreseeable death and destruction. Vattel was seemingly unqualified in his acceptance of the inevitability of incidental damage, and placed no upper threshold on its lawful extent, noting sanguinely that it 'is difficult to spare the most beautiful buildings when one is bombarding a town':[39] if, in furthering military operations, a commander 'thereby destroy[ed] some work of art', it was simply 'an accident, an unfortunate consequence of the war'.[40] Burlamaqui had earlier come to a similar conclusion when, restating the classical doctrine of double effect, he posited that, as a strict matter of natural law, what was otherwise impermissible in war was rendered permissible if it was the unintended and inevitable consequence of a permissible act,[41] even if the principles of humanity called for moderation.[42]

But whatever the inexorable dictates of the law, the stress remained on distinguishing things military, on the one hand, from the populace and its property, on the other. It was an emphasis endorsed by Jean-Jacques Rousseau. Writing in *The Social Contract*, Rousseau crystallised in politico-philosophical terms the principle of distinction inchoate in the doctrine of limited war espoused since the scholastics, that is, that a belligerent must distinguish at all times between the military forces of the state and the civilian population and its property, making every effort to spare the latter:

War . . . is not a relation between men, but between states; in war individuals are enemies wholly by chance, not as men, not even as citizens, but only as soldiers;

[38] *Ibid*., para. 169.
[39] *Ibid*.
[40] *Ibid*., para. 168. The precise context for the quote was the right of the governor of a besieged town to destroy his own districts in pursuit of the war.
[41] Burlamaqui, *Principes*, part 4, chap. 5, paras. 5–6.
[42] *Ibid*., para. 8.

not as members of their country, but only as its defenders . . . Since the aim of war is to subdue a hostile state, a combatant has the right to kill the defenders of that state while they are armed; but . . . [i]t is sometimes possible to destroy a state without killing a single one of its members, and war gives no right to inflict any more destruction than is necessary for victory. These principles were not invented by Grotius . . .; they are derived from the nature of things; they are based on reason.[43]

The principle enjoyed a rapid reception after the coming to power in France of revolutionary leaders 'nourished on the writings of Rousseau'.[44]

As for appropriation, Vattel, Wolff and Burlamaqui all recognised a right of capture and removal to the value of any debt, plus varying sums.[45] No property was exempt. But here also the stress came to be laid on distinction, with the French jurist Portalis quoting Rousseau's maxim at the inauguration of a prize court in 1801. As for pillage, Vattel thought it permitted if the commander gave permission.[46] Wolff allowed it too, but cautioned that 'it should hardly be resorted to unless the greatest necessity should demand it'.[47]

The French Revolution, the Napoleonic Wars and the nineteenth century

As well as hastening the reception of the doctrine of distinction, the French Revolution and the Napoleonic Wars marked a turning point in attitudes to the legal protection of monuments and works of art, domestically as much as internationally and in peace as much as in war.

The passions inflamed by the Revolution posed a grave threat to the artworks and monuments of France. Partly with this in mind, a Commission on Monuments was established in 1790, after the nationalisation of royal, émigré and church assets, to amass, inventory and assume stewardship over confiscated cultural property, which, in the words of the Comte de Kersaint, was now 'the heritage ['patrimoine']

[43] J.-J. Rousseau, *The Social Contract*, text of 1762, translated by M. Cranston (London: Penguin, 1968), pp. 56–7.
[44] M. Vauthier, 'La doctrine du contrat social' (1914) 16 RDI (2 sér) 325 at 340.
[45] Vattel, *Droit des Gens*, book 3, chap. 9, paras. 160 and 164; Wolff, *Jus Gentium*, chap. 7, para. 849; Burlamaqui, *Principes*, part 4, chap. 7, para. 11.
[46] Vattel, *Droit des Gens*, book 3, chap. 9, para. 164.
[47] Wolff, *Jus Gentium*, chap. 7, para. 846.

of all'[48] — a 'national heritage' ('patrimoine national'), according to François Puthod de Maisonrouge.[49] On 3 March 1791, the National Constituent Assembly promulgated nine conditions for the conservation of condemned treasures and monuments,[50] and when, after the Paris uprising in 1792, the Legislative Assembly and later the National Convention issued respective decrees ordering the destruction of the vestiges of despotism, an exception was made in the event that the Commission on Monuments requested the preservation of 'objects which may be of interest to the arts'.[51] The confusion surrounding this exception was sought to be dispelled by a decree of 16 September 1792 calling for the preservation of 'masterpieces of the arts'.[52] But further and more inflammatory incitements to destruction followed the launch of the Terror in 1793. Some of the revolutionaries looked to stanch the loss, among them Joseph Lakanal, a deputy to the Convention, who appealed for protective legislation, declaring — as was literally true after their expropriation — that works of art 'belong[ed] to all citizens in general; not to any one of them in particular'.[53] On 13 April 1793, a penal decree was issued to safeguard certain 'masterpieces of sculpture',[54] followed by a 70-page 'Directive on the means of inventorying and conserving throughout the Republic all objects capable of serving the arts, sciences and teaching', written by Félix Vicq d'Azyr and referring to such objects as an inheritance ('héritage').[55] A further decree of 24 October 1793 forbade persons 'to remove, destroy, mutilate or alter in any way — on the pretext of effacing signs of feudalism and royalty — books, drawings, ... paintings, statues, bas-reliefs, ... antiquities ... and other objects of interest to the arts, history or teaching located in libraries, collections or ... artists' residences'.[56] In spite of these efforts, citizens set upon the cultural property of the *ancien régime* with gusto.

[48] F. Choay, *The Invention of the Historic Monument*, translated by L. M. O'Connell (Cambridge: Cambridge University Press, 2001), p. 195 n. 9.
[49] A. Desvallées, 'Emergence et cheminements du mot patrimoine', *Musées & Collections publiques de France*, No. 208, September 1995, p. 6 at p. 8.
[50] Reproduced in Choay, *Invention of the Historic Monument*, pp. 197—8 n. 27.
[51] J.-P. Babelon and A. Chastel, 'La notion de patrimoine' (1980) 49 *Revue de l'art* 5 at 18.
[52] *Ibid*., at 19.
[53] J. L. Sax, 'Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea' (1990) 88 Mich. LR 1142 at 1157 n. 76.
[54] Choay, *Invention of the Historic Monument*, pp. 72 and 198 n. 34.
[55] Desvallées, 'Emergence et cheminements', at p. 9.
[56] Choay, *Invention of the Historic Monument*, p. 72.

Finally, after the fall of Robespierre in 1794, the abbé Grégoire, a deputy to the Convention, produced three commissioned reports on revolutionary vandalism[57] (a word coined by Grégoire himself[58]). Grégoire sought to preserve France's architectural, archaeological and artistic property by emphasising that they were 'the nation's objects, which, belonging to no one, are the property of all'.[59] He chided that '[t]he man with a measure of common decency will have the sense that, while he is free to be lavish with what is his, he is entitled only to be sparing with what is the nation's'.[60] The abbé undertook to 'pass on this . . . inheritance ['héritage'] to posterity'.[61] Indeed, the Convention 'owe[d] it to its own glory and to the people to hand down to posterity both [France's] monuments and its horror at those who wish to destroy them'.[62]

At the international level, in a policy initiated by the Directory in spring 1796, Napoleon's military conquests were accompanied by the systematic appropriation, by plunder and coerced treaty, of a vast collection of artworks from France's defeated enemies. Ironically, the publicly-espoused inspiration for this was the vision of a pan-European artistic culture, of which France, as a republic among tyrannies, was best placed to act as custodian. But the same vision inspired the policy's critics. In 1796, affirming that 'for a long time in Europe the arts and sciences [had] constituted a republic',[63] the fine arts scholar Antoine Quatremère de Quincy published a set of open letters condemning the removal of treasures of art from Italy. The arts and sciences 'belong[ed] to all of Europe, and were no longer the exclusive property of one nation';[64] indeed, 'the riches of the sciences and arts . . . belong[ed] to all the world'.[65] France's plunder was a 'violation of common

[57] See l'abbé Grégoire, 'Rapport sur les destructions opérées par le Vandalisme, et sur les moyens de le réprimer', in *Œuvres de l'abbé Grégoire. Tome II. Grégoire député à la Convention nationale* (Nendeln/Paris: KTO Press/EDHIS, 1977), p. 257; l'abbé Grégoire, 'Second Rapport sur le Vandalisme', in *ibid*., p. 321; l'abbé Grégoire, 'Troisième Rapport sur le Vandalisme', in *ibid*., p. 335.

[58] See l'abbé Grégoire, 'Rapport sur les inscriptions des monumens publics', in *ibid*., p. 141 at p. 149.

[59] Grégoire, 'Rapport sur les destructions', at p. 277.

[60] Grégoire, 'Second Rapport', at p. 328.

[61] Grégoire, 'Rapport sur les destructions', at p. 268.

[62] Grégoire, 'Troisième Rapport', at p. 352.

[63] A. C. Quatremère de Quincy, *Lettres à Miranda sur le déplacement des monuments de l'art de l'Italie (1796)*, 2nd edn, introduction and notes by E. Pommier (Paris: Macula, 1996), p. 88.

[64] *Ibid*.

[65] *Ibid*., p. 123.

property'.[66] Quatremère declared that 'in civilised Europe, everything belonging to the culture of the arts and sciences is above the rights of war and victory'.[67] After Napoleon's eventual defeat, the sculptor Antonio Canova, a leading figure in negotiations for the return of collections to the Papal States, called in aid 'the good of the republic of the arts'[68] to claim once more, in the words of Quatremère, that '[e]verything belonging to the culture of the arts and sciences is above the rights of war and victory'.[69] In a letter to the Plenipotentiaries of Austria, Prussia and Russia, Lord Castlereagh, the British Foreign Secretary, characterised Napoleon's plunder as 'in contravention of the Laws of modern War'.[70] Meanwhile, on the other side of the Atlantic, a British Court of Vice-Admiralty in Halifax, Nova Scotia, decreeing in *The Marquis de Somerueles* the return of Italian artworks seized *en route* to Philadelphia by a British ship in the Anglo-American War of 1812, reasoned that '[t]he arts . . . are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interest of the whole species'; as such, they were 'admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favour and protection'.[71]

Back in France, efforts set in train by the likes of Lakanal, Vicq d'Azyr and Grégoire bore fruit with the setting up in 1830 of the Comité des travaux historiques; with the first allocation of funds for the preservation of historic monuments in 1831; with the establishment in 1833 of the Historic Monuments Inspectorate, whose task it was to determine which buildings deserved that status; with the creation of a Commission on Historic Monuments in 1837; and with the first law on historic monuments in 1887. Between 1840 and 1849 alone, the number of listed monuments went from 934 to 3,000.[72] The French lead was followed elsewhere. By 1850, 'most European countries would grant to the historic monument the official blessing of institutionalization',[73]

[66] *Ibid*., p. 89.
[67] *Ibid*., p. 109.
[68] E. Jayme, 'Antonio Canova, la repubblica delle arti ed il diritto internazionale' (1992) 75 Riv. Dir. Int. 889 at 890.
[69] *Ibid*., at 891.
[70] 3 BFSP (1815–1816) 203 at 206. See also *ibid*., at 204 ('contrary . . . to the usages of modern warfare'), and the Duke of Wellington to Castlereagh, *ibid*., 207 at 210 ('contrary to the practice of civilized warfare').
[71] *The Marquis de Somerueles*, Stewart's Vice-Admiralty Reports (Nova Scotia), p. 482 (1813).
[72] Choay, *Invention of the Historic Monument*, p. 97.
[73] *Ibid*., p. 84.

and by 1860 Burckhardt was able to state that '[t]he age in which we live is loud ... in proclaiming the worth of culture, and especially of the culture of antiquity'.[74] The newly-independent republics of Central and South America joined in, as did Meiji Japan. As for the UK, in 1845 an Act for the better Protection of Works of Art introduced criminal penalties for malicious destruction or damage to, *inter alia*, 'any Statue or Monument exposed to public View';[75] in 1877 William Morris founded the Society for the Protection of Ancient Buildings, borrowing from John Ruskin in seeing such sites as belonging 'partly to all generations of mankind who are to follow us';[76] in 1882 the Ancient Monuments Protection Act was passed, being updated in 1900;[77] in 1895 the National Trust was established as a private body voluntarily charged with the acquisition of historic sites to be held on trust for the nation, a task lent a degree of state support by the National Trust Act 1907;[78] and in 1908 the Royal Commission on Historical Monuments was set up.

Rather than undermining cultural ecumenism, this material cultural nationalism 'retained ... a cosmopolitan colouring'.[79] Preservationism at home flowed easily into a concern for the architecture, art and antiquities of other countries. Ruskin and Morris militated for the preservation of the monuments and old towns and cities of France, Switzerland and Italy. In 1854, the former coined the idea of the common 'European asset', and proposed setting up a Europe-wide private conservation organisation along the lines of the Society for the Protection of Ancient Buildings and the National Trust. Morris was vocal in defence of a working-class district in Naples, and later called for the protection of monuments in Turkey and of the Arabic and Coptic architecture of Egypt. At the popular level, Champollion's archaeological exploits in Egypt and Layard and Botta's in Mesopotamia, along with Elgin's Marbles and Schliemann's excavations at Troy and Mycaenae,

[74] Burckhardt, *Civilization of the Renaissance*, p. 146.
[75] 8 & 9 Vict. 44, s. 1.
[76] Quoted in N. Boulting, 'The law's delays: conservationist legislation in the British Isles', in Fawcett, J. (ed.), *The Future of the Past. Attitudes to Conservation 1174–1974* (London: Thames and Hudson, 1976), p. 9 at p. 16.
[77] 45 & 46 Vict. 73 and 63 & 64 Vict. 34 respectively.
[78] 7 Edw. VII 136.
[79] G. Best, *Humanity in Warfare. The Modern History of the International Law of Armed Conflicts* (London: Weidenfeld and Nicolson, 1980), p. 46, referring more generally to nineteenth century nationalism.

did much to raise public awareness of the historico-artistic wonders of the world. The birth of mass tourism played its part too, as the well-heeled Grand Tourists of the eighteenth century, armed with their Vasaris, gave way to the sensible-shoed '"Cook's Tourists"... carrying their Murrays and Baedekers'.[80] By 1903, in his landmark book *The Modern Cult of Monuments*, the Viennese art historian and theorist Alois Riegl was able to identify an interest in historic monuments in its 'modern form', that is, 'a concern for every accomplishment, however slight, of every people, whatever the differences that separate us from them; a concern for the history of humanity in general, each of its members appearing to us as an integral part of ourselves'.[81]

As for international legal protection in time of war, despite the demise of just war doctrine which had ethically underpinned the rule of necessity, the jurists of the early to mid-nineteenth century restated, for the most part, Vattel's positions on the destruction of civilian property and of cultural property in particular.[82] In 1863, Francis Lieber's Instructions for the Government of Armies of the United States in the Field (the Lieber Code),[83] the first codification of the laws of war, spoke of 'the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms', noting that '[t]he principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit'.[84] All direct destruction of property indispensable for securing the ends of the war, or incidentally unavoidable in the securing of such ends, remained permissible;[85] or, in the prohibitive wording of the 1874 Draft International Regulations on the Laws and Customs of War (the Brussels Declaration[86]), the first intergovernmental, albeit non-binding

[80] G. Lindop, 'With a cold tongue or a piece of beef', *Times Literary Supplement*, 31 July 1998, p. 9.

[81] A. Riegl, *Le Culte Moderne des Monuments: Son Essence et Sa Genèse*, text of 1903, translated by D. Wieczorek (Paris: Seuil, 1984), p. 51.

[82] See e.g. J.-L. Klüber, *Droit des gens moderne de l'Europe*, 2 vols. (Paris: J.-P. Aillaud, 1831), vol. I, paras. 262 and 253 respectively.

[83] D. Schindler and J. Toman (eds.), *The Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents*, 4th revised and completed edn (Leiden/Boston: Martinus Nijhoff, 2004), p. 3.

[84] Lieber Code, art. 22.

[85] *Ibid*, arts. 14 and 15.

[86] Brussels, 27 August 1874, in Schindler and Toman, *Laws of Armed Conflicts*, p. 21.

codification of the laws of war, and of the so-called Oxford Manual,[87] a private initiative of the newly-formed Institut de droit international, all destruction of the enemy's property which was not 'imperatively demanded by the necessity of war' was forbidden.[88] 'Open towns, agglomerations of dwellings, or villages' which were undefended could not be attacked or bombarded.[89] But when it came to defended places, even if the Oxford Manual and late nineteenth century jurists underlined that 'considerations of humanity' required that 'this means of coercion be hedged with certain restraints',[90] the strict legal position — strongly contested though it was by a few — remained that the bombardment of civilian quarters of fortified towns was permissible if demanded by the exigencies of war.[91]

And by the late nineteenth century, the strategic and technological revolution signalled by the American Civil War and the Franco-Prussian War meant that such 'exigencies' threatened to become the rule rather than the exception. Strategically, the rise and extension of participatory democracy in several European countries and North America, along with the centralisation of the modern state, led to a reassessment of the rationale behind bombardment. With defending garrisons ultimately controlled by politicians responsive to the electorate, it now made sense to make the inhabitants suffer when seeking to occupy fortified towns and cities.[92] More to the point, the overrunning of particular towns and cities was less and less bombardment's *raison d'être*: rather than the collapse of individual garrisons, the incipient aim of bombardment was the surrender of the national government through the demoralisation

[87] Institut de droit international, 'Les lois de la guerre sur terre. Manuel publié par l'Institut de droit international' (1881–2) 5 AIDI 157.

[88] Brussels Declaration, art. 13(g). See also Oxford Manual, art. 32(b).

[89] Brussels Declaration, art. 15. See also Oxford Manual, art. 32(c).

[90] Oxford Manual, art. 32(c), explanatory note. Such restraints were 'to restrict the effects as far as possible to the hostile military force and its means of defence': *ibid*. See also G. Rolin-Jaequemyns, 'La guerre actuelle' (1870) 2 RDI 643 at 674; J.-C. Bluntschli, *Le droit international codifié*, 3rd edn, translated by M. C. Lardy (Paris: Guillaumin, 1881), para. 554 *bis*; J. Guelle, *Précis des lois de la guerre sur terre. Commentaire pratique à l'usage des officiers de l'armée active, de la réserve et de la territoriale*, 2 vols. (Paris: Pedone-Lauriel, 1884), vol. I, pp. 117–18.

[91] Bluntschli, *Droit international*, para. 554 *bis*; Guelle, *Précis*, vol. I, pp. 117–18; C. Calvo, *Le droit international théorique et pratique*, 5th edn, 5 vols. (Paris: Rousseau, 1896), vol. IV, para. 2073.

[92] An early instance of this thinking and practice was the bombardment of revolutionary Venice in 1849 by Austrian forces under Field Marshal Radetzky.

of the populace.[93] Technological advances made this feasible. Modern metallurgical techniques applied to artillery and the spread of railways capable of hauling heavy freight to the front with maximum expedition meant that resort to bombardment became much easier. Indeed, it became more convenient to do away with the time-consuming entr'acte of siege and to proceed post-haste to shelling as the technique of choice. Added to this, the vastly increased range of cannon meant that shells penetrated far deeper into the civilian heart of a city than in the past, when they rarely flew much further than the walls.[94]

But despite the creeping tendency towards 'morale' bombardment, it was never suggested that it was permissible to target monuments and works of art in the hope of breaking a population's will to resist. Indeed, there was by now a consensus in the Western world that such property was deserving of legal privilege, a consensus crystallised during the Franco-Prussian War by the international outcry, both scholarly and public, at the Prussians' unintended bombardment of the abbey of St Denis and of historico-artistic sites in Strasbourg and Paris. While apportioning blame differently, the Royal Academy of Ireland and the University of Göttingen both characterised the threatened treasures of Paris as the 'property of humanity as a whole'.[95] The protest lodged by the Institut de France at the shelling of Strasbourg cathedral similarly described such buildings as 'belonging to humanity as a whole, forming, so to speak, the common heritage of cultured nations'.[96] The upshot was that the Brussels Declaration, the Oxford Manual and leading jurists were all in agreement that, in the event of bombardment of a defended place, 'all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, and charitable purposes, ... on condition they are not being used at the time for military purposes'.[97]

[93] 'Bismarck was much impressed in September 1870 by General Sheridan's advice, based on his experience in the American Civil War, to cause "the inhabitants so much suffering that they must long for peace, and force their government to demand it".': R. Tombs, 'The Wars against Paris', in S. Förster and J. Nagler (eds.), *On the Road to Total War. The American Civil War and the German Wars of Unification, 1861–1871* (Washington, DC/Cambridge: German Historical Institute/Cambridge University Press, 1997), p. 541 at p. 561.

[94] The Prussian artillery around Paris in 1871 had a range of 8 km.

[95] Quoted in G. Rolin-Jaequemyns, 'Essai complémentaire sur la guerre franco-allemande dans ses rapports avec le droit international' (1871) 3 RDI 288 at 302.

[96] Quoted in Guelle, *Précis*, vol. II, p. 133 n. 1 and Calvo, *Droit international*, para. 2086 n. 1.

[97] Brussels Declaration, art. 17. See also Oxford Manual, art. 34; T. Twiss, *The Law of Nations Considered as Independent Political Communities. On the Rights and Duties of Nations in Time*

The late nineteenth century also saw the rise of rules governing the treatment of cultural property during belligerent occupation, rules catalysed earlier by the Napoleonic Wars and consolidated by the furore over the plunder and torching of the Chinese imperial summer palace by Anglo-French forces in the Second Opium War of 1860. Guelle, in his handbook on the laws of war for use by French officers, declared:

> One act particularly contrary to international law is the destruction or carrying off of artistic collections, libraries and archives. These riches are the heritage of the whole of humankind, so it is in the interests of all that they escape the effects of war as much as possible . . .[98]

A prohibition on injury to or destruction of monuments and works of art during belligerent occupation was endorsed by the Lieber Code, the Brussels Declaration, the Oxford Manual and contemporary jurists,[99] and once more gave voice to the belief that such behaviour was in no way necessary. As for appropriation, while an Occupying Power had certain rights in respect of the movable and immovable property of the occupied territory, the property of establishments devoted to the arts and sciences was to be treated as private property,[100] and was thus not to be seized.[101] For his part, Lieber permitted the removal of 'works of art, libraries, collections, or instruments belonging to a hostile nation' for the benefit of that nation, if it could be done without injury to them, with the ultimate ownership to be settled by the ensuing treaty of peace.[102] But under no circumstances were they to be sold or given away; nor were they to be privately appropriated.[103] Lieber's limited permission

of War, 2nd edn revised (Oxford/London: Clarendon Press/Longmans, Green, 1875), para. 69; Bluntschli, *Droit international*, para. 554*ter*; Guelle, *Précis*, vol. II, p. 131.

98 Guelle, *Précis*, vol. II, p. 136.

99 Lieber Code, art. 36 (not to be 'wantonly destroyed or injured'); Brussels Declaration, art. 8; Oxford Manual, art. 53 ('save when urgently demanded by military necessity'); Twiss, *Law of Nations*, paras. 68–9; Bluntschli, *Droit international*, paras. 649–50; F. de Martens, *Traité de Droit International*, 2 vols. (Paris: Librairie Maresq Ainé, 1887), vol. II, p. 261; H. S. Maine, *International Law*, 2nd edn (London: John Murray, 1894), p. 195.

100 Lieber Code, art. 34; Brussels Declaration, art. 8.

101 Brussels Declaration, arts. 8 and 38; Oxford Manual, art. 53; P. Fiore, *Trattato di diritto internazionale pubblico*, 2nd edn, 3 vols. (Turin: Unione Tipografico-Editrice, 1884), vol. III, paras. 1664 and 1747; Martens, *Traité*, vol. II, p. 261; Maine, *International Law*, pp. 194–5; A. Pillet, *Les lois actuelles de la guerre* (Paris: Rousseau, 1898), para. 222.

102 Lieber Code, art. 36.

103 *Ibid*.