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0521849829 - America and the Return of Nazi Contraband: The Recovery of Europe's  
Cultural Treasures

Michael J. Kurtz

Excerpt

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PART ONE

CRISIS AND RESPONSE

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I

## Plunder and Restitution

### *An Historical Overview*

Restitution: (1) an act of restoring or a condition of being restored: as (a) a restoration of something to its rightful owner; (b) a making good of or giving an equivalent for some injury; (2) a legal action serving to cause restoration of a previous state.<sup>1</sup>

#### Ancient and Medieval Eras

Throughout recorded history, armies have attacked the territories of other tribes, cities, or nations with the defeated enduring the pillage or loss of their property. Objects representing the most important values of the defeated peoples, such as religious articles, military banners or symbols, works of art, and archives were those most usually coveted by the victors. The Assyrian King Sargon II and the Babylonian ruler Nebuchadnezzar, for example, carried both captive peoples and their cultural treasures into exile.<sup>2</sup>

In the Old Testament book of the prophet Jeremiah, the biblical writer describes the looting in 586 B.C.E. of the most holy Jewish site in Jerusalem, the temple of Solomon:

The Chaldeans [i.e., the Babylonians] broke up the bronze pillars in the bronze sea, and carried off all the metal to Babylon. They removed also the pots, shrouds, snuffers, tossing-bowls, saucers, and all the bronze vessels used in the service of the temple.<sup>3</sup>

<sup>1</sup> *Webster's Seventh New Collegiate Dictionary*, revised ed. (Springfield, Mass.: G&C Merriam Co., 1965).

<sup>2</sup> Jeanette Greenfield, "The Spoils of War," in *The Spoils of War: World War II and Its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property*, edited by Elizabeth Simpson (New York: Harry N. Abrams, 1997), p. 34.

<sup>3</sup> Jeremiah 52:17–18, *The Oxford Study Bible: Revised English Bible with Apocrypha* (New York: Oxford University Press, 1992), p. 846.

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When the Romans sacked Jerusalem in 70 C.E., they not only destroyed the city but first looted valuable items for use in their military victory parade, the triumph, back in the capital. The Arch of Titus, erected in honor of the Roman victory, contained representations of the treasures seized from the defeated Jewish city.<sup>4</sup> Yet by 554 C.E., a different perspective emerged: Emperor Justinian promulgated his great revision of Roman law, the *Sanctio Pragmatica*, which contained perhaps the earliest legal restitution provisions. Despite the law, the only certain method of restoration was the eventual triumph of the defeated, an event of rare occurrence.<sup>5</sup>

Europeans, beginning with the decline of the *Pax Romana*, repeatedly experienced the loss of cultural treasures through the vicissitudes of warfare. Invaders, such as the Germanic tribesmen, the Norsemen, the Mongols, and the Turks, swept over the lands of the Roman Empire with devastating results. But cultural loss was not always at the hands of the “barbarian” outsiders. During the Fourth Crusade in the early thirteenth century, Latin Christians stole four bronze horses from the Hippodrome in Constantinople and brought them to adorn the piazza of San Marco in Venice.<sup>6</sup>

### Renaissance and Early Modern Times

The Italian wars of the French kings Charles VIII and Louis XII during the Renaissance accelerated the trend of European state-sponsored looting during wartime. During the Italian wars, the value Renaissance princes placed on artistic and literary treasures is clearly witnessed in the clauses of numerous treaties stipulating the transfer of tapestries, manuscripts, statues, and paintings to the victors.<sup>7</sup> The use of treaties to provide a legal framework for the transfer of looted property was a step beyond – though not necessarily an improvement on – a total reliance on brute force and conquest.

This trend of cultural looting again accelerated with the religious wars of the sixteenth century and the ensuing Thirty Years War. Examples of looting abound. Among the most notorious was the seizure of the Elector Palatine's library at Heidelberg by Maximilian of Bavaria and the subsequent gift of the library to Pope Gregory XV.<sup>8</sup> Some effort at restitution was made in the Treaty of Westphalia in 1648, which provided for a limited return of property to the Estates of the Holy Roman Empire.<sup>9</sup> In particular, article CXIV

<sup>4</sup> Greenfield, “The Spoils of War,” p. 35.

<sup>5</sup> Louis E. Pease, “After the Holocaust: West Germany and Material Reparations to the Jews – From the Allied Occupation to the Luxembourg Agreements” (Ph.D. dissertation, Florida State University, 1976), p. 11.

<sup>6</sup> Greenfield, “The Spoils of War,” p. 35.

<sup>7</sup> U.S. Department of State, *International Protection of Works of Art and Historic Monuments*, International and Cultural Series 8, Publication 3590 (1949), p. 823.

<sup>8</sup> *Ibid.*

<sup>9</sup> Pease, “After the Holocaust,” p. 11.

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provided “that the Records, Writings and Documents and other Moveables be also restored.”<sup>10</sup> This was an important milestone in the evolution of international law and restitution.

The Treaty of the Pyrenees in 1659, ending an extended period of French-Spanish conflict, marked another significant milestone. The treaty not only called for specific restitution measures, but also established a joint commission to supervise the process and settle any disputes that might arise.<sup>11</sup> The concept of an internationally sanctioned body of arbitrators was one that would reappear, particularly in the twentieth century.

**The French Revolution and Its Aftermath**

The wars of the French Revolution brought cultural looting and restitution fully into the modern era. Artistic and literary treasures were taken not only for their value or religious significance but also as part of an overall ideological attitude. Revolutionary France saw itself as the center of enlightened thought and practice, Europe's liberator from its feudal past, and thus the “natural repository” for Europe's artistic heritage.<sup>12</sup> Revolutionary and Napoleonic armies put this idea into practice and brought back to France many precious treasures from public and state collections in northern Italy and the rest of Europe.<sup>13</sup> In a practice carried over from the Renaissance, the French cloaked much of their pillaging through the legal cover of armistices and peace treaties concluded with their defeated foes. In 1796, for example, agreements with the princes of Parma, Modena, and the Holy See all provided for the transfer of specific items. For example, in the 23 July 1796 Armistice with the Papal States (article VIII), the French required that

The Pope will give over to the French Republic 100 paintings, busts or statues according to the choice made by the commissioners who will come to Rome, among these objects one should find in particular the bronze bust of Junius Brutus and the marble bust of Marcus Brutus which are now located in the Capitol, additionally 500 manuscripts chosen by these commissioners.<sup>14</sup>

The commissioners called for in the armistice with the Holy See obviously functioned differently from the body established by the Treaty of the

<sup>10</sup> Wojciech Kowalski, “Introduction to International Law of Restitution of Works of Art During Armed Conflicts, Part II,” *Spoils of War International Newsletter* No. 3 (December 1996): p. 10.

<sup>11</sup> *Ibid.*, p. 11.

<sup>12</sup> Sharon A. Williams, *The International and National Protection of Movable Cultural Property: A Comparative Study* (Dobbs Ferry, N.Y.: Oceana Publications, 1978), pp. 7–8.

<sup>13</sup> Janet Flanner, *Men and Monuments* (New York: Harper and Brothers, 1947), p. xiv.

<sup>14</sup> Wojciech Kowalski, “Introduction to International Law of Restitution of Works of Art During Armed Conflicts, Part III,” *Spoils of War International Newsletter* No. 4 (August 1997): p. 40.

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Pyrenees. Whether a military campaign ended in victory, defeat, or stalemate determined how any joint bodies would function. The aftermaths of World War I and World War II would make this abundantly clear. Another Napoleonic feature that set an example for future developments was the conqueror's display of looted art in the Musée de la République for his own and France's glory.<sup>15</sup> Revolutionary fervor, nationalist pride, and greed were a formidable combination. Not all French actions were so negative. A law of December 1790 provided for restitution to Huguenots for property seized after the revocation of the Edict of Nantes in 1666.<sup>16</sup>

At the Congress of Vienna, the reaction of the Allies to Napoleon's looting marked the first substantial efforts in the modern era to develop a legal and ethical framework for the old Latin concept *restitus*. The question facing the Congress was whether items transferred to France by treaties concluded during the French Revolutionary wars were, in reality, looted or valid transfers now legally belonging to France. The English representatives, Lords Liverpool and Castlereagh, at first saw a distinction between items that were clearly spoils and those covered by treaties. Insistent claims to the contrary by the King of the Netherlands, German and Italian princes, and the Pope forced a reconsideration of the issue.<sup>17</sup>

After protracted debate, the Allies finally decided to return items taken either by force or through treaty provisions to the country of origin. Promulgated in the 1815 Convention of Paris, this was the first international condemnation of looting and the establishment of the principle that all loot should be returned to the country of origin.<sup>18</sup> This decision was based on the concept of the artistic integrity of a nation, an idea first propounded by French scholars and artists such as Jacques-Louis David, Jean Louis Darmond, and Antoine Quatremère de Quincy, who had forcefully objected to Napoleonic looting.<sup>19</sup> Thus, the four bronze horses taken from the Byzantines by the Venetians, and then in 1797 from the Venetians by the French, were returned to Venice,<sup>20</sup> but not to their original home. This highlighted a political reality in cultural restitution. It was actually difficult in many situations to return an object to its point of origin. In this case, the Byzantine Empire had long since disappeared, and in the eyes of Europe, the successors to the Byzantines, the Turks, had no right to make a claim. No one, however,

<sup>15</sup> Flanner, *Men and Monuments*, p. xiv.

<sup>16</sup> Pease, "After the Holocaust," p. 11.

<sup>17</sup> *International Protection of Works of Art and Historic Monuments*, p. 826.

<sup>18</sup> Lawrence M. Kaye, "Laws in Force at the Dawn of World War II: International Conventions and National Laws," in *The Spoils of War: World War II and Its Aftermath: The Loss, Reappearance and Recovery of Cultural Property*, edited by Elizabeth Simpson (New York: Harry N. Abrams, 1997), p. 101.

<sup>19</sup> Charles Estreicher, ed., *Cultural Losses of Poland: Index of Polish Cultural Losses During the German Occupation, 1939-44* (London, 1944), p. xi.

<sup>20</sup> Flanner, *Men and Monuments*, p. xiv.

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asked the Sultan for his views. The Turks were not accepted as part of the political or diplomatic concert of Europe.

Politics also affected cultural restitution in other ways. The peacemakers in Vienna, though accepting restitution in principle, did not want to turn French opinion against the restored Bourbons. Hence, an overly rigorous approach was avoided. French sensitivities had an even more direct effect on restitution efforts. Two hundred Prussian troops were needed to get Prussian art stored in the Louvre past sullen French National Guardsmen and irate citizens.<sup>21</sup> Diplomacy, politics, and popular feeling would always affect cultural restitution.

**Developments Prior to World War I**

By the mid-nineteenth century, the romantic notion of the integrity and unity of a national cultural heritage dominated. This belief, along with developments in the technology of war, created a great deal of anxiety about the fate of art and other cultural property during war.<sup>22</sup> The American Civil War stimulated the first attempt to codify principles of international law for the protection of cultural property. At the request of Abraham Lincoln, Dr. Francis Lieber of Columbia College in New York developed a code of conduct, subsequently issued for use by the Union Army, designed to protect cultural, educational, and charitable property from looting and destruction.<sup>23</sup> The Lieber Code served as the basis for the 1874 Brussels Conference. The Declaration of the Conference, which contained principles of international law never ratified but significant for later developments, clearly stated that cultural and educational property, even where state-owned, should be treated as private property and thus be exempt from seizure.<sup>24</sup> Another building block in the search for international consensus on the conduct of war came in 1880 when the Institute of International Law issued the Oxford Manual. Based on the Lieber Code and the deliberations of the Brussels Conference, the Oxford Manual sought to codify the rules for land warfare.<sup>25</sup>

Two conferences at The Hague, in 1899 and 1907, attempted to regularize the rules of warfare and to limit its destructiveness. The second conference, building on earlier efforts, approved Convention No. 4: "Laws and Customs of War on Land." The convention contained articles that became the essential statements in international law on the protection of property. Article 47 forbade pillaging, while Article 56 specifically prohibited the "seizure or destruction or willful damage to institutions dedicated to religion, charity,

<sup>21</sup> Kowalski, "Introduction to International Law . . . Part III," p. 40.

<sup>22</sup> Williams, *The International and National Protection of Movable Cultural Property*, p. 12.

<sup>23</sup> Kaye, "Laws in Force at the Dawn of World War II," pp. 101–2.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

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education, [or] the arts and sciences,” as well as “historic monuments, [and] works of art and science.”<sup>26</sup> The taking of private property was expressly prohibited.<sup>27</sup> Equally significant were provisions that permitted legal proceedings for violations of the convention and for payment in compensation by those deemed as violators.<sup>28</sup> This agreement was signed by the major European and non-European powers, including the United States, Germany, Russia, France, and Great Britain.

In the tense years prior to the outbreak of war, several nations took related steps to protect their cultural heritage. Italy in 1902 and 1909 passed laws controlling the sale or transfer of cultural objects in public and private institutions as well as items in private hands.<sup>29</sup> The French in 1913 placed similar restrictions on cultural objects that the government classified as protected property.<sup>30</sup> The Italian laws, in particular, would affect cultural restitution disputes with Germany in the post-World War II period.

### World War I and Restitution

The events of 1914 through 1918 showed how fragile were the results of the Hague Conventions. Among other Convention articles, those on pillaging and property were flouted. Because of sensitivity in neutral nations after the burning of part of the University of Louvain and the bombardment of Rheims Cathedral, the Germans in late 1914 created an organization in their conquered territories in Belgium and northern France that was supposed to protect historic monuments and cultural objects.<sup>31</sup> Many items, though, were sent to Germany for “protection,” setting a precedent zealously imitated in World War II. One particularly notorious item sent to Germany was sections of the Van Eyck altarpiece from the church of St. Bavo in Ghent. The Allies viewed all this as looting, and German actions created an intense amount of ill will.

In the harsh peace treaties that concluded the Great War, the provisions in the Hague Convention pertaining to restitution and compensation were used as the basis for strong Allied measures. In the Versailles Treaty, Article 245 required Germany to return all “trophies, archives, historical souvenirs, or works of art carried away from France by the German authorities in the course of the war of 1870–1871 and during [the World War].” The restituted items would be drawn from a list prepared by the French government. The Germans were ordered in Article 247 to provide for restitution-in-kind to

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ernst Posner, “Public Records Under Military Occupation,” *American Historical Review* 49 (January 1944): 215.

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Belgium for the destruction in Louvain. Specifically, the Germans were forced “to furnish the University of Louvain, within two months after a request is made by it . . . manuscripts, incunabula, printed books, maps, and objects of collection corresponding in value to those destroyed in the burning by Germany of the Library of Louvain.”<sup>32</sup>

In response to a strong Belgian demand, the second clause of Article 247 directed the Germans to return not only the looted Van Eyck altarpiece panels but also panels sold to Prussian King Frederick William III in 1821 by an English collector and kept in the Kaiser Friedrich Museum in Berlin. Along the same lines, the Germans had to return to the church of St. Peter in Louvain panels from the triptych of the *Last Supper* by Dirk Bouts, which had been legitimately purchased by German museums before 1914.<sup>33</sup> The return of these altarpieces was an innovative step in international law. Here for the first time was articulated a requirement to reintegrate works of art into a nation's historical and artistic heritage. Though Article 247 was only a small part of the Versailles Treaty, it would have long-term consequences. The return of the altarpieces stirred bitter German resentment, and both works, destined to be looted again, would fit well into the Nazi racist view of art history.

Through those actions, the Allies clearly established the principle of using works of art as reparations (i.e., compensation for other, destroyed works of art). In requiring reparations for cultural losses, the Allies determined that legitimate purchases could be voided and that public collections of the defeated were fair game. These measures and the one that mandated restitution for an earlier conflict provoked a fierce German reaction, which manifested itself in the next war and would also complicate restitution efforts after that conflict.

Treaties with Austria and Hungary and the settlement of the Polish-Soviet-Ukrainian conflict all featured prominently the restitution principles of returning items to the countries of origin, compensating these countries for objects destroyed during war and replacing lost objects with objects of comparable nature and value.<sup>34</sup> The Poles, for example, regained cultural treasures taken at the time of the first Polish partition in 1772. Many valuable artworks, tapestries, and other cultural items were returned to Poland.<sup>35</sup> An interesting point to note is that, in going back to 1772 and 1870–1871

<sup>32</sup> Kaye, “Laws in Force at the Dawn of World War II,” p. 103; Leslie Poste, “The Development of U.S. Protection of Libraries and Archives in Europe During World War II,” 2 vols. (Ph.D. dissertation, University of Chicago, 1958), vol. 1: 9.

<sup>33</sup> Kaye, “Laws in Force at the Dawn of World War II,” p. 103; Gladys E. Hamlin, “European Art Collections and the War,” *College Art Journal* 5 (March 1946), p. 233; Andrea Gattini, “Restitution by Russia of Works of Art Removed from German Territory at the End of the Second World War,” *European Journal of International Law* 7 (1996): 1–6.

<sup>34</sup> Kaye, “Laws in Force at the Dawn of World War II,” p. 103.

<sup>35</sup> *Ibid.*

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in settling restitution issues, the Allies ignored the concept of the statute of limitations, a legal concept that required much time and attention in the decades after the Second World War.

Much bitterness ensued from the application of the cultural restitution provisions in the various treaties. For example, during the course of the war the Germans had stolen many cultural items from private owners. The issue of restoring private property was new. The Allied and German responses were inadequate. The 1919 peace agreements did not specifically address the practical aspects of returning various categories of property. Owners of looted items often spent years in futile efforts to recover their property from their own governments. The Germans, for their part, responded to Allied restitution efforts with bitter passive resistance.<sup>36</sup>

### Interwar Years

International tensions during the period between the wars, particularly in the 1930s, made it clear that another general conflict was in the offing. The efforts of the International Museums Office of the League of Nations reflected intense concern about the protection of fine arts. A series of conferences, beginning in 1931, focused on the protection of fine art during wartime. The issues of distinguishing between public and private cultural property and the alienation of cultural property through illegal export and sales also figured prominently in the international discussions. A draft convention prepared in 1933 by the International Museums Office required repatriation for all objects illegally exported and the cancellation of all transactions in which objects were illegally alienated, no matter what the means. The draft convention failed to address questions related to statutes of limitations and did not clearly distinguish between public and private cultural property.<sup>37</sup> The League, distracted by crises in the Far East, Africa, and Europe, failed to act.

The worsening international climate prompted another effort, this time clearly focused on war-related threats to cultural property. The International Committee on International Cooperation for the Year 1937–8 urged the International Museums Office to draft yet another new convention.<sup>38</sup> As a

<sup>36</sup> Memorandum, "Restitution after the War of 1914–18, 1 September 1944," File "Restitution – Study on Restitution of Works of Art after World War I," Reports from Advisors Overseas, 1944–1945, Records Relating to Restitution of Cultural Materials, 1943–1946, RG 239, Records of the American Commission for the Salvage of Artistic and Historic Monuments in War Areas (the Roberts Commission), National Archives at College Park, Maryland.

<sup>37</sup> Kaye, "Laws in Force at the Dawn of World War II," pp. 103–4.

<sup>38</sup> Report, "The Director's Committee of the International Museums Office to the International Committee on International Cooperation for the Year 1937/38, Together with a Preliminary Draft International Convention on the Protection of Historic Buildings and Works of Art in Time of War," File "League of Nations – Draft of International Agreement to Protect Arts and Monuments in Time of War," Correspondence, 1943–1946, RG 239.

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result, the International Museums Office appointed a committee of experts to prepare a new draft convention. The committee, interestingly enough, consisted of legal and military experts, with no one from the fine arts.<sup>39</sup> In April 1938, shortly after the German annexation of Austria, the group submitted a draft “International Agreement to Protect Arts and Monuments in Time of War.” This agreement provided for inspections of cultural objects and sites in time of war and specifically stated that works of art stored abroad in wartime were exempt from confiscation or any other form of disposition.<sup>40</sup> But the withdrawal of Japan, Germany, and Italy had fatally weakened the League. This, along with the bitterness of the Germans about the Versailles Treaty and its cultural restitution obligations, made it certain that Germany would pay no attention to this League initiative.

The outbreak of war in September 1939 blocked any further diplomatic efforts to gain assent on the draft international agreement. The secretary general of the League unilaterally issued a declaration containing the basic principles of the draft convention, but only Belgium, Greece, the Netherlands, Spain, and the United States (a nonmember) announced adherence.<sup>41</sup> Thus, the Fourth Convention of the Second Hague Convention remained the fundamental statement in international law regarding the protection of property in wartime. All the issues raised in the First World War – protecting cultural heritage from plundering, appropriately distinguishing between public and private cultural property, instituting restitution measures involving reparations and compensation-in-kind – remained to be resolved.

But the events of the Holocaust era and World War II would result in destruction and loss beyond anything experienced in the dreadful conflict of 1914–18. The cataclysm that convulsed Europe between 1933 and 1945 affected every aspect of existence, including cultural heritage. The issues involving cultural protection and restitution were beyond anything heretofore experienced or imagined. To understand the disaster that befell Europe's cultural heritage, we must turn to the author of the calamity: Nazi Germany.

<sup>39</sup> Ibid.<sup>40</sup> Ibid.<sup>41</sup> Ibid.