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Law of Art, Law of War: The Legacy of the Law of War in International Cultural Property Law

By: Richard De Schweinitz



Issues of international art law tend to center on the restitution of lost works of art to their owners across borders. Wars today engender many disputes over rightful ownership; but historically, these conflicts were decided rather simply by the law of nations. Per one Judge Croke, “all property belonging to the enemy shall be liable to confiscation”.[1] However, one of the earliest principles of just war in the modern era was the extension of special protections to works of culture.[2] This principle, developed in the international conflict context, evolved through a lineage of international agreements into the basis for modern cultural property law – from the law of war, to the law of art.

The earliest recorded reference to a special dispensation for works of art confiscated in war is found in *The Marquis de Somerueles*, a case in the British Court of Vice-Admiralty in Halifax, Nova Scotia.[3] The court was adjudicating a dispute arising from the British capture of the eponymous American ship, the *Marquis de Somerueles*, during the War of 1812.[4] Among the property claimed by its captor was a collection of paintings and prints from Italy *en route* to a fledgling

institution of science in Philadelphia.[5] The court's opinion, written by Judge Dr. Croke, considers a petition by the institution, praying for the restitution of the art to the American collection.[6] The petition reads: "The value [of this collection] we know not, but in this country, and in an infant establishment, every accession is important . . . knowing that even war does not leave science and art unprotected, and that Britons have often considered themselves at peace with these, we are not without hopes of seeing [the collection]."[7]

No legal authority is cited in this petition, nor in the court's opinion – and yet, as if moved by the value of culture itself, the court decided to grant the Philadelphia institution relief.[8] Instead of legal precedent, the court opines on the civilizing value of the liberal arts; on the "lawless" state of the French government under Napoleon, which had been looting the great art of Europe (for what would become the modern Louvre collection[9]); and the Court's hope that, with this restitution, the United States would eventually see a moral improvement commensurate with the improvement of its culture, such that "there can be no doubt but that the two nations of brethren on opposite shores of the Atlantic, will be united in the indissoluble bonds of friendship".[10] Judge Croke summarizes his opinion as follows:

"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 amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favour[sic] and protection. They are considered not as the peculium of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species."[11]

This statement encapsulates the values of cultural property law – even in conflict, common humanity demands that our cultural achievements be preserved. Fifty years later, these values would be enshrined in the Lieber Code, a document admired internationally for its humane construction (by 19th-century standards) of the law of war.[12] The Lieber Code was drafted by Francis Lieber, a German émigré and professor at Columbia College (later known as Columbia University)[13], and promulgated by President Lincoln as General Order No. 100 to instruct Union soldiers in their occupation of the Confederate territories.[14]

Through Article 34, paired with Article 31, the Lieber Code extends special protections to works of cultural significance against appropriation in war.[15] Article 31 declares the automatic seizure by the occupying army of all public property in the occupied territory; and Article 34 states that "property belonging to . . . establishments of education, or foundations for the promotion of knowledge, whether . . . academies of learning or observatories, museums of the fine arts, or of a scientific character such property is not to be considered public property in the sense of paragraph 31".[16] Through this operation, the Lieber Code makes the exact relaxation to the law of nations' general rule of confiscation described by Judge Croke[17]. Though it is not clear that The Marquis de Somerueles influenced the drafters of the Lieber Code, it only strengthens Judge Croke's statement of the law of nations that the exact operation of law he espoused would appear again without reference to his opinion.[18]

Another half century later, the Lieber Code's civilizing influence would spread to the other side of the Atlantic.[19] It was highly influential in the drafting of the 1907 Hague Convention.[20] The Convention succinctly restates the Lieber Code's protection of cultural property in Article 56:

"The property 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 . . . is forbidden, and should be made the subject of legal proceedings."[21]

Two world wars after the 1907 Hague Convention, the international community drafted the most important agreement yet in the development of cultural property law. The 1954 Hague Convention was the first to define 'cultural property,' and the first of these documents to focus on cultural property specifically.[22] In its preamble, the Convention writes similarly to Judge Croke on the policy underlying cultural property protections:

"Being convinced that damage to cultural property belonging to any people whatsoever meansdamage to the cultural heritage of all mankind, since each people makes its contribution to theculture of the world . . . Considering

that the preservation of the cultural heritage is of greatimportance for all peoples of the world . . .”[23]

..The 1954 Convention binds its signatories to “prevent and . . . put a stop to any form of theft, pillage, or misappropriation of . . . cultural property.”[24] As well, they “shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.”[25]

Inasmuch as art is afforded special protections under the law, the history of those protections is inextricably linked with the law of nations and the law of war. Perhaps one day, the same protections in war afforded to the greatest of human accomplishments can be extended to the humans themselves who create them.

Richard De Schweinitz is a Submissions Editor at CICLR.

[1] The Marquis de Somerueles, Stewart’s Vice-Admiralty Reports 482 (1813).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Jessie Szalay, *The Louvre Museum: Facts, Paintings & Tickets*, Live Science (May 2, 2018), <https://www.livescience.com/31935-louvre-museum.html> .

[10] The Marquis de Somerueles, Stewart’s Vice-Admiralty Reports at 482.

[11] *Id.*

[12] *General Orders No. 100: The Lieber Code*, The Avalon Project, https://avalon.law.yale.edu/19th_century/lieber.asp ; Patty Gerstenblith, *Art, Cultural Heritage, and the Law* 721 (4th ed., 2019).

[13] *Francis Lieber*, Encyclopaedia Britannica (Sept. 28, 2021), <https://www.britannica.com/biography/Francis-Lieber> .

[14] *Lieber Code*, supra note 13.

[15] *Lieber Code*, supra note 13 at Arts. 31 and 34.

[16] *Id.*

[17] The Marquis de Somerueles, Stewart’s Vice-Admiralty Reports at 482; *Lieber Code*, supra note 13 at Arts. 31 and 34.

[18] The Marquis de Somerueles, Stewart’s Vice-Admiralty Reports at 482; *Lieber Code*, supra note 13 at Arts. 31 and 34.

[19] *Art, Cultural Heritage, and the Law*, supra note 13.

[20] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907.

[21] *Id.* at art. 56.

[22] The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954.

[23] *Id.* at the Convention for the Protection of Cultural Property In the Event of Armed Conflict.

[24] *Id.* at Art. 4.

[25] *Id.*