

LICIT WAR TROPHIES AS A MEANS OF PRESERVING ART AND CULTURE IN TIMES OF WAR

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King David's spears and shields, that were in the temple of the Lord.¹

INTRODUCTION

In the conduct of military operations throughout history, soldiers serving on the battlefield have returned home with souvenirs and relics to remember their tours. When David fought with an adversary, and overcame him, “he took away his armor and his weapons, and as other victorious heroes were wont to do, he bore them home as mementoes of his prowess, the trophies of the battle. These were placed in the house of the Lord.”² Many war-related items, on display in museums, were brought home by individual service members, while other similar items remained in private hands or suffered loss or destruction.

As international humanitarian law has developed norms towards this practice, state practice has established the rule that “parties to conflict may seize military equipment belonging to an adverse party as war booty . . . as a norm of customary international law applicable in international armed conflicts.”³ This is distinct and different from places and their contents that, barring few exceptions and exigencies, are culturally protected, such as historic monuments, museums, and scientific, artistic, and cultural

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1. 2 *Kings* 11:10 (King James).

2. C.H. Spurgeon, *A Sermon (No. 972) Delivered on Lord's-Day Evening, Nov. 20, 1870*, BLUE LETTER BIBLE, https://www.blueletterbible.org/Comm/spurgeon_charles/sermons/0972.cfm (last visited Feb. 4, 2022).

3. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 173 (2017); Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (May 14, 1954), http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html [hereinafter Hague Cultural Property Convention].

institutions. It also is distinct and different from circumstances of domestic disturbance and internal armed conflict, and the domestic laws that would proscribe takings of private or public property.

“Different operations and areas of responsibility will have different rules on prohibited activity regarding souvenirs.”⁴ Longstanding laws of war proscriptions have permitted parties to a conflict to seize military equipment belonging to an adverse party as war booty. “Aside from U.S. legal restrictions, there may be [domestic ministry/department of defense], . . . command, and combined or joint task force regulations and orders proscribing certain activities and allowing others.”⁵

This Article will examine these issues and more with respect to the history of prescriptions and proscriptions on objects that may be seized in occupied territory during time of war, even though technically they may not be captured or found on the battlefield,⁶ and the practical operational, ethical, and legal advantages of promulgating and enforcing a limited “war trophies” policy for service members serving in time of war or armed conflict.

I. HISTORICAL EXAMPLES OF TROPHY-TAKING PRACTICE AND LAW

History is replete with examples of takings in time of war. “When armies occupy a city or countryside, desirable things change hands. The collection of booty is a tradition of war that persists despite being outlawed and morally condemned—[a practice which has been referred to] as ‘ancient, timeless, and pandemic.’”⁷ What follows is the briefest and most cursory of surveyed exemplars of such takings and rationales for same.

4. Randy Randolph, *Vet News: War Trophies Can Be Illegal—and Dangerous*, VETERANS ADVANTAGE (Oct. 18, 2002), <https://www.veteransadvantage.com/blog/military-veterans-news/war-trophies-can-be-illegal-and-dangerous> (quoting an interview with USASOC Deputy SJA, Kevin Govern).

5. *Id.*

6. See Convention Respecting the Laws and Customs of War on Land art. 53, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention IV]. Article 56 of the Hague Convention of 1907, stated: “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 willful 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.” *Id.* art. 56.

7. Penelope Hamblin, *Alexandria’s Ashes: War and the Loss of Libraries* (Dec. 1999) (Master’s thesis, University of North Carolina at Chapel Hill), <https://ils.unc.edu/MSpapers/2552.pdf> (quoting Jeanette Greenfield, *The Spoils of War*, in *THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* 34–38 (Elizabeth Simpson ed., 1977)).

In *The Iliad*, the mythical Achilles, in Book Nine, is “delighting his heart in a lyre, clear-sounding, splendid and carefully wrought, with a bridge of silver upon it, which he won out of the spoils when he ruined Eetion’s city.”⁸ In medieval times, “[Duke] Maximilian graciously [announced] that he would send the library [of Heidelberg] to the Pope [Gregory XV] as a war trophy and as a ‘token of my most obedient affection.’”⁹ In addition to the stupendous amount of cultural items wrongfully taken by the Nazis during World War II,¹⁰ in practice, the restitution of items from the USSR to East Germany in the 1950s “was pursued by the Soviet government to calm social tensions caused by the post-war economic exploitation of East Germany. No legal considerations were applied.”¹¹

Duane Michael Thompson has reflected upon the irony of how the lure of spoils have eroded the discipline of fighting forces in conflicts past, when their “attention shifted to stuffing their rucksacks even before the enemy had been defeated” and how “[a]cts of pillage and plunder exacerbated the task of restoring peaceful relations in a post-war environment” such that “[s]omething had to be done to constrain the evil of war.”¹² The two prongs of international humanitarian law, *jus ad bellum* for the resort to war and *jus in bello* for the laws within war, evolved in the nineteenth and twentieth centuries to restrict the resort to war in the first place, then to protect noncombatants and cultural property from harm and destruction as well.¹³

II. MODERN LAW OF ARMED CONFLICT, AND THE PROTECTION OF PRIVATE AND CULTURAL PROPERTY

The law of war (“LOW”), interchangeably called the law of armed conflict (“LOAC”) and international humanitarian law (“IHL”), as it has

8. HOMER, THE ILIAD, bk. IX (Richmond Lattimore trans., Univ. Chi. Press 2011) (800 B.C.E.).

9. Hamblin, *supra* note 7, at 20 (quoting Elmar Mittler, *Bibliothek im Wandel: Die Universitätsbibliothek zwischen Vergangenheit und Zukunft [Library in Change: The University Library between the past and the Future]*, in HEIDELBERG: GESCHICHTE UND GESTALT [HEIDELBERG: HISTORY AND FORM] 351 (1996)).

10. See Thérèse O’Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 EUR. J. INT’L L. 49, 52–54 (2011), <https://academic.oup.com/ejil/article/22/1/49/436574>.

11. ANDRZEJ JAKUBOWSKI, STATE SUCCESSION IN CULTURAL PROPERTY 108 (2015) (citing Konstantin Akinsha, *Stalin’s Decrees and Soviet Trophy Brigades: Compensation, Restitution in Kind, or “Trophies” of War?*, 17 INT’L J. CULTURAL PROP. 195 (2010)).

12. Duane M. Thompson, *Boots to Booty: The Overarching Restraints Imposed by Jus ad Bellum Justifications on Property Acquisition in War 1* (June 17, 2004), (Master of Laws thesis, George Washington University Law School).

13. *Id.* at 1–2.

evolved over the years, has authorized the confiscation of enemy military property as property of the capturing force.¹⁴ War trophies or souvenirs taken from enemy military property are legal under the LOAC.¹⁵ War trophy personal retention by an individual soldier is restricted under the deploying force's domestic law.¹⁶ Consistent with IHL, U.S.-confiscated enemy military property is the property of the United States.¹⁷ The property becomes a war trophy and capable of legal retention by an individual soldier as a souvenir, only as authorized by a higher authority.¹⁸ Pillage, or the unauthorized taking of private or personal property for personal gain or use, has been expressly prohibited.¹⁹

The modern tradition for this set of rules is generally viewed as the Lieber Code of 1863.²⁰ According to the Lieber Code, war booty belongs to the party that seizes it and not to the individual who seizes it.²¹ This rule, whereby a party to the conflict may seize military equipment belonging to an adverse party as war booty, also reflects a long-standing practice in international armed conflicts, as codified in the later Hague Regulations and Third Geneva Convention of 1949, requiring that prisoners of war must be allowed to keep all their personal belongings (as well as protective gear).²²

Particular prohibitions include Articles 28 and 47 of the 1899 Hague Regulations which provide: "The pillage of a town or place, even when taken by assault, is prohibited,"²³ and "[p]illage is formally prohibited."²⁴ This is mirrored by Article 7 of the 1907 Hague Convention (IX) which provides: "A town or place, even when taken by storm, may not be pillaged," and

14. NAT'L SEC. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 90 (Micah Smith ed., 2020) [hereinafter OPLAW HANDBOOK] (citing Hague Convention IV, *supra* note 6, art. 23(g), 53; U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL para. 5.17.3, 11.18.6 (June 2015) (Updated Dec. 2016)) ("Confiscation is the permanent taking or destruction of enemy *public* property found on the battlefield.").

15. *Id.*

16. *Id.* at 91.

17. *Id.* at 90.

18. *Id.* at 91.

19. *Id.* at 90.

20. See WAR DEP'T, THE LIEBER CODE OF 1863: GENERAL ORDERS NO. 100 § 2 (1863), <https://civilwarhome.com/liebercode.html>.

21. *Id.* para. 45.

22. HENCKAERTS & DOSWALD-BECK, *supra* note 3, at 173; Hague Convention IV, *supra* note 6, art. 4; Geneva Convention Relative to the Treatment of Prisoners of War art. 18, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

23. Hague Convention IV, *supra* note 6, art. 28, 47.

24. *Id.*; Convention with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 47, July 29, 1899, 32 Stat. 1803.

Article 21 of the 1907 Hague Convention (X), whereby its signatory parties “undertake to enact or to propose to their legislatures . . . the measures necessary for checking in time of war individual acts of pillage.”²⁵

Article 6(b) of the 1945 International Military Charter (“IMT”) includes “plunder of public or private property” in its list of war crimes, for which there must be individual responsibility.²⁶ Also arising post-World War II, the Geneva Convention IV, Article 33, second paragraph, provides that “[p]illage is prohibited.”²⁷ By the late twentieth century, Article 4 of the 1977 Additional Protocol II prohibits acts of pillage against “[a]ll persons who do not take a direct part or who have ceased to take part in hostilities.”²⁸

Pursuant to Article 8(2)(b)(xvi) and (e)(v) of the 1998 International Criminal Court (ICC) Statute, “[p]illaging a town or place, even when taken by assault” is a war crime in both international and non-international armed conflicts.²⁹ More recently, in the wake of international armed conflicts in West Africa, Article 3 of Statute of the Special Court for Sierra Leone gives the Court jurisdiction over serious violations of Article 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II, including pillage.³⁰

Paige Goodwin’s study of art and the spoils of war led her to conclude that,

[t]he idea of “cultural property” came out of World War II, but the legal regime that allows for the repatriation of art taken during WWII seems to have a statute of limitations. Things taken centuries ago remain where they are. Goodwin makes “an argument for why France should return Flemish

25. Convention Concerning Bombardment by Naval Forces in Time of War art. 7, Oct. 18, 1907, 36 Stat. 2351.

26. Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 89 U.N.T.S. 280.

27. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

28. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, June 8, 1977, 1125 U.N.T.S. 3.

29. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90.

30. Statute of the Special Court for Sierra Leone, 2003 (S/RES/1315 (2000)) (U.N.), <http://www.rscsl.org/Documents/scsl-statute.pdf>.

art [. . .] and describes the legal routes Belgium might take to retrieve its works of art.”³¹

Nations and peoples around the world have sought to have their cultural heritage returned from foreign powers:

The British Museum is famously home to many such artifacts, including the Elgin Marbles, statues that were removed from the Parthenon in the early 1800s, and which the Greek government maintains should be returned to its possession. And, during both world wars, there was massive and widespread looting of art of all kinds, including . . . prints by the German painter Albrech[t] Dürer.³²

Article 15 of the Hague Cultural Property Convention established a duty to respect (not directly attack) persons protecting such property.³³ Regulations attached to the Convention provide for identification and filling of specific positions as cultural protectors.³⁴ As these individuals would likely be civilians, they are entitled to protection from intentional attack due to their civilian status.³⁵

Religious, cultural, and historic sites, in general, are protected from attack as long as they are not used in support of the enemy’s military effort.³⁶ Hague Convention IV Article 56 bans acts of hostility against cultural, historic, and religious sites but also prohibits their misuse in support of a military effort.³⁷ Article 56 does not explicitly state that these sites can be attacked when supporting a military effort illegally.³⁸ Neither the Hague IV Article 27 (1907) or the Hague Cultural Property Convention state or imply that these targets can be attacked if misused.³⁹ The warning requirements for these sites are similar to those applicable to the civilian population as a

31. Matthew Wills, *Art and the Spoils of War*, JSTOR DAILY (Nov. 13, 2015) (quoting Paige S. Goodwin, Comment, *Mapping the Limits of Repatriable Cultural Heritage: A Case Study of Stolen Flemish Art in French Museums*, 157 U. PA. L. REV. 673, 676 (2008)), <https://daily.jstor.org/art-treasures>.

32. Ben Phelan, *Spoils of War?*, PBS: ANTIQUES ROADSHOW (Jan. 16, 2012), http://www.pbs.org/wgbh/roadshow/fts/tulsa_201104A27.html.

33. Hague Cultural Property Convention, *supra* note 3, art. 15. To date, the United States has ratified the Convention itself, but not the Regulations. *Id.*

34. *Id.* art. 17.

35. *Id.*

36. See OPLAW HANDBOOK, *supra* note 14, at 90.

37. *Id.*

38. *Id.*

39. See Hague Convention IV, *supra* note 6, art. 27; Hague Cultural Property Convention, *supra* note 3, art. 8, 9.

whole. Normally, warning will be required in the case that a protected site is misused to support a war effort, unless circumstances do not permit such a warning.⁴⁰

Historically, the confiscation and use of captured and abandoned property has been used “not for direct military use, but as a means of reducing the enemy’s resources, and adding to the resources of the Union government,”⁴¹ during the American Civil War, rather than just the destruction of same. Fast-forward to the twenty-first century, some modern-day elements of the Russian Army have plundered civilian property during their occupation of Ukraine; in April 2022, the Ukrainian Defense Ministry’s Intelligence Directorate reported that “Russian troops have opened a ‘bazaar’ in Belarus to trade and sell property looted during the invasion of Ukraine,” with the looted items trade post in Narovlya selling “washing machines and dishwashers, refrigerators, jewelry, cars, bicycles, motorcycles, dishes, carpets, works of art, children’s toys [and] cosmetics”⁴²

III. SEIZURE AND DESTRUCTION OF PUBLIC PROPERTY AND SPOILS OF WAR

There are circumstances under which the permanent taking of private or state property is nonetheless sanctioned at international law, while other categories of property are completely protected from military action, usage, or seizure (e.g., historic monuments, museums, and scientific, artistic, and cultural institutions).⁴³ “Confiscation is the permanent taking or destruction of enemy public property found on the battlefield.”⁴⁴ When required by military necessity, confiscated property becomes the property of the capturing state. The concept of state ownership includes the requirement to preserve property. Confiscation is a taking without compensation to the

40. OPLAW HANDBOOK, *supra* note 14, at 69; *see* Hague Convention IV, *supra* note 6, art. 27; Hague Cultural Property Convention, *supra* note 3, art. 16 (stating that cultural property is marked with “[a] shield, consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle.”).

41. James G. Randall, *Captured and Abandoned Property During the Civil War*, 19 AM. HIST. REV. 65, 66 (1913).

42. Michael Starr, ‘Bazaar’ for Looted Ukrainian Property Allegedly Opened in Belarus, THE JERUSALEM POST (Apr. 4, 2022, 6:48 PM.), <https://www.jpost.com/international/article-703211>; *see also* Denys Karlovskiy, *Journalists Have Found the Data of Looters Who Have Sent the Plunder to Russia*, UKRAYINSKA PRAVDA (Apr. 4, 2022, 7:47 PM), <https://www.pravda.com.ua/eng/news/2022/04/4/7337132>.

43. OPLAW HANDBOOK, *supra* note 14, at 90.

44. *Id.* (emphasis omitted) (citing DEP’T OF THE ARMY, FM27-10: THE LAW OF LAND WARFARE para. 59 (1956)); Hague Convention IV, *supra* note 6, art. 23, 53.

owner.⁴⁵ Thus, a commander may acquire the supplies of an enemy armed force and its government. Public buildings may also be used for military purposes. “When military necessity requires it, if ownership is not known, a commander may treat the property as public property until ownership is determined.”⁴⁶

Under very restrictive circumstances, military forces may seize, or temporarily take, private or state personal or real property as a form of requisition; this may also apply to services. For instance, “[w]hen the use of private real property on the battlefield is required by military necessity, military forces may temporarily use it without compensation.”⁴⁷ “Anything other than a transient use of private real property will require a . . . lease,” typically retroactive.⁴⁸ “Private personal property, if taken, must be returned when no longer required, or else the user must compensate the owner.”⁴⁹

IV. INDIVIDUAL PRESCRIPTIONS REGARDING WAR BOOTY, WAR TROPHIES AND PROSCRIPTIONS REGARDING PILLAGE AND ILICIT SEIZURE AND DESTRUCTION OF ENEMY PROPERTY

In addition to the legal principles set forth above, “[n]umerous military manuals define war booty as enemy military objects (or equipment or property) captured or found on the battlefield.”⁵⁰ Several other manuals specify that it must concern movable “public” property.⁵¹ With respect to private property found on the battlefield, the U.K. Military Manual and U.S. Field Manual, like those of many more nations around the world, specify that to the extent that they consist of arms, ammunition, military equipment and military papers, they may be taken as booty as well.⁵² These are items

45. See Hague Convention IV, *supra* note 6, art. 23, 53.

46. OPLAW HANDBOOK, *supra* note 14, at 90.

47. *Id.*

48. *Id.* (suggesting that this might be concluded by the Army Corps of Engineers, while this author, as a judge advocate, concluded such lease agreements prospectively and retroactively, both domestically during Operation Hawkeye (Hurricane Hugo Civil Disturbance/Disaster Assistance in USVI) and during Operation Just Cause (military intervention in Panama)).

49. *Id.* (citing Hague Convention IV, *supra* note 6, art. 53); DEP’T OF THE ARMY, *supra* note 44, para. 394.

50. HENCKAERTS & DOSWALD-BECK, *supra* note 3, at 174.

51. *Id.*

52. *Id.* (citing MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 299, 301 (The Joint Doctrine and Concepts Centre 2004)); DEP’T OF THE ARMY, *supra* note 44, para. 396, 410.

contemplated as being used for furtherance of military operations, however, and not as individual souvenirs.

The LOAC authorizes the confiscation of enemy military property. War trophies or souvenirs taken from enemy military property are legal under the LOAC. War trophy personal retention by an individual soldier is restricted under U.S. domestic law. Confiscated enemy military property is property of the United States. The property becomes a war trophy, and capable of legal retention by an individual military member as a souvenir, only as authorized by higher authority.⁵³

In the American example,

10 U.S.C. § 2579 requires that all enemy material captured or found abandoned shall be turned in to “appropriate” personnel.” The law, which directs the promulgation of an implementing directive and service regulations, contemplates that members of the armed forces may request enemy items as souvenirs. The request would be reviewed by an officer who shall act on the request “consistent with military customs, traditions, and regulations.” The law authorizes the retention of captured weapons as souvenirs if rendered unserviceable and approved jointly by DoD [the Department of Defense] and the Bureau of Alcohol, Tobacco, and Firearms (BATF).⁵⁴

V. THE KEY TO CLEAR AND WORKABLE POLICIES AND PRACTICES PRESERVING PROTECTED PROPERTY WHILE ALLOWING FOR LIMITED TROPHY TAKING

A notable historical example of restriction on taking souvenirs was the 30 August 1990 U.S. Central Command (“USCENTCOM”) General Order No. 1 issued by General Norman Schwartzkopf, Jr.; applicable to all U.S. troops during the so-called First Gulf War, the order included, amongst other prescriptions and proscriptions, a ban on the taking of war trophies from Iraqi prisoners, which was later amended to permit U.S. troops to retain

53. OPLAW HANDBOOK, *supra* note 14, at 78; *see* DEPTS. OF THE ARMY, THE NAVY, AND THE AIR FORCE, ARMY REGULATION 608-4, PERSONAL AFFAIRS CONTROL AND REGISTRATION OF WAR TROPHIES AND WAR TROPHY FIREARMS § III.7.a–d, 10.a (1969), <https://www.marines.mil/Portals/1/Publications/MCO%205800.6A.pdf>.

54. OPLAW HANDBOOK, *supra* note 14, at 78–79 (quoting 10 U.S.C. § 2579).

captured bayonets as souvenirs.⁵⁵ The 21 May 2013 USCENTCOM General Order 1C is a more recent example of a war trophy order tracing its heritage to the First Gulf War.⁵⁶ These orders, along with regulations, policies, and relevant provisions of the Uniform Code of Military Justice, may be used to enforce those regulations and policies that must be made known to U.S. forces prior to combat.⁵⁷ “War trophy regulations must be emphasized early and often, for even those who are aware of the regulations may be tempted to disregard them if they see others doing so.”⁵⁸

“An 11 February 2004 U.S. Deputy Secretary of Defense memorandum establishes interim guidance on the collection of war souvenirs for the duration of OPERATION IRAQI FREEDOM (“OIF”) and will remain in effect until an updated DoD Directive is implemented. This memorandum provides the following:”⁵⁹

1. War souvenirs shall be permitted by this interim guidance only if they are acquired and retained in accordance with the LOAC obligations of the United States. Law of armed conflict violations should be prevented and, if committed by U.S. persons, promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.
2. All U.S. military personnel and civilians subject to this policy, operating in the Iraqi theater of operations during OIF shall turn over to officials designated by CDRUSCENTCOM all captured, found abandoned, or otherwise acquired material, and may not, except in accordance with this interim guidance, take from the Iraqi theater of operations as a souvenir any item captured, found abandoned, or otherwise acquired.
3. An individual who desires to retain as a war souvenir an item acquired in the Iraqi theater of operations shall request to have the item returned to them as a war souvenir at the time it is turned over to

55. See, e.g., FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 130, 132 (2001) (as a limited exception, U.S. personnel would be allowed to retain items such as enemy hats, shirts, belts, insignia, canteens, mess kits, helmets, and ammunition pouches as trophies).

56. OPLAW HANDBOOK, *supra* note 14, at 505–13.

57. Information Paper, War Trophies/Souvenirs 1 (Mar. 24, 2011), <https://nation.time.com/wp-content/uploads/sites/8/2013/05/war-trophies-2010-info-paper.pdf>.

58. *Id.*

59. *Id.*

persons designated by CDRUSCENTCOM. Such a request shall be in writing, identify the item, and explain how it was acquired.

4. The guidance defines “War Souvenir” as any item of enemy public or private property utilized as war material (i.e., military accouterments) acquired in the Iraqi area of operations during OIF and authorized to be retained by an individual pursuant to this memorandum. War souvenirs are limited to the following items: (1) helmets and head coverings; (2) uniforms and uniform items such as insignia and patches; (3) canteens, compasses, rucksacks, pouches, and load-bearing equipment; (4) flags (not otherwise prohibited by 10 U.S.C. 4714 and 7216); (5) knives or bayonets, other than those defined as weaponry [in paragraph 6 below]; (6) military training manuals, books, and pamphlets; (7) posters, placards, and photographs; (8) currency of the former regime; or (9) other similar items that clearly pose no safety or health risk, and are not otherwise prohibited by law or regulation. Under this interim guidance, a war souvenir does not include weaponry.

5. Acquired. A war souvenir is acquired if it is captured, found abandoned, or obtained by any other lawful means. “Abandoned” for purposes of this interim guidance means property left behind by the enemy.

6. Weaponry. For this guidance, weaponry includes, but is not limited to: weapons; weapons systems; firearms; ammunition; cartridge casings (“brass”); explosives of any type; switchblade knives; knives with an automatic blade opener including knives in which the blade snaps forth from the grip (a) on pressing a button or lever or on releasing a catch with which the blade can be locked (spring knife), (b) by weight or by swinging motion and is locked automatically (gravity knife), or (c) by any operation, alone or in combination, of gravity or spring mechanism and can be locked; club-type hand weapons (for example, blackjacks, brass knuckles, nunchaku); and blades that are (a) particularly equipped to be collapsed, telescoped or shortened, (b) stripped beyond the normal extent required for hunting or sporting, or (c) concealed in other devices (for example, walking sticks, umbrellas . . .).⁶⁰

As an exemplar of best practices, the OPLAW Handbook suggests:

60. *Id.* at 1–2.

The key to a clear and workable war trophy policy is to publicize the policy before deployment, work the policy into all exercises and plans, and train with the policy. When drafting a trophy policy, consider “6 Cs”:

- a. COMMON SENSE—does the policy make sense?
- b. CLARITY—can it be understood at the lowest level?
- c. COMMAND INFORMATION—is the word out through all means available? (Post on unit bulletin boards, post in mess facilities, put in post newspaper, put in PSA on radio, etc.).
- d. CONSISTENCY—are we applying the policy across all layers and levels of command? (A policy promulgated for an entire Corps is better than diverse policies within subordinate divisions; a policy that is promulgated by the unified command and applies to all of its components is better still).
- e. CUSTOMS—prepare for customs inspections, “courtesy” inspections prior to redeployment, and amnesty procedures.
- f. CAUTION—Remember one of the primary purposes of a war trophy policy: to limit soldiers from exposing themselves to danger (in both Panama and the 1991 Persian Gulf War, soldiers were killed or seriously injured by exploding ordnance encountered when they were looking for souvenirs). Consider prohibitions on unauthorized “bunkering,” “souvenir hunting,” “climbing in or on enemy vehicles and equipment.” A good maxim for areas where unexploded ordnance or booby-traps are problems: “If you didn’t drop it, don’t pick it up.”⁶¹

VI. FUTURE RISK UNDER CHANGING POLICIES—PAST IS PROLOGUE

In the absence of clear and workable cultural property and war trophy policies, publicized before deployment, and worked into all exercises and plans, and trained and enforced while deployed, military forces may never know what may not be taken, and allow opportunity and avarice to take over their motivations.

The revered journalist and author William H. Honan wrote some years ago about how immunity can overcome impunity with regards to the return

61. OPLAW HANDBOOK, *supra* note 14, at 79.

of wrongfully acquired and retained property during wartime. In one vignette, he describes how, “[i]n the closing days of World War II in Germany, Cameron Anderson, a young American Army private, casually pocketed a valuable 14th-century manuscript from the castle of Grossgrundlach on the outskirts of Nuremberg,” only to return it years later when he “informed the German authorities of his desire to repatriate the manuscript [and] they arranged to have him fly to Germany on an all-expenses-paid, red-carpet trip to personally present the 8-by-12-inch document to Baron Helmut Haller von Hallerstein, whose family had owned the castle of Grossgrundlach for generations.”⁶²

In yet another vignette, Honan recounted a much more senior service member’s wartime taking: “Maj. Gen. Lemuel C. Shepherd Jr., who commanded the Sixth Marine Division on Okinawa in World War II,” took a “15th-century Buddhist temple bell—a Japanese national treasure—presented to him in Okinawa by his troops, which he in turn donated to the Virginia Military Institute, his alma mater.”⁶³ Only after Shepherd’s death in 1990 did the “Defense Department dare[] to arrange the return of the bell.”⁶⁴

In neither instance was there official investigation and prosecution, although in significant precedence, the so-called “Quedlinburg case, which concerns the theft of medieval church treasures from Germany by an American officer in World War II . . . set an important precedent.”⁶⁵ In the estimation of Constance Lowenthal, director of the Commission for Art Recovery at the World Jewish Congress,

“[e]ven though in that case the thief’s heirs escaped trial on a technicality, it has been a powerful deterrent because it showed that if you indulge in careless or shady acquisitions, let alone outright theft, you not only run the risk of a possible civil action, but also may face criminal prosecution.”⁶⁶

Nearly a generation later, Vice Admiral Joseph Metcalf 3d, who commanded the October 1983 United States invasion of Grenada, was given,

62. William H. Honan, *Ideas & Trends; Returning the Spoils of War, With Immunity*, N.Y. TIMES (Apr. 16, 2000), <https://www.nytimes.com/2000/04/16/weekinreview/ideas-trends-returning-the-spoils-of-war-with-immunity.html>.

63. *Id.*

64. *Id.*

65. *Id.* On October 22, 1996, the District Court dismissed the charges against the accused because federal prosecutors obtained an indictment one day too late under the federal statute of limitations. *United States v. Meador*, 138 F.3d 986, 990 (5th Cir. 1998).

66. Honan, *supra* note 62.

after extensive investigation, a non-punitive letter of warning for bringing back twenty four Soviet-made assault rifles.⁶⁷

The case received wide attention in 1985 after reports that lower-ranking servicemen had been tried and imprisoned upon conviction for charges involving smuggling of guns from Grenada; the U.S. Navy attempted to contrast how “Admiral Metcalf requisitioned weapons as gifts for high-ranking officials and surrendered them to Customs,” while the enlisted men “were convicted of stealing or selling the weapons.”⁶⁸

After the Persian Gulf War, Lieutenant General Gary E. Luck, the commander of the 18th Airborne Corps, which includes the 82nd Airborne, 101st Airborne and 24th Mechanized Infantry divisions was purportedly “planning to keep a French assault rifle he received . . . until an Army lawyer inquired about the weapon.”⁶⁹ Specialist Victor N. Melnichuck, a combat engineer with the U.S. 682nd Engineer Battalion, was indicted in 2005 for allegedly shipping two assault rifles from Iraq to the United States.⁷⁰

Despite plans, training, enforcement, and constant vigilance, even in wartime, are there political threats in the present era that may undermine by word and example the military’s dedication to scrupulous respect for property rights in wartime? In August 2016,

[then-candidate Donald] Trump argued that during the U.S. war in Iraq, the United States should have taken the Middle Eastern nation’s abundant oil reserves and used the profits to pay the families of dead and wounded soldiers. “In the old days, when we won a war, to the victor belonged the spoils,” he shouted to applause.⁷¹

A month later, a key advisor to Trump suggested seizing the resources of a sovereign nation after invading it; when challenged as to such acts’

67. Eric Schmitt, *Pentagon Accused of Bias in Enforcing Ban on Booty*, N.Y. TIMES, Aug. 21, 1992, at A18, <https://www.nytimes.com/1992/08/21/us/pentagon-accused-of-bias-in-enforcing-ban-on-booty.html>.

68. *Id.*

69. *Id.*; *Grenada Gun Case: Jail for 7 But Not Admiral*, N.Y. TIMES, Feb. 8, 1985, at A3, <https://www.nytimes.com/1985/02/08/world/grenada-gun-case-jail-for-7-but-not-admiral.html> (six enlisted personnel and one junior officer, of which two were Marines and five were soldiers from the 82nd Airborne Division, all received reduction in rank, dishonorable discharges and at least one year of prison time for the same offense).

70. St. Paul Pioneer Press, ‘*War Trophy*’ Gets Soldier Indicted, SUN JOURNAL (Dec. 16, 2005), <https://www.sunjournal.com/2005/12/16/war-trophy-gets-soldier-indicted>.

71. Alex Griswold, *Trump Argues United States Should Have Carried Out War Crime in Iraq*, MEDIAITE (Aug. 15, 2016, 4:13 PM), <https://www.mediaite.com/online/trump-argues-united-states-should-have-carried-out-war-crime-in-iraq>.

legality, former U.S. Attorney and Mayor, Rudy Giuliani, said, laughing, “Of course it’s legal. It’s a war. . . . Until the war is over, anything’s legal.”⁷²

Should such bluster become policy, it may well constitute a war crime as conduct prohibited by “Articles 23, 25, 27, or 28 of the Annex to the Hague Convention IV.”⁷³

CONCLUSION

Effective and enforced war trophies laws and policies protect property, cultural or otherwise, and proscribe any temptation by the average service member to improperly pursue a “to the victor belong the spoils” approach to their sworn responsibilities to conduct themselves in accordance with law and custom. Which ethical, competent defense counsel would ever raise the specious and unethical legal defense that “until the war is over, anything’s legal,” notwithstanding political rhetoric?

The promulgating and enforcing of a limited “war trophies” policy has the goal of recommending precedent and policy for service members serving in time of war or armed conflict. A modest and sensible war trophy policy has a practical impact in allowing personal mementos with little more than sentimental value and minimal utility to be retained by soldiers from their time of service, without depriving private citizens of their possessions nor (former) adversary governments or entities of their ability to provide continuity of government. Aside from academics advancing adherence to IHL, most importantly, military members will be aided in exercising their discernment when called upon in missions to destroy—or protect—public and private property, as well as cultural advisors, especially Civil Affairs and Civil-Military Operations experts, and Judge Advocates, the advisors and guardians of protected persons and things.

72. Jenna Johnson, *Top Trump Adviser Rudy Giuliani: ‘Until the War Is over, Anything’s Legal’*, WASH. POST (Sep. 11, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/09/11/top-trump-adviser-rudy-giuliani-until-the-war-is-over-anythings-legal>.

73. OPLAW HANDBOOK, *supra* note 14, at 84 (citing Hague Convention IV, *supra* note 6).