

April 11, 1945

MEMORANDUM

Re: War Booty.

Historically the concept of war booty is associated with the booty which soldiers capture during the course of a battle. In early times soldiers were entitled to keep all that they succeeded in obtaining. It was a personalized version of "to the victor belongs the spoils."

However, the various countries, engaged in foreign wars, soon realized that war booty could become a profitable source of income and doctrines such as the British doctrine of "booty belongs to the Crown" became prevalent. Partly as an incentive to the troops to make greater efforts to capture war booty and partly as an inducement to report that which had been captured, many nations, particularly the British and French, made provision for allocating portions of the booty to the soldier responsible for the capture.

The two principle questions on war booty are, first, what constitutes war booty and secondly, to whom does it belong? With respect to the nature of war booty the international authorities are quite clear. In his book on international law, Oppenheim reviews the development of the appropriate rule and states:

"According to a former rule of the Law of Nations, all enemy property, public or private, which a belligerent could get hold of on the battlefield was booty, and could be appropriated. * * * As regards public enemy property, this customary rule is still valid. * * *"
~~Oppenheim's International Law~~ (ed. by Lauterpacht 6th ed.) p. 310.

Similarly, the British international law writer, W. E. Hall, in his treatise on international law states:

"Booty consists in whatever can be seized upon land by a belligerent force, irrespective of its own requirements, and simply because the object seized is the property of the enemy." W. E. Hall, ~~A Treatise on International Law~~ (6th ed.) 1924, p. 520.

Another broad, yet specific statement, on types of booty is found in Hennis Taylor's International Public Law wherein it is stated:

"Money, arms, stores, supplies, ships, means of transportation or communication, and everything else directly

serviceable in warfare is regarded as booty (praedia bellica, kriegsbeute) which may be used, destroyed, or otherwise disposed of at will." Hennis Taylor, International Public Law (1901), p. 540.

A general statement of the rule is found in Fiore's International Law Codified by Borchard who states:

"A Belligerent has the right to take possession of and confiscate property belonging to the enemy State which may come into his hands." Fiore's International Law Codified by Borchard (1918) Title XI, p. 590.

In view of the fact that only public enemy property is legitimately subject to capture as booty, it is interesting to note that a presumption has grown up with respect to the character of property in cases where it is not clear whether such property is publicly or privately owned. In the basic field manual (1940) "Rules of Land Warfare", issued by the War Department as a guide to our troops, the presumption is stated as follows:

"Where the ownership of property is unknown that is, where there is any doubt as to whether it is public or private, as frequently happens -- it should be treated as public property until ownership is definitely settled."

Having reached the determination that the property is subject to capture as booty, the second question arises as to who is the appropriate beneficiary of such booty. Lawrence in his Principles of International Law states the universally accepted rule as follows:

"By the strict rules of international law booty belongs to the State whose soldiers have captured it."

A general statement to the same effect is found in the basic field manual, referred to above, wherein it is stated:

"All captures and booty belong, according to the modern rule of war, primarily to the government of the captor."

Although the rule is clear under some circumstances its application becomes somewhat complicated. This is true, for example, when allied nations, fighting for a common cause, are operating in the same field of action. In such circumstances it is necessary to determine to which nation or nations the captured booty belongs. In Wheaton's

International Law the rule is stated as follows:

"The general rule for the distribution of booty, to be adhered to as far as possible, in accordance with the naval prize decisions, is the rule of actual capture. The association entitling to joint sharing must be military and not political and must be under the immediate command of the same commander. The cooperation which is necessary as a title to joint sharing is a cooperation tending directly to produce the capture in question." (Underscoring supplied)

The basis for this rule is found in the leading case of *The Banda and Kirwee Booty*, 1866 1 L. R. 109. The factual situation in that case is particularly significant since regardless of the outcome of the decision the British Crown would be entitled to the booty, the dispute being between different divisions of the British Army. These divisions were operating in India under a single command to quell certain insurgent tribes. The court, in a long and exhaustive decision, reached the conclusion that only the division which actually captured the booty was entitled to share in it.

The language of the decision is very helpful in clarifying the precise meaning of Wheaton's statement that joint sharing must be based on the fact that the forces involved are under "the immediate command of the same commander." The British court describes the appropriate basis for joint sharing as follows:

"In the first place it is clear that the association must be military and not political. Two bodies of troops are not associated together (so as to found a title to be considered joint captors) because they are carrying out parts of a political plan involving military operations, or because their commanders receive instructions from the same political authority, whether on the spot or otherwise. Next, there must be some limits even upon military association. In a certain sense the whole British army are associated together. It is not even enough that the association should be under the same commander, otherwise a whole local army, as being under one commander-in-chief, would share in booty captured by any portion of it. The true limits seem to me to be those indicated by the rule which practically obtains in prize cases, that the association must be under the IMMEDIATE command of the same commander." (Underscoring supplied)

It seems clear from the foregoing that any booty captured by an American Army under an American general in Europe would be booty belonging to the United States notwithstanding the fact that the top command was a joint command and that the venture was an allied venture.