

Prologue

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

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

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

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

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

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

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

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

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

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

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

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

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1 From the high Renaissance to the Hague Rules

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

The classical law

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

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

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

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6 THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT

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

As well as regulating the infliction of direct injury or damage, the rule of necessity governed the common situation where persons or property to be spared, such as civilians or things of artistic or historic value, were incidentally harmed in the course of destroying permissible targets. Applying scholastic moral philosophy's doctrine of 'double effect', Grotius⁹ – along with Suárez,¹⁰ Vitoria¹¹ and Ayala¹² before him, and

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

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

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

⁶ *Ibid.*, s. 6.

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

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

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

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

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

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

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Textor¹³ afterwards — declared, as one of his ‘general rules from the law of nature’, that things which were unlawful to do directly were lawful if unavoidable in pursuit of a lawful end. In other words, no rule of law was broken if civilians were unavoidably killed or things of artistic or historic value unavoidably destroyed in an attack on a defended position.

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

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

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

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

Suárez, however, rejected this restriction.¹⁶

¹³ Textor, *Synopsis Juris Gentium*, chap. 18, para. 10.

¹⁴ Vitoria, ‘De Indis Relectio Posterior’, para. 37.

¹⁵ Grotius, *De Jure Belli ac Pacis*, book 3, chap. 1, s. 4. See also Textor, *Synopsis Juris Gentium*, chap. 18, paras. 10–11, seemingly endorsing Grotius.

¹⁶ Suárez, ‘On Charity’, disputation 13, s. 7, para. 19.

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As for the appropriation of enemy property in war, the general view was that the law of nations permitted a belligerent to capture and carry off movable property in pursuit of a just cause 'without limit or restriction'.¹⁷ All chattels captured from the enemy population became the property either of the capturing power or of the individual captor. At the same time, considerations of justice, or at the very least humanity, dictated moderation.¹⁸ As with destruction, when it came to appropriation most early modern writers made no distinction between different types of movables. Gentili expressly included 'statues and other ornaments' within the freedom to capture and remove.¹⁹ If a town was captured by assault after refusing to surrender, a commander was entitled to turn it over to pillage²⁰ – that is, to every-man-for-himself looting by the soldiery, with each permitted to keep what he laid his hands on. Vitoria, however, thought pillage lawful only 'if necessary for the conduct of the war or as a deterrent to the enemy or as a spur to the courage of the troops'.²¹ Either way, it was forbidden for soldiers to pillage other than with express permission.²²

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁷ *Ibid.*

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

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

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

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

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

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

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

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

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