

## “Praeda bellica in bellum justum?”

### The legal development of war-booty from the 16th century to date: A chance of better museum practice?

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War-booty is as old as mankind. This keynote will discuss the development of public international law from the 16th to the 21st century. Also it will lay the groundwork for the legal framework on restitution to help the readers care adequately for problematic goods in their institutions. For this reason, recommendations including restitution guidelines are expounded towards the end of this article.

#### A. Introduction

In ancient times, Marcus Tullius Cicero excoriated a roman warlord in his fictional pleading *Orationes in Verrem* and strongly insisted that there can be no worse crime than making booty in times of war. This warning, it seems, was to remain unheard for centuries. In the sack of Jerusalem, Roman groups again looted the city of Jerusalem wholesale. In Roman law, it was a common conception that war-booty was lawful, as the victor had the right to take spoils. *Vae victis!* This unfortunate development continued in the Middle Ages, when Thomas Aquinas in his work *bellum justum* justified war-booty once again. He claimed that there was a right to war-booty in just wars. In his opinion, a war was just if it was for ultimate ratio, carried out by a legitimate party and by good reason.

This legal opinion was often abused during lootings in the Middle Ages. In this era, the quadriga horses of Constantinople were transferred (in 1204) to Venice, where they are now a landmark in the Piazza San Marco.

In the Sacco di Roma in 1527 the Vatican was again brutally despoiled by mercenary troops. This clearly shows that war-booty could also function as a cheap way for warlords to pay their soldiers, who had no qualms about looting even sacred property from the Vatican. This subsequently should have been the hour of birth of the protection of cultural property within its defined territorial scope: The Pope ruled that cultural property in the possession of the church should be *deemed res sacrae* and therefore should not be subject to the market (*res extra commercium*), which was to say that it was no longer alienable. *Res extra commercium* is still a very important instrument in the national protection of cultural property in countries such as France and Italy.

The historical background of this international symposium includes inter alia the Swedish campaigns conducted in Europe by Gustavus Adolphus and Queen Christina

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in the 17th century. Today, in 2009, after hundreds of years, the people of Europe are very reluctant about the restitution of such looted goods.

To conclude this introduction, it must be borne in mind that war trophies were a very big problem in World War II and in the context of the persecution of Jews by the Nazi terror regime. Looting happened especially during the occupation of the eastern zone by Russia between 1945 and 1949. The looting of excavations in Iraq just recently – in 2003 – showed that the problem always stays the same and therefore has to be described as an “anthropological constant”.

## B. The development of state practice and its impact on war-booty

In his fundamental work *De jure belli ac pacis*, Hugo Grotius reflected upon the conduct of States in times of war. He was convinced that the “prize of war” must belong to the enemy. He stated (all bold type is printed by the author for academic accentuation):

*V. It is a clear point too, that for any thing to become a prize or conquest by the right of war; it must belong to an enemy.*

*VII. According to the law of nations it is undoubtedly true, that things taken from an enemy which had been captured by him cannot be claimed by those, to whom they belonged before they were in the enemy's possession, and who had lost them in war. Because the law of nations assigned them to the enemy by the first capture, and then to the person, who took them from him by the second.*

*XII. But things moveable, whether inanimate, or living, are taken either as connected or unconnected with the public service. When unconnected with the public service, they become the property of the individual captors.*

It is evident that Grotius still represented the ideal of *bellum justum* and of the conception of Roman law. Grotius underlines the assignment of looted goods to the victor by quite old-fashioned examples from the Bible and Roman law. Therefore, it might be said that Grotius was not a modern scholar in respect of war-booty despite his very modern ideas which influence ideals of public international law even today. Nevertheless, his idea was decisive for the conduct of war by belligerent states until the Congress of Vienna in 1815.

However, Emmerich de Vattel, another important scholar of that time, is a good example of how reflection upon war-booty can be much more critical. In his book “The law of Nations”, published in 1758, he restricts the assignment of booty as follows:

### *§ 164. Booty.*

*As the towns and lands taken from the enemy are called conquests, all movable property taken from him comes under the denomination of booty. This booty naturally belongs to the sovereign making war, no less than the conquests; for he alone has such claims against the hostile nation as warrant him to seize on her property and convert it to his own use.[...] But the sovereign may grant the troops what share of the booty he pleases. At present most nations allow them whatever they can make on certain occasions when the general allows of plundering, – such as the spoil of enemies fallen in the field of battle, the pillage of a camp which has been forced, and sometimes that of a town taken by assault. In several services, the soldier has also the property of what he can take from the enemy's troops when he is out on a party, or in a detachment, excepting artillery, military stores, magazines, and convoys of*

*provisions and forage, which are applied to the wants and use of the army. This custom being once admitted in an army, it would be injustice to exclude the auxiliaries from the right allowed to the national troops.*

But what does this actually mean? As I see it, Emmerich de Vattel already had the conception that war-booty can only be legitimate if there is an urgent need for it within the conduct of war. This means that cultural property which is not necessary for the conduct of war must not be confiscated. This is very important, as war-booty was often the wherewithal for paying the soldiers and their families: national operational guides for the Austrian Army or the American troops included stipulations which did not allow looting unless it was sanctioned by the captain.

Another fundamental ideal affected the right to war-booty. In his work *De l'esprit des lois*, Montesquieu formulated the basic precept that a war is fought between people and not between citizens. Therefore, private property must be protected and cannot be subject to requisition.

Further opinions, such as the letters of Quatremère de Quincy to General Miranda and the ruling of Sir Alexander Croke, underlined the need for a new approach to war-booty. In his famous letters, Quatremère sharply criticised Napoleon's widespread looting and his personal conduct and lack of respect towards foreign cultures. He wrote:

*Vous m'invitez aussi à traiter la question sous le rapport des principes généraux de la morale universelle, auxquels, sans doute se rattache naturellement la discussion que je vous promets. [...] Je sais bien aussi qu'il existe sur l'objet de cette discussion des maximes de droit public, que quelques esprits pervers où pervertis feignent d'ignorer, et dont l'oubli, s'il pouvoit avoir lieu, feroit retrograder l'Europe, et rentrer son droit de gens dans le chaos de la politique leonine des anciens Romains ...*

The judge Sir Alexander Croke underlined these thoughts in practice as he ordered the restitution of cultural property which was confiscated in Boston harbour in 1813. He said:

*The same law of nations, which prescribes that all property belonging to the enemy shall be subject to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted among all civilized nations, as forming an exemption to the severe rights of warfare, and as entitled to favour and protection. They are considered not as the peculium of this or that nation, but as property of mankind at large, and as belonging to the common interest of the whole species.*

All this conglomerated into the conference of Vienna, where the idea of war trophy was officially contested by the participating states. Robert Stewart Castlereagh addressed this question to the congress:

*Upon what principle deprive France of her late territorial acquisitions, and preserve to her spoiliations appertaining to those territories, which all modern conquerors have invariably respected, as inseparable from the country to which they belonged?*

Lord Wellington confirmed the principle that all modern congresses have invariably respected and wrote in a dispatch to Castlereagh:

*The allies then having the contents of the museum justly in their hands, could not do anything other than return them to the countries from which, contrary to the*

*practice of civilised warfare, they had been torn during the disastrous period of the French Revolution and the tyranny of Bonaparte.*

All this leads to the conclusion the Vienna Congress came to, which is that there is a legal duty to restitute war-booty kept without any military context. After all, France was obligated to restitute looted goods to the former plaintiffs. This should have been the beginning of the end of the right for war-booty (*jus praedae*) in public international law.

Before the decisions of the Congress of Vienna, such restitutions could only be enforced through peace treaties. However, moral thoughts of scholars (e.g. Emmerich de Vattel) were already strongly against war-booty in the 18th century, as *res sacrae* even where protected since the 16th century. Before the 19th century, there was no written law against war-booty. There also was no soft law practice asking for a restitution of looted goods before the Congress of Vienna. As we have already seen, there was a strong moral consensus against war-booty in which scholars stressed their ideas of natural law, humanity, and the strict separation of private and public property in time of war., which warrants the conclusion that even before the Congress of Vienna a moral obligation in favour of restitution has to be considered. Moreover, before the Congress of Vienna there was no soft law practice asking for restitution of looted goods. As we have already seen, there was a strong moral consensus against war-booty in which scholars stressed their ideas of natural law, humanity, and of the strict separation between private and public property in wartime, which entitles us to conclude that that even before the Congress of Vienna a moral obligation in favour of restitution has to be considered.

The Martens Clause of 1899 underlines these findings of basic rules in customary public international law against *jus praedae*, as it already portrays the existence of standards in humanitarian public international law already in use:

*Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.*

Finally, the Hague Convention of 1907 was the last milestone, putting an official end to *jus praedae*. The very important article 56, which at that time rather recorded the current state of public international law (as it was state practice since 1814), reads as follows:

*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 of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.*

C. Guidelines for prospective restitution claims (time frame from 1815 to 1907)

Whilst public international law for the protection of the cultural property has consistently developed, it seems that mankind has not. As the Congress of Vienna was

the point of inflection in favour of restitution, any war-booty taken after that date should be subject to open and fair negotiations between the parties concerned. We should bear in mind that no case should lead to open confrontations. Our ideals of the common heritage of mankind and the development of friendship between the states in Europe can open new doors and challenging opportunities to customize new relationships in restitution issues. All options for a fair solution should be discussed. For instance, it might be also in scope to pay an adequate compensation to the plaintiff instead of restitution.

I hope that these lines are acceptable to all of you. In the end, an open and fair dialogue is much more important than any legal battle. As a restitution claim might be only brought via diplomatic (verbal) notes between states and not via interaction between museums in legal terms, it is highly recommendable to find a best practice for restitution claims for looted goods after 1815. To move that dialogue forward, please also find the author's recommendations on restitution guidelines at the end of this article. The author hopes that these guidelines will be discussed at a future conference in Stockholm.

It should be self-evident that all looted goods confiscated in the context of war actions (before, in and after war actions) must be checked carefully, also as soon as there are any indications that something could be wrong with the object. This moral commitment naturally also applies to any cultural property with unclear provenance. So: What is the object, what is the purpose and what is the territorial and cultural background? Only property of practical use for the conduct of war can be kept – through requisition – by the belligerent party. This means, that flags or weapons which are decorative rather than of military use (having no real ballistic function) have to be returned to the former plaintiff. Also, it has to be stressed that there is no limitation rule in public international law concerning restitution claims. This means that a restitution claim by the demanding state against the possessing state can be successful even if lodged today. But very often such a claim cannot be enforced as the possessing state is not within the jurisdiction of the International Court of Justice in the Hague, Netherlands. Unfortunately, this is the case in the current Beutekunst debate on the return and restitution of World War II loot between Germany and the Russian Federation.

Nevertheless, public international law knows the possibility of acquiring good title, for example through acquiescence. Acquiescence was developed in the acquisition of land, when one state accepted the occupation of land through the other state for a certain period of time without asking for correction of the border lines. The same criteria may be applied to claims for restitution of looted art. For instance, in the German-Russian Debate mentioned above, Germany did not know the whereabouts of a cultural property in Russia until 1995. After that, they consequently demanded restitution to Germany. Unfortunately, the Russian Federation is not open to any discussion of this to date.

Please note also that there are means of restitution merely in public international law, but not so often in the more familiar way of civil claim. Civil law, independent of the applicable law of the European States, generally knows rules of limitation on restitution claims (one exception is Switzerland). 30 years after the date of theft is not a long time for tracing looted property. Moreover, good title may be obtained through bona fide acquisition and purchase, for example in a private deal or at an auction. Although it has to be stated that the standards of diligence among our professionals

have increased dramatically, any acquisition in good faith is still possible as long as there are no indications to the buyer (!) that something could be wrong with the property to be purchased. But usually you will not find any traces of war or persecution on the object.

Despite this legal framework, please check carefully the following recommendations which are fundamental in dealing with restitution claims. Basically, you have to answer three fundamental questions:

1. Where does the culture property really belong? So, what is the truth?
2. What are the conditions for preservation in the demanding state?
3. What are the conditions for excess and exhibitions in the demanding state?

If you come to the conclusion that, for example, a weapon or a flag really belongs to the demanding state and that the conditions have to be considered appropriate, please enter into negotiations with a museum of the demanding state – as long as the cultural property in question has been looted since 1815. Before 1815, please keep in mind that also at that time there was already a strong moral obligation and first demands in favour of restitution. To conclude, the criteria elaborated below are also applicable to any looting in time of war after 1750.

**D. Conclusions:**

**Practical recommendations for the handling of restitution claims**

**I Time frame**

Century/ topic	16/17	18	19	20	21
State practice (restitution?)	Only through peace treaties, e.g. Münster and Osnabrück 1648, Oliva 1660 and Wyszak 1678	See 16/17	Opinio juris: War-booty is forbidden, established usage (Congress of Vienna, 1815)	War-booty becomes a war crime (Nuremberg tribunal)	War-booty is also clearly against peremptory norms (common global standards)
Law on restitution	(-), but sometimes principles of humanity	(-), but protection of res sacrae and against destruction	First stipulations and practical restitutions (e.g. Lieber Code, Canova)	Hague Convention 1907 against illicit confiscation in war. Hague 1954 Unesco 1970	Hague 1954 Unesco 1970 Unidroit 1995 New soft law such as Washington Principles

				Unidroit 1995	1998.
Scholars	Alberico Gentili, Hugo Grotius Reception of <i>Roman Law</i>	Emmerich de Vattel, De Quincy; <i>Natural Law arising</i>	Canova, Croke, Lieber	Nuremberg doctrine, Lauterpacht	Merryman, Jayme
Remarks/ Examples	No restitution scheme	Moral obligation to be discussed	Legal obligation in public international law	German- Russian debate on Beutekunst	Iraq

## II Principles for the handling of restitution claims

– war-booty from 1750 (1815) to 1907

*derived from the restitution principles of Lyndel Prott (Resource: “Special Reports”, Spoils of War, No 1, 19 December 1995, p. 6 et. seq.) and customary public international law*

The following proposals are grounded in existing legal principles, although the instruments concerned may not be strictly applicable, due to their having been developed after the date of the events concerned, or their applicability may be contested. Their use would take account of the social, cultural and economic developments of the intervening years and the general political delicacy of the subject.

- *Restitution*

Cultural objects which have been taken without any military necessity during or in the context of wars or by any belligerent since 1814 will be returned to the country from which they have been taken. This rule especially applies to private property. (Customary public international law.)

Between 1730 and 1814, a moral obligation deriving out of the specific circumstances of the case may advocate the return of the property affected (property of outstanding cultural worth to the demanding state).

- *Origin*

Where there have been successive displacements, the objects will be returned to the territory where they were located at the outbreak of hostilities. (Analogy to UNIDROIT draft). Another approach would be to figure out the real cultural

circumstances and background of the cultural property in concern (so called *lex origio*), which can be easily applied in cases such as army flags or other typical characteristic “national” army weapons without ballistic function.

- *War reparations*

Cultural property taken from an occupied territory during armed conflict shall never be treated as war reparations. (Analogy to Hague Protocol Art. 3)

- *Private possession after state looting*

Where the cultural objects have passed into the hands of third parties, the State which has the responsibility for their removal from the country where they were located should take all means to reacquire them for return to the State from which they were taken (by repurchase, indemnity or other appropriate means, analogy to Hague Protocol Art. 4)

- *Prescription and acquiescence*

No time limits for restitution claims between states in private international law can be set. Only independent states are subject to restitution claims. (Precedents: the Congress of Vienna 1815).

In restitution cases between individuals, the prescription rules of the applicable state private law have to be applied. The only exemption is the non application of prescription rules via *ordre public*/public conscience through peremptory norms in private international law or the basic principle of equity and good faith in private law.

However, acquiescence also can be a legal remedy against restitution, if the demanding state has accepted the possession for a very long time without any verbal note or other action against it. The counterpart for that in civil law is acquisitive prescription.

- *Documentation*

Cultural objects being repatriated are to be accompanied by the relevant scientific documentation where available. (The importance of the sharing of scientific information has been asserted in a number of UNESCO and ICOM documents.)

- *Cultural substitution*

Restitution by replacement is an available remedy where unique cultural objects have been destroyed (but only since World War I! Precedent: Treaty of Versailles).

- *Truth, preservation, access*

Recommendations according to John Henry Merryman

1. Truth: Where does the cultural good really belong?  
Try to figure out the origin of the looted goods (compare *lex origio*).
2. Preservation: How are current conditions in the demanding state?
3. Access: See No. 2

- *Compensation in bona fide situations*

If a fair market price for war-booty has been paid in good faith (e.g., after auction), the demanding party shall adequately compensate with the price being paid in good faith. Conversely, if nothing has been paid, nothing has to be compensated for.

