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Plunder, Restitution, and International Law

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Abstract: The Russian *Federal Law on Cultural Valuables Displaced to the USSR as a Result of the Second World War and Located on the Territory of the Russian Federation* purports to establish the legal basis for the Russian state to hold permanent title to the vast majority of the cultural valuables removed from Germany to the Soviet Union at the end of World War II. Russia claims that the cultural objects seized by the Soviet Union constitute "compensatory restitution" for the hundreds of thousands of cultural and artistic valuables seized or destroyed by the Nazis during the war. This article assesses the compatibility of the Russian claim with relevant international law. It does so by tracing the development of the international antiplunder legal regime. It then assesses the Russian claim with respect to three categories of cultural valuables, based on prewar ownership: property belonging to private persons and organizations, property belonging to nonenemy states, and property belonging to enemy states (Axis powers). "Compensatory restitution" does not exist as a category or principle in international law, so the analysis focuses on the legal concept that is most similar and therefore of potential relevance, restitution in kind. If restitution in kind is impermissible under international law, then the broader "compensatory restitution" is, with even greater force, also impermissible. The key finding is that international law does not permit "compensatory restitution," nor does it permit unilateral seizures of cultural objects under some broader notion of compensation.

More than 50 years after the end of World War II, its legacy of displaced and destroyed cultural valuables continues to trouble former protagonists. Russia retains hundreds of thousands of paintings, sculptures, art objects, books, and archives

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that its "trophy brigades" removed from Germany and other countries at the end of the war. The German government has claimed that, taking into account significant returns to the former German Democratic Republic, Russia probably retains over one million art objects, including 200,000 significant pieces, 4.6 million books, and substantial archival material. A report in *Time* magazine estimated that the Soviets removed 2.5 million artworks and 10 million books and manuscripts, and recent scholarship supports the higher estimate (10–12 million books).[1] Moscow insists that the displaced works of art should remain in Russia as replacements or compensation for the millions of items of cultural property seized or destroyed by the Nazis in Soviet territory. A 1998 Russian law purports to settle definitively Russia's claim to the displaced cultural property.[2] Several European governments as well as private actors have contested the Russian assertion of ownership.

For most of history, such a dispute would not have arisen because the rule was "to the victor go the spoils." The artistic and cultural patrimony of a defeated foe became the war trophies of the victor. Roman generals, for example, paraded their booty through the avenues of Rome. Art plunder was a regular and accepted feature of European wars well into the seventeenth century. But the past two centuries have seen the development of international legal rules that prohibit the seizure or destruction of cultural property in wartime. International law, in other words, regulates the status and fate of cultural goods in wartime and occupation. Today's controversial Russian claim and the question of restitution fit under the umbrella of the antiplunder legal regime. This article assesses the extent to which the Russian claim is compatible with international law. Specifically, it must determine whether there exists, under international law, a rule permitting states unilaterally to effect restitution in kind—to take from a defeated enemy replacements for cultural and artistic valuables lost or destroyed by that enemy in the course of the war. To preview, a rule permitting unilateral restitution in kind for cultural valuables did not exist in 1945–1946 and has not developed since.

International norms regarding the restitution of cultural property taken in war are thoroughly intertwined with international rules on wartime art plunder. Indeed, the question of restitution does not arise if art plunder is permissible. The first section of the article therefore analyzes the development of the international legal regime prohibiting wartime plunder and assesses the status of potential norms of restitution in that broader regime. The second section assesses the status under international law of private cultural property in wartime. Some of the cultural treasures seized by the Soviet Union at the end of World War II had belonged to private (nonstate) parties before the war. The Nazi regime confiscated the cultural valuables of hundreds of thousands of persons, families, and private organizations, many of them victims of the Holocaust or opponents of the Nazis. Soviet brigades found the looted objects in German depots and storehouses and removed them to the Soviet Union. International law on private property in wartime is quite clear: It is immune from seizure and thus cannot be claimed as restitution in kind or compensation.

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The third section evaluates the Russian *Federal Law on Cultural Valuables* as it might apply to the cultural property of states. This law purports to create a legal framework for Russia's claim for "compensatory restitution." "Compensatory restitution" is not a category or principle recognized in international law. But the analysis cannot halt there. Instead, it must evaluate Russia's asserted right to "compensatory restitution" against the international legal norms and principles that are most relevant and potentially applicable. "Compensatory restitution" shares some elements with two concepts that have been treated within international law: restitution in kind and general compensation. As the third section will show, if restitution in kind is impermissible under international law, then the broader notion of "compensatory restitution" is, *a fortiori*, also impermissible. International law provides no basis for unilateral transfers of cultural property as restitution in kind and therefore cannot justify the broader and unspecified transfers claimed by Russia as "compensatory restitution." The analysis will also show that the principle of compensation cannot be applied to unilateral seizure of cultural objects as compensation for cultural losses.

A brief note on terminology is necessary. "Restitution," or "specific restitution," means the return of identifiable items seized or removed in war to their prewar owners. "Restitution in kind" means replacement of cultural property lost or destroyed during war by objects of similar kind and value from the state responsible for the loss or destruction. For example, restitution in kind occurred when, after World War I, the peace settlement obligated Germany to replace the treasures destroyed in the burning of the library at Louvain with comparable pieces from German institutions.

THE EMERGENCE OF ANTIPLUNDER NORMS IN INTERNATIONAL LAW

International rules evolve in response to practical problems that inevitably arise out of the gap between general norms and specific actions. Because the fit between rules and situations is never perfect, states and other international actors constantly behave in ways that provoke arguments about the meaning and application of the rules. The outcomes of those disputes inevitably modify the rules, giving them new content, making them stronger (or weaker), clearer (or less), more specific (or less), more subject to exceptions (or less). The modified rules then establish the context for subsequent rounds of action and disputation. Norm change thus occurs in cycles, and those cycles are linked backward and forward in time.[3]

The emergence of antiplunder norms displays the cyclic dynamic, with the crucial first cycle having occurred in the aftermath of the Napoleonic Wars. Plundering the cultural treasures of the defeated had previously been an acknowledged right of victors and a routine practice.[4] The art seizures carried out by the French armies during the wars of the Revolution and the Empire were so massive and methodical

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that they dwarfed previous instances, at least in medieval and early modern Europe. French looting triggered debates about the legitimacy of wartime art plunder and about restitution of displaced items. Subsequent episodes of norm development built on the outcome of 1815; by World War II, these episodes had produced customary international rules prohibiting the wartime looting of cultural objects.

Napoleonic Plunder

Beginning with the wars of the French Revolution (1793–94), the removal from conquered lands to France of paintings, sculptures, and other cultural properties was official policy. By October 1794, a special committee had compiled lists of artistic and scientific objects in countries where the French armies were expected to enter.[5] Art experts and commissioners traveled with the armies under orders "to identify and to effect the careful removal of the masterpieces that are found."[6] French armies sent treasures to Paris by the cart and barge load, and the arrival of art treasures in Paris was the occasion of public festivities.[7] The masterpieces went to stock the Musée Napoléon (later the Louvre), which had become the preeminent collection of art in Europe.[8] The Musée, and a number of provincial museums as well, would subsequently absorb the haul from the German states, Austria, Spain, and Italy.

In 1814, following the first defeat of Napoleon, a number of countries (including Austria, Prussia, and other German states) demanded the return of their art treasures.[9] But others among the allies, including the British, feared that insisting on restitution would destabilize the newly restored French monarchy, an outcome the other monarchies clearly preferred to avoid. Castlereagh, the British minister, explained the 1814 consensus: The victorious powers used "their influence to repress at that moment any agitation of these claims [for restitution]," in hopes of preserving the "bond of reconciliation between the nation and the King."[10] Similarly, the Russian emperor, Tsar Alexander I, argued that in 1814, the allies could have relied upon their right of conquest to reclaim the works of art seized by France during the wars. But, he noted, the allies sought to avoid "any measure that might discredit [the new government] in the eyes of the nation."[11]

In the end, the documents of the First Peace of Paris (30 May 1814) were silent on the question of the plundered art. Talleyrand considered the treaty a diplomatic success for France. In his *Mémoires* he listed the points that were favorable to France, concluding, "And finally, we have retained all of the admirable pieces of art conquered by our arms in nearly all the museums of Europe."[12]

Napoleon's return altered the debates. In the fall of 1815, after Waterloo, the allies resolved to repossess the stolen art "without any diplomatic negotiations, and to disregard any protestations."[13] Even so, the fate of the looted art was the subject of intense debate in the ensuing negotiations in Paris. The allied representatives sought to agree on general principles regarding restitution. The initiative in this regard came from Britain. In a letter dated 11 September 1815, Castlereagh

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assured the allied ministers that the British crown had no wish to acquire any of the looted artworks for itself. With full backing from Wellington, Castlereagh declared that England "deems it to be the duty of the Allies Sovereigns . . . to facilitate the return" of the art treasures to "the places from whence they were torn." The Prussian minister, Prince Hardenberg, quickly expressed complete agreement with the reasoning contained in the memoir. Metternich (the Austrian minister) had earlier submitted a note similarly calling for full restitution.[14]

Talleyrand, responding on behalf of Louis XVIII, offered several arguments. He asserted that because the war of 1815 was not against France but against Napoleon, a usurper, there was no need for a new treaty, and the Treaty of Paris of 1814 had not required the French to return the art treasures. In addition, many of the art objects belonged to France by virtue of solemn treaties. And since the treaties did not cover all of the loot, a "right of conquest . . . has been admitted by all nations in all times."[15]

Tsar Alexander I largely agreed with the French. Through his ministers in Paris, the tsar argued that "the military success of the allies gave them no right to profit from their current position by demanding concessions from France contrary to the Treaty of Paris." In fact, the tsar believed that in the previous year the allies could have "in all fairness exercised their rights of conquest to reclaim the art objects that France had taken from other countries." But the Treaty of Paris had in effect approved France's possession of them. Furthermore, as in the previous year, forced restitutions might have undermined the new government (of Louis XVIII). Nevertheless, Alexander I also noted that he would welcome any partial and voluntary restitution to which the king of France might agree.[16]

In the end, the pro-restitution position prevailed. England (after Waterloo), supported by Austria, Spain, the Low Countries, the German states, the Italian states, and the Vatican, contended that there could be no right to conquest that would permit the French to retain the plundered art. Only Russia remained sympathetic to the French position, perhaps in part because Alexander I had secretly purchased various looted art objects from the French.[17] The great powers (except Russia) meeting in the Congress of Vienna affirmed that the works of art seized by France during the wars should be returned to their owners.[18]

France returned most of the looted artworks seized by Napoleon to the cities and states from which they had been taken. It is impossible to quantify the extent of the restitution, in part because there is no comprehensive list of the items plundered by France. Still, the share of looted items that were returned must have been very high.[19] Prussian troops appeared at the Louvre to oversee the removal of all of the Prussian paintings and statues; the Prussians also made sure that objects taken from other German states (Schwerin and Brunswick) were likewise returned. Of 299 paintings seized from the German states, 272 were recovered.[20] English troops similarly supported the Dutch and Belgians as they reclaimed their art treasures at the Louvre.[21] Austrian soldiers enforced the restitution of artworks to Austria as well as to some of the Northern Italian cities (Venice, Parma,

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Piacenza, and Florence).[22] Spain apparently recovered virtually all of the paintings confiscated from Spanish nobles, and after dogged negotiations, the Vatican retrieved most of its treasures (77 out of 100 masterpieces according to one count).[23] A director of the Louvre at the time counted 5233 pieces of art from the Louvre restored to other countries, though, again, it is impossible to know what share of the total plunder this constituted.[24] However, the principle of full restitution was clear, and deviations from the principle appear generally to be traceable to practical obstacles to returning specific pieces. Some looted items had been distributed to churches and museums in the French provinces and were thus difficult to trace; others were lost, and still others were determined to be too large or unwieldy to be moved.[25] Florence left some 29 paintings at the Louvre because it could not afford to pack and ship them, and the Vatican left some treasures in Paris as a gift to Louis XVIII.[26] The apparently limited scale of the exceptions to restitution, and the practical or voluntary reasons for leaving certain items in France, both indicate that the restitution carried out by France was virtually complete.

This outcome signaled the emergence of a new norm in international relations, reversing the traditional right to plunder. Even Talleyrand, in his *Mémoires* written years later, acknowledged the persuasive force of the new norm: "perhaps the monuments of art should never have entered the domain of conquest."[27]

Codifying Antiplunder Norms: The Nineteenth Century

The next major developments in the emergence of antiplunder rules of international law were driven largely by a group of international law activists from Europe and the Americas, a transnational network of lawyers, diplomats, and scholars with shared professional interests and objectives. The international law activists established personal and professional ties across national borders in order to press for the codification of international rules that would regulate and "civilize" warfare. The protection of cultural treasures was part of that project.

Legal writers in the first half of the nineteenth century took full notice of the outcome of the Napoleonic Wars, including the fate of France's collection of looted art treasures, though they did not achieve consensus on whether restitution of plundered artworks constituted a legal obligation. One of the most cited jurists of the nineteenth century was Georg Friedrich von Martens, a Hanoverian diplomat and professor of law at the University of Göttingen. Martens was the founder and sole editor of the original *Recueil des Traités*, which developed into the largest collection of treaties in the world (the *Nouveau Recueil Général des Traités*). He also wrote an influential international law treatise, his *Précis du Droit Moderne de l'Europe*. In early (1795) editions, in discussing war, Martens made no mention of artworks or cultural institutions. However, in the 1820 edition, Martens asserted that in war private property should be spared, "especially monuments of art and industry."[28]

Henry Wheaton, the American jurist, authored another of the most cited international law treatises of the 1800s, *Elements of International Law*, first published

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in 1836. Wheaton noted the "forcible restitution of the pictures, statues, and other monuments of art, collected from different conquered countries during the wars of the French revolution, and deposited at the Museum of the Louvre." To explain the grounds for the restitution, Wheaton quoted and paraphrased extensively, without comment, from Castlereagh's 11 September 1815 note to the allies. However, he also quoted at length from a 20 February 1816 speech in the House of Commons by Sir Samuel Romilly, who criticized the restitution of artworks, pointing out that "many, and the most valuable of them, had become the property of France by express treaty stipulations," which should have been inviolate.[29]

To this assertion the editor of the 1866 edition of Wheaton, Richard Henry Dana, Jr., added a footnote quoting Henry Wager Halleck's *International Law* (1861), which concluded that either the works of art were "legitimate trophies of war [for the allies], or that the conduct of the allied powers in 1815 was in direct violation of the law of nations." Dana, in turn, argued against Halleck: "To strip a conquered belligerent, whose sovereignty we recognize and permit to continue, of works of art—the instructors and civilizers, as well as the just pride, of the nation—simply to transfer those advantages to ourselves . . . is a course which the enlightened and liberal civilization of modern times ought to denounce."[30] The point and counterpoint is revealing, first because it demonstrates that international law commentators were aware of the restitution of artworks in 1815, and second because it reveals ongoing disagreement, in the 1860s, as to whether the restitution had violated international rules or established new ones.

Francis Lieber, a German émigré to the United States, joined the faculty of Columbia College in New York City in 1857 and wrote prolifically on law and politics. When the Civil War erupted, Lieber threw himself behind the Union cause. General H. W. Halleck (author of the above-mentioned *International Law*) became general-in-chief of the Union Army in July 1862, and he invited Lieber to join a committee that would propose amendments to the American rules and articles of war and the regulations for armies in the field. Lieber accepted the task of drafting the document, and in February 1863, he circulated his *Code for the Government of Armies in the Field as Authorized by the Laws and Usages of War on Land* (since known as the Lieber Code). President Lincoln signed the code and promulgated it in May 1863 as General Orders No. 100, *Instructions for the Government of Armies of the United States in the Field*.[31] The *Instructions* protect "works of art, libraries, collections, or instruments belonging to a hostile nation or government. . . . In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured" (Article 36). The property belonging to charitable, educational, and scientific institutions, including "museums of fine arts," are not to be considered public property subject to seizure and sequestration (Articles 34, 31).[32]

Lieber's project for distilling laws of warfare set off more distant reverberations. It inspired a number of influential European jurists and publicists, who in turn lent their energies to various transnational efforts to codify rules of war. Among

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the international law activists were notable figures in European law and diplomacy, including August W. Heffter, Johan-Kaspar Bluntschli, Gustave Moynier, P. S. Mancini, John Westlake, and Franz von Holtzendorff. All were familiar with Lieber's *Code* and praised it as the model for their efforts; several of them corresponded with Lieber and invited him to participate in their projects. Members of this transnational network created the Institute of International Law and founded the first international law journal, the *Revue de Droit International et de Législation Comparée*.[33] Just as the unfolding horrors of the American Civil War provoked Lieber to seek a codification of the rules of war, the Franco-Prussian War of 1870–71 mobilized European jurists. The Franco-Prussian War also offered reasons for action with respect to cultural treasures. The destruction by bombardment of the cathedral and library of Strasbourg, along with the treasures they contained, was a notorious catastrophe.

The Russian emperor, Tsar Alexander II, invited European nations to send delegates to a meeting at Brussels, the subject of which would be a proposed convention, drafted by Russia, on the rules of war. Fifteen states sent representatives, and the conference convened in July 1874; Bluntschli was one of the German delegates. The participants adopted the proposed convention with minor changes. Article 8 declared, "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as private property. All seizure or destruction of, or willful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities." Ratification did not follow, so the document, since known as the "Brussels Declaration," never became international law. However, its influence was substantial, providing as it did much of the normative material that went into the *Oxford Manual* and the Hague Conventions. The Institute of International Law produced the *Oxford Manual* in 1880 as a model for national regulations to govern armed forces and the conduct of war. Article 53 of the *Manual* states, "The property of municipalities, and that of institutions devoted to religion, charity, education, art and science, cannot be seized. All destruction of or willful damage to institutions of this character, historic monuments, archives, works of art, or science, is formally forbidden, save when urgently demanded by military necessity."[34]

The initiative for the first Hague Peace Conference was, once again, Russian. The subcommission assigned in 1899 to draft rules for land warfare took the 1874 Brussels Declaration as its starting point and paid tribute to Lieber's *Instructions*. The 1899 conference produced the Convention Respecting the Laws and Customs of War on Land and its annexed regulations. That convention emerged unchanged in the second (1907) Hague Peace Conference (also convened by Russia) as Convention IV. Article 56 of the regulations follows the corresponding portion of the Brussels Declaration, adding just two words (in italics): "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All

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seizure or destruction of, or wilful [sic] damage to, institutions of this character, historic monuments, works of art and science, *is forbidden*, and should be made the subject of legal proceedings."[35]

By the first decade of the twentieth century, then, states had formalized and codified, for the first time, international norms for the wartime protection of cultural patrimony.

World War I and Its Aftermath

The destruction of, or damage to, historic and artistic monuments in World War I provoked furor and debate. The bombardment or burning of culturally significant sites aroused popular feeling, provoked heated public protests in the press, and led to propaganda campaigns on both sides. Hundreds of churches and historic buildings—indeed, entire towns with centuries-old neighborhoods of architectural distinction—along with the art treasures they housed were destroyed during the course of World War I. Such devastation befell dozens of towns in Belgium and France.[36]

Among the most notorious of the cultural losses were those suffered by Louvain and Rheims. The library of the University of Louvain, its 1636 building an architectural jewel, was a major repository of rare and ancient books. On the night of 25 August 1914, the Germans put the torch to much of the town, including the library, which was entirely lost. The incident triggered an international outcry, as well as German responses. The cathedral at Rheims, a high gothic masterpiece with spectacular stained-glass windows, also became an international *cause célèbre*. The Germans subjected the cathedral to artillery bombardment in September 1914, inflicting heavy damage. The international protest was so intense that, again, the Germans felt obligated to respond.[37]

The fate of Louvain, Rheims, and the other sites ensured that the treatment of cultural treasures was among the topics of international debate during the war. Belgium repeatedly appealed to the international community for redress of its cultural losses. Germany charged a well-known German art scholar, Paul Clemen, with inspecting and administering monuments in the occupied regions of Belgium and France. Clemen and his coworkers later published a collection of reports detailing their efforts. The Germans also appointed Otto von Falke, director of the Museum of Industrial Art in Berlin, as "commissioner for art with the German civil administration in Belgium." In addition, "from the fall of 1914 … so-called art officers were attached to the army commands, including those in the hinterland, and to the governments of occupation and became the official protectors of such monuments in their respective districts."[38]

Not surprisingly, the question of cultural property arose in the Peace Conference debates over reparations. Among the various committees created by the victorious allies for the peace negotiations in Paris was the Commission on War Responsibility and Sanctions (*Responsabilités des auteurs de la Guerre et Sanc-*

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tions). The U.S. Secretary of State, Robert Lansing, who chaired the commission, compared it to a grand jury, whose primary tasks were to document the facts relative to possible crimes in starting the war and in the conduct of the war, and to determine whether the evidence would justify prosecution. Various countries—including Belgium, France, Italy, Romania, and Serbia—presented reports to the commission, describing incidents of pillage and destruction involving houses, churches, libraries, and museums—even entire towns.[39] Operating parallel to the Commission on War Responsibility and Sanctions was the Commission on Reparation of Damage. Works of art and cultural monuments were clearly on the table during the reparations debates. National delegations agreed on the principle of (specific) *restitution*, which meant the return of identifiable objects taken from the territories occupied by the Central Powers.

A second principle under debate was "payments in kind," which referred to specific kinds of articles that would count toward the reparations burden. Allied experts prepared lists of materials that could be accepted as payment in kind, including works of art, along with items like machinery, cattle, and coal. A crucial area of debate centered on whether specific objects, like works of art, that had been lost or destroyed during the war should be subject to replacement by similar objects taken from the Central Powers ("restitution in kind" in the language of this article). Many of the national submissions to the Commission on Reparation of Damage included reports of damages to and losses of cultural properties and institutions. "Art objects," "monuments," and "artistic patrimony" appeared in its first subcommission's summary table of categories of damages "mentioned by all or most of the delegations," and in its report to the conference, "Categories of Damage."[40]

The Commission on Reparation of Damage assigned the question of restitution to its second subcommission. In a February 1919 meeting, the Italians proposed various means "by which the enemy may be required to make payment" for cultural losses:

> 7. Restoration of works and objects of art or of historical interest and documents, removed from the Associated countries.
>
> 8. Cession of works and objects of art or of historical interest in compensation especially for those which have been destroyed by the enemy in the Associated countries.[41]

Both France and Italy favored permitting the replacement of "works of art stolen or destroyed by the enemy by similar works of art," that is, restitution in kind.[42] In fact, the French proposed on 7 April 1919 that France, in order to "reestablish to the fullest extent possible the artistic patrimony of the devastated regions," be authorized to "choose art objects in Germany of a nature approximately comparable to the destroyed art objects."[43]

The committee of experts constituted by the Council of Four (Britain, France, Italy, and the United States) considered the French proposal at its meeting on 19

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April 1919. With respect to the article concerning art objects, the following interchange took place:

> Lord Sumner [Great Britain]: I accept this Article, if the French want it. I think it questionable whether it is wise politically, but that is France's affair. The bartering about objects of art caused very bitter feelings in 1814.
>
> Mr. Baruch [U.S.]: I sympathize with the replacement of works of art. It is impossible to create them anew.
>
> Mr. Loucheur [France]: Italy and Belgium are insistent on a right of this sort. Belgium particularly wants to replace the Louvain library.
>
> Lord Sumner: I assume that the value of these objects will also go into the pool [of reparations payments, presumably].
>
> Mr. Loucheur: Yes. I take it then that we all accept Article 4 [of the draft treaty provision]. Let us adjourn until 5:30 tomorrow.[44]

The historical memory invoked by Lord Sumner of similar negotiations in 1814, also in Paris, is noteworthy. Nevertheless, this French proposal did not find its way into the draft treaties. The Council of Four ultimately dropped, without providing reasons, the second subcommission's recommendation in favor of permitting reparation by works of art. The minutes of a meeting of the three powers (Britain, France, and the United States) on 23 April 1919 recorded that "after some discussion, it was agreed to omit" specified paragraphs from the draft articles, including one that would have permitted restitution in kind.[45]

The Preliminary Treaty Text presented to Germany on 7 May 1919 included, in Part VIII, Reparation, a Section II, Special Provisions. The special provisions, comprising three articles, appeared unchanged in the final treaty text of 28 June 1919. Article 245 required that the "German government must restore to the French Government the 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 last war." The most extensive article, 247, dealt with Belgium. "Germany undertakes to furnish to the University of Louvain . . . manuscripts, incunabula, printed books, maps and objects of collection corresponding in number and value to those destroyed in the burning by Germany of the Library of Louvain." In addition, Article 247 obligated Germany to transfer to Belgium parts of two triptychs long considered major masterpieces of Belgian art; the pieces in question had found their way into Germany via legitimate transactions well before the war.[46] Article 195 of the treaty established a committee of jurists, under the Reparation Commission, to hear and adjudicate claims advanced by Italy, Belgium, Czechoslovakia, and Poland for the return of items of historic and artistic importance taken in other times to Austria. Only Belgium and Czechoslovakia submitted claims under Article 195.

In short, the Versailles settlement at the conclusion of World War I reinforced the international norm against the seizure or destruction of cultural property in war. The resulting treaties also contributed to the formation of state practice re-

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garding restitution. The allies agreed that artistic and cultural objects removed during the war (and, in some instances, well before it) be returned. The restitution of specific items followed the practice initiated in 1815, when the victorious allies compelled France to return cultural treasures to their previous owners. But the peace treaties at the end of World War I also provided for limited restitution in kind, namely, the replacement of cultural treasures destroyed in the library of Louvain with comparable items from German collections.

The 1921 Treaty of Riga between the Soviet Union and (Soviet) Ukraine on one side and Poland on the other further cemented the principle of restitution.[47] The treaty (in Article 11) obligated the Soviet Union and Ukraine to return to Poland a variety of cultural and historical objects seized under imperial Russian occupation since 1772 and the reign of Catherine the Great. Of course, the treaty was binding only on the parties to it, but it did contribute to the development of a customary rule that cultural objects cannot legitimately be retained by countries that have removed them by force but should, instead, be returned.

The two decades following World War I produced several projects with the aim of codifying in general treaties the protection of cultural treasures during armed conflict. The rules of aerial warfare drafted in 1922 closely followed the Hague Regulations on land warfare and naval bombardment, prohibiting attacks on historic monuments and buildings dedicated to art, science, religion, charity, and medicine. The draft rules never took treaty form, but they did represent a degree of international consensus on extending protections for cultural sites in wartime.

On April 15, 1935—Pan-American Day—delegates from 21 countries signed the *Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments*, also known as the Roerich Pact. This pact grew out of the efforts of Nicholas Roerich, a Russian-born artist, who proposed and promoted the treaty. President Franklin D. Roosevelt hosted the signing ceremony at the White House. The signatories included the United States and 20 Latin American states, all members of the Pan-American Union. Article I declares, "Historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents." Eleven countries ratified the agreement, which came into effect in August 1935.[48] The Roerich Pact involved only a limited number of countries, and none of them were from the continent that had suffered the worst wartime depredations against cultural treasures. It was, nevertheless, the first international convention specifically devoted to the protection of artistic and cultural monuments in time of war.

The civil war in Spain triggered new efforts to produce a broad international treaty. The destruction of Spanish historic centers and cultural monuments, including the library of Oviedo, aroused worldwide concern. The initiative for an international response came from the League of Nations and the International Museums Office (IMO), an agency of the League. The result was a 1938 Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Time of War. The draft cited the 1899 and 1907 Hague Conven-

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tions as foundations, and it also borrowed from the 1923 Draft Convention on aerial warfare and from the Roerich Pact. The Draft Convention asserted that governments had a duty to protect historic buildings and works of art and "to prepare that defense in time of peace." In other words, like the 1923 aerial warfare draft and the Roerich Pact, it established obligations prior to the outbreak of war. Governments would also incorporate principles for protecting cultural monuments into their military regulations and the training of troops.[49]

One innovation in the 1938 Draft Convention was the notion of refuges, places to be designated by governments as shelters for movable artistic treasures. The refuges would have to be announced during peacetime, "not be used directly or indirectly for purposes of national defense," and be open to international inspectors during hostilities. The refuges would be marked with a special symbol, consisting of a "light blue triangle inscribed in a white disc." The draft also borrowed from the proposed aerial warfare convention the idea of zones of immunity extending 500 meters around historic and artistic monuments. These too had to be designated in peacetime, not be used for any military purpose, and be open to international inspection. Finally, the Draft Convention included a set of Regulations for the Execution of the Convention, an innovation that the 1954 Convention would later imitate.[50]

The IMO endorsed the Draft Convention and submitted it to the Council and Assembly of the League of Nations in the fall of 1938. The government of the Netherlands volunteered to host a diplomatic conference to finalize a treaty. The Assembly of the League accepted the Dutch offer, and in early 1939 the Dutch circulated the draft to 62 governments. By October 1939, 30 states had responded that they were willing to participate in such a conference; other states supported the ideals expressed but made no commitment regarding the conference. Then, Germany invaded Poland on September 1, 1939, putting an end to those plans.[51]

A last-ditch effort by the IMO to salvage some part of the convention project consisted of a Draft Declaration Concerning the Protection of Historic Buildings and Works of Art in Time of War. This declaration contained the same principles and mechanisms stipulated in the Draft Convention. The IMO hoped that states would sign the declaration as an expression of shared international principles. Five did: Belgium, Greece, the Netherlands, Spain, and the United States. But by the spring of 1940, two of these countries were at war, and further work ceased.[52]

World War II and the Soviet Art Seizures

Hitler and the Nazis surpassed even Napoleon as relentless plunderers of Europe's artistic patrimony. Of course, the Nazis could exploit tools and technologies that Napoleon never imagined. Where the French relied on carts and barges, the Germans could loot on a scale made possible by trucks, trains, and aircraft. Multiple authors have described and documented Nazi plundering during World War II.[53] That looting triggered another cycle of international norm development, as the

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Allies debated restitution and reparations. Those discussions began even before the war concluded.

In the early 1940s, as word of Nazi cultural looting filtered out of Europe, the Allies, including the Soviets, denounced the Nazis as plunderers and violators of international rules. The Allies also began at an early stage to prepare for the protection of Europe's cultural sites during the offensives that would take Allied troops across Europe and into Germany, and to plan for the restitution of cultural goods stolen by the Nazis. In condemning Nazi plundering and in devising restitution policies, the Allies invoked precedents and international norms, including 1815, the Hague Convention, and the Versailles settlement.

Already in 1942, the Allies were planning for the recovery and restitution of cultural properties stolen by the Germans during the war.[54] The general restitution policy that emerged as early as January 1943 was the *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control*, signed by 16 governments (including those of Britain, the Soviet Union, and the United States) and the French National Committee. The declaration announced that transfers of ownership of or interest in properties from the occupied lands would be void, even if they took place under apparently legal cover. The disposition of looted properties also figured in the agenda for the Bretton Woods conference of July 1944. The Bretton Woods *Final Act* referred to the 1943 *Declaration* and endorsed the measures taken by the Allies to recover and restore to their owners looted properties, even when found in the territory of neutral countries. As Kurtz noted, "postwar restitution [was] a goal generally accepted by all the Allies," though it became "thoroughly embroiled in the diplomatic and political conflicts of the Great Powers."[55]

When the war ended in Europe, the Allies confronted a number of knotted questions regarding the return of dislocated cultural properties to the countries from which they had been taken during the war. The Allied debates over restitution in kind are particularly relevant for understanding the international law context of Russia's current claims on the cultural objects taken from Germany at the close of the war. Specific restitution moved ahead by general agreement, though it was a massive and complex task in practice, and the Allies did not agree on common procedures and mechanisms to carry it out.[56] The issue of restitution in kind was bitterly divisive.

The French took the hardest line: Where looted items could not be located, they should be replaced by equivalent pieces from German collections. Belgium, Luxembourg, the Netherlands, and several other smaller countries supported the French position. It is worth recalling that the Allies, in fact, had in their control virtually all of Germany's cultural patrimony, much of which they were finding in hidden caches. The Russians favored restitution in kind only for unique cultural treasures, and the Americans and British sided with them on this issue. However, some influential Americans argued in favor of restitution in kind. A 1945 report from the Council on Foreign Relations, an influential private group, recommended: "The

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Axis nations must likewise restore property of exceptional historical, artistic, or cultural importance or if it has been lost, destroyed, or damaged, substitute equivalent property out of Axis public or private property." After months of back-and-forth negotiations, the four major powers, in the forum of the Allied Control Council (ACC), agreed that restitution in kind would apply only to "goods of a unique character." But they left the definition of conditions and mechanisms for such restitution in kind to a "special instruction" to be prepared later.[57]

In the end, the four Allies failed to reach agreement on a general procedure for restitution in kind. Instead, the Directorate of Reparations, Deliveries, and Restitution (DRDR, a body under the ACC) determined that any claim for restitution in kind for unique cultural objects would be submitted to the DRDR, which would resolve each request individually. In other words, the occupying powers refused to grant any country the authority to obtain restitution in kind unilaterally; only the DRDR, on a case-by-case basis, could approve replacement of specific cultural treasures.[58] But even that proposed mechanism came to nothing. The Americans had consistently resisted a general program for restitution in kind.[59] The Soviets effectively closed off the possibility of restitution in kind by declining to provide a list of cultural objects removed by the Soviets from Germany.[60] An additional problem was that the Soviets had not been able to compile a comprehensive list of Soviet cultural objects lost or destroyed during the war. Such a list was essential in order to identify the items that would be subject to restitution by replacement with similar objects from Germany and its allies.[61]

Some of the postwar peace treaties contained clauses requiring restitution in kind for cultural property. For instance, the treaty with Bulgaria required that country to provide cultural objects of similar kind and value to replace items taken by Bulgaria from other states and since lost or destroyed. The armistice agreement with Hungary included a similar clause, as did the peace treaty with Romania.[62]

ANALYSIS: PRIVATE CULTURAL PROPERTY

Russia continues to possess hundreds of thousands of cultural properties removed from Germany and other states at the end of World War II, and its recent legal measures aim to confirm Russian ownership of the vast majority of those objects.[63] The Russian *Federal Law on Cultural Valuables Displaced to the USSR as a Result of the Second World War and Located on the Territory of the Russian Federation* purports to establish the legal basis for the Russian claim. The preamble of the law lays out the Russian legal rationale for retaining ownership of the displaced objects: They constitute "partial compensation for the damage caused to cultural property of the Russian Federation as a result of the plunder and destruction of its cultural valuables by Germany and its military allies during the Second World War." Article 2 of the law lists "International Legal and Other Instruments on Which the Present Federal Law Is Based" and names the following: the Peace

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Treaties of 1947, documents relating to the occupation of Germany, the treaty with Austria of 1955, the Treaty of Final Settlement with Germany of 1990, the London Declaration of January 1943 (referred to in the Russian law as the "United Nations Declaration"), and Article 107 of the United Nations Charter. The law does not explain how or why the documents referred to support the Russian claim for "compensatory restitution." Rather, it assumes that they are instances of, or statements of, an international norm of "compensatory restitution." As Peter Maggs noted, the 1998 decision of the Russian Constitutional Court, upholding the *Federal Law on Cultural Valuables*, applied "a highly dubious theory of compensatory restitution" and cited various international treaties without engaging "in serious analysis of the provisions of these treaties."[64] Indeed, as argued earlier, "compensatory restitution" does not exist as a category in international law.

The cultural valuables removed by the Soviets in World War II came from diverse prewar origins.[65] Some of the cultural property now held by Russia was in fact Holocaust plunder. The Nazis had seized artworks and other cultural valuables from Jews and other victims of the Holocaust or opponents of Nazism all across Europe, east and west. They gathered that loot into storehouses and depots in Germany and territories annexed to the Reich, where the Soviet forces ultimately found it and removed it to the Soviet Union. The international legal status of private property in wartime is quite straightforward: It is immune from seizure and thus cannot be taken by a belligerent state as restitution in kind, as trophies, or for any other purpose.

The 1907 Hague Regulations codify a clear rule: "Private property cannot be confiscated." The regulations also declare that "pillage is formally forbidden."[66] Russia had taken the initiative in convening the 1907 Hague conference. Russia had issued the invitations, prepared the list of topics for discussion, and ratified the resulting conventions. The Soviet Union accepted the Hague Conventions (and other treaties) entered into by Russia as legally binding. Clearly, then, because private property, including cultural valuables, is immune from seizure, any Soviet removals of private cultural property from territories it occupied in the closing months of World War II cannot be legitimate. And illegitimate seizures cannot confer upon today's Russia legal title to the illegitimately seized private cultural properties, for purposes of "compensatory restitution" or for any other reason.

The Russian *Federal Law on Cultural Valuables*, after the decisions of the Constitutional Court, permits the return of cultural property that belonged to private persons in former enemy states, as long as the owners were not Nazi organizations or persons active in Nazi regimes. However, the law does not allow private citizens to submit claims for the return of cultural valuables directly to the Russian government. Instead, foreign governments must act on behalf of their citizens. The law does not bar the filing of private claims in Russian courts, but so far only one such case has been pursued (the claim of the Herzog heir). Furthermore, unclaimed or "ownerless" cultural objects become property of the Russian state once the projected 18-month period for submitting claims has passed. The controversies and criticisms that continue to swirl around the *Federal Law* as it applies to

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private claimants focus on practical obstacles: the difficulties non-Russians face in obtaining information about objects in the Russian repositories, the short period for filing claims, the question of when that period began, and the complexities of dealing with Russian courts and civil procedures, among others.[67]

ANALYSIS: STATE PROPERTIES AND RESTITUTION IN KIND

If private property is immune from seizure as restitution in kind, the analysis must turn to state properties as potential material for "compensatory restitution." The Russian *Federal Law* uses the term "restitution" essentially as I use it in this article, but it does not employ the term "restitution in kind." Instead, the law refers to "compensatory restitution," which it defines as

> [a] form of international legal material responsibility of an aggressor State, applied in cases when implementation of the responsibility of said State in the form of regular restitution is impossible, consisting of the responsibility to compensate for the material damage inflicted on another State by handing over to the affected State objects of the same kind (or by their removal by the affected State for its own benefit) as those that were plundered and illegally removed by the aggressor State from the territory of the affected State.[68]

"Compensatory restitution" does not exist as a term or concept in international law, so the analysis must begin with those legal principles or categories that are most similar to the notion of "compensatory restitution" and therefore might be applicable to the Russian claim. The idea of compensatory restitution is similar to what I (and the legal literature more generally) have called "restitution in kind," in that it refers to the replacement of cultural objects that cannot be returned (due to loss or damage) by "objects of the same kind" from the state responsible for the loss. "Compensatory restitution" differs from restitution in kind in that it invokes the idea of compensation. The law, and the Russian claim more broadly, provides not for replacement of lost objects by similar ones but rather for a transfer of cultural property that offsets Russian cultural losses during the war or compensates Russia for those losses.

The question to be answered is whether international law permits either restitution in kind or the broader, less specific transfer of cultural objects as "compensatory restitution." Whatever conclusions apply to restitution in kind will apply with even greater force to "compensatory restitution." If restitution in kind is illegitimate under international law, then "compensatory restitution" is, *a fortiori*, also illegitimate. If the narrower and more specific "restitution in kind" is impermissible, then the broader and more open-ended "compensatory restitution" must be also.

The displaced cultural valuables held by Russia since World War II include two categories of state-owned cultural properties: objects and collections that belonged to the Soviet Union's enemies in the war (Germany and its allies) and those

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that belonged to states that were not enemies of the Soviet Union. Cultural valuables in the latter category were those seized by the Axis powers in countries that they defeated and occupied. For instance, German forces shipped various French and Belgian state archives to Germany. As they overran Germany, Soviet troops and trophy brigades found those items and packed them off to the Soviet Union. For such properties, the law is clear: Cultural valuables from states that were not Russia's enemies during the war cannot serve as restitution in kind for Russia. Put differently, Russia cannot claim compensatory restitution from the cultural property of its own Allies or other victims of Axis aggression because those countries inflicted no harm on Russia's cultural patrimony. The clear illegitimacy of claiming restitution in kind from the cultural valuables of other victims of Axis aggression may help to explain why Russia has returned some state-owned collections to the countries from which Germany or its allies had taken them.[69]

The remaining category of cultural valuables in Russia's possession is that of properties originally owned by enemy states. The claim would be that Russia is entitled to restitution in kind from countries responsible for the cultural losses the Soviet Union suffered during World War II. Germany and its allies would have a corresponding duty to make good those losses via replacement or compensation. The question is whether international law provides for unilateral restitution in kind from the cultural property of defeated enemies.

Though the Russian *Federal Law* does not provide the arguments needed to sustain its claim of a right to "compensatory restitution" under international law (it is, of course, a statute, not a brief), it is possible to construct such arguments and examine their plausibility. Three such arguments, based on international legal norms and materials, appear possible in principle. The first is a claim that Soviet art seizures were justified by agreements among the Allies regarding the authorities and prerogatives of the occupying powers in Germany. The second possible argument is that a right to restitution in kind exists under customary international law. The third potential justification would be grounded in a general right to compensation for losses suffered when another state bears legal responsibility for those harms. The following sections address these three international law arguments.

Allied Agreement on the Authorities of the Occupying Powers in Germany

The four powers that assumed control of occupied Germany—Britain, France, the Soviet Union, and the United States—did discuss principles and procedures for securing reparations or restitution from Germany for war losses, including seized, lost, or destroyed cultural properties. Those negotiations took place within the ACC and in other forums. The problem for the Russian claim is that those talks never produced a common policy, much less a legal instrument authorizing compensatory restitution by means of seizing cultural treasures located in Germany.

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Soviet representatives consistently pushed for restitution in kind (replacement with comparable objects) only for unique items of outstanding cultural or historic value.[70] As discussed earlier, the Allies reached general agreement on a broad policy of specific restitution (return of cultural objects to their prewar owners or, more accurately, to the countries from which they had been taken) but did not agree on restitution in kind. Furthermore, during the debates in the ACC and its subgroups, the Soviets did not advocate a policy of wholesale restitution in kind. In fact, the Soviet representatives in the ACC working group declined to provide a list of cultural objects taken by Soviet trophy brigades from Germany, effectively killing any possible Allied agreement on a policy of restitution in kind. In other words, the Soviets themselves in 1945 and 1946 did not support the comprehensive restitution-in-kind principle that the Russian *Federal Law* suggests was the subject of Allied agreement. In fact, after declining to provide a list of cultural objects seized in Germany, it appears that the Soviets were unable subsequently to demand restitution in kind.[71]

Restitution in Kind under Customary International Law

The Russian *Federal Law on Cultural Valuables Displaced to the USSR* also refers to the Peace Treaties of 1947 and the Treaty on the Restoration of Independent and Democratic Austria of 1955 (Article 2). Of course, none of the treaties mentioned could directly authorize the transfer of cultural valuables from Germany to the Soviet Union, as they all dealt with other countries. In any case, the Soviet art removals had taken place before the treaties were signed. Still, one could argue, in support of the Russian *Federal Law*, that the treaties identified in Article 2, though not directly authorizing the Soviet removals, were evidence of a customary international norm of restitution in kind. The argument for a customary norm permitting restitution in kind for cultural objects would require evidence of consistent state practice accompanied by the belief that such practice was legally grounded (*opinio juris*).

On the question of state practice, an advocate of the Russian position could point to a set of instances in which, at the conclusion of a war, states were obligated to provide restitution in kind for cultural treasures lost or destroyed during the conflict. Such an account would begin with the Treaty of Versailles, which required Germany to hand over to Belgium cultural objects to replace those destroyed in the razing of the University of Louvain library (Article 247, as discussed earlier). The 1921 Treaty of Riga between the Soviet Union and Ukraine on one side and Poland on the other did not mandate restitution in kind but opened the possibility of it.[72] The treaty did bring about specific restitution, with the Soviet Union and Ukraine returning to Poland a variety of cultural and historical objects, some seized as early as 1772. It also provided for the possibility of handing over items of "the same artistic or scientific value" when returning the original pieces would destroy the integrity of a larger collection (§ 7).

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The armistice treaties of 1947, with Italy, Hungary, Romania, and Bulgaria, also included provisions for restitution in kind for cultural objects. The 1947 agreements required the former Axis powers, when their forces had removed items belonging to the cultural heritage of any of the United Nations and those objects could not be returned, to provide pieces of similar kind and value. The problem with the 1947 treaties, as already noted, is that they cannot be used as evidence of a customary norm that would have been in place in 1945–46 when the Soviet Union took possession of cultural valuables in Germany. More generally, though the Versailles and Riga treaties were legally binding on the states that were parties to them, they are insufficient to establish a general customary international rule, especially lacking evidence of *opinio juris* (general acknowledgment that the norm in question is a legal rule).[73]

Furthermore, even if we were to grant the argument that treaties like the 1919 Treaty of Versailles and the 1921 Treaty of Riga established a customary norm of restitution in kind, the Russian position is still unsustainable. Suppose that the treaties referred to did establish a customary practice of restitution in kind. The next step would be to specify the nature of that practice. Though it may not be clear what treaty-based restitution practice is, it is clear what it is not. None of the treaties that included restitution-in-kind provisions created an open-ended, unilateral right of the state seeking restitution to seize whatever it wanted as compensation. Indeed, the salient fact is that restitution in kind has always been authorized within the framework of a treaty. States certainly have a right to restitution in kind when authorized by formal agreement. Of course, there was no such treaty in place at the time the Soviet armies carried out the transfer of cultural valuables from Germany and other countries in World War II.

A Customary Right to Reparation Under the Law of State Responsibility

State responsibility exists when a state violates an international legal obligation, thereby inflicting a loss or damage on another actor.[74] Germany and its allies were responsible for the loss or destruction of cultural treasures in the Soviet Union during World War II, in violation of international law, namely, the Hague Regulations (Article 56) protecting cultural and artistic property during wartime. Perhaps the Russian claim for "compensatory restitution" would be viable under the norms governing reparations. Given a loss inflicted in violation of international law, the next question has to do with the nature of the reparation to which the harmed state is entitled. Under state responsibility, failure to meet a legal duty entails "an obligation to make reparation," which "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[75] Though "the question of restitution in kind (or specific restitution) is a matter of considerable

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doubt and controversy," in some instances "specific restitution can be the only *legal* remedy or result."[76] Brownlie mentioned "illegal possession of territory" and "objects of special historical or cultural or religious significance" as subject to specific restitution. When specific restitution is impossible, the state that caused the harm is obligated to provide some other kind of reparation, which could take the form of monetary compensation or even "satisfaction."[77]

In the case of many of the Soviet Union's cultural losses, specific restitution was impossible. Germany could not restore the *status quo ante* because it could not return the artworks that had been destroyed or lost. Let us assume, for the sake of argument, that restitution in kind is an acceptable form of reparation where specific restitution is impossible, given that some treaties have provided for restitution in kind for the loss of cultural treasures. Indeed, the previous section argued that the pattern of international practice has been that restitution in kind occurs when, and only when, stipulated by treaty. Could Russia argue that, under international law of state responsibility, in the absence of a treaty providing for restitution in kind, it was entitled to compel Germany to provide reparation for cultural losses? By seizing German cultural valuables at the end of the war and during the occupation, Russia was, by this logic, giving effect to its right to cultural property reparation, under the general international law of state responsibility. Brownlie suggested that such a remedy might be permissible, in that "certain 'sanctions' may be available to an injured state either to enforce the making of reparation or as means of protecting its legal interest until such time as a settlement is effected."[78]

The problem with this argument, as applied to the Russian claim on German cultural valuables, is that the asserted right unilaterally to enforce reparation would run afoul of specific rules that protect cultural property from seizure or removal. The first section of this article assessed the development of those rules beginning with the Napoleonic Wars. The basic doctrine of *lex specialis derogat legi generali* holds that a specific rule overrides a more general one. A law regulating a specific subject (*lex specialis*) has primacy over a law governing general matters. In the present context, international rules protecting cultural property in war and occupation are the specific law, and rules on state responsibility are the general law. The specific rule is quite clear: "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure or destruction of, or wilful [sic] damage to, institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."[79] The law prohibits, categorically, "all seizure" of cultural property. The supposed general norm permitting the Soviet Union to enforce reparation for cultural property losses by removing German cultural objects would therefore run afoul of the more specific rule. The seizure of cultural valuables of another country in wartime or occupation, for any purpose, is impermissible under international law.

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CONCLUSION

International antiplunder rules emerged through cycles of development triggered by events. Those rules include two dimensions. The first is a clear international legal norm prohibiting the seizure or removal of cultural property in wartime, codified in the Hague Regulations of 1899 and 1907.[80] The second dimension complements the first: cultural objects removed during war should be returned to the countries from which they were taken. The practice of specific restitution has been consistent for a period of some 200 years. Postwar settlements following conflicts in which one state removed cultural objects from another have regularly included the return of those items. Cultural valuables seized during the Napoleonic Wars, the Franco-Prussian War, World War I, and World War II have thus been subject to specific restitution. The number of instances is not large, but the practice of restitution across them has been consistent. Furthermore, the antilooting norm would be meaningless if states were allowed to retain their illegally obtained plunder. Finally, it seems clear from the discourse and arguments surrounding postwar returns that the states involved viewed specific restitution as obligatory (establishing *opinio juris*). During World War II and at its conclusion, the Western Allies treated specific restitution not just as a preferred policy but as the only policy consistent with international norms protecting cultural treasures from seizure and destruction.[81]

Restitution in kind, and compensatory restitution, however, are a different question. The cultural valuables removed to the Soviet Union at the end of World War II fall into three categories, based on prewar ownership: property belonging to private persons and organizations, property belonging to nonenemy states, and property belonging to enemy states. As shown earlier, cultural objects in the first two categories can never be taken as restitution in kind. International law clearly forbids any seizure or removal or private property, and Russia can have no legal claim on the property of states that did not inflict any cultural losses on Russia and that were, in fact, fellow victims of Nazi aggression. The only category of cultural goods to which the Russian claim of compensatory restitution might conceivably apply is that consisting of property belonging to enemy states during World War II (Germany and its allies).

Even with respect to the cultural property of enemy states, as the analysis showed, no general rule of international law supports restitution in kind. And if restitution in kind is illegitimate under international law, the broader notion of "compensatory restitution" is, *a fortiori*, also illegitimate. History does provide instances of postconflict treaties that included provisions requiring or authorizing restitution in kind. But those precedents do not support the claim that Russia has asserted, namely, the unilateral right to take unspecified quantities of cultural valuables from Germany and other states as replacement or compensation for the loss of unspecified quantities of Russian cultural objects. If the treaties of Versailles and Riga established a precedent, it was a precedent of effecting restitution in kind through formal, multilateral agreement.

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In the absence of general international norms permitting unilateral restitution in kind or seizure of cultural objects as compensation or reparations, the Soviet removals from Germany amount simply to seizure, and international law prohibits "all seizure" of cultural objects in wartime.[82] Russia may well be entitled to some form of compensation for its cultural losses in World War II. Two bilateral treaties signed by Russia and Germany in the early 1990s commit both countries to return to their owners (or their successors) any "lost or unlawfully transferred art treasures."[83] Reparation for Russia's cultural losses could, it would seem, take place in a process undertaken pursuant to those treaties. Such a mechanism would include an orderly accounting of losses and the identification of replacement items. Only an open and treaty-based procedure for restitution in kind could dispel the air of illegitimacy that surrounds the Russian *Federal Law on Cultural Valuables*.

ENDNOTES

1. Ritter, "The Soviet Spoils Commissions," 447; Hughes, "The Spoils of War"; Grimsted, "Tracing 'Trophy' Books."
2. Akinsha and Grimsted, "Federal Law on Cultural Valuables," this issue, Appendix 1.
3. Sandholtz, *Prohibiting Plunder;* Sandholtz and Stiles, *International Norms and Cycles of Change*.
4. The historical account that follows draws extensively on Sandholtz, *Prohibiting Plunder*.
5. Gould, *Trophy of Conquest*, 41.
6. Müntz, "Les Annexions de Collections d'Art" (1895), 377.
7. Saunier, *Les Conquêtes Artistiques*, 35–37.
8. Lanzac de Laborie, *Paris sous Napoléon*, 236; Gould, *Trophy of Conquest*, 65.
9. Saunier, *Les Conquêtes Artistiques*, 87; Treue, *Art Plunder*, 187.
10. "Memoir of Lord Castlereagh," September 1815.
11. "Russian Memoir Relative to the Statues, etc.," September 1815.
12. Talleyrand-Périgord, *Mémoires II, 1807–1815*, 343.
13. von Müffling, *The Memoirs of Baron von Müffling*, 264; Müffling was the military governor of Paris in 1815.
14. Protocol of the Conference: Meeting of 6 September 1815; Lord Castlereagh to the Prince Regent, 11 September 1815; "Memoir of Lord Castlereagh," September 1815; Hardenberg, "Confidential Note from Prince Hardenberg to Lord Castlereagh," September 1815; Metternich, "Note from Prince Metternich." 31 August 1815.
15. Talleyrand to Castlereagh, 19 September 1815.
16. "Russian Memoir Relative to the Statues, etc."
17. Quynn, "The Art Confiscations," 452, 460.
18. Saunier, *Les Conquêtes Artistiques*, 122.
19. For an overview of the restitution, see Quynn, "The Art Confiscations," 450–60.
20. Quynn, "The Art Confiscations," 450–51; Treue, *Art Plunder*, 192;
21. Saunier, *Les Conquêtes Artistiques*, 114–16, 118, 121.
22. Quynn, "The Art Confiscations," 453; Saunier, *Les Conquêtes Artistiques*, 131–33.
23. Lanzac de Laborie, *Paris sous Napoléon*, 299; Müntz, "Les Annexions de Collections d'Art" (1896), 502.
24. Treue, *Art Plunder*, 196.
25. Gould, *Trophy of Conquest*, 125; Quynn, "The Art Confiscations," 456–57.
26. Treue, *Art Plunder*, 196–98; Saunier, *Les Conquêtes Artistiques*, 167.
27. Talleyrand-Périgord, *Mémoires II, 1807–1815*, 463.
28. Martens, *Précis du Droit des Gens Moderne de l'Europe*, 251–52.

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29. Wheaton, *Elements of International Law*, 375, § 352; 377, § 354.

30. Wheaton, *Elements of International Law*, 377, n. 170; 377–78, n. 170.

31. Freidel, *Francis Lieber*, 331–35; Childress, "Francis Lieber's Interpretation of the Laws of War," 37–38.

32. "General Orders No. 100, Instructions for the Government of the Armies of the United States in the Field."

33. Sandholtz, *Prohibiting Plunder*, 71–100.

34. "Project of an International Declaration," 28; Institut de Droit International, *Annuaire de l'Institut de Droit International*, 700–709; "The Laws of War on Land," 44.

35. "Convention (IV) Respecting the Laws and Customs of War on Land," 85–86.

36. Lettenhove, *La Guerre et les Oeuvres d'Art en Belgique;* Phillipson, *International Law and the Great War;* Marguillier, *La Destruction des Monuments;* Garner, *International Law and the World War.*

37. Garner, "Some Questions of International Law in the European War"; Foreign Ministry of Germany, *Die völkerrechtswidrige Führung des belgischen Volkskriegs;* Garner, *International Law and the World War;* Marguillier, *La Destruction des Monuments*, 40. Marguillier cites the German booklet as *Le Bombardement de la cathédrale de Reims*, 1915.

38. Clemen, *Kunstschutz im Kriege;* Posner, "Public Records under Military Occupation," 215–16.

39. La Documentation Internationale, *La Paix de Versailles*, 12, 17, 47–48.

40. La Documentation Internationale, *La Paix de Versailles*, 185–220, 694–98.

41. "Methods by Which the Enemy May be Required to Make Payment," presented by the Italian Delegation, 19 February 1919, reproduced in Burnett, *Reparation at the Paris Peace Conference from the Standpoint of the American Delegation*, 604–605.

42. "Second Subcommittee: Minutes of the Twelfth Meeting, March 5, 1919, 4:30 P.M.," reproduced in Burnett, *Reparation at the Paris Peace Conference*, 663–665.

43. "Dans le but de rétablir dans toute la mesure du possible le patrimoine d'art des régions dévastées, la France sera autorisée à faire choisir en Allemagne des objets d'art de nature sensiblement analogue à celle des objets d'art détruits. . . . La valeur de ces objets sera portée au crédit de l'Allemagne et sera considérée comme un paiement en espèces"; from "Exhibit 18, Loucheur's Proposal for Reparation in Kind and for Reparation by Means of German Labor, April 7, 1919," reprinted in Burnett, *Reparation at the Paris Peace Conference*, 865.

44. "Minutes of the Experts, April 9, 1919, 10 P.M.," reprinted in Burnett, *Reparation at the Paris Peace Conference*, 876.

45. "Minutes of the Council of Four (I.C. 176 A), April 23, 1919, 4 P.M.," reprinted in Burnett, *Reparation at the Paris Peace Conference*, 1009. The deleted paragraphs can be found in "British First Print (Including Annexes 1–5), April 21, 1919," Annex 4, reprinted in Burnett, *Reparation at the Paris Peace Conference*, 981–82.

46. De Visscher, *International Protection of Works of Art and Historic Monuments*, 829–30.

47. *Treaty of Peace between Poland, Russia and the Ukraine*, 1921.

48. Union Panamericana, *Tratado para la Proteccion de Instituciones*, 4; Roerich Pact and the Banner of Peace, 10–11, 36–37; Decter, *Nicholas Roerich*, 132–33.

49. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 32; Société des Nations, *Coopération Intellectuelle 85–86: Enquêtes 1938*; Kurtz, *Nazi Contraband*, 7–8; De Visscher, *International Protection*, Appendix A; Toman, *The Protection of Cultural Property*, 18–19.

50. De Visscher, *International Protection*, Appendix A; Toman, *The Protection of Cultural Property*, 18–19.

51. Toman, *The Protection of Cultural Property*, 19.

52. De Visscher, *International Protection*, Appendix A; Kurtz, *Nazi Contraband*, 9.

53. Roxan and Wanstall, *The Rape of Art;* Simon, *The Battle of the Louvre;* Nicholas, *The Rape of Europa;* Petropolous, *Art as Politics in the Third Reich;* Feliciano, *The Lost Museum*; Sandholtz, *Prohibiting Plunder*.

54. On the debates among the Allies regarding restitution, see Kurtz, "The Allied Struggle," this issue, as well as Kurtz, *Nazi Contraband* and *America and the Return of Nazi Contraband*.

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55. Kurtz, *Nazi Contraband*, 58; Kowalski, *Art Treasures and War*, 40–41, 42; Kurtz, "The Allied Struggle," this issue; Kurtz, *America and the Return of Nazi Contraband*, 110, 114.

56. Kurtz, "The Allied Struggle," this issue; Kurtz, *America and the Return of Nazi Contraband*, 110.

57. Kurtz, *Nazi Contraband*, 111–13; Kurtz, *America and the Return of Nazi Contraband*, 107; Council on Foreign Relations, *The Postwar Settlement of Property Rights*, 50; Kurtz, "The Allied Struggle," this issue.

58. Kurtz, "The Allied Struggle," this issue; *America and the Return of Nazi Contraband*, 110–113.

59. Kurtz, "The Allied Struggle," this issue; *America and the Return of Nazi Contraband*, 110; Akinsha and Kozlov, *Beautiful Loot;* Kurtz, *Nazi Contraband*, 132–51.

60. See Akinsha, "Stalin's Decrees," this issue.

61. Kurtz, "The Allied Struggle," this issue; Akinsha, "Stalin's Decrees," this issue.

62. *Treaty of Peace with Bulgaria*, February 10, 1947; *Armistice Agreement with Hungary, January 20, 1945*; *Treaty of Peace with Romania, February 10, 1947.*

63. The Russian *Federal Law* covers only those cultural objects removed under Soviet authority, for instance, by the trophy brigades. Soviet soldiers took cultural property for themselves and the *Federal Law* says nothing about such unofficial, "private" plunder.

64. Akinsha and Grimsted, "Federal Law on Cultural Valuables," this issue; Maggs, "The Russian Constitutional Court Decisions," 7.

65. This article addresses cultural valuables seized by agents of the Soviet state (its armed forces and trophy brigades). It does not treat "private plunder," which is seizure of cultural property by Soviet personnel not acting in an official capacity or under Soviet government authority. The *Federal Law on Cultural Valuables* does not claim as Russian property cultural valuables removed to the Soviet Union by private actors. In principle, private plunder is subject to return to its original owners. In practice, a variety of obstacles and complications have inhibited such returns. See, for an example, Akinsha, "The Baldin Bremen Kunsthalle Case," this issue.

66. Hague Convention (IV), Regulations Respecting the Laws and Customs of War on Land, Arts. 46, 47.

67. See Akinsha and Grimsted, "Federal Law on Cultural Valuables," this issue; Grimsted, "Legalizing 'Compensation'," this issue; "Maggs, "The Russian Constitutional Court Decisions." For a more detailed account of the working of the *Federal Law on Cultural Valuables* and its amendments, see Grimsted, "Legalizing 'Compensation'," this issue, section titled "2000: An Amended Law Implemented under the Ministry of Culture."

68. *Russian Federal Law*, Article 4.

69. See Grimsted, Hoogewoud, and Ketelaar, *Returned from Russia*.

70. Kurtz, *Nazi Contraband;* Kurtz, "The Allied Struggle," this issue.

71. See Akinsha, "Stalin's Decrees," this issue; Kurtz, "The Allied Struggle," this issue.

72. *Treaty of Peace between Poland, Russia and the Ukraine*, 1921.

73. Carducci pointed out that the existence of restitution clauses in some treaties may be evidence of traditional practice but not necessarily of customary law. He argued, moreover, that the variety of obligations and mechanisms contained in agreements like the 1919 Versailles Treaty make it impossible to identify a general rule applicable to all states; Carducci, *La Restitution Internationale*, 125–26.

74. Brownlie, *State Responsibility: Part I;* Shaw, *International Law*, 696.

75. *Chorzow Factory* (1928), Permanent Court of International Justice, Series A, 29, 47–48.

76. Brownlie, *State Responsibility: Part I*, 210. Brownlie used the terms "restitution in kind" in a sense that differs from that employed in this article and in current general usage. For Brownlie, "restitution in kind" means return of objects or properties wrongfully taken. Brownlie's term "specific restitution" captures the same idea (return of specific items). In this article and in discussions of cultural property more generally, "restitution in kind" refers to replacement of lost or destroyed objects by items of comparable kind and value.

77. Brownlie, *State Responsibility: Part I*, chap. 13.

78. Brownlie, *State Responsibility: Part I*, 34.

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79. Koskenniemi, "Fragmentation of International Law," 4; Hague Convention (IV), Regulations Respecting the Laws and Customs of War on Land, Article 56.

80. Antiplunder norms became even more specific and developed in the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol. This article has not included the 1954 Convention in its analysis because the treaty was not in effect at the time the events at the heart of Russian claim took place.

81. But see Carducci, *La Restitution Internationale*, 123–29. Carducci argued that an international norm of postconflict specific restitution has not emerged.

82. Convention (IV), Respecting the Laws and Customs of War on Land, Article 56.

83. *Treaty Between the Federal Republic of Germany and the Union of Soviet Socialist Republics on Good-Neighborliness, Partnership and Cooperation*. 9 November 1990; *Agreement Between the Government of the Federal Republic of Germany and the Government of the Russian Federation on Cultural Cooperation*, 16 December 1992.

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