



Praeda bellica in bellum iustum?

THE LEGAL DEVELOPMENT
OF WAR BOOTY FROM
THE 15TH TO THE 20TH CENTURY

Key note

by

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Stockholm, Friday, May 30, 2008



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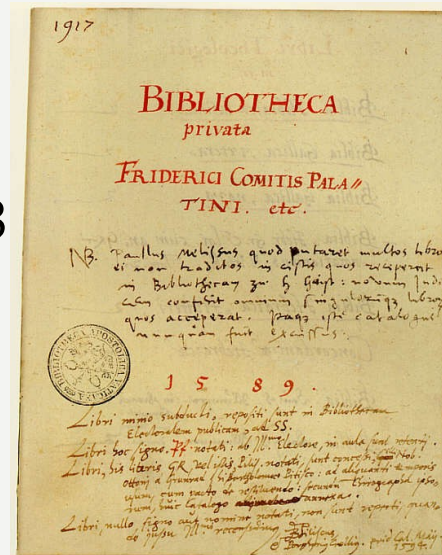
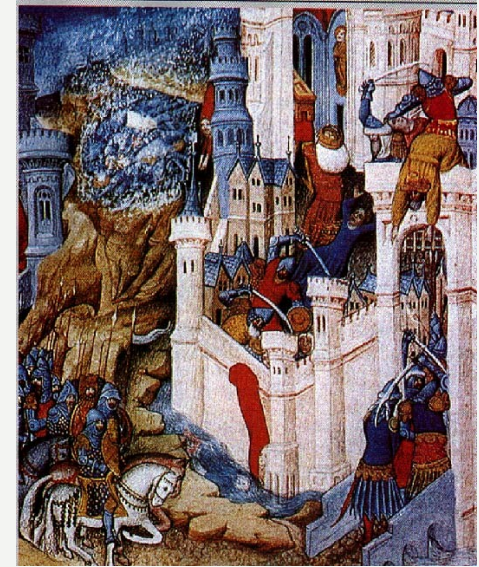
Doctoral thesis at the University of Zurich: *Kunstraub in Krieg und Verfolgung*,
Walter de Gruyter Berlin New York 2005, awarded with the Carl-Sonnenschein-prize

Numerous publications in german and english on international art law issues

Further information: www.art-wealth.com



- I. The Sack of Jerusalem
- II. The horses of San Marco (formerly Constantinopel, since 1204 in Venice)
- III. The Sacco di Roma, 1527
- IV. The Bibliotheca Palatina, 1623

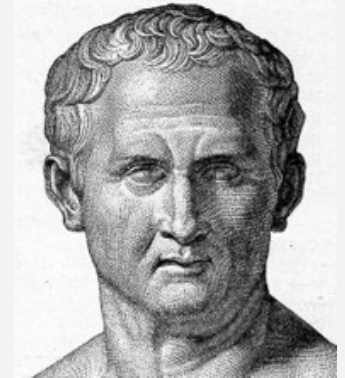




I. Marcus Tullius Cicero, Orationes in verrem

*Rei magnitudo me breviter perstringere
atrocitatem criminis non sinit.*

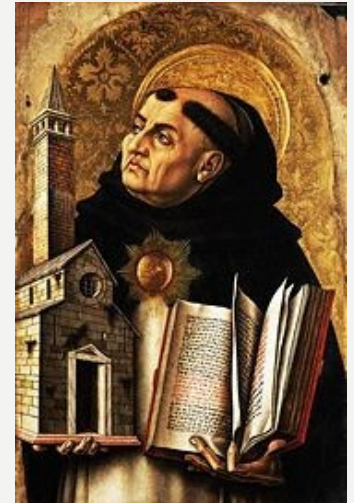
Sharp criticism of *praeda bellica* (war booty) in Greece;
war booty was sign of power



II. Thomas von Aquin, Bellum iustum

Right for war booty in a just war

War is just, if: *Ultima ratio*, carried out by
legitimate authority and by good reason
Basis for modern public international law







I. Law of nations

1. Legal framework between states as only subject
2. Based upon common conceptions (*opinio juris*)
3. Written through treaties or customary

II. Preliminary questions

1. What is war booty in legal terms?
2. Has the booty to be defined as *cultural property*?
3. Is the booty part of a country's *cultural heritage*?

III. Right to war booty...

1. Ius praedae not in dispute for a very long time, even private sacking by soldiers
2. No codifications before 19th century
3. Contesting views of leading scholars



- I. What do we talk about (restiution, reparation, return)?
- II. Treaties between nations (not before 1907)
- III. Consistent practice of states / opinio juris (might be influenced by views of scholars- see below)
- IV. General principles
 1. Nemo cum damno alterius locupletior fieri debet
(*unjust enrichment*)
 2. *Ex iniuria non oritur jus* -
Nullus commodum capere potest de sua propria iniuria
- V. Peremptory norms
Jus cogens says that *war booty is a war crime*
(not before Nuremberg Trial)



Hugo Grotius, De jure belli ac pacis, book 3, chapter 6 (1625)

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. ...



 Please notice: These words are proved by examples of the bible (David) and roman law (!)



Emer de Vattel: The law of Nations, 1758

§ 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.**

➔ Restricted to the right of contributions, also no right to destroy foreign cultural property





I. Charles de Montesquieu, De l'esprit des lois, 1748

“La guerre n'est donc point une relation d'homme à l'homme, mais une relation d'état à état”

Also supported by Jean-Jacques Rousseau

II. Sir Alexander Croke, ruling of restitution, 1813

„The same law of nations, which prescribes that all property belonging to the enemy shall be liable 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.*“



I. Antoine Chrystosome Quatremère de Quincy,
Letters to General Miranda, 1796
(in respect of the conduct of Napoleon)

„ 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 de gens dans le chaos de la politique leonine des anciens Romains“



- I. Conference of Vienna, 1815 contesting the idea of war trophy (Background: Napoleon Bonaparte), restitutions
- II. Lieber Code, 1864, for US- American troupes
- III. Brussels declaration, 1874
- IV. Manual d´Oxford: Code of conduct for troops
- V. Hague Convention 1907:

Art. 56.

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.



*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.***



Hour of birth of humanitarian public international law

This also means: Public movable property subject to military uses (e.g. war munitions, transport) may be seized without compensation. Other public movables such as art and objects of national patrimony are treated as private property



- I. Requisition of military goods and weapons allowed at any time
Exception: Armory without any military efficiency
- II. Protection of cultural property: *Looting or even destruction?*
 1. Idea(l) of humanity does not allow destruction and contests looting without military reason
 2. Idea(l) of separation between national and private property (Jean-Jaques Rousseau)
 3. *Res sacrae* (property of the church) may not be destroyed
- III. Confiscation of cultural property was accepted for a very long time
 1. The idea of common heritage of mankind pointed out that war booty was not acceptable any longer
 2. The Congress of Vienna in 1815 was the begin of the end of „legitimate war booty“



- I. Views have changed generally against war booty in the 18th century.
- II. Before 1815, war booty was in accordance with the right for spoils of the victor in international law:
 1. However, moral thoughts against war booty were already strong in the 17th century, protection of *res sacrae*
 2. The consciousness arose world wide that war booty is disputable and therefore shall be discussed
- III. But: So far, there is **no soft law or best practice asking for restitution of looted goods before 1815**
Compare: There is rather strong practice and soft law in respect of Holocaust looted art (e.g. in Germany: Restitution guidelines/ „Handreichung“)



Century/ topic	15/16	17	18	19	20
State practice (restitution?)	Only through peace treaties, e.g. Münster and Osnabrück 1648, Oliva 1660 and Wyswik 1678	See 15/16	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 Unidroit 1995
Scholars	Alberico Gentili, Hugo Grotius Reception of <i>Roman Law</i>	Emer de Vattel, De Quincy; <i>Natural Law arising</i>	Canova, Croke, Lieber	Nuremberg doctrine	...
Remarks/ Examples	No restitution scheme (right to war contribution)	Moral obligation to be discussed	Legal obligation in public international law	German-russian debate on Beutekunst	Iraq



- I. Origin of cultural property, circumstances of loot
- II. Recommendations according to John Henry Merryman:
 1. *Truth*: Where does it really belong to?
 2. *Preservation*: How are the actual conditions in the demanding state?
 3. *Access*: See No. 2
- III. Background for legal restitution claims
 1. No legal obligation before roundabout 1815, but moral discussions since 1750-> moral obligation for restitution shall also be discussed here
 2. If there is legal obligation, there are generally no prescription rules (e.g. Elgin Marbles in British Museum)
 3. Possibility to acquire good title through acquiescence



- I. Prescription rules: Usually 30 years
- II. Application of *bona fide rules* for acquisitive prescription and bona fide purchase
- III. *Res extra commercium* in certain states (e.g. France, Italy, Spain)
- IV. Compensation rules not in force

Conclusion: Usually no mean for restitution claims based on applicable private law



*"It's the crime of the century because
it affects the heritage of all mankind."*

*When your history is stolen from you, you lose your sense
of that history. Not just the Iraqi people, but all of
civilization that can trace its roots back to this area*

*"We will now have all that is beautiful in Italy except for a
few objects in Turin and Naples"*

*The law stands as a bulwark against the handiwork of evil,
to guard to rightful owners the fruits of their labors.*



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