Customary International Law and the Rule Against Taking Cultural Property as Spoils of War

ZHANG Yue*

Abstract

Many countries seek to regain lost cultural property that was taken as spoils of war during the nineteenth and early twentieth centuries. Some scholars, however, regard such claims as baseless in public international law of this period. This article carries out an intertemporal law analysis and argues that the rule against such plunder was indeed founded in the laws and customs of war in the eighteenth century, became well established in the nineteenth century, and further developed in the twentieth century. If the plundered works exist and are identifiable, restitution is the only remedy for violation of this rule. This article aims to provide the legal grounds for restitution claims and thus provide the first steps for victim States to regain their lost cultural property.

I. Introduction

1. This article evaluates the legality of taking cultural property as spoils of war that occurred during the nineteenth and early twentieth centuries. It aims to apply the results of

---

* S.J.D. candidate, University of Wisconsin-Madison, Law School, USA (yuezhang wisc@icloud.com). The author would like to thank her S.J.D. advisor Prof. Heinz Klug for reviewing and editing this article. The author also would like to thank her second advisor Prof. Alexandra Huneeus, Prof. CAI Congyan from Xiamen University Law School, China, and Prof. LIU Lijun from Fudan University Library, China, for their advice. This article was completed on 20 November 2018 and all the websites cited were current as of this date unless otherwise noted.

1 Cultural property refers to objects that are important to archaeology, prehistory, history, literature, art or science on either religious or secular grounds. See UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 1, 823 UNTS 234; Council of Europe Convention on Offences relating to Cultural Property, 221 Council of Europe Treaty Series, 19.V. (2017), art. 2(2).
analysis to support the claims for restitution of displaced cultural properties to their countries of origin, which is one of the most controversial issues in international law today. Many countries have suffered the loss of cultural property due to plunder in war during this period, such as China, Egypt, Greece, Iraq, Italy, Nigeria, and Turkey. These victim States have frequently requested the return of their lost treasures over the years.

2. However, it is very challenging for victim States to provide convincing legal arguments to support restitution, especially when the looting occurred in the nineteenth century. No conventional law referred to the protection of cultural property during war before The Hague Convention II of 1899. Moreover, the current literature generally argues there was no rule or merely an emerging rule against such practices upon customary international law during most of the nineteenth century. In this sense, it

---

2 Plunder in this article refers to the removal of property as spoils of war. It includes various forms, such as looting, confiscation, seizure, appropriation, or requisition. For the details of the plunder of cultural property in war during the nineteenth and twentieth centuries, see Patrick J. O’Keefe & Lyndel V. Prott, 3 Law and the Cultural Heritage (1989), 838-44; Ivan A. Lindsay, The History of Loot and Stolen Art from Antiquity until the Present Day (2nd ed., 2014); Grazyna Czubek & Piotr Kosiewski (eds.), Displaced Cultural Assets: the Case of Western Europe and the Problems of Central and Eastern Countries in the 20th Century (2004); Elizabeth Simpson (ed.), The Spoils of War: World War II and Its Aftermath: the Loss, Reappearance, and Recovery of Cultural Property (1997).


4 In the literature, restitution, repatriation, and return are frequently used to discuss the claim for the victim States to regain their lost cultural property. For the differences between and controversies over the three terms, see Wojciech Kowalski, General Observations: Claims for Works of Art and Their Legal nature, in: The International Bureau of the Permanent Court of Arbitration, Resolution of Cultural Property Disputes (2003), 33-51; Lyndel V. Prott (ed.), Witnesses to History: Documents and Writings on the Return of Cultural Objects (2009), xxiii. This article uses restitution to show the claim has a legal ground.

5 Below Part V.B.iii.

6 Charles de Visscher argued that the doctrine of international law against plundering cultural property was accepted by all nations during the two Hague Conventions in 1899 and 1907. See Charles de Visscher, International Protection of Works of Art
appears that the claims for the restitution of cultural property plundered during the nineteenth century have no basis in international law. Some scholars support claims for restitution using human rights law instead; they argue the importance of possessing cultural property to preserve the identity of peoples and communities within the framework of international human rights law. Still other scholars also argue for

restitution on ethical and political grounds, such as redressing historical wrongs, building national identities, or carrying out the necessary steps of decolonization.  

3. Contrary to the views of these scholars, this article argues, the rule against plundering cultural property (“the rule against plunder”) was founded in the laws and customs of war in the eighteenth century, became well established in the nineteenth century, and further developed in the twentieth century. Restitution serves as the only remedy for violation of this rule, so long as the plundered works exist and are identifiable. This article carries out an intertemporal law analysis concerning the evolution of the rule against plunder, rather than applying our current views of international law to examine the formation and development of the rules in previous centuries.

4. This article is divided into eight parts beginning with the introduction. Part II explores different criteria for identifying customary international law in different periods of time from the mid-seventeenth through twentieth centuries. Part III analyses the influence of Roman legal traditions and philosophical ideas on the emergence of the rule against plunder in later centuries. Part IV explores the establishment of the rule against plunder upon natural jurisprudence in the eighteenth century. Part V examines the validity of the rule against plunder within the context of a fundamental change in the philosophy of international law in the nineteenth century in two episodes. The first episode was Napoleon’s looting of artefacts and the responses of the

---


Prohibition of the looting of cultural property is unquestionably a well-established rule of the laws and customs of war today. See ICTY statute, art. 3(d) (www.icls.de/dokumente/icty_statut.pdf). Therefore, this article does not discuss the validity of this rule in the twenty-first century.

This article does not concern restitution in kind or compensation as possible remedies for violation of the rule against plunder, in which the plundered objects were destroyed and therefore could not be restituted. When the plundered objects are preserved and identifiable, then restitution serves as the only remedy, while restitution in kind or compensation could not take a place.
public and European sovereigns. The second was the codification of the laws and customs of war in the second half of the nineteenth century. Part VI examines the development of the rule against plunder in the twentieth century, with a focus on the two World Wars and the further codification of the rule in the 1954 Hague Convention and its first protocol. Part VII discusses claims in favour of retention and provides a brief analysis of the significance of the primary argument of this article in transforming the current debates between restitution and retention. Finally, Part VIII brings together the results of my analysis.

II. Identification of customary international law

II.A. Formation and development of customary international law

5. The current orthodox theory of customary international law is founded upon State practice as the material element, and *opinio juris* (or, alternatively, acceptance as law) as the subjective element.\(^{11}\) *Opinio juris* refers to a feeling or belief that practice corresponds to a sense of legal right or obligation.\(^{12}\) State practice must be general, which means that it requires “sufficiently widespread and representative, as well as consistent” practice.\(^{13}\) However, it is not clear if the two-element approach applies to

---


identifying customary international law in previous centuries. Did customary international law require a subjective element before the *opinio juris* was introduced into the legal science of international law? Did the material element require a general practice as is the case today? This section employs the intertemporal law approach to explore different criteria for identifying customary international law in different periods of time from the mid-seventeenth through twentieth centuries.

II.A.i. The mid-seventeenth through eighteenth centuries

6. The law of nations, a commonly used term in the seventeenth through nineteenth centuries, originated from the Latin term “*jus gentium*” in the Roman legal system.\(^{14}\) Many rules of international law can be traced back to the Roman era.\(^{15}\) In the traditional view, the modern development of international law began with the Peace of Westphalia of 1648.\(^{16}\) The Peace of Westphalia overturned the old doctrines that the Pope or the Emperor had enacted as the ruler of a world empire.\(^{17}\) It gave legal recognition to States as equal sovereigns, regardless of land area and power.\(^{18}\) One prominent class of jurists, known as classical international law jurists, came to the fore during the seventeenth and eighteenth centuries. These jurists included Hugo Grotius, often referred to as the founding father of international law, Pierino Belli, Alberico Gentili, Francisco Suarez, Samuel Rachel, Baron Puffendorf, Cornelius van Bynkershoek, Christian Wolff, and Emer de Vattel. These jurists articulated and codified the legal rules that governed the interactions of sovereign nation-States.\(^{19}\) Their writings were regarded as the highest source of the law of nations in their respective times.\(^{20}\)

7. As an essential source of the law of nations during this period, it is vital to know whether customary international law required the subjective element to be legally binding. Raphael M. Walden concludes that tacit consent was the subjective element

---


\(^{18}\) Origins of Public International Law, above n.16, 276.

\(^{19}\) Sir Henry S. Maine, *International Law* (1888), 13-14; Origins of Public International Law, ibid.

\(^{20}\) George G. Wilson & George F. Tucker, above n.17, 40-41.
of custom, according to the writings of classical international law jurists. However, this argument is correct only regarding custom, but not concerning customary law that also included usage at that time. Usages constituted the main body of the law of nations before the early twentieth century. In the Flad Oyen case in 1799, the celebrated British Admiralty Judge Lord Stowell observed, “[A] great part of the law of nations stands upon the usage and practice of nations”. This opinion derived from British legal tradition, in which usages alone were able to create the legal rules. According to Travers Twiss, Suarez was the first jurist to recognize that usages among nations were binding in the intercourse among them. According to Suarez, such usages needed to be long observed and uniformly acted upon.

8. It seems that usage did not require State consent or opinio juris, as we assume today, to be legally binding. However, there was an invisible subjective element for customary law if we examine the philosophy of international law during this period. Natural law theory was the dominant philosophy underlying international law at that time. This philosophy combined law, ethics, and morality as the supreme legislator to deduce rules. According to this theory, the law of nature, which was based on justice and reasonableness, made all rules of the law of nations legally binding.

---

22 Henry Wheaton, above n.14, 5-6. The jurists in the nineteenth century also quoted this statement, such as Travers Twiss, Two Introductory Lectures on the Science of International Law (1856), 52.
24 Travers Twiss, above n.22, 11.
25 Ibid.
29 Hans Kelson, ibid.; Birgit Schlutter, ibid.
Thus, the validity of customary law had to be tested by the law of nature.\textsuperscript{30} In 1753, the British government stated in a memorable document as an answer to a memorial of the Prussian government, the law of nations was “founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage”.\textsuperscript{31} This statement of State had generally been recognized as one of the ablest expositions of international law embodied in a State paper at that time.\textsuperscript{32} Therefore, in the seventeenth and eighteenth centuries, customary international law that was based upon usage required a long established practice, upon which nations uniformly acted as the material element; the usage had to conform to the law of nature as the subjective element.

\textbf{II.A.ii. The nineteenth century}

\textbf{II.A.ii.a. The rise of positivist theory and its impact on the identification of customary law}

9. John Austin introduced positivist theory into the legal science of international law, which looks to the practice of States, rather than to \textit{priori} deductions, to formulate international law.\textsuperscript{33} According to this theory, the common consent of nations makes the rules of international law legally binding.\textsuperscript{34} Due to the growing influence of positivism, the practice of States drew increasing attention as a means to identify customary international law, in which the consent of States was presumed from consistent practice. As David Kennedy argues, jurists stepped gradually away from the law of nature and increasingly emphasized the role of custom and State practice in their understanding of the rules of international law.\textsuperscript{35} In the \textit{North Atlantic Coast Fisheries} case at the Permanent Court of Arbitration, as Judge Luis Draco observed, although the court regarded reason as a source of the law of nations, it preferred to seek the law “in a constant custom of concluding treaties in one sense or another and in examples that have occurred in one country or another”.\textsuperscript{36} In the \textit{R. v. Keyn (The Franconia)} case of 1876, Lord Chief Justice Cockburn argued that the law must have received the assent


\textsuperscript{31} As quoted in Robert Phillimore, 1 Robert Phillimore Commentaries upon International Law (1854), 55, para.xx.

\textsuperscript{32} Ibid.

\textsuperscript{33} Birgit Schlutter, above n.28, 16-17; James L. Brierly, above n.15, 36-37.


\textsuperscript{35} David Kennedy, ibid., 117.

\textsuperscript{36} North Atlantic Coast Fisheries (USA v. Great Britain), PCA Award, XI Reports of International Arbitration Awards (1910), 206 (diss. op. Luis Draco) (legal.un.org/riaa/cases/vol_XI/167-226.pdf). Though the award was made at the beginning of the twentieth century, the court had drawn rules of international law based on its observation of rules that had been established in the nineteenth century and before.
of the nations that may be expressed by treaty or implied from established usage.\footnote{Henry Wheaton, above n.14, 23.} In the \textit{Paquete Habana} case of 1900, the U.S. Supreme Court held that the court must resort to the custom and usage of civilized nations to determine questions involving international law, if there was no treaty and no controlling executive or legislative act or judicial decision on point.\footnote{Paquete Habana, 175 US 677, 700 (1900).}

\textbf{II.A.ii.b. The substantial role of the law of nature in identifying customary law}

10. The law of nature should not be neglected in identifying customary international law, even though the dominance of natural law theory declined with the rise of positivism during the nineteenth century. According to Lord Mansfield, “the law of nations is founded on justice, equity, convenience, and the reason of the thing, and confirmed by long usage”.\footnote{As quoted in James L. Brierly, above n.15, 45.} Lord Mansfield apparently copied his statement from the memorial document of Britain in 1753.\footnote{Text to n.31.} James Lorimer and Henry Halleck also supported Lord Mansfield’s opinion, as they contended that the law of nature determined the binding force of custom, usage and practice.\footnote{James Lorimer, 1 The Institutes of the Law of Nations (1883), 19, 27; Henry W. Halleck, Elements of International Law and Laws of War (1878), 32, para.9.}

11. The law of nature and State consent closely interacted with each other; it was therefore difficult to make a clear distinction between them as the basis for customary international law. As Henry Maine stated in his treatise \textit{International Law} in 1888, “The most useful and practical part of the Law of Nations is, no doubt, instituted or positive law, founded on usage, consent, and agreement. But it would be improper to separate this law entirely from natural jurisprudence”.\footnote{Henry S. Maine, above n.19, 32.} Some jurists, such as Henry Wheaton, defined the concept of international law from the perspective of both natural law and positivism.\footnote{Henry Wheaton, above n.14, 22. The similar definition can also be seen in Ld. Russell of Killowen, 7 Law Quarterly Review (1896), 317, as quoted in Oxford English Dictionary: the Definitive Record of the English Language (www.oed.com.ezproxy.library.wisc.edu/view/Entry/106405?rskey=lnhaQ5&result=2&isAdvan ced=false#eid39478937).} Justice and reason were also among the main foundations in drafting the codes of the law of war in the late nineteenth century, which were concluded by State consent.\footnote{Francis Lieber, et al., Lieber’s Code and the Law of War (1995), 10; The Hague Conventions of 1899 and 1907, below n.226, the preambles.}
II.A.ii.c The opinions of State and customary law

12. The historical school of law eventually developed a critique of natural law theory and introduced *opinio juris sive necessitatis* into international law during the first half of the nineteenth century. As a result, the opinion of States began to play an increasingly important role in generating customary international law, even though the *opinio juris* had not formally constituted the subjective element of the law at that time. Francis Lieber drafted the code on the laws and customs of war for the U.S. government on the grounds of “the legal consciousness of civilized peoples”. As Austin argued, international law was a framework “which [is] imposed upon nations or sovereigns by opinions current amongst nations”. According to Thomas Baty, a British expert on international law in the late nineteenth century, the opinions of nations laid the foundation for international law and made the rules valid to nations. As Wheaton concluded, the usage and opinion of nations generally recognized that the right of intervention or interference was an incontrovertible right of sovereignty.

13. International law in the nineteenth century was therefore still influenced by natural law. This period also witnessed the rise of positivism that examined the common wills of sovereigns, and began to give greater weight to the opinion of States in identifying customary international law. In this regard, whether the rule that was established in earlier centuries remained valid in the nineteenth century depended on an overall examination in the dynamic context from the perspective of the law of nature, State consent, and the opinions of States.

14. These three theories, though in tension with one another in legal philosophy, all played a significant role in developing customary international law during this period, but with different degrees of significance. The law of nature played a more dominant role at the beginning of the nineteenth century, while State consent held the more influential position toward the end of that century. As this article shows, in the early nineteenth century, European nations agreed to return Napoleon’s plundered artefacts to their countries of origin; this agreement was concluded according to the justice and usages of modern war, which was expressed by the opinions of States.


46 Lewis R. Harley, Francis Lieber, His Life and Political Philosophy (1899), 153.

47 As quoted in Birgit Schlutter, above n.28, 16.


49 Henry Wheaton, above n.14, 90.

50 Below Part V.A.iii.
At the end of the nineteenth century, States concluded The Hague Conventions of 1899 and 1907 regarding the laws and customs of war by consent.51 Their consent reflected the opinions of States about what were the customary rules of war at the time.52 Their consent was also made according to the law of humanity, as one of the foundations for these rules, which was stated in the preambles of The Hague Conventions of 1899 and 1907.53

II.A.iii. The twentieth century

15. Positivism was thoroughly rooted in the science of international law during the twentieth century.54 On this basis, the two-element approach with State practice and opinio juris is applied to identify customary international law. Due to the dynamic nature of customary international law, subsequent practice that is inconsistent with the established rule might modify or abandon it.55 In such circumstances, according to Mark E. Villiger, it requires the examination of the general opinio juris with respect to inconsistent State practices.56 In the Nicaragua v. USA case, the ICJ deemed it sufficient to deduce the existence of customary rules, if subsequent practices inconsistent with a given rule should have generally been regarded as breaches of that rule.57 According to Wolfke, “[I]llegal acts can, and often do, create opportunities for emphatically confirming the customary rule which has been violated, thus in fact strengthening it”.58 As this article shows, the two World Wars provide occasions for confirming the established rule against plundering cultural property.59 In fact, when that rule was violated, critical responses actually ended up reinforcing it.

16. In conclusion, usage constituted the main body of the law of nations from the seventeenth through nineteenth centuries. Usage was required to be long established and uniformly acted upon. The law of nature functioned as an invisible subjective element to validate usage in the seventeenth and eighteenth centuries. Consent, the law

---

51 Below Part V.B.iii.
52 Ibid.
53 The Hague Conventions of 1899 and 1907, see below n.226, the preambles.
54 David Kennedy, above n.34, 113.
56 Mark E. Villiger, Customary International Law and Treaties (1985), 48. (“As long as the previous opinio has not been eroded, and the new opinio is not established, the diverging practice remains a form either of persistent or subsequent objection.”)
57 Nicaragua v. USA, above n.13, para.186. (“In order to deduce the existence of customary rules, the Court deems it sufficient that […] instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”)
58 Karol Wolfke, above n.45, 8.
59 Below Part VI.A. and VI.B.
of nature, and opinions of States closely interacted with one another and carried out this function in the nineteenth century, but with different degrees of significance. *Opinio juris*, or alternatively the acceptance of the general practice as law, have functioned as the subjective element since the twentieth century.

II.B. Proof of customary international law

II.B.i. *The writings of recognized publicists*

17. Today, the writings of recognized publicists serve as a subsidiary means for identifying international law. 60 However, this source of law was regarded as an essential proof of international law before the twentieth century, but with different degrees of importance in different periods. During the seventeenth and eighteenth centuries, the writings of classical international law jurists were considered the highest source of authority upon matters regarding the law of nations. 61 In the nineteenth century, the writings of recognized publicists were regarded as one of the main sources of international law. 62 At that time, statesmen and diplomats relied on these treatises, and courts looked to these writings to conclude decisions concerning the law of nations. 63

II.B.ii. *International agreements*

18. Treaties and other international agreements may merely formalize the established rules of customary international law. 64 In the judgment of the Nuremberg trials, the tribunal deemed, “[I]n many cases treaties do no more than express and define for more accurate reference the principles of law already existing”. 65 According to George G. Wilson and George F. Tucker, these sources could reflect the opinion of States regarding the matters of which they speak, 66 which would help identify the rules of customary international law. As this article shows, during the second half of the nineteenth century, when sovereigns began to codify the laws and customs of war,

60 The ICJ Statute, above n.11, art. 38 (1)(d).
64 Henry Wheaton, above n.14, 24; George G. Wilson & George F. Tucker, ibid.; James Lorimer, above n.41, 19, 27, 37, 51, 54, 87; Robert Phillimore, above n.31, 86.
65 International Military Tribunal (Nuremberg), below n.280, 54.
many provisions in these codes reflected the established rules of customary international law in warfare.\textsuperscript{67} In particular, Wheaton regarded treaties of peace as a key source of the law of nations.\textsuperscript{68} Polson expressed a similar idea in his 1853 treatise \textit{Principles of the Law of Nations}, regarding peace treaties as main sources of international law.\textsuperscript{69}

\textbf{II.B.iii. The history of State interaction, particularly war and peace negotiations}

19. The history of transactions regarding the intercourse of States was always a compelling source reflecting the law of nations.\textsuperscript{70} According to Robert Phillimore, one could not identify customary law without looking to history.\textsuperscript{71} As Archer Polson and Halleck further explained, it is necessary to resort to history for information about what has generally been approved or condemned in the practice of sovereigns.\textsuperscript{72} Grotius and other jurists drew the law of nature from the events of history.\textsuperscript{73} Wheaton especially considered the history of the wars and peace negotiations as an essential source of the law of nations.\textsuperscript{74}

\textbf{II.B.iv. Decisions of prize or admiralty courts}

20. Decisions of prize or admiralty courts were a reliable source of the law of nations in the eighteenth and nineteenth centuries.\textsuperscript{75} As the Duke of Holles Newcastle explained to the King of Prussian Secretary of the Embassy in 1753, decisions of admiralty courts were always made “according to the universal law of nations only”.\textsuperscript{76} As Wilson and Tucker concluded from the \textit{Bolton v. Gladstone} case of 1804 in the

\begin{itemize}
\item \textsuperscript{67} Below Part V.B.
\item \textsuperscript{68} Henry Wheaton, above n.14, 31.
\item \textsuperscript{69} Archer Polson, above n.61, 20-21.
\item \textsuperscript{70} Henry W. Halleck, above n.41, 36-37. (“The history of transactions relating to the intercourse of states, both in peace and war, is one of the most fruitful sources of international law.”)
\item \textsuperscript{71} Robert Phillimore, above n.31, 86.
\item \textsuperscript{72} Archer Polson, above n.61, 22-23; Henry W. Halleck, above n.41, 36-37.
\item \textsuperscript{73} James Mackintosh, A Discourse on the Study of the Law of Nature and Nations (1828), 25.
\item \textsuperscript{74} Henry Wheaton, above n.14, 31.
\item \textsuperscript{75} George G. Wilson & George F. Tucker, above n.17, 37; Travers Twiss, above n.27, 155-56.
\item \textsuperscript{76} The Duke of Holles Newcastle’s Letter to Monsieur Mic Hell, the King of Prussia’s Secretary of the Embassy, 8 February 1753, as reprinted in Joseph Chitty, Practical Treatise on the Law of Nations (1812), 310.
\end{itemize}
Court of King’s Bench, “[The prize court’s] decision, if legally rendered, stands as valid in all states”.

II.B. v. Public conscience

21. Public conscience had a growing influence on shaping the law of nations starting at the beginning of the nineteenth century. Beginning with this period, public conscience became a significant factor in causing a change of policy relating to the conduct of war. Observing this change, James Lorimer listed public opinion as an indirect source of the law of nations. Sovereigns considered public opinion as a foundation for codifying the laws and customs of war in the late nineteenth century. As this article shows, the public condemned Napoleon’s looting of art, which indicated an established rule against plundering cultural property during this time.

III. The origin of the rule against plunder in the Roman era

22. The original idea, which regarded cultural property as a special category of property and insisted that it could not be taken, appeared early in the Roman era, and was developed for centuries before it became a legal norm within customary international law. This part evaluates how Roman legal traditions and philosophical ideas set the stage for the emergence of the legal norm against plundering cultural property.

III.A. Roman legal norm regarding the treatment of sacred property

23. Roman law has had a significant impact on the development of modern international law starting in the sixteenth century. According to James L. Brierly, the founders of international law based the rules of the law of nations upon Roman law, and European sovereign State-nations gave great respect to the principles of Roman law in the sixteenth century. As Brierly explains, Roman law was regarded as the written

77 George G. Wilson & George F. Tucker, above n.17, 38; Bolton v. Gladstone (UK, the Court of King’s Bench, 1804), 5 East, 155, 160.
80 James Lorimer, above n.41, 87; Wilhelm G. Grewe, above n.45, 507.
81 As revealed in the preambles of The Hague Conventions of 1899 and 1907, the requirements of the public conscience were one basis for concluding the principles of international law. The Hague Conventions of 1899 and 1907, see below n.226, the preambles.
82 Below Part V.A.ii.
reason in the scope of international law, which provided the foundation to seek the law of nature. As this section illustrates, the rule against plundering cultural property originated from Roman property law and customs of war regarding the treatment of sacred objects.

III.A.i. Distinction between sacred property and other property in Roman law

24. Roman law had made a primary distinction between sacred property and other property. In the second century, the Roman jurist Gaius divided property into two groups: objects that were subject to human law (“res ius humanum”), and objects that were subject to divine law (“res divini iuris”). Objects under divine law were not subject to any human ownership and were thus immune to private capture because of their sacred nature. They were therefore also outside the boundaries of a sovereign’s domination. The sovereign, acting as the guardian of the sacred objects, imposed strict criminal sanctions on persons who interfered with them. In this regard, sovereigns had the duty to protect such objects from any human interference within their territories, but did not possess the power to interfere with the objects. Therefore, even conquest could not justify the plunder of sacred property in the enemy’s land. The Justinian Code of the Byzantine Empire adopted this classification of property in the sixth century. Due to the profound influence of this code on the European civil law system, this distinction remained long after the Byzantine Empire fell. Sacred objects functioned as religious expressions, but they also carried both social and cultural roles, regardless of their uses within a religious or secular context. Therefore, classifying sacred objects as a particular category of property and sparing them from human interference prepared the ground for categorizing cultural property and excluding it from spoils of war.

84 Ibid.
85 For the classifications, see Charles P. Sherman, 2 Roman Law in the Modern World (1917), 139; Aelius Gallus, another Roman jurist, had a similar classification of property in the late Republic. See Alan Watson, The Spirit of Roman Law (1995), 1.
87 David M. Berry, Beyond Public and Private: Reconceptualising Collective Ownership, Dept. Media & Film (2006), 164.
89 J.B. Moyle (trans.), The Institutes of Justinian (4th ed. 1906), 36 (Justinian Institute 2.1.7); Alan Watson (trans. & ed.), 1 Digest of Justinian (2009), 96-97 (Digest of Justinian 1.8.9.5, 1.8.6.2).
III.A.ii. The custom of war against the plunder of sacred property

25. The Roman customs of war also reflected legal thinking that regarded sacred property as a special category of property and considered it as an exception to the right of conquest. Greek and Roman historians illustrated that many great commanders at that time were conscious that they ought not to plunder or destroy the sanctuaries. Grotius listed numerous instances in practice to show that looting sanctuaries and sacred artefacts were not considered a right of conquest at the time. The Roman Senate imposed severe punishments on looters or thieves for the violation of sanctuaries. As Polybius stated, “No one can deny that to abandon oneself to the pointless destruction of temples, statues and other sacred objects is the action of a madman”.

26. During the medieval era, this custom was further developed by Christian canon law, kings’ orders, and the code of chivalry. First, canon law protected churches, tombs, and their property from being stolen or looted. Second, some kings threatened their armies with the death penalty for violating churches, sacred buildings, and the property belonging to them. Finally, the code of chivalry, which exerted a strong influence on military codes during this period, began to codify the norm against looting churches during the fourteenth century.

27. Beginning in the sixteenth century, many classical international law jurists codified this custom of war in their treatises regarding the law of nations; they deemed the looting of sacred property as not merely unjust but beyond all limits of a humane society. As Grotius explained, “If there is no danger from them, reverence for divine things urges that such buildings and their furnishings be preserved”. De Vattel

---

91 Margaret M. Miles, Art as Plunder: the Ancient Origins of Debate About Cultural Property (2008), 82.
93 Margaret M. Miles, above n.91, 76-78.
96 Lucy Lynch, ibid., 73.
97 Lucy Lynch, ibid., 63, 77.
99 Hugo Grotius, above n.92, 751-52.
developed this idea and argued that belligerents should spare sacred places and objects in war, because preserving them honoured human society and did not increase the enemy’s strength. Furthermore, both Grotius and de Vattel based the norm regarding the protection of sacred property on the grounds of military necessity, which also became the juridical basis for the norm against plundering cultural property.

III.B. The ideas of Polybius and Cicero against the plunder of works of art

28. The Roman Empire was committed to conducting the systematic and organized looting of art. It created a ceremony called “the triumph” to display significant plundered artefacts as trophies from conquered nations to show Rome’s glory and strength. The right of conquest, which granted victors the right to capture everything within enemy’s territory, had justified this practice. The Greek historian Polybius, however, challenged the reasonableness of such practice in the second century BCE. He distinguished works of art from other types of spolia and argued for excluding this type of property from spoils of war, since taking it would not necessarily weaken the enemy. Grotius and de Vattel later developed Polybius’ idea, and argued for sparing cultural property from looting, on the grounds of military necessity.

29. The Roman jurist Cicero discussed the fate of works of art during his prosecution of Governor Verres on the grounds that he abused his authority by plundering...
artistic treasures in 70 BCE. Cicero raised several essential questions, as Margaret M. Miles explains: 1) why do we value Roman artefacts?; 2) who should own works of art?; 3) do works of art have a fixed location where they belong?; 4) what should happen to artefacts in times of war?; and 5) when should the victors in war allow the conquered to retain their artefacts, and why should they do so?\(^\text{108}\)

30. Cicero’s arguments were essential for forming the concept of cultural property today. Cicero appreciated works of art as culturally valuable, rather than for its economic or religious value.\(^\text{109}\) Modern society has adopted his idea, and similarly values the importance of cultural property to archaeology, prehistory, history, literature, art and science, whether on religious or secular grounds.\(^\text{110}\) Moreover, Cicero valued artefacts as an essential part of the conquered people’s life, and observed the psychological connection between cultural property and the people it represented.\(^\text{111}\) On this basis, Cicero argued that cultural artefacts should remain in their original surroundings, which provided the philosophical basis for the restitution of plundered art to its original territory.\(^\text{112}\)

31. Cicero’s notion that works of art belonged in their original surroundings had a decisive impact on later generations.\(^\text{113}\) His speeches were more widely known during the Renaissance, shaping the view of the early modern European world regarding the ownership of art.\(^\text{114}\) Cicero’s views also exerted influence on Hugo Grotius, who quoted many essays and speeches of Cicero to support his own arguments.\(^\text{115}\) The essential idea that had been traced from Cicero to Grotius was the recognition of a human community that transcended the borders of sovereigns.\(^\text{116}\) This idea also provided the juridical basis for protecting cultural property in war, regardless of its ownership. Most important of all, Cicero’s arguments played a significant role in changing legal thinking and social reactions to the looting of art in Europe during the

\(^{107}\) Margaret M. Miles, above n.91, 8; Francis H. Taylor, The Taste of Angels: a History of Art Collecting from Rameses to Napoleon (1948), 30-31; Patty Gerstenblith, Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward, 7 Cardozo Public Law, Policy & Ethics Journal (2008-2009), 679; Margaret M. Miles, above n.91, 2.

\(^{108}\) Margaret M. Miles, ibid.

\(^{109}\) Margaret M. Miles, ibid., 6, 363-64.

\(^{110}\) Above n.1.

\(^{111}\) Cicero Comments on the Impact on Foreign Envoys to Rome of Verres’ Plundered Art from Asia Minor, as reprinted in Margaret M. Miles, ibid., 363-64.

\(^{112}\) Ibid.; Cicero Comments on Scipio Aemilianus Repatriation of Art Booty from Carthage to Sicilian Cities, as reprinted in Margaret M. Miles, ibid., 366-67.

\(^{113}\) Margaret M. Miles, ibid., 7.

\(^{114}\) Ibid.

\(^{115}\) Ibid., 229, 287-88; 299.

\(^{116}\) Ibid., 300.
seventeenth century. Edmund Burke for example quoted Cicero’s Verres in his opening speech on the prosecution of Warren Hastings for extortion in 1794 in India. Lord Elgin was described as another Verres when he removed the classical Greek marble scriptures from the temple of the Parthenon in Athens in 1801 and 1802. Quatremère de Quincy, a French artist and architectural theorist in Napoleon’s time, also borrowed Cicero’s arguments to criticize Napoleon as comparable to Verres in his confiscation of art.

IV. The formation of the rule against plunder in the seventeenth and eighteenth centuries

IV.A. The usage against the plunder of cultural property

32. Looting an enemy’s artistic treasures was a common practice beginning in the Roman era. However, sovereigns in Europe began to refrain from plundering each other’s cultural property starting with the Peace of Westphalia in 1648. As a result, the practice of looting artefacts was abandoned almost entirely during the mid-seventeenth and eighteenth centuries. In this regard, a usage of refraining from plundering each other’s cultural property, upon which European sovereigns uniformly acted for over a century, had been established by the end of the eighteenth century.

IV.B. The change in the perception of the right of conquest

33. What made sovereigns stop the looting of art, which had occurred for millennia, and instead refrain from this practice? There are three key questions to ask when considering this shift of practice. First, may the abstentions of sovereigns result from lack of interest? As we know, sovereigns had eagerly looted artistic treasures in war because

117 Ibid., 286.
118 Ivan A. Lindsay, above n.2, 24; Margaret M. Miles, ibid., 302.
120 Margaret M. Miles, above n.91, 326.
121 See text to n.102.
122 Lakshmikanth R. Penna, Protection of Cultural Property During Armed Conflict, in: Maley William (ed.), Shelter from the Storm: Developments in International Humanitarian Law (1997), 258; Wilhelm Treue, above n.103, 162; John H. Merryman, above n.181, 325; John H. Merryman, above n.102, 4; Charles de Visscher, above n.6, 824; Stanislaw E. Nahlik, above n.92, 203.
123 Charles de Visscher, ibid., 824; Wilhelm Treue, ibid., 162; Percy Bordwell, above n.78, 62.
they were interested either in economic profits or seizing them as emblems of national glory. Cultural property was still economically or politically significant during the mid-seventeenth and eighteenth centuries. In this regard, refraining to loot works of art was not likely to result from lack of interest among sovereigns. Second, may the abstentions result from lack of capacity? Logically speaking, how could a party lack the capacity to loot his enemy, if they could engage in a war? Even if some sovereigns at the time of war were too weak to loot, that was not the general cause for all sovereigns who refrained from looting artefacts. In this sense, why would sovereigns stop exercising the right to plunder artistic treasures when they had considerable interests in and the ability to do so? Furthermore, why would they stop looting when they could rely upon the traditional right of conquest and the customs that permitted such practice for centuries? This goes to the third question—may the abstentions result from lack of legal ground? As the current section argues, the abstentions resulted from a change in the perception of justice and reasonableness that restricted the right of conquest.

IV.B.i. The emergent principle of military necessity

34. Due to the influence of the ideologies of the Enlightenment, many classical international law jurists sought to use reason to limit the damage of warfare and place restrictions on the right of conquest.124 According to these jurists, treatment of an enemy’s property was determined by just war and just cause.125 These jurists always related just cause to military necessity, which determined what type of property could be taken. Gentili marked laying waste to things irrelevant to war as “rage and madness”.126 Pufendorf likewise argued, “the law of humanity demands that I destroy none of the enemy’s property except because of necessity”.127 And Wolff held that the law of nature granted a right to an enemy’s property only when it was necessary for waging war.128 Wolff further clarified that a just cause could be a reason, such as diminishing the strength of an enemy and increasing that of the just party.129

35. Grotius emphasized that it was not necessary to use force upon things of no danger to an army in a war, but which honoured human society, such as temples and

124 Wayne Sandholtz, above n.102, 40-44.
127 Samuel von Pufendorf, above n.98, 256.
128 Christian Wolff, above n.125, 427.
129 Ibid., 426.
sacred properties. De Vattel developed Grotius’ idea and excluded more types of cultural property from spoils of war. As he stated,

For whatever cause a country is ravaged, we ought to spare those edifices which do honor to human society, and do not contribute to increase the enemy’s strength,—such as temples, tombs, public buildings, and all works of remarkable beauty. What advantage is obtained by destroying them? It is declaring one’s self an enemy to mankind, thus wantonly to deprive them of these monuments of art and models of taste.

36. The arguments of Grotius and de Vattel have thus provided the juridical basis for excluding cultural property from spoils of war on the grounds of military necessity. In this regard, the looting of cultural property could not be justified by military necessity; because looting of cultural artefacts was not necessary for sovereigns to engage in or sustain a war. The principle of military necessity later became an essential principle of the law of war, which provided a foundation for the rule of protection of cultural property in war in the nineteenth century.

IV.B.ii. The change in legal thinking about cultural property as spoils of war
37. The Renaissance increased people’s appreciation for cultural artefacts and enhanced the cultural impact of art in the development of humanism. As a result, jurists became interested in the protection of cultural property. For example, the Polish jurist Jakub Przyluski had expressed a principle forbidding the plundering of works of art in the sixteenth century. Cicero’s idea concerning the fate of artefacts was revived and used as a compelling ancient precedent on the ethics of collecting cultural artefacts. De Vattel argued that the law of nations absolutely condemned the wanton destruction of cultural property. By the eighteenth century, Cicero’s arguments, together with de Vattel’s views, played a significant role in changing legal thinking about and social reactions to the looting of artefacts in Europe.

130 Text to n.99.
131 Emer de Vattel, above n.100.
132 Below Part V.B.
133 Wayne Sandholtz, above n.102, 35-36; Stanislaw E. Nahlik, above n.6, 1071; Victoria A. Birov, Prize or Plunder? The Pillage of Works of Art and The International Law of War, 30 NYU JIL & Politics (1997-1998), 205-6.
134 Stanislaw E. Nahlik, above n.92, 203.
135 Margaret M. Miles, above n.91, 8. For Cicero’s influence in the eighteenth century, see text to nn.113-120.
137 Margaret M. Miles, above n.91, 286.
Consequently, sovereigns began to refrain from looting each other’s artistic artefacts and developed the usage against the plunder of cultural property.

38. In conclusion, the usage of refraining from looting cultural property in war emerged in the seventeenth century. Sovereigns uniformly acted in conformity with this usage over a century, which overturned the previous usage of looting artistic treasures in warfare. This new usage reflected a change in the perception of justice and reasonableness regarding the right of conquest during the seventeenth and eighteenth centuries. Therefore, the rule against plundering cultural property was established in the laws and customs of war by the end of the eighteenth century.

39. Customs of war may be local, but the laws of war are universal rules by nature.138 The law of nature had general application to all nations,139 even though the practices in conformity therewith were more common in the western world. As Grotius explained, the law of nature was applied universally, because it reflected “the common sense of mankind”.140 The rule against plunder was a general rule of the laws of war rather than a mere European custom of war. The rule against plunder reflected requirements of the law of nature regarding military conduct during the era when natural law was dominant. Thus, the rule against plunder had a universal application and should apply to all nations, even though the practice of it appeared primarily in Europe at that time.

V. Development of the rule against plunder in the nineteenth century

V.A. Napoleon’s looting and restitution of cultural property

40. Napoleon conducted a systematic and organized confiscation of cultural artefacts throughout Europe from 1794 to 1814.141 Napoleon’s looting, which deviated

138 Francis Lieber, et al., above n.44, 4 (“Through the centuries the civil theorists evolved a set of dicta based on natural law theory, religious and secular, combined it with their view of custom, practice and law, and pronounced a law of nations which ought to be binding on all societies.”) Ingrid D. Lupis, The Law of War (1987), 125 (“Occasionally the Law of War is adapted to local customs, but for the most part rules are universal application”).


140 Hugo Grotius, above n.92, 42.

141 For the details of Napoleon’s confiscation of artistic treasures, see Cecil Gould, Trophy of Conquest, The Musée Napoléon and the Creation of the Louvre (1965), 31, 34, 48; Wilhelm Treue, above n.103, 143-44; Patricia Mainardi, Assuring the Empire of the Future: the 1798 Fete de la Liberte, 48 Art Journal (1989), 155; Dorothy M. Quynn, The Art Confiscations of the Napoleonic Wars, 50 The American Historical Review (1945), 439; Margaret M. Miles, above n.91, 319-28; Wayne Sandholtz, above n.102, 48-52.
dramatically from the newly established rule against plundering cultural property, cast doubt on the validity of the rule. This section argues that the rule against plundering cultural property was, instead of being eroded, strengthened as a consequence of Napoleon’s looting. This argument includes three sections: 1) the means of Napoleon’s looting, which shows that he knew that the right of conquest no longer permitted looting; 2) the public condemnation of his looting, which strongly suggests that modern civilization could not tolerate such practice; and 3) the reactions from other States to Napoleon’s looting, which not only confirmed the existence of the rule, but also strengthened the rule by confirming restitution as the only remedy for violation of the rule, so long as the looted articles were preserved and identifiable.

V.A.i. Means of Napoleon’s looting of cultural property
V.A.i.a. Concealing government-sponsored looting
41. Napoleon secretly sent specialists to accompany his troops with confidential instructions to confiscate artefacts during his campaign in Belgium in 1794. Why would Napoleon seek to conceal confiscation if he believed he had the right to do so? His behaviour indicated that the plunder of cultural artefacts was no longer regarded as “a natural right of warfare at that time”.

V.A.i.b. The confiscation of cultural artefacts by treaties
42. Moreover, Napoleon began to use treaty clauses to transfer ownership of plundered artefacts during his campaign in Italy beginning in 1796. Napoleon and his high-level officials deemed such a clause to be unprecedented in modern history. Why would Napoleon write his confiscation into treaty clauses if the traditional view of conquest naturally justified such practice? Does it indicate that conquest alone no longer justified such seizure during this time? Another important detail is that Napoleon stopped concealing confiscation when he used treaties to defend this practice. It seems that Napoleon became confident enough to reveal these confiscations when he discovered a new way to validate the practice. Both concealing looting and

142 Patricia Mainardi, ibid., 156.
143 Ibid.
144 For instance, the armistice with the Duke of Modena on 17 May 1796, the treaty with the Duke of Parma on 18 May 1796, the armistice with the Pope’s representative in Bologna on 23 June 1796, and the Treaty of Tolentino with the Pope in February of 1797. Wilhelm Treue, above n.103, 149-150; Margaret M. Miles, above n.91, 319-320; Cecil Gould, above n.141, 45-48.
145 In Napoleon’s memoirs, he regarded such confiscation clause as an act unprecedented in modern history. High-level French officials also deemed it to be a “nouveau trait qui vous distingue” (new distinguishing feature). See Cecil Gould, ibid., 45.
using treaties to justify the confiscation thus indicate that Napoleon knew that modern warfare no longer allowed the traditional practice of looting cultural artefacts.

V.A.ii. Public conscience against Napoleon’s looting

V.A.ii.a. Quatremère’s arguments against Napoleon’s looting

43. Confronted with Napoleon’s looting, Quatremère de Quincy, a prominent French archaeologist, argued that States should not revive the Roman right of conquest to confiscate the enemy’s property.\(^{146}\) Moreover, he raised the idea that works of art should be preserved in their particular geographical and archaeological contexts.\(^{147}\) According to his argument, to divide was to destroy; artefacts should not be removed because the artistic and historical value and effects of them could only be fully appreciated in their original surroundings.\(^{148}\) Quatremère’s idea offered the philosophical basis for the rule against plundering cultural property, and furthermore provided the juridical basis for the restitution of looted artefacts to their original surroundings. Quatremère circulated his viewpoint in the publication of a 74-page pamphlet and his letters to General Miranda in 1796.\(^{149}\) His arguments played an important role in raising public opinion against Napoleon’s actions.\(^{150}\)

V.A.ii.b. Public debate on the legality of Napoleon’s looting

44. Quatremère later petitioned the French government and urged them to cease confiscating these artefacts.\(^{151}\) Quatremère’s petition intensified public debate on the legality of Napoleon’s confiscation.\(^{152}\) Forty-seven of the most distinguished French artists at the time signed the petition and supported the movement against Napoleon’s looting.\(^{153}\) Soon afterwards, another group of thirty-seven artists, not as eminent as the first group, sent a counter-petition.\(^{154}\) They defended the government’s looting on the grounds that France was allowed to confiscate works of art by

---

146 Patricia Mainardi, above n.141, 156.
147 Wilhelm Treue, above n.103, 178; Dorothy M. Quynn, above n.141, 439; Margaret M. Miles, above n.91, 326.
148 Ibid.
149 Dorothy M. Quynn, ibid.
150 Ibid., 327; Wilhelm Treue, above n.103, 178; Charles de Visscher, above n.6, 824; Patricia Mainardi, above n.141, 156;
151 Ibid., 327; Wilhelm Treue, above n.103, 178; Charles de Visscher, above n.6, 824; Patricia Mainardi, above n.141, 156;
152 Ibid.
153 Patricia Mainardi, ibid.; Margaret M. Miles, above n.91, 178-179; Wayne Sandholtz, above n.102, 56-57.
154 Ibid.
right of conquest.\footnote{155} The public debate on the legality of Napoleon’s practice further undermined the beliefs that once supported the ancient practice of looting.

\textit{V.A.ii.c. Public sentiment against Napoleon’s looting}

45. In general, people of the conquered nation naturally resented their losses. However, Napoleon’s looting aroused great indignation that went beyond State borders and spread widely among the patrons of the arts throughout the world.\footnote{156} The people of Italy were not alone in vigorously protesting the removal of artefacts.\footnote{157} Many scholars at that time regarded such practice as criminal robbery, and argued that such behaviour was unacceptable in modern society.\footnote{158} In one instance, even the French army stood up to oppose these confiscations and demanded punishment for these crimes.\footnote{159} French soldiers also demanded that their government return all confiscated artefacts to their previous owners.\footnote{160} Although the opposing voices were powerless to stop French military looting, such social reactions, for the first time, were so forceful as to raise serious doubts about the legality of looting.

46. As mentioned previously, ceremonially displaying looted art trophies was originally a way to demonstrate the victorious nation’s strength during the Roman era.\footnote{161} Napoleon attempted to earn the same kind of glory for France by reviving the traditional Roman practice. Instead, he provoked strong condemnations from outside and even within France. This paradigm shift in the public’s attitudes convincingly suggests that modern civilization was no longer tolerant of such a practice. The beliefs in appreciating cultural property rooted in civil societies of the modern State provided formidable momentum to securing the legal norm against plunder. This momentum also extended the rule with the later addition of restitution as the remedy.

\footnotesize{\begin{enumerate}
\item[155] Ibid.
\item[156] Wilhelm Treue, above n.103, 176.
\item[157] Dorothy M. Quynn, above n.141, 441; Charles De Visscher, above n.6, 825; François R. Jean (Baron de Pommereul), Campaign of General Buonaparte in Italy (1799), 131.
\item[158] Wilhelm Treue, above n.103, 175, 180; Eugène Müntz, Les annexions d’art ou de bibliothèques et leur rôle dans les relations internationales [Annexations of Art or Libraries and Their Role in International Relations] (1896), 49; Charles de Visscher, ibid., 825.
\item[159] In February of 1798, when Napoleon’s armies plundered Rome, military officers of the French General Berthier drew up a statement and also issued a proclamation later to the people of Rome to show their condemnation to such practice. See Wilhelm Treue, ibid., 158-159.
\item[160] Ibid.
\item[161] Text to n.103.}

\end{enumerate}
V.A.iii. Reactions of other States to Napoleon’s looting and restitution

V.A.iii.a. Britain’s arguments against Napoleon’s looting and for restitution

47. The strong opposition to Napoleon’s looting not only occurred in European civil society, but also among European sovereigns. During the peace negotiations in Paris, the allied powers attempted to “discover a mode of doing justice” to deal with Napoleon’s looting.162 The Duke of Wellington, the commander who defeated Napoleon at Waterloo and later became a British diplomat in Paris, argued that stolen artistic treasures should be returned to their countries of origin because Napoleon’s looting was contrary to the law of war.163 Wellington circulated his argument at the diplomatic conference and received general acceptance among the allied powers.164 Lord Castlereagh, the British diplomat to the Congress of Vienna, fully supported Wellington’s claim and contended that Napoleon’s looting was “contrary to every principle of justice and the usages of modern warfare.”165 Accordingly, Castlereagh claimed that returning the plundered artefacts to the territories where the looting occurred was the “only guide to justice.”166 Castlereagh also declared on behalf of Britain that it was the duty of the allied sovereigns to facilitate the return of these artistic treasures to their countries of origin.167

V.A.iii.b. Responses of other allied powers to the Britain’s arguments

48. Other allied powers offered broad support to Wellington and Castlereagh’s arguments. Prince Hardenberg, the Prussian minister, quickly stated his complete agreement with Britain’s reasoning.168 Other allied powers, including Austria, Spain, the Low Countries, the German states, the Italian states, and the Vatican all contended that France had no right to retain the plundered art.169 Consequently, the allies refused a French request to include a clause in the second Treaty of Paris in 1815 to

162 See the Letter of the Duke of Wellington to Viscount Castlereagh, Paris, 23 September 1815, as reprinted in 3 British & Foreign State Papers (1815-1816), 207.
163 The House of Commons Select Committee on Culture, Media and Sport (UK), Memorandum submitted by the Committee on the Parthenon, paras.7.3, 7.4. (publications.parliament.uk/pa/cm199900/cmselect/cmcumeds/371/371ap40.htm); Christopher Hibbert, Wellington (1997), 199.
164 See the publications in the London Courier on October 3 and October 4, 1815, as reprinted in Dorothy M. Quynn, above n.141, 448, 452-53.
165 Letter from Viscount Castlereagh to Plenipotentiaries of Austria, Prussia, and Russia (Sept. 1815), as reprinted in 3 British & Foreign State Papers (1815-1816), 204.
166 Ibid, 207.
168 Ibid.
169 Ibid., 150.
retain all the previous looted cultural property. On behalf of the allies, Wellington also refused another French request to make restitution only to a few powers, such as Prussia. As Wellington expressed to the French representative, he stood there for all the allied powers, and must claim restitution for all of them. In the meantime, victim States began to negotiate restitution and gave support to one another.

V.A.iii.c. French tacit consent to restitution

49. The French government opposed the allies’ desire for restitution at the beginning of the negotiations, but later changed its attitude and gave tacit consent to restitution. For instance, Wellington asked Louis XVIII, the newly restored French king, for an opinion about what mode might be employed to make the restitution that would be the least offensive to him. Louis XVIII replied that he could give no order upon this matter and Wellington might act as he thought proper. In another instance, Charles Maurice de Talleyrand-Périgord, the French representative at the peace negotiations in Paris, advised the director of French museums to allow the Prussians to start packing their statues and busts during Prussia’s negotiations with the museums. Later, when Prussia’s attempts to remove their plundered artefacts at the Louvre were met with the resistance of eighty men of the French National Guard, the ministry of the French National Guard instructed the guards to step back.

50. The tacit consent of the French government to restitution was made not only because of political considerations, but also because of a deep conviction that France lacked the right to retain the looted artefacts. As admitted in the memoirs of Talleyrand, who had made all the arguments against restitution during negotiations, “[P]erhaps the monuments of art should never have entered the domain of conquest”.

---

172 Ibid.
173 Wayne Sandholtz, above n.167, 149-50; Wilhelm Treue, above n.103, 193-95; Dorothy M. Quynn, above n.141, 455-456.
174 Wilhelm Treue, ibid., 187; Wayne Sandholtz, ibid.; Wayne Sandholtz, above n.102, 53-55.
175 The Letter of the Duke of Wellington to Viscount Castlereagh, above n.162, 208.
176 Ibid.
177 Wilhelm Treue, above n.103, 191.
178 Ibid., 191-92.
179 Talleyrand-Périgord, Mémoires II, 1807-1815, 463, as quoted in Wayne Sandholtz, above n.167, 5.
51. Restitution was a natural means of remedy flowing from violation of the rule against plundering cultural property. According to Richard Zouch, robbery or theft could not transfer the legal title of the lost property, and instead, merely changed the possession. Due to the unique character of cultural property, as long as the plundered works were preserved and identifiable, restitution should be the only remedy for violation of the rule against plunder, in which compensation cannot take the place to restore the status quo ante.

52. In the Marquis de Somerueles case of 1812, in the British Vice-Admiralty Court of Halifax, Judge Croke held, “The arts and sciences are admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favour and protection”. On this basis, Croke issued orders for the restitution of the works of art which Britain seized as war prizes during the US—UK War of 1812, thus returning them to the Pennsylvania Academy of the Fine Arts in Philadelphia.

53. Acts of restitution after the defeat of Napoleon confirmed the general acceptance of this remedy. As Part V.A.iii. demonstrates, the outcome of restitution was not an arbitrary exercise of the victors’ power, but an expression of international law against plundering cultural property existing at the time of restitution. Wellington and Castlereagh’s arguments reflected the general belief of sovereigns that modern laws and usage of war prohibited the looting of art. This belief was not a one-sided view held by the victorious parties or by the victim parties, but was a general opinion shared with the French government and neutral sovereigns that did not suffer Napoleon’s looting. This general belief was in accordance with the law of nature regarding the justice and practice of modern warfare in the early nineteenth century. Because of this belief, sovereigns consented to make restitutions; as a result, almost all the victim States ultimately received artefacts that were looted from them. After that, the right to restitution was formally confirmed in the second Treaty of Paris, signed on 20 November 1815, which obliged France to return the plundered artefacts.

---


181 The Marquis de Somerueles (UK, Vice-Admiralty Court of Halifax, 1812), Stewart’s Vice Admiralty Reports (1813), 482, as reprinted in John H. Merryman, Note on the Marquis de Somerueles, 2 International Journal of Cultural Property (1996), 319.

182 Ibid., 319, 321.

183 Wayne Sandholtz, above n.167, 150; Wayne Sandholtz, above n.102, 61; Wilhelm Treue, above n.103, 195.
to their former sovereigns.\textsuperscript{184} Restitution after the final defeat of Napoleon was therefore not only a reflection of the existing international law against such plunder by that time, but also a contribution to international law by confirming restitution as the only remedy for violation of the law, so long as the plundered works existed and were identifiable.

54. The rule against plundering cultural property, including restitution as the remedy, was a general rule that would apply to all nations rather than merely a European custom. The decision of the \textit{Marquis de Somerueles} case, concluded by admiralty courts, which were considered one of the main sources of the law of nations in the nineteenth century,\textsuperscript{185} strongly suggests the universal application of the rule against plunder. As mentioned previously, according to natural law theory, although the rule against plunder appeared mainly as a European practice, such practice reflected the requirement of the law of nature, which ultimately defined the law of war concerning the right of conquest; thus the rule should apply to all nations. With the rise of positivism in the second half of the nineteenth century, the rule against plunder began to acquire its binding force and universal application by consent of the international community in the process of codifying the laws and customs of war.

\section*{V.B. Codification of the rule against plundering cultural property}

55. One feature of international relations in the nineteenth century was the rise of the international community.\textsuperscript{186} There came into existence many nations and powerful governments related to one another in close connection, distinct from earlier times.\textsuperscript{187} As a result, peace became the normal condition of States while war was considered the exception; thus, the ultimate end of all modern war was a renewed state of peace.\textsuperscript{188} In this context, States began to codify the law of war, which had developed in the form of customary international law previously, in the second half of the nineteenth century.\textsuperscript{189}

56. The customary rule against plundering cultural property also fell within the scope of codification during this time. This rule was first codified in the Lieber Code

\textsuperscript{185} Above Part II.B.iv.
\textsuperscript{186} Lewis R. Harley, above n.46, 141-42 ("The civilized nations have come to constitute a community of nations").
\textsuperscript{187} Ibid., 151.
\textsuperscript{188} Ibid.
of 1863, then in the Brussels Declaration of 1874 and the Oxford Manual of 1880, and finally in The Hague Conventions of 1899 and 1907. Contrary to many scholars who claim that the rule against plunder was formulated by codification during this period,190 this section argues that these international agreements did not articulate new rules against plunder, but merely codified established rules with specificity and clarity. In addition, this section claims that the customary rule against plunder acquired its binding character from the law of nature to the consent of States.

V.B.i. The Lieber Code of 1863

57. The Instructions for the Government of Armies of the United States in the Field, General Order No. 100 (the Lieber Code of 1863) was the earliest official government codification of the laws of war,191 including the rule against plundering cultural property.192 It treated property belonging to churches and museums of fine art as private property, even though it was public property (Article 34).193 Accordingly, property belonging to churches and museums of fine art should not be confiscated unless required by military necessity (Article 38).194 Article 35 more specifically called for the protection of classical works of art, libraries, scientific collections, and precious instruments, “even when they are contained in fortified places whilst besieged or bombarded”.195 Article 36, however, formulated an exception to the principle against looting cultural property; “the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace”.196 In this regard, as Alan Marchisotto explains, “In no event were the seized works to be privately appropriated, sold, destroyed, or given away before ownership was ultimately determined by treaty”.197 This article corresponded with the practice of restitution after the defeat of

190 Above n.6.
193 The Lieber Code of 1863, ibid., art. 34.
194 Ibid., art. 38.
195 Ibid., art. 35.
196 Ibid., art. 36.
Napoleon; during that occasion, the peace treaty ultimately confirmed the proper ownership of plundered artefacts.\textsuperscript{198}

58. Articles 34, 35 and 36 reflect the customary rule against plundering cultural property in the mid-nineteenth century. Lieber drafted this code according to the laws and customs of war at that time.\textsuperscript{199} He observed the laws and customs of war by various sources of the law of nations, including “[u]sage, history, reason, and conscientiousness, a sincere love of truth, justice and civilization”.\textsuperscript{200} As for the protection of cultural property, Lieber extended Grotius’ idea of military necessity, and required that the necessity must be present, urgent, and overruling.\textsuperscript{201} In this sense, he argued that monuments of art, religious temples, churches, libraries, and public or private buildings of a civil character should be spared unless the standard of military necessity was met.\textsuperscript{202} Military necessity has thus been regarded as the general principle to limit the violence of war since the Lieber Code,\textsuperscript{203} and has provided a firm foundation for protecting cultural property during warfare.

59. The Lieber Code significantly enhanced the codification of the laws and customs of war and particularly the rule against plundering cultural property in the nineteenth century.\textsuperscript{204} It exerted a powerful influence on government legal advisors or diplomats, jurists, and legal scholars in the network of international law.\textsuperscript{205} These legal professionals, in turn, influenced the States they worked for in attempts to finalize international agreements to codify the laws of war.\textsuperscript{206} As a result, the Lieber Code

\textsuperscript{198} Ibid., 696 and text to n.184.
\textsuperscript{199} The title of the draft clearly reflected this foundation—Code for the Government of Armies in the Field as Authorized by the Laws and Usages of War on Land. Furthermore, the formal text of the Code defined it as “martial law” and explained, “Martial Law is simply military authority exercised in accordance with the laws and usages of war”. See the Lieber Code of 1863, above n.192, art. 4; also see Lewis R. Harley, above n.46, 149 (“Lieber was commissioned to prepare a code, which should conform to the existing usages of war”).
\textsuperscript{200} Francis Lieber, et al., above n.44, 10.
\textsuperscript{201} Ibid., 123-24.
\textsuperscript{202} See Official Orders dealing with the Application of Lieber’s Essay on Guerrilla Warfare, 22 April 1863, General Orders No.30; and also see The Letter From D. Hunter, Major-General, to James Montgomery, Colonel, Stressing the Protection of Fugitives, 9 June 1863. Both documents are reprinted in Francis Lieber, et al., ibid., 100, 113, respectively.
\textsuperscript{203} Burrus M. Carnahan, above n.191, 213.
\textsuperscript{204} Ibid., 215.
\textsuperscript{205} Wayne Sandholtz, Dynamics of International Norm Change: Rules against Wartime Plunder, 14 European Journal of International Relations (2008), 115; Wayne Sandholtz, above n.102, 71-72; Wayne Sandholtz, above n.167, 153; John H. Merryman, above n.181, 326.
\textsuperscript{206} Ibid.
provided the material basis for the Brussels Declaration of 1874, the Oxford Manual of 1880, and The Hague Conventions of 1899 and 1907.

V.B.ii. The Brussels Declaration of 1874 and the Oxford Manual of 1880

V.B.ii.a. The Brussels Declaration of 1874

60. Russia initiated, and fifteen European States attended, the Brussels conference and adopted the Project of an International Declaration Concerning the Laws and Customs of War (the Brussels Declaration). The Brussels Declaration represented the first attempt by the international community to codify the laws and customs of war, including the rule against plunder. Similar to the Lieber Code, the Brussels Declaration regarded property belonging to churches and museums of fine art as private property (Article 8). Compared to the Lieber Code, the Declaration provided a stricter rule against plunder, which stated that military necessity was not an exception to confiscation of private property (Article 38).

61. Furthermore, the Declaration required that “All seizure [of] institutions of this character [dedicated to religion and arts], historic monuments and works of art should be made the subject of legal proceedings by the competent authorities” (Article 8). This article clarified that competent authorities would prosecute the actors who violated the rule against plunder and conducted illicit confiscation. Later in the Nuremberg trials of 1946, the tribunal relied on a similar stipulation in The Hague Conventions of 1899 and 1907 to prosecute war criminals that illegally confiscated works of art during World War II.

62. The Brussels Declaration was never ratified because States were not ready to accept strict conventional obligations. However, the adoption of the articles relating to the protection of cultural property reflected States’ general belief in the established rule against plundering cultural property in the laws and customs of war. As the records reveal, this conference was determined “to enter into no new obligations, no new commitments of any kind with regard to general principles.”

207 Project of an International Declaration Concerning the Laws and Customs of War, adopted by the Conference of Brussels, 27 August 1874, as reprinted in 1 AJIL Supp. (1907), 96-107.
208 Ibid., art. 8.
209 Ibid., art. 38.
210 Ibid., art. 8.
211 International Military Tribunal (Nuremberg), below n.280, 68.
212 The Oxford Manual of 1880, below n.218, the preamble.
213 See the title of the agreement as “Declaration Concerning the Laws and Customs of War”, above n.207.
Martens, who drafted the Declaration, also described the conference as “in a sense the natural development of a thought, which has long been recognized as just”. Thus, the absence of ratification would not undermine the States’ belief in general laws and customs of war at that time.

63. The Brussels Declaration had considerable influence upon many of the subsequent manuals prepared for the use of armies in the field. Furthermore, it helped the international community prepare for concluding the conventions on the law and customs of war during the Hague Peace Conferences at the end of the nineteenth century.

V.B.ii.b. The Oxford Manual of 1880

64. The Institute of International Law (Institut de Droit International) established a committee to study the Brussels Declaration of 1874, and then adopted Les Lois de La Guerre sur Terre (The Laws of War on Land) (the Oxford Manual) in 1880. The Oxford Manual offered the strictest rule against plundering cultural property. Article 53 directly stipulated that the property of institutions devoted to religion and art could not be seized. It also stated, “All destruction or wilful damage to institutions of this character, historic monuments, archives, Works of art, or science, is formally forbidden, save when urgently demanded by military necessity”.

65. The articles relating to cultural property also declared the established rules of customary international law at that time. The preamble of the Manual sought to observe the laws of war by “codifying the accepted ideas of our age so far as this has appeared allowable and practicable”, and “in accord with both the progress of juridical science and the needs of civilized armies”.

66. The Oxford Manual was intended to provide governments with a manual as a suitable basis for national laws in each State. Copies of the manual were then sent to various governments, with a letter declaring it to be the duty of each government

---

215 Ibid., 76.
217 Below Part V.B.iii.
219 Ibid., art. 53.
220 Ibid.
221 Ibid., preface.
222 Ibid.
to issue some such instructions to its troops. According to Percy Bordwell, various governments did informally adopt this manual.

V.B.iii. The Hague Conventions of 1899 and 1907

67. The Hague Peace Conferences of 1899 and 1907 marked the greatest achievements in codifying the laws and customs of war in the form of conventions. The two conferences adopted two conventions concerning the laws and customs of war on land with regulations respectively. Both conventions codified the rule against plundering cultural property. The Hague Convention II of 1899 stipulated in the regulation, Article 56, “[the property] of religious, charitable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property.” It also stipulated in Article 46 that private property cannot be confiscated. There were further stipulations in Article 56: “All seizure of... such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.” The provisions in The Hague Convention IV of 1907 offered minor revisions of those already established in 1899.

68. Most of the provisions in the two conventions merely restated international law rather than amending it; it therefore applied to all nations even if some powers had not signed and ratified the conventions at that time. The provisions concerning the protection of cultural property were among those provisions that restated international law. As the records reveal, there were no debates on drafting Article 56 throughout all of the meetings of both conferences. The context of Article 56 has

223 Percy Bordwell, above n.78, 113.
224 Ibid., 115-16.
227 The Hague Conventions II of 1899, ibid., art. 56.
228 Ibid., art. 46.
229 Ibid., art. 56.
230 The Hague Conventions IV of 1907, above n.226, art.56, art.46.
been unanimously adopted in conformation with the wording of the Brussels Declaration with slight modifications that were merely changes in expression.\textsuperscript{233} The unanimous adoption of the rule according to the Brussels Declaration reflected that the powers participating in the Hague Peace Conferences accepted that the rule laid down in the Brussels Declaration was an established rule of the laws of war and was still valid in their time. Moreover, according to Bordwell, placing the rules of warfare in the Regulations instead of in the Conventions would not diminish their obligatory character.\textsuperscript{234}

\textit{V.B.iv. Development of the rule against plunder in the context of a fundamental change in legal philosophy}

69. In earlier times, the rule against plundering cultural property obtained its binding force by the law of nature and was confirmed by established usage.\textsuperscript{235} The efforts of the international community to codify the rules of warfare reflected that this customary rule began to acquire its binding force because of the adoption of the international community. In this process, the rule against plunder, along with other established customary rules of warfare, gradually shifted in legal foundation from the law of nature to the general consent of the international community.

70. Compared with classical international law jurists, the jurists in the nineteenth century articulated the rules of war with stricter restrictions on the damages of war.\textsuperscript{236} As previous military history shows, the law of war was insufficient to ensure that belligerents would faithfully follow these rules in the form of customary international law.\textsuperscript{237} Thus, Lieber attempted to fill in the gap between the law of war in theory and military disobedience in practice by clarifying the rules in a code.\textsuperscript{238} Inspired by Lieber’s model, many nations soon recognized that relying on the traditional means to observe the law of war would not effectively secure the application of it in military practice.\textsuperscript{239} They agreed that it was necessary to fix the rules of warfare with precision, and to make them compulsory for governments and their armies.\textsuperscript{240} They believed that only the consent of States regarding a common understanding of the rules of war

\begin{itemize}
\item 233 Feder F. Martens, above n.214, 546, 563-64.
\item 234 Percy Bordwell, above n.78, 135-36.
\item 235 Above Part IV.
\item 236 Lewis R. Harley, above n.46, 151; Feder F. Martens, above n.214, 115.
\item 237 Feder F. Martens, ibid., 79-80.
\item 238 Francis Lieber, et al., above n.44, 4-5.
\item 239 Feder F. Martens, above n.214, 73-74.
\item 240 Ibid., 73-75, 95-96, 98-99.
\end{itemize}
could effectively prevent acts that were contrary to the rules. They also agreed that it was the right time to bring States together for this purpose due to the development of solidarity among States. This shared view ultimately led to convening the Brussels Conference.

71. The Brussels Conference was regarded as epoch-making. It manifested the willingness of the powers to come to a common understanding regarding the laws and customs of war. Russia initiated the Brussels Conference with the intention of making this declaration the common rule of all civilized peoples. Though only fifteen European powers attended the conference, the rules they recognized as the laws and customs of war were to impose limits on the actions of all nations, particularly those of major powers. Consequently, the small States were interested in taking advantage of these circumstances to protect their rights in the event of war.

72. By the end of the nineteenth century, States were ready to accept conventional obligations of the rules codified by the Brussels Declaration, which led to the convening of The Hague Conventions of 1899 and 1907. The two Hague Conferences aimed to define the laws and customs of war that would apply to all nations. The First Hague Conference (1899) was attended by the representatives of twenty-six countries. It included all the major European powers, with the United States and Mexico attending from North America and China, Japan, Persia, Siam, and Turkey from the Near and Far East. This conference showed that different nations could meet and consent to the rules that apply to all humankind.

241 Ibid., 73-74.
242 Ibid., 91, 95-96 (“All these governments have shown themselves ready to define the rights and duties of the belligerents in order to bring the law of war into harmony with the consciousness of peoples and to elevate it to the level of contemporary civilization” [on translation]).
244 Ibid.
245 Fedor F. Martens, above n.214, 106.
246 Ibid., 105 (“If the great Powers undertake to observe in time of war certain positive rules which impose limits on their action, it is easy to see how much the small States are interested in taking advantage of this circumstance in order to safeguard their rights in the event of an enemy invasion” [on translation]).
247 Ibid.
248 James B. Scott (ed.), The Hague Conventions and Declarations of 1899 and 1907 (1915), v (Russia initiated the conference by circulating a note asserting “a possible reduction of the excessive armaments which weigh upon all nations” and “the most effective means of ensuring to all peoples the benefits of a real and lasting peace”).
249 Gordon Martel (ed.), above n.189, 1.
250 Ibid.
251 James B. Scott (ed.), above n.248, viii.
Conference (1907) had forty-four countries in attendance.\textsuperscript{252} It included all the participants of the First Hague Conference and seventeen other States from Central and South America.\textsuperscript{253}

73. The rise of the international community and States’ willingness to fix the rules of warfare by consent reflected a fundamental change in legal philosophy from natural law to positivism in that century. Thus, even as the philosophy of international law changed, the basic rule against plunder remained valid and maintained its nature of universal application.

VI. Development of the rule against plunder during the twentieth century

74. This part explores the development of the rule against plunder during the twentieth century. The two World Wars provide significant occasions to examine the validity of the rule in circumstances of the extensive looting of cultural property as practices substantially diverged from the rule. It also examines the further codification of the rule against plunder in the 1954 Hague Convention and its first protocol.

VI.A. World War I

VI.A.i. Preservation of cultural property during the war

75. As a response to the criticism of the loss of cultural property during World War I, Germany began in 1914 to attach art officers to military units and to governments of occupation to protect artistic treasures and monuments under their control.\textsuperscript{254} Germany also sent experts to protect archives from destruction and spoliation in occupied France, Belgium and Poland at the beginning of 1915.\textsuperscript{255} The German practice of employing experts to protect archives, artistic treasures, and monuments in the field reflected the new importance of the requirement of the rule against plunder in international custom and conventions.

VI.A.ii. Restitution after the war

76. Restitution of looted cultural property after the war was enacted through a series of peace treaties among States. This process started with the Treaty of Versailles of 1919, which required Germany to return looted cultural property to France,

\textsuperscript{252} Gordon Martel (ed.), above n.189, 3.
\textsuperscript{253} Ibid.
\textsuperscript{254} Ernst Posner, Public Records Under Military Occupation, 49 American Historical Review (1944), 215-16.
\textsuperscript{255} Ibid., 216.
Belgium, and other States. The restitution referred not only to plunder that occurred during World War I, but also included plunder that occurred during the previous wars of the eighteenth century. Such restitution was not simply an occasional clause in the Treaty of Versailles, but a pattern in all peace treaties after World War I. The peace treaties reaffirmed that restitution served as the only remedy for violation of the rule against plundering cultural property, so long as the plundered works were preserved and identifiable. Furthermore, the treaties reflected that the passing of a long period, even over a century, would not inhibit the claims for restitution.

VI.B. World War II

VI.B.i. Institutional protection of cultural property during the war

77. One feature of the law of war as practiced during World War II was the emphasis on the duty of military forces to protect cultural property during battle. In particular, special institutions were set up to employ art professionals, who worked with armies in the field to effectively safeguard cultural property. The U.S. government, for example, established the Roberts Commission to preserve fine art and monuments in war zones in June 1943. In the autumn of that year, the U.S. government set up the military program of the Monuments, Fine Arts and Archives (MFA&A).

256 The Treaty of Versailles, art. 245, art. 246, art. 247, 225 CTS (1919), 303-304.
257 Ibid., art. 245.
259 Alan Marchisotto, above n.197, 699.
262 Ibid.
The MFA&A employed art professionals in cooperation with the Roberts Commission to prevent unnecessary damage to cultural sites. For instance, they provided armed forces with maps identifying churches, palaces, museums, historic buildings and monuments to be spared from war damage. Furthermore, MFA&A art officers worked in the field to gather information about confiscation of artistic treasures by the Axis Powers. They searched out “fine arts repositories”—places where the Germans armies conceivably stored their looted artistic treasures—and safeguarded the cultural treasures they discovered. The British government also approved a parallel committee for dealing with fine arts and monuments in the spring of 1944. The efforts of these special institutions safeguarded cultural property in battles and collected information regarding the identification of these artefacts, which not only strengthened the rule against plundering cultural property during the war, but also paved the way for restitution of looted artefacts after the war.

VI.B.ii. Restitution after the war

78. The Allied powers first laid down the principles regarding restitution of looted cultural property in the London Declaration of 1943 to give a formal warning to all concerned, including neutral States. It declared that the Allies would invalidate any transfers of or dealings with looted cultural treasures from the territories of occupation directly or indirectly by the governments of the Axis powers. According to the statements, the principles of restitution were made as the remedy for the looting of cultural property that occurred during the war. The Declaration laid out the legal grounds for the restitution actions of States after the war, which was enforced through a series of international agreements and domestic legislation in different regions of the world. In Germany and Austria, restitution was enacted through regulations and programs passed by the Allied Control Authority and military governments, and later

263 Wayne Sandholtz, ibid.
264 Ibid.
266 Wayne Sandholtz, ibid.; Military Government of Germany (U.S. Zone), above n.261, 16.
267 Ibid.
268 Declaration Regarding Forced Transfers of Property in Enemy-controlled Territory (the London Declaration of 1943), 8 Department of State Bulletin (1943), 21-22.
269 Ibid.
by conventions with the allied powers.\textsuperscript{271} With regard to other Axis powers, restitution was made by armistice agreements and peace treaties.\textsuperscript{272} In neutral States, conventions and legislations were put in place to enforce restitution.\textsuperscript{273} As these extensive restitution actions demonstrate, the rule against plundering cultural property was firmly rooted in international society, no matter how severe the looting of cultural property that occurred in violation of the rule was. This history further reflects that if the plundered works were identifiable, restitution was the only remedy for the illicit act of looting or confiscating cultural property during the war.

\textbf{VI.B.iii. Development of the rule against plundering cultural property}

\textbf{VI.B.iii.a. The broad interpretation of plunder}

79. The taking of cultural property involved more complicated and concealed forms during World War II; as a response, the London Declaration of 1943 provided a broad interpretation of using force or duress.\textsuperscript{274} This definition contained every form of transfer of property, even transactions that were apparently legal in form.\textsuperscript{275} The subsequent international agreements and domestic laws followed this broad definition in the London Declaration of 1943.\textsuperscript{276} The Bonn Convention of 1952 further clarified the scope of using force to include duress, larceny, requisitioning or other forms of dispossession.\textsuperscript{277} According to this convention, cultural property acquired as a gift

\begin{flushright}
\textsuperscript{271} The Bonn Convention of 1952, below n.277; State Treaty for the Re-establishment of an Independent and Democratic Austria, 1955, 217 UNTS Recueil des Traites 225.
\textsuperscript{272} The Armistice Agreement with Rumania, 1944, art. 12 (avalon.law.yale.edu/wwii/rumania.asp#art12); The Armistice Agreement with Bulgaria, 1944, art. 11 (avalon.law.yale.edu/wwii/bulgaria.asp#art11); Armistice Agreement with Hungary, 1945, art. 1 (avalon.law.yale.edu/wwii/hungary.asp#1); Treaty of Peace with Italy, 1947, art. 37 and 75, 49 UNTS Recueil des Traites (1950), 142, 158; Treaty of Peace with Hungary, 1947, art. 11, 41 UNTS (1949), 178; Treaty of Peace with Bulgaria, 1947, art. 22, 41 UNTS 64, 66; Treaty of Peace with Finland, 1947, art. 24, 53 TS (1948), 10; Treaty of Peace with Romania, 1947, art. 23, 42 UNTS 50.
\textsuperscript{273} Final Act and Related Documents of the United Nations Monetary and Financial Conference at Bretton Woods, 1944, Chapter VI (fraser.stlouisfed.org/files/docs/historical/ecclses/036_17_0004.pdf); Final Act and Annex of the Paris Conference on Reparations, annex 1, as reprinted in Wojciech Kowalski, above n.6, 103; UNESCO, below n.287, para.10; Kowalski Wojciech, above n.6, 62.
\textsuperscript{274} See the London Declaration of 1943, above n.268.
\textsuperscript{275} Ibid.
\textsuperscript{276} Text to nn.270-273.
\textsuperscript{277} Convention on the Settlement of the Matters Arising out of the War and the Occupation (The Bonn Convention of 1952), the United States, Great Britain and France signed at Bonn with the Federal Republic of Germany in 1952, chapter IV, art. 1.1, 49 AJIL Supp. (1955), 90.
\end{flushright}
would also be subject to restitution if the gift were received through direct or indirect
duress or by use of an individual’s official position.\textsuperscript{278} The scope of restitution in this
convention also included cultural property that was acquired by purchase, unless it
had been brought into a given country for the purpose of sale.\textsuperscript{279}

\textbf{VI.B.iii.b. International crime as defined by the Nuremberg trials}

80. According to the judgment of the Nuremberg trials, looting of cultural property
was not merely illegal but also criminal at the time of World War II.\textsuperscript{280} For instance,
Rosenberg, who directed the organisation Einsatzstab Rosenberg was found guilty of
“looting cultural property in occupied territories”, among other charges.\textsuperscript{281} The
Nuremberg Tribunal relied on Article 56 against plundering cultural property in The
Hague Conventions of 1899 and 1907.\textsuperscript{282} The Tribunal regarded this article as
founded upon customary international law that all civilized nations recognized.\textsuperscript{283}

\textbf{VI.C. Further codification in the 1954 Hague Convention}

\textbf{VI.C.i. Efforts to conclude a special convention regarding the protection of cultural property
in war}

81. After The Hague Convention IV of 1907 entered into force, codification of the
rule against plundering cultural property was enhanced by an additional convention
specifically for the protection of cultural property in war. The \textit{Treaty on the Protection
of Artistic and Scientific Institutions and Historic Monuments, 1935 (Roerich Pact)}, as a
regional convention for the Americas, represents the first attempt to formulate such a
convention.\textsuperscript{284} It declares that cultural property and all institutions devoted to art, ed-
cucation and culture shall be regarded as neutral and obtain absolute protection unless
they are used for military purposes.\textsuperscript{285} Inspired by the Roerich Pact, the League of
Nations and its agency, the International Museums Office (IMO), attempted to pass
a similar international convention that could apply to all nations in 1938.\textsuperscript{286}

\textsuperscript{278} The Bonn Convention of 1952, chapter IV, art. 1.2 (a), ibid., 90-91.
\textsuperscript{279} Ibid., art. 1.2 (b), 91.
\textsuperscript{280} International Military Tribunal (Nuremberg), Judgment of 1 October 1946, 55
\textsuperscript{281} Ibid., 114-115.
\textsuperscript{282} Ibid., 68.
\textsuperscript{283} Ibid., 80.
\textsuperscript{284} Treaty on the Protection of Artistic and Scientific Institutions and Historic
Monuments, 1935 (Roerich Pact), 167 LNTS (1936), 289.
\textsuperscript{285} Roerich Pact, art. 1, ibid. ("The historic monuments, museums, scientific, artistic,
educational and cultural institutions shall be considered as neutral and as such
respected and protected by belligerents"); also see art. 2 and art. 5.
\textsuperscript{286} Wayne Sandholtz, above n.167, 158.
However, World War II interrupted this process. After the war, the UNESCO General Conference restored their efforts, and finally brought the 1954 Hague convention and its first protocol into being. The 1954 Hague convention as well as its first protocol marks the first special convention for protecting cultural property in armed conflicts.

VI.C.ii. The development of the rule against plundering cultural property

VI.C.ii.a. The term of cultural property and its definition

82. The Bonn Convention of 1952 introduced the term “cultural property” for the first time. It defined cultural property as comprising “movable goods of religious, artistic, documentary, scholarly or historic value, or of equivalent importance, including objects customarily found in museums, public or private collections, libraries or historic archives”. The 1954 Hague Convention extends the scope of cultural property to include “immovable property of great importance to the cultural heritage of every people” and buildings and centres destined to preserve or exhibit the movable cultural property.

VI.C.ii.b. The broad means of illegal removal of cultural property

83. According to Article 4, contracting parties are undertaken to respect cultural property situated within the territories of contracting parties; to refrain from any use of the property and its immediate surroundings in the event of armed conflict; and to refrain from any act of hostility directed against such property, unless the action satisfies imperative military necessity. Furthermore, this article requires contracting parties 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”. It also requires contracting parties to “refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party”.

288 UNESCO, ibid., para.12.
289 The Bonn Convention of 1952, chapter 5, art. 1(4), above n.277, 91.
290 Ibid.
292 Ibid., art. 4 (1)(2), 242-244.
293 Ibid., art. 4 (3), 244.
294 Ibid.
84. The content of Article 4 originated from the Lieber Code of 1863, the Brussels Declaration of 1874, the Oxford Manual of 1880, the 1899 and 1907 Hague Conventions, and the Roerich Pact of 1935. This provision further codifies the rule against plunder with a broad interpretation of the means of plunder. It basically prohibits all means of the removal of cultural property that seek to acquire ownership of the property, including theft, pillage, misappropriation and requisition. This broad definition of plunder reflects the principles and practices regarding restitution after World War II.

85. The first protocol to the 1954 Hague Convention obliges contracting parties to make restitution of looted cultural property in their territories to the country of origin. This provision reflects the principle that restitution is the remedy for violation of the rule against plundering cultural property on the basis of customary international law. Thus, whether the provision is in the Convention or in its protocol would not harm the right to restitution as reflected in this provision.

VII. What about claims for retention?

86. Despite the international consensus today about prohibiting illicit traffic of cultural property, there are many claims against restitution of cultural artefacts that were plundered during the nineteenth and twentieth centuries. First, as mentioned previously, there was an incorrect belief among scholars that general international law did not prohibit the plunder of such artefacts during international armed conflicts of those centuries. Relying on this assumption, institutions that possess plundered artefacts have argued that these collections belong to them due to ownership or trusteeship, and that they are therefore not open to dialogue about restitution.

87. Second, some scholars argue that the passage of time has cancelled claims for restitution, even if taking such property was illegal at the time it was seized. They

---

295 John H. Merryman, above n.181, 326; the 1954 Hague Convention, the preamble, ibid., 240.
297 Above Part I, para.2.
seek to apply the principle of repose to maintain the status quo in the form of statutes of limitations, prescription, or lapse.300

88. Last but not least, the concept of “cultural property internationalism” regards cultural property as common world heritage; therefore all peoples should have a share and voice in determining the fate of such property.301 This argument is frequently used as a defence against restitution. In particular, the ability of a given country of origin to protect cultural objects is an argument frequently raised against restitution.302

89. These arguments in favour of retention might become obstacles for victim States to regain their plundered artefacts. Most of these arguments, however, rest on the presumption that claims for restitution lack a basis in international law; mere ethical or political arguments for restitution have therefore been regarded as insufficient to require the restoration of displaced cultural property.303 Identifying the rule against plunder provides firm legal ground for rebutting this false presumption; it thus paves the way to removing these obstacles so that victim States can regain their lost treasures. As this article shows, the rule against plunder was established as a general customary international law that should apply to all nations when the looting occurred during the nineteenth and early twentieth centuries. The rule remains valid throughout time until now. Relying on this rule, restitution serves as the only remedy for the illicit act of looting or confiscating cultural property during war, so long as the plundered works are preserved and identifiable. Peace negotiations and acts of restitution in the previous two centuries have repeatedly confirmed that the passage of time would not cancel the right to restitution. Victim States therefore have strong legal grounds for their restitution claims, because the States that acted as perpetrators violated the rule against plunder, and their illicit acts against international law give victim States the remedy of restitution. Applying the rule against plunder to cases regarding claims for restitution would thus ultimately transform the current debates between restitution and retention.304

300 Ibid.
303 The concept of cultural property internationalism also rests upon this presumption. See John H. Merryman, above n.299, 1881-1923.
304 An article of the author’s work on the right to restitution of displaced cultural property by customary international law is forthcoming.
VIII. Conclusion

90. The original idea of classifying cultural property as a particular category of property that should not be considered spoils of war appeared in early Roman property law and customs of war regarding the treatment of sacred property, and in Polybius and Cicero’s arguments regarding the treatment of works of art. These Roman legal traditions and philosophical ideas significantly influenced the legal thinking of classical international jurists regarding the protection of cultural property in warfare starting in the seventeenth century. These jurists articulated the rules to limit the damages of war according to just war and just cause. They related just cause to military necessity in determining what type of property could be legally taken. They claimed cultural property should not be spoils of war, because taking such artefacts would not necessarily weaken the enemy. The jurists’ particular attention to the protection of cultural property in war, reinforced by the emerging principle of military necessity, strongly suggests that the law of nature no longer permitted taking cultural property as spoils of war. This understanding of the law of nature was confirmed by the usage of refraining from looting cultural property starting in the mid-seventeenth century, a usage which sovereigns uniformly enacted for over a century. In this regard, the rule against plundering cultural property was firmly established by the end of the eighteenth century. Although the practice of this rule appeared mostly in Europe, the rule reflected the law of nature regarding modern military conduct and had an essentially universal application.

91. The nineteenth century witnessed the transition from natural law to positivism within the philosophy of international law. This century provided two episodes to examine the validity of the rule against plunder. In the first episode, Napoleon knew this rule, but sought to abandon it by reviving the Roman practice of looting. Rather than being undermined by Napoleon’s practice, the rule was confirmed by the public’s and European sovereigns’ critical responses to his looting as contrary to the laws of modern warfare. Moreover, subsequent restitutions strengthened the rule by confirming restitution as the only remedy for violating it, so long as the plundered works existed and were identifiable. As the history of negotiation reveals, the consensus of European nations about restitution was reached according to the justice and usages of modern war, which was expressed by the opinions of States. Another episode occurred when States attempted to codify the laws and customs of war in the second half of the nineteenth century. The Lieber Code of 1863, the Brussels Declaration of 1874, and the Oxford Manual of 1880 all reaffirmed that States believed the rule against plunder was a general customary international law, which was previously formulated upon natural jurisprudence, rather than European custom. The Hague Conventions of 1899 and 1907 remark that States were committed to applying the rule against plunder as conventional obligations. The broad participation of States, including many non-Western powers, confirmed the universal application of this rule.
As the two episodes show, even though the philosophy of international law changed, the rule against plunder remained valid and applied to all nations.

92. The looting of cultural property that occurred during the two World Wars provided significant occasions to examine the consistent validity of the rule against plundering cultural property during the twentieth century. Military efforts to preserve cultural property during the war and restitution made after the war fortified the application of this rule and its remedy. The Nuremberg trials ascertained that the looting of cultural property was not merely an illegal act against international law, but also a war crime. After World War II, the international community brought about the 1954 Hague Convention and its first protocol, which specifically deal with the protection of cultural property in war, and further codify the rule against plunder with broadened definitions of plunder and cultural property.

93. Therefore, the rule against plundering cultural property was established in the eighteenth century, and became entrenched in the laws and customs of war in the nineteenth and twentieth centuries. As such, the traditional right of conquest was unable to survive in the new landscape of international law. History reveals that Napoleon attempted to revive this particular right of conquest but ultimately failed. One century later, Hitler once again sought to bring back this practice, but was likewise not successful. The evolution of the rule against plunder shows that this rule was not merely a rule of war confined to European territories, but a general customary international law that should also apply to other regions of the world in the nineteenth and early twentieth centuries. It further shows that restitution serves as the only remedy for the illicit act of looting or confiscating cultural property during war, so long as the plundered works are preserved and identifiable. Subsequent peace negotiations and acts of restitution have repeatedly confirmed that the passage of time would not cancel the right to restitution. Thus, many victim States other than European States could claim restitution now even if the looting occurred over a century before. For instance, the British and French joint armies looted China’s Old Summer Palace and carried away countless invaluable Chinese cultural properties during the second Opium War of 1860. The Chinese government could claim restitution on the legal grounds that the joint armies violated the rule against plundering cultural

property; the items were thus illegally taken and should be returned even if the looting took place a century ago.\textsuperscript{306}

\textsuperscript{306} There might be a doubt on whether the rule against plunder could be applied to colonies or semi-colonies, such as India, China, or Korea, because the West set up the “standard of civilization” for the purpose of colonization and imperialism to exclude non-Western nations playing with the rules of international law in the nineteenth and early twentieth centuries. See Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2004); Turan Kayaoglu, Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China (2010); Nico Krisch, International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order, 16 EJIL (2005), 369. However, as this article shows, the rule against plunder was established as a general customary international law in the eighteenth century, maintained its validity throughout the nineteenth century when colonization began to dominate the world, and further developed in the twentieth century when the world cooperated in decolonization. Therefore, colonization did not harm the evolution of this universal rule. Additionally, why should this rule, as formulated mainly by western powers, not be applied to themselves during their wars with other nations?