

LOOTING OF MEN AND LEGAL THEORIES IN MEDIEVAL AND EARLY MODERN EUROPE*

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I. *Legality of Looting in Pre-Modern Europe*

Pillage is seizing the goods of the inhabitant at the front or in an occupied territory. ‘The inhabitant’ means not only the persons of enemy country, but also fellow countrymen and a third power’s people. It doesn’t matter whether the goods were seized by theft or by might. If they are seized in peacetime, the seizing is treated as a robbery or theft. If, however, it is done at the front or in an occupied territory, it is in particular called ‘Pillage.’¹

This paragraph is cited from a representative Japanese textbook on the law of war published in the Second World War. As the author makes clear, pillage is a criminal act which is equivalent to robbery or theft. This recognition is common to all mankind in modern times. International law prohibits the military from pillaging any property of an inhabitant. This prohibition makes common sense. Indeed there have been a lot of examples of pillaging, destruction, and killing of innocent people in wartime even in modern times. But these acts are obviously judged to be illegal and severely denounced by international society. Offenders should be punished at a military court or international war crimes tribunal. In Japan there have often been debates on the Massacre of Nanking. The problem is the fact of massacre and pillage by Japanese soldiers in Nanking. Is there the fact of massacre or not? This is the point of the debates. The illegality of massacre and pillage is beyond controversy. In this modern world massacre and pillage in wartime are legally never admitted.

But this common-sense concerning the illegality of pillage has not existed from time immemorial. As Fritz Redlich, the author of a splendid article on looting, showed, prior to the 15th century looting was taken as a matter of course and even in the 16th, 17th and 18th centuries it was legal on some conditions. By 1815 it became a practice to be condemned and eliminated. But according to him “the vicious practice survived in colonial wars”. For example, in the war of 1860 the French and English plundered Peking. Eye-witnesses reported the episode: “. . . prize agents [were] appointed; they should select such articles

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[in the imperial palace] as they deemed fitting a prize for each army, and . . . when their selection was complete, the rest of the property might be taken as individual spoil.”²

We can see some traces of public looting expressed in article 28 of Rules Concerning the Laws and Usages of War on Land (1899, 1907) at the Hague which is one of the most important treaties legally restricting war. Article 28 says: “The pillage of town or place, even when taken by assault, is prohibited.”³ Why does this article especially mention the case of “assault”? Why does this article use the expression such as “even when taken by assault”? Because in the 17th and 18th centuries there was a firm rule that cities were legally plundered only when taken by assault. I will cite a paragraph of Redlich’s article to understand this meaning more clearly.

The commander of the besieging army sent a formal request to surrender, announcing that in case of refusal all citizens would be considered enemies; and we know what that meant according to the legal concepts of the period. Non-compliance was made a quasi-collective crime which in the eyes of contemporary armies justified plunder if the city was actually taken by assault. On the other hand, until late in the eighteenth century, army commanders considered this practice difficult, if not impossible, to prevent; nay, indispensable. The expectation of booty was to encourage the soldiers during the siege, and the booty itself to remunerate them for the hardship of the siege and the horrors of the assault.⁴

We can read a similar description in “The History of the Thirty Years War,” written by Friedrich Schiller: “As soon as Tilly began to evacuate the front, the King of Sweden left the camp at Schwet at once and aimed at Frankfurt an der Oder with this army. This city was defended by 8,000 men. . . . This city was attacked fiercely and on the third day it was occupied by the storming party. The Swedish army was confident of its victory and didn’t permit the townsmen in Frankfurt to surrender although they showed their will to capitulate, in order to realize their awful right of revenge . . . several thousand soldiers were slain or captured; many men were drowned; the rest fled to Silesia. All of the artillery became the property of the Swedish army. Gustav Adolf permitted his men to pillage for three hours to moderate their brutality.”⁵

G. Adolf was never brutal. He himself and his articles of war were even Neostoic and humane. His authority was established, too. But he never stopped his soldiers from looting as victors. He could not stop it. He possibly had no idea of prohibiting pillaging, because looting after victory in war was certainly legal in his times.

It is well known that G. Adolf brought the masterpiece of early international law, “The Law of War and Peace” of Grotius with him into the battlefield and almost every night read it. While “The Law of War and Peace” was published in 1625, in fact Grotius had already written an unpublished study on looting in 1604 or 1605. He insisted in the book,

¹ Junpei Shinobu, Senji Kokusaihou Teiyō (The Institute of the Law of War), Tokyo, 1943, p. 647.

² Fritz Redlich, *De Praeda Militari, Looting and Booty 1500–1815*, in: *Vierteljahrschrift für Sozial und Wirtschaftsgeschichte*, Beiheft 39, Wiesbaden, 1956, p. 78.

³ Adam Roberts and Richard Guelff (ed.), *Documents on the Laws of War*, 2nd ed., 1989, Oxford, p. 53.

⁴ F. Redlich, *op. cit.*, pp. 23–4.

⁵ F. Schiller, *Geschichte des dreißigjährigen Krieges*, in: R. Boxberger (Hrsg.), *Schillers Werke XI*, Berlin, S. 146.

"Commentary on the Law of Prize and Booty" (published in 1868) that there is the just war as the execution of right and looting in this just war is legal and honourable. The 14th chapter of this book is entitled 'The Seizure of the Prize in Question Was Honourable.' It proves the following theses.⁶

- I Everything just is honourable.
- II It is especially honourable to take vengeance, on behalf of one's allies or one's native land, upon men who are incorrigible.
- III Seizure of spoils may be especially honourable because of the purpose served thereby.

Young Grotius did not doubt the legality and honour of prize and booty in the just war. This is in a sense the most general attitude of legal intellectuals in early modern Europe.

Naturally the legality of looting is not restricted to early modern Europe. Going back to the past, the looting was more and more natural. Of the Greeks, Otto Brunner says: "In Homeric times booty was the main reason for war, and to destroy a city was also to plunder it, the choicest booty (*leis*) consisting of weapons, horses, cattle, precious metals, expensive equipment, and women. The Greek "*leis*" covers both such military booty and the fruits of brigandage, indiscriminately; its root has the more basic sense of "acquiring" and "enjoying". The cattle raids depicted on the shield of Hephaestus often led to war, while piracy was ubiquitous in the medieval period. In other words, plundering *per se* was considered neither illegal nor immoral, but a legitimate way of acquiring property and winning honour. If Hesiod, the voice of the peasantry, inveighed against plundering, he still did not represent it as illegal. Even in later centuries of Greek history, plundering was recognized as one way of getting goods."⁷

Also in the Roman period the mentality on plundering had not changed. I will cite one paragraph on a scene of triumph from "Plutarch's Lives".

The senate decreed a triumph to Marcellus alone, and his triumphal procession was seldom equalled in its splendour and wealth and spoils and captives of gigantic size; but besides this, the most agreeable and the rarest spectacle of all was afforded when Marcellus himself carried to the god the armour of the barbarian king. He had cut the trunk of a slender oak, straight and tall, and fashioned it into the shape of a trophy; on this he bound and fastened the spoils, arranging and adjusting each piece in due order. When the procession began to move, he took the trophy himself and mounted the chariot, and thus a trophy-bearing figure more conspicuous and beautiful than any in his day passed in triumph through the city. The army followed, arrayed in most beautiful armour, singing odes composed for the occasion, together with paeans of victory in praise of the god and their general.⁸

This brilliant description shows that among the Romans the taking of booty from the

⁶ Hugo Grotius, *De Iure Praedae Commentarius*, Hagae, 1868, pp. 300 ff. (This book is translated into English. In the following I will use the English translation if there is one, and cite it by the name of the translator.) Idem (translated by Gwaldys L. Williams), *Commentary on the Law of Prize and Booty*, New York, 1964, p. 318 ff.

⁷ Otto Brunner, *Land und Herrschaft, Grundfragen der territorialen Österreichs im Mittelalter*, 5 Aufl., Darmstadt, 1973, S. 85. Idem (trans. by Howard Kominsky and James Van Horn Melton), *Land and Lordship: Structures of Governance in Medieval Austria*, Philadelphia, 1992, p. 74.

⁸ Plutarch's *Lives V*, The Loeb Classical Library, London, 1955, pp. 453-5.

vanquished was clearly honourable and needed to be viewed by Roman citizens as evidence of the victory. Plutarch provides also a concrete fact of the distribution of booty to the soldiers. It is from the time when Cato the Elder was Consul. In B.C. 195 he won marvelous victories against the Barbarians in the campaign into 'Hither Spain.' "His soldiers got large booty in this campaign, and he gave each one of them a pound of silver besides, saying that it was better to have many Romans go home with silver in their pockets than a few with gold."⁹ Cato the Elder was praised by Plutarch because of his fair and impartial distribution to his soldiers. Cato was never reproached for his plundering and distribution of the spoils by Plutarch.

Roman lawyers recognized the legality of plundering and spoiling, too. The most explicit expression can be found in a famous classical lawyer, Gaius. His words were as follows.

When a real action was instituted, the movable property, and that which could move itself and be brought into court, was demanded as follows. The party making the claim, held a staff, and then grasping the object in dispute, as for instance, a slave, said: "I declare this slave to belong to me, on account of his condition, in accordance with quiritarian right. See! In accordance with what I have stated, I have placed my staff upon him"; and, at the same time, he laid the staff upon him. His opponent then said and did the same thing. . . The staff was employed instead of a spear, as an emblem of lawful ownership, for whatever was taken from an enemy a man considered to be absolutely his own; wherefore in cases tried before the *Centumviri*, a spear was placed in front of the tribunal.¹⁰

Also according to the distinguished scholar of Roman law, Professor Max Kaser, "the acquisition of things through occupation, which were taken from the outlawed enemy is not precluded by the commander's order prohibiting looting or delivering of the spoils".¹¹ In the first place soldiers in ancient Rome had to be responsible for their own expenses. In earliest times the Roman soldier didn't get pay for his service. He was the armed independent citizen. His share of the distribution by his general in a victory, as well as the profits of the Roman people as a whole, was his reward. In a sense the Roman citizen went to battle to obtain his share. The war was often for him economic. To fight was to profit. And these circumstances were basically identical in ancient Germany and medieval Europe where we can see a similar system of looting in war. Ancient German warriors and feudal knights fought for their friends and their own profits. In times of low production it was very rational to acquire food, products, articles of value and slaves from the enemy by force. Tacitus indicates such a way of thinking of German tribes fitting this situation.

In the place of pay, they are supplied with a daily table and repasts, though grossly prepared, yet very profuse. For maintaining such liability and munificence a fund is furnished by continual war and plunder. Nor could you so easily persuade them to

⁹ Ibidem II, p. 331.

¹⁰ B. Kvebler (ed.), *Gai Institutionum Commentarii quattuor*, Leipzig, 1926, SS. 196-8. Idem. *The Four Commentaries of Gaius, On the Institutes of the Civil Law*. in: S. P. Scott (transl.), *The Civil Law*, Vol. 1, Cincinnati, 1973, p. 187.

¹¹ Max Kaser, *Römisches Privatrecht*, 16 Aufl., München, 1992, p. 121.

cultivate the ground, or to await the return of the season and produce of the year, as to provoke the foe, and to risk wounds and death: since they account it stupid and spiritless to acquire by their sweat what they can gain by their blood.¹²

As to medieval Europe we can first of all cite the words of Marc Bloch.

It (violence) played a part in the economy: at a time when trade was scarce and difficult, what surer means of becoming rich than plunder or oppression? A whole class of masters and warriors lived mainly by such means, and one monk could calmly make a petty lord say in a charter: I give this land 'free of all dues, of all exaction or tallage, of all compulsory services . . . and of all those things which by violence knights are wont to extort from the poor.'¹³

Denys Hay described the following, too.

The desire for booty was a motive in all medieval warfare. . . . Even a cursory knowledge of the period of Anglo-French hostilities between 1337 and 1453 leaves one under no illusions as to the overriding importance to the combatants of the winnings of war. Spoils mattered equally to the rank and file soldier, to the magnate and to the crown. The depredations of the *chevauchée* in Languedoc in 1355 benefited everyone in the Black Prince's army. 'Chevaliers, escuiers, brigants, garchons' were loaded with 'leurs prisonniers et leurs richesses.'¹⁴

Hay cited the last sentence from Jean le Bel's *Chronique*. As le Bel writes, the booty can be classified into two types: men and things. Bloch also says: "it was undoubtedly considered that the finest gift the chief could bestow was the right to a share of the plunder. This was also the principal profit which the knight who fought on his own account in little local wars expected from his efforts. It was a double prize, moreover: men and things."¹⁵ We feel it odd and barbarous that persons comprised the booty. But it was fact. Besides, it was not only a matter de facto, but also de jure. Even in early modern times it was often recognized as legal by great jurists although the form of spoiling persons had been fairly transformed.

Hugo Grotius argued this matter in the chapter 'on the right over prisoners of war' in his "The Law of War and Peace."

Whether those who have been captured become the property of the people, or of individuals, must be decided by what we have said in regard to booty; for in this case the law of nations has put men in the same category as things. Gaius the jurist said in his *Daily Questions*, Book II: 'Also what is captured from the enemy becomes at once, by the law of nations, the property of the captors, to the extent indeed that even

¹² Rudolf Much, *Die Germania des Tacitus*, Heidelberg, 1937, S. 159. Idem (translated by Thomas Gordon Esq.), *A Treatise of the Situations, Customs, and People of Germany*, In: *The Works of Tacitus*, Vol. II, London, 1817, p. 290.

¹³ Marc Bloch, *La Société Féodale*, 5éd., Paris, 1968, p. 567. Idem (transl. by L. A. Manyon), *Feudal Society* (2), London, 1962, p. 411.

¹⁴ Denys Hay, *The Division of the Spoils of War in Fourteenth-Century England*, *Transactions of the Royal Historical Society*, 5th series, Vol. 4, 1954, p. 91.

¹⁵ M. Bloch, op. cit., p. 414. L. A. Manyon, p. 297.

free men are led off into slavery.’¹⁶

Even in the representative theory of early international law the right of booty was recognized. In early modern times persons were included in the booty under the law of nations. This is really astonishing to us. But this fact is characteristic of the legal concept held by scholars in pre-modern Europe. I will investigate the legal institution and theory of spoiling men in more detail.

II. *Killing of Prisoners of War*

There were three ways of treating prisoners of war in pre-modern Europe. First they were slain. Second they became slaves. Third they were ransomed. It seems to be proper to begin with the first, because it was the oldest and most fundamental.

According to Grotius, in Josephus (*Antiquities of the Jews*, IX.iv.3) Elisaeus said that it was right to slay those who had been made prisoners by the law of war.¹⁷ In Widukindus the Saxons slew the prisoners of the Slav in 955: “on the same day the enemy position was captured and many men were killed or taken captive. The dead were left even in the night. On the next day the skull of their prince was exposed in the field and close to him 700 captives were slain. The eyes of the counsellor of the prince were removed and his tongue was cut out. After having been made powerless, he was laid among the dead.”¹⁸

Until about the 16th century it was not so rare nor felt immoral to kill captives. O. Brunner interests us also here. He explains the logic of killing the captive as follows. In early and high medieval times, “the lawbreaker who committed a felony became an ‘enemy’ of the individual or community whose rights be injured. . . . He was now peaceless, an outlaw and an enemy. As Frankish and Nordic sources put it, he became a ‘vargr,’ a wolf, a rabid beast to be treated accordingly. He could be killed on the spot with impunity, and if captured, he was at one time sacrificed to the gods in ways that survive in modern forms of capital punishment”. The foreign enemy, also, was “a violator of the public peace and hence ‘peaceless’”. Therefore “the execution of prisoners of war as public enemies endured far into the Middle Ages, despite the moderating influence of Christian universalism and knightly codes of chivalry”.¹⁹

First of all it is never illegal for men to kill wolves. So even in 1458 the duke of Austria, Albrecht VI, killed rightfully the 300 Czech captives. Grotius writes: “Not even captives are exempt from this right to inflict injury. In Seneca, Pyrrhus says, in accordance with the accepted custom of the time, *No law the captive spares or punishment restrains*. In the *Ciris*, attributed to Virgil, such is said to be the law of war, even against captive woman: Scylla there speaks thus: *But by the law of war a captive you had slain*. Also in the passage cited from Seneca the killing of a woman, Polyxena in fact, was under discussion. This

¹⁶ H. Grotius, *De Iure Belli ac Pacis* (Paris, 1625), Leiden, 1939, p. 664. Idem (translated by F. W. Kelsey), *The Law of War and Peace*, Oxford, 1925, pp. 692–3.

¹⁷ Idem., op. cit., p. 664. Kelsey, p. 649.

¹⁸ Widukindus, *Res gestae Saxonicae* III-50. MG SS, III, p. 461. Cf. K.-G. Cram, *Judicium Belli*, Münster, 1955, S. 158.

¹⁹ O. Brunner, op. cit., S. 32. Howard Kominsky and James Van Horn Melton, op. cit., p. 27.

practice gave rise to that saying of Horace: *When you can sell a prisoner, slay him not*; for the words imply the postulate that it is permissible to kill a captive. . . . So far as the law of nations is concerned, the right of killing such slaves, that is, captives taken in war, is not precluded at any time, although it is restricted, now more, now less, by the laws of states.”²⁰

Even in the 18th century there is a famous judge who recognized the legality of the killing of captives. This jurist is Cornelius van Bynkershoek (1637–1734). He was the president of court of Holland, Seeland, Westfrisland. He writes the following.

Since the conqueror may do what he likes with the conquered, no one doubts that he also has the power of life and death over him. There are so many records and instances of the exercise of this right among all nations of ancient time, that one thick volume would not contain a full account of time; and writers on public law have already exercised their industry upon this subject. But although the right of executing the vanquished has almost grown obsolete, this fact is to be attributed solely to the voluntary clemency of the victor, and we cannot deny that the right might still be exercised if any one wished to avail himself of it.²¹

Naturally both Grotius and Bynkershoek do not recommend executing this right of killing captives. Grotius tried to restrict this right with the law of nature and law of love. Bynkershoek recognized that in his time this right to kill was in fact null and void because it was restricted by the custom and right depending on the “clemence of a victor.” Vitoria (Francisco de Vitoria, 1480/6–1546), also, says that “I reply that, in itself, there is no reason why prisoners taken in a just war or those who have surrendered, if they were combatants, should not be killed, so long as common equity is observed. But as many practices in war are based on the law of nations, it appears to be established by custom that prisoners taken after a victory, when the danger is passed, should not be killed unless they turn out to be deserters and fugitives.”²²

If so, how were prisoners of war treated? As I wrote at the beginning of this chapter, there were two ways of treating captives besides killing them. I will deal with the matter of enslaving prisoners of war first.

III. *Enslaving of Prisoners of War*

I will go back to the Early Middle Ages again. In war at this time it was not only warriors but also many inhabitants who were killed. But at the same time women and children were often spared. We can read it, for example, in “Antapodeseos” of Liudprandus of Pavia. According to his description, Henry I of Germany (876–936), being raided by the Hungarians, summoned all the warriors of Saxony and appealed to them: “The Hungarians looted many women and children, and massacred uncountable men. They had prearranged to terrify us that all the men over ten years old should be killed.” Liudprandus continues.

²⁰ H. Grotius, op. cit., p. 664. Kelsey, op. cit., p. 649.

²¹ Cornelius v. Bynkershoek, *Quaestionum Juris Publici Libri duo* (1737), New York, 1930, p. 19. Idem (translated by Tenney Frank), New York, 1930, p. 27.

²² Franciscus Vitoria (ed. by Ernest Nys), *De Indis et De Jure Belli Relectiones*, Washington, 1917, p. 293. Idem (ed. by A. Pagden), *Political Writings*, Cambridge, p. 321.

"But the king had an indomitable spirit. He was never upset and told them to fight more bravely for their country and to die in glory."²³

The Hungarians killed "all the men over ten years old". However, they "looted many women and children". The women and children became slaves. Henry I, also, acted similarly. When he attacked Gana in Daleminici, he occupied the city on the 20th day after he started to attack.²⁴ "The spoils were given to his warriors. All the adults were slain. Boys and girls became captives and their lives were spared." They were brought to Saxony as their slaves as G. Waitz interpreted the word 'servatae' so. Waitz writes: "What ruled here is the laws of war".²⁵

Medieval chronicles tell us these cases repeatedly. Enslaving men was a matter of course. It belonged to the medieval law of war. Legal theories accepted this custom. First of all Roman Law recognized the enslaving of captives. There is a famous law concerning the enemy in the Digest.

Enemies are those against whom the Roman people have publicly declared war, or who themselves have declared war against the Roman people; others are called robbers, or brigands. Therefore, anyone who is captured by robbers, does not become their slave, nor has he any need of the right of *postliminium*. He, however, who has been taken by the enemy, for instance, by the Germans or Parthians, becomes their slave, and recovers his former condition by the right of *postliminium*.²⁶

The most excellent jurist of the Middle Ages, Bartolus de Saxoferrato (1314–1357) commented on this law and justified the enslaving of captives. In their relationship with 'the real enemy' "captives become slaves, things captured then become the things of the captor".²⁷ Baldus de Ubaldis (1327–1400) showed a similar opinion. According to him, in the war declared by Emperor or Pope, soldiers, when captured, change from men to things and are rated like asses or some other movables. In short such prisoners of war become slaves of the captor. "And in regard to a war declared by the Emperor, this was the view of all the early Doctors, according to Calderinus."²⁸

Even Roman Popes recognized the enslaving of captives. Their authority was St. Augustine (Aurelius Augustinus, 354–430). Augustine writes as follows:

The origin of the Latin word for "slave" is believed to be derived from the fact that those who by the law of war might have been put to death, when preserved by their victors, became slaves, so named from their preservation. But even this could not have occurred were it not for the wages of sin; for even when a just war is waged, the enemy fights to defend his sin, and every victory, even when won by wicked men, humbles the vanquished through a divine judgement, concentrating or punishing their

²³ Liudprandus, Liber Antapodoseos, II-2, MG SS, III 294.

²⁴ Widukindus, op. cit., p. 432.

²⁵ Georg Waitz, Jahrbücher des deutschen Reiches unter König Heinrich I, 4 Aufl., Darmstadt, 1963, S. 124.

²⁶ Ulpianus, D.49.15.24. S. P. Scott (transl.), The Civil Law, Vol. IX, Cininnati, 1973, pp. 186–7.

²⁷ Bartolus a Saxoferrato, In II Digesti Novi Partem Commentaria, Venetiis, MDLXXV, p. 215.

²⁸ Baldus de Ubaldis, Consilia II 358 (in Pierino Belli, De Re Militari et Bello Tractatus [1563], Oxford, p. 41. Idem [translated by Herbert C. Nutting], A Treatise on Military Matters and Warfare, Oxford, 1936, p. 56.)

sins.²⁹

Thomas Aquinas (1225–74) gives a similar opinion, commenting on Aristotle, too. He thinks there are two kinds of rightness. “The thing which is right from its nature is said to be right in itself (*simpliciter*). The thing which is related to the benefit of men demanded by laws, however, is said to be right because of its benefit. For every law is enacted for the utility of men.” Therefore enslaving the defeated is not right in itself. But this is right for the benefit for men. “Enslavement is useful for the defeated because their lives are spared. This is useful also for the victor. For this leads to the more courageous fighting of soldiers.” All peoples use this law. So it can be called ‘the law of nations’.³⁰

Early modern jurists, especially the forerunners of early modern international law justified the enslaving of captives in line with Augustine and Aquinas. For example, P. Belli (1502–75) says: “Beyond a doubt slaves are so called from being ‘spared’ (*servari*). For nature herself admonishes us that it is humane to spare a captured enemy and not to kill him. For it is not right to treat a prisoner with cruelty or to put him to death.”³¹

The keen protector of enslavement was A. Gentili (Alberico Gentili, 1552–1608), a famous Oxford professor in the 17th century. He insisted that “the condition of slavery is a just one. For it is a provision of the law of nations”. He knew that there was a strong objection that slavery was against natural reason on which the law of nations was based. The objection insisted that slavery was contrary to nature and owed its origin in the cruelty of the enemy. Gentili, however, refuted this argument relying on natural reason against slavery. He writes with T. Aquinas that slavery is in harmony with nature, “not indeed according to her first intent, by which we were all created free, but according to a second desire of hers, that sinners should be punished”.³²

Gentili affirmed that slavery is a just condition. He says: “The law of nature has not ordained that men should not become slaves, although it has made men free; and therefore the law of slavery might be based upon the law of nations. And the law of nations did not ordain that slaves should not be restored to freedom, but on the contrary the privilege of manumission was established through that same law. . . . Add to this that the law of nations about making slaves provides that prisoners be slaves, if those who have captured them so desired.”³³

We must remember the logic that enslaving captives means saving the lives of the captives. A. Gentili, a strong opponent of killing prisoners of war, recognized the enslaving of captives positively. The reason is obvious. He wanted to save the lives of prisoners of war. He was sure that in his time enslavement is the only rational and real way of saving captives. He thought that some idealists denying slavery are the very men who do not respect the lives of captives in fact. In his judgement, the representative theorist of anti-slavery was Jean Bodin (1530–96). Gentili writes:

²⁹ S. Aurelius Augustinus, *De Civitate Dei Contra Paganos*, XIX-15, The Loeb Classical Library, S. Augustine, *The City of God against the Pagans*, VI, London, 1960, pp. 186–9. On just war theories in the Middle Ages, see F. H. Russel, *The Just War in the Middle Ages*, Cambridge, 1979.

³⁰ S. Thomas Aquinas, *In Octo Libros Politicorum Aristotelis Expositio*, Taurini, 1966, p. 24.

³¹ P. Belli, *op. cit.*, p. 41. H. C. Natting, *op. cit.*, pp. 85–6.

³² Albericus Gentilis, *De Jure Belli Libri tres* (1612), Oxford, 1933, p. 538. *Idem* (translated by John C. Rolfe), *The Three Books of the Law of War*, Oxford, 1933, p. 330.

³³ *Idem.*, p. 539. J. C. Rolfe, p. 331.

But the disquisition written against slavery by Jean Bodin is exceedingly silly. He does not countenance slavery even among men of different religions, although perhaps it would be better for it to be accepted even among those of the same religion; for in that case not so many men would be put to death, if the law of slavery existed among all men. Thus in civil strife, which is always abnormal, wretched, and the worst of all wars, it is believed that more men are slain because the captives do not become the slaves of the captors. And this was one of Aristotle's reasons for approving slavery.³⁴

Bodin denies clearly all slavery according to the law of nature. In his opinion, although slavery has existed a long time, it does not mean that servitude is agreeing to nature. God gave us the choice of good and evil. Man chose often the worse, contrary to the law of God and nature. We must not measure the law of nature by men's actions. He continues as follows:

Neither thereof conclude, that the servile estate of slaves is of right natural: as also much lesse to attribute it to charitie, or to courtesie, that the people in auntient time saved their prisoners, taken in warres, whome they might have slaine; to draw a greater gaine and profit from them as from beasts. For who is hee that would spare the life of his vanquished enemie, if he could get greater profit by his death than by sparing his life? Of a thousand examples I will produce but one. At the siege of Ierusalem vnder the conduct of *Vespasian*, a Roman souldier having found gold in the entrails of a Iew that was slain, made his companions therewith acquainted, who forth with cut the throats of their prisoners, to see if they had also swallowed any of their crownes; so that in a moment there were slaine about twentie thousand of those Iews. O faire example of charitie towards captives!³⁵

Bodin concluded that the enslaving of prisoners of war was neither natural nor the fruit of charity. According to his opinion, it all depends on profit. This understanding seems to be right. Many examples found in history show its correctness. But Gentili judged that the opinion of Bodin was not real in his time. Because only through slavery was the killing of captives prevented. "Yet even as it is, the richer prisoners are spared with an eye to their ransom, and unquestionably the common soldiers now die in greater numbers than was the case when all could be made slaves." Both scholars, Gentili and Bodin, have in fact the same understanding that profit has very much to do with slavery. Nevertheless, Gentili recognized the legality of enslaving captives almost completely while Bodin denied it totally. In the theory of Gentili the enslaving of prisoners of war belongs to the law of nations and of nature. In Bodin slavery was illegal even in the field of law of the nations. In early modern Europe they were too extreme. As we will consider soon, in this period enslavement was legal in relation to infidel enemy under the law of nations. But Bodin did not "countenance slavery even among those of the same religion". On the contrary Gentili insisted "it would be better for it to be accepted even among those of the same religion". This is certainly the extreme opinion. There had been no slavery in the wars among Christians since about the middle of the 13th century.

³⁴ Ibid.

³⁵ Jean Bodin, *Les Six Livres de la République* (1583), Aalen, 1977, p. 55. Idem (translated by Richard Knolles), *The Six Books of a Common Weal* (1606), Cambridge, 1962, pp. 35-6.

It was Hugo Grotius who managed clearly this complicated problem of great importance in early modern Europe. He distinguished in principle the law of nature from the law of nations as a voluntary law. The law of nature is right *a priori*, but the law of nations is right *a posteriori*. Namely the rightness of the law of nations depends only on the agreement between nations. The important thing for the law of nations is the agreement which was made by men for the benefit of themselves. It does not matter essentially whether the content of the agreement is right or not.

Naturally Grotius, a founder of international law, recognized the legality of customs in international society. So slavery can be legal although the law of nature prohibits it. He writes:

By nature at any rate, that is, apart from human act, or in the primitive condition of nature, no human beings are slaves. . . In this sense it is correct to accept what was said by the jurists, that slavery is contrary to nature. Nevertheless . . . it is not in conflict with natural justice that slavery should have its origin in a human act, that is, should arise from a convention or a crime.

But in the law of nations . . . slavery has a somewhat larger place, both as regards persons and as regards effects. For if we consider persons, not only those who surrender themselves, or promise to become slaves, are regarded as slaves, but all without exception who have been captured in a formal public war become slaves from the time when they are brought within the lines, as Pomponius says.³⁶

Grotius thought that in the law of nations the enslaving not only of the belligerent but also of the non-belligerent was permissible. Why is it permissible? His answer was simple. The reason is only the common benefit. Essentially the captor can kill his captives. This is the legal right of the captor. So nothing but his willing restraint can require him not to kill his prisoner of war. The thing which restrains him from killing the prisoner is neither charity nor natural reason, but his profit. He says this so calmly as to amaze us.

All these rights have been introduced by the law of nations . . . for no other reason than this: that the captors, mollified by so many advantages, might willingly refrain from recourse to the utmost degree of severity, in accordance with which they could have slain the captives, either immediately or after a delay. . . 'The name of slaves (*servi*),' says Pomponius, 'comes from the fact that commanders are accustomed to sell prisoners and thereby to save them (*servare*) and not to kill them.' I have said 'that they might willingly refrain'; for there is no suggestion of an agreement whereby they may be compelled to refrain, if you are considering this law of nations, but a method of persuading them by indicating the more advantageous course.³⁷

Grotius had his own strategy. The enslaving of captives was for him a choice of lesser evil. This is legal not because of charity or natural reason, but the agreement of nations. Legality was not for him synonymous with the desirable. He tried to modify the severity of slavery. He did not forget insisting that what "may be done to a slave with impunity according to the law of nations differs widely from that which natural reason

³⁶ H. Grotius, *op. cit.*, p. 706. F. W. Kelsey, p. 690.

³⁷ *Idem.*, *op. cit.*, p. 708. F. W. Kelsey, p. 692.

permits to be done. From Seneca we quoted this: Although against a slave all things are permissible, there are some things which the common law of living things forbids to be done against human beings." He distinguished the world of the law of nations from that of the law of nature. He recognized the legality of lesser evils like slavery which saved lives of men. But he did not affirm slavery to be natural as Gentili insisted. Slavery should be modified to the degree that "the amount of either an original or derivative debt allows, unless perhaps on the part of the men themselves there is some special crime which equity would suffer to be punished with loss of liberty".³⁸

But Grotius did not deny slavery completely even in the law of nature. He recognized it so far as "the amount of either an original or derivative debt". It was only "moderation" that he desired to introduce into his international society. The enslaving of captives was so deep rooted that he recognized it with moderation even in his ideal world of the law of nature.

War in medieval Europe was made with a tendency towards profit. The looting which occurred in wartime was the appearance of this kind of mentality. Men were an object of looting. Prisoners of war became slaves and were traded as slaves. The mentality which permitted slavery remained also in Grotian time. Even Bynkershoek says that "if we so desire," "we may make use of it (slavery)," "and indeed at times we do against those who exercise the right against us". The word "we" means the Christians. "Those who exercise the right against us" are the Muslims. Therefore, he writes:

For this reason the Dutch usually sell as slaves to the Spaniards the people of Algiers, Tunis, and Tripoli that they capture on the Atlantic or in the Mediterranean, for the Dutch do not use slaves except in Asia, Africa, and America. Indeed, in 1661 and again in 1664 the States General ordered their admiral to sell into slavery all the pirates he should take.³⁹

It is not the custom of the Netherlander only that the object of enslaving was limited to the pagans, and the Christians were excluded from the object. Such a custom had been established at least in the 13th century. When the jurists of early modern Europe insisted that the enslaving of captives was legal in the law of nations, those captives were only the pagans. Christians had not to be enslaved. Gentili writes: "it is generally believed that in the wars of the Christians there was no slavery. For those wars are more than civil, since all men are brothers in Christ, since we are members of the one body of which Christ is the head, and since it is commonly believed that there is one Church of Christ and a single Christendom. From this it follows that an enemy may not be held captive perpetually, that he must not be sold. . ."⁴⁰

Now then, how were Christian captives treated in the late Middle Ages? Were they treated as "brothers in Christ" with charity? They were, but to a limited degree. The environment of medieval Europe survived largely in this period. The warriors of the time wanted to make a profit from war for their investment and work. The new system appeared as filling the conditions which demanded the making of a profit and at the same time not the enslavement of Christians. It was ransom. The ransom (*redemptio*) is the

³⁸ *Idem.*, op. cit., p. 738. F. W. Kelsey, p. 761.

³⁹ C. v. Bynkershoek, op. cit., p. 20. T. Frank, p. 28.

⁴⁰ A. Gentili, op. cit., pp. 534-5. J. C. Rolfe, p. 328.

emancipation of the captive by the payment of ransom (*pretium*) which means also the provision of a reward for the captor's saving of his captive.⁴¹

IV. *Ransom I*

There are two categories of ransom. First there is the ransom of the enslaved captive. Second is the ransom of the captive who preserves his state of free man. The former was a system since ancient times. The latter was a system seen only in medieval and early modern Europe. I will start to write on the former.

The ransom of the enslaved captive has a long history, at least since the time of King Hammurabi (1728–1686 B.C.). The following is written in the 32nd article of the Code Hammurabi: "If either a runner or a fisher, who is taken captive on a mission of the king (and) a merchant has ransomed him and so has enabled him to regain his city, has the means for ransoming (himself) in his house, he shall himself ransom himself; if there are not the means of ransoming him in his house, he shall be ransomed out of (the resources of) the temple of his city; if there are not the means of ransoming him in the temple of his city, the palace shall ransom him. His field, his plantation and his house shall not be given for his ransom."⁴²

The Roman law knew this kind of ransom. Paulus says: "Although a woman may have received her dowry during marriage not for the purpose of paying her debts, or buying certain desirable lands, but in order that she might assist her children by a former husband, or her brothers, or her parents, or ransom them from the hands of the enemy, for the reason that these objects are just and honourable, the dowry will not be held to have been improperly received, and therefore, in accordance with justice, it was rightly paid to her."⁴³

Emperor Justinian (483–565) proclaimed the nonpayment of ransom one just cause of the exclusion of heirs. It is written in the article 115.3.13: "Where one of the aforesaid parents is retained in captivity, and one or all of the children do not hasten to ransom him, he shall have the power, if he can escape from captivity, to insert this as a cause of ingratitude into his will. But where, through the negligence or contempt of his children, he is not liberated, and dies a prisoner, we do not permit them to obtain his estate, for the reason that they did not make any effort to release him, and we order that all the property left by the captive to his negligent children shall pass to the church of the town in which he was born, that a public inventory of the said property shall be drawn up, in order that nothing of which it consists may be lost, and that whatever is acquired by the church in this way shall be employed for the ransom of captives."⁴⁴

This kind of ransom continued to exist in medieval Europe in respect of the Muslims. They ransomed their friends in negotiations with the Christian captors, too. There was a firm rule to ransom prisoners of war with each other between the Christians and the Muslims. Who paid ransom then? First it was the prisoner himself and his family. Second

⁴¹ Adalbert Erler, *Loskauf Gefangener*, Berlin, 1978, S. 15.

⁴² G. R. Driver and J. C. Miles, *The Babylonian Laws II*, Oxford, 1955, p. 23.

⁴³ Paulus, D.24.3.20. S. P. Scott, Vol. VI, p. 9.

⁴⁴ Nov. 115.3.13. S. P. Scott, Vol. XVII, p. 42.

Christian churches tried to emancipate the prisoners of war captured by Islamic warriors. The anecdote of St. Ambrosius (333/4-397) that he sold sacred church vessels to ransom Christian captives, spread throughout latin Europe and made the role of church important. Besides this anecdote produced a legal effect. Gratianus (c. 1160) inserted the principle in his *Decretum* and permitted churches to sell sacred things for the ransom of Christians as a just cause. In this case, "although sacred vessels were purified," selling those is permitted. The ransom of captives (*redemptio captivorum*) be perfectly the ornament of church.⁴⁵

Two Orders acted to ransom captive Christians: the Order of Trinity and Merced. They tried to ransom the Christian captives, sometimes together with the captive's family or sometimes by themselves. The Merced acted during 500 years and rescued 70 thousand Christian slaves from the Islamic world. It is said that the Trinity had branches in France, Spain, Portugal, Poland, Italy, Austria, North and South America, and ransomed about 900 thousand prisoners.⁴⁶ Cervantes (1547-1616), the author of "Don Quixote" was captured by the Muslims, too. It was a Mercedarian who ransomed him with the money gathered by his daughter, Andrea. Cervantes wrote later about the condition of the captives in a Muslim camp in his "Don Quixote".

The Mercedarian Order as a ransomer required of their redeemed captives only allegiance to the Order. It is written in the Constitutions of the Mercedarian Order (1272) that "Captives ransomed by the brothers are immediately to swear an oath and do homage to the master or to the one or ones who have redeemed them, that they will not leave the service of the Order until that time assigned by the master or by those who have redeemed them has passed. . . . When the assigned time is completed, let their beards be shaved and their hair cut. They are to be given new clothing according to the season it is and suitable provision, so that they may return to their lands with cheer and hapiness".⁴⁷

Besides there were the professional contractors of ransom. We can guess in the article 32 of Code Hammurabi that there had been such professionals from ancient times. But the most impressive professional ransomers were the *alfaqueques* in crusader Spain. According to De Coca Castaner, they were appointed by the Crown or by two councils and got safe conduct across the frontier between Muslims and Christians. They had the right to receive 10 per cent of the ransom price. "As these *alfaqueques* were above frontier hostility and enjoyed something akin to diplomatic immunity, they not only arranged for the liberation of captives, but they could also act as merchants, ambassador, and spies."⁴⁸

This kind of redemption was just the same with that of ancient time. The ransom was paid for the emancipation of enslaved or being enslaved captives. Inside Europe, however, the other kind of redemption and ransom has worked generally in practice since the high time of the Middle Ages.

⁴⁵ *Decretum Magistri Gratiani, Causa XII. Quest. II.c.69 et 70*, In: *Corpus Juris Canonici I*, Editio Lipsiensis Secunda. Post Aemilii Ludovici Richter, 1879, pp. 709-10. Cf. A. Erler, op. cit., S. 29.

⁴⁶ A. Erler, op. cit., S. 33.

⁴⁷ James William Brodmann, *Ransoming Captives in Crusader Spain: The Order of Merced on the Christian-Islamic Frontier*, Philadelphia, 1986, p. 134.

⁴⁸ José Enrique Lopez De Coca Castaner, *Institutions on the Castilian-Granadan Frontier 1369-1482*, in: R. Bartlett and A. Mackay (ed.), *Medieval Frontier Societies*, Oxford, 1992, p. 141.

V. *Ransom 2*

There were laws of war observed by knights mutually in feudal Europe. Knights especially tried to keep their honour with each other. This attitude bore a new kind of ransom. The captives of knights were treated as free men with honour until they paid ransom. This ransom was paid to emancipate the captives. But the captives were not slaves. They remained free. This is the new kind of ransom. Naturally they were free because of their Christianity. Being Christian, however, was not enough for them to be ransomed. They had to be knights generally. We can read its typical expression in the speech of King Henry V of England to his men just before the battle of Agincourt (1415). He says:

The best and bravest fellow-soldiers, the time has come to fight not for our glory and fame, but for our lives. We know well of the haughty mind of the French. If you got timid, they would never spare you. They would slaughter all of you as if you were the common unrenowned people. I myself and my consanguineous princes need not fear the approach of this situation. If they won a victory over us, they would require of us a great deal of ransom and save rather than slay us. But if you desire to escape this peril, expel your fear from your heart. Never hope that the enemy who has had always inveterate and severe enmity to our nation will save you if you redeem your lives with ransom money. Therefore if you choose to live rather than be killed, fight just as men manfully and actively for your lives after the manner of brave men, remembering your nobilities, the fame and glory of England in war.⁴⁹

The chronicle of Froissart (1333[37]–1405[10]), also, shows us many cases. Sometimes even many of the knights taken prisoners were slain. Froissart cites such a case in the battle of Aljubarrota (1385): “then incontinent they ordained a piteous deed, for every man was commanded on pain of death to slay their prisoners without mercy, noble, gentle, rich nor other, none except. . . . To say truth it was great pity, for every man slew his prisoner, and he that did not, other men slew them in their hands. . . . Lo, behold the great evil adventure that fell that Sunday, for they slew as many good prisoners as would well have been worth, one with another, four hundred thousand franks.”⁵⁰ As Hay pointed out, this lament is very impressive. What did Froissart lament? Is it that many lives or 400 thousand franks were lost? At least he converted all the lives of knights etc. into 400 thousand franks. The system of ransom was deeply rooted in medieval Europe. It is written in the 12th article of Magna Carta, which confirmed the rights of the barons, that “no scutage nor aid shall be imposed on our kingdom, unless by common counsel of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying

⁴⁹ Thomas Basin (La Société de L'Histoire de France), *Histoire des Regnes de Charles VII et de Louis XI*, Paris, 1856, p. 21.

⁵⁰ Jean Froissart, *Chronique* (par Société de l'Histoire de France), Paris, 1869, XII, p. 163. *Idem* (translated by John Bouchier, Lord Berners), Edited and reduced into one volume by G. C. Macaulay, London, 1924, p. 349. On the knightly laws of war, see Maurice Hugh Keen, *The Laws of War in the Late Middle Ages*, London, 1965.

our eldest daughter.”⁵¹ In fact the subjects of Richard I (1157–99) had to pay a large sum of money as his ransom to the Holy Roman Emperor Henry VI.

The right of claim for ransom was so firm and legal that it could be transferred. Richard I had been taken captive by Duke Leopold VI of Austria and resold to the Emperor for 150 thousand marks. Jeanne d’Arc was resold twice and transferred to the hands of the King of England. As the King of France, Charles VII, did not try to ransom her, she was burnt to death.

Belli could write with certainty that transfers continued into early modern Europe. He asked the following question. “In battle it often happens that very distinguished prisoners taken from the enemy fall into the hands of the common soldiers, who sell them as they can, or according to agreement, and the purchasers later exact from these prisoners an immense amount of ransom even up to many thousands of crowns—though they bought them for a few hundreds. We ask whether this is legitimate business; also, whether it is permissible to exact from a prisoner a larger ransom than the price at which he was sold.”⁵² He believed the negative position is the more righteous and just. But he presumed that “it would be very difficult to protect a prisoner from the operation of camp usage” under which prominent men in the army receive substantive ransoms, even up to fifty thousand crowns, though the prisoner had been sold for hardly five hundred or a thousand.

Grotius says, too:

Christians furthermore have as a whole agreed that those who are captured in a war which has arisen among themselves do not become slaves so as to be liable to be sold, constrained to labour, and suffer the fate of slaves in other respects. In this they are surely right, because they have been, or should have been instructed in the teachings of Him who has sanctioned all charity than to be unable to be restrained from the slaughter of unfortunate men in any other way than by the concession of a lesser cruelty.⁵³

Almost every forerunner of international law recognized the system of ransom as a legal one in the law of nations. Belli entitled chapter 1 of part 4th of his book “Whether among Christians prisoners of war become slaves”. According to the Pope Innocent and Baltolus, they become slaves in the case of war declared by the Pope or the Emperor. But—he continued—there is another opinion contrary to this theory. Namely the captives in a war among Christians did not become slaves. “For Christians, no less than Romans, are brothers and fellow-citizens to one another, as Scriptures show. For when the Israelites were carrying off a great number of captives from Jerusalem, a prophet met them, protesting vehemently against the enslavement, and demanded that all the prisoners be released; for, as he said, the fierce wrath of the Lord was upon captors. Being brothers, therefore, and not enemies, even though they go to war, Christians do not become slaves of the captors.”⁵⁴

Belli’s logic has been developed by Alciato (Andreas Alciatus 1492–1550). Alciato combined Christians and Roman citizens (cives) in Roman Law. So there should be neither

⁵¹ William S. Mckechnie, *Magna Carta: A Commentary on the Great Charter of King John*, Glasgow, 1914, p. 232.

⁵² P. Belli, *op. cit.*, p. 54. J. C. Rolfe, p. 117.

⁵³ H. Grotius, *op. cit.*, p. 712. F. W. Kelsey, p. 696.

⁵⁴ P. Belli, p. 53. J. C. Rolfe, p. 116.

slaves nor booties in the wars among Christians. Because they are all brothers and do not become enemies. But this theory of Alciato was never received by any other contemporaries. Ayala (Balthazar Ayala, 1548–84) says: “I do not agree with Alciato in his attempt to show that in a war between Christians things captured do not become the property of the captors. His argument is as follows. . . All Christians are brothers by the law of Christ; Wars occurring between them are more like civil wars; therefore, that the rule of war whereby things captured become the property of the captors does not apply between Christians. . . (But) it is impossible to describe a war between two sovereign princes or two free peoples as a civil war, for those are not fellow citizens who do not owe fealty and obedience.”⁵⁵

In early modern Europe the theory of Glossators that the sovereignty belonged to the Holy Roman Empire and the law was only the Roman law, which was the only law of the Empire, was not accepted. As French legists insisted, “the king in his own kingdom is the emperor” (*rex imperator in regno suo*). So the other theorists of early international law cut away the Christian brotherhood from the Glossators’ logic of “*unum imperium, unum ius, unus populus*”. It was enough for them that the Christian brotherhood denied slavery among Christians and affirmed the slavery of infidels. This double standard was a matter of course and did not need any other reason but the custom in the law of nations. Ayala says: “And indeed there has grown up in the Christian world a laudable and long-established custom that the prisoners on either side, however just the war, are not enslaved, but they are kept with their freedom intact until payment of ransom. . . If, however, any Christians fight on the side of Saracens and infidels against fellow Christians, or render them any aid whatever, then should they be taken prisoners, they will be enslaved and they are by the fact itself excommunicate.”⁵⁶

Vitoria, also, writes:

That one may lawfully enslave the innocent under just the same conditions as one may plunder them. Freedom and slavery are counted as goods of fortune; therefore, when the war is such that it is lawful to plunder all the enemy population indiscriminately and seize all their goods, it must also be lawful to enslave them all, guilty and innocent alike. Hence, since our war against the pagans is of this kind, being permanent because they can never sufficiently pay for the injuries and losses inflicted, it is not to be doubted that we may lawfully enslave the women and children of the Saracens. But since it seems to be accepted in the law of nations that Christians cannot enslave one another, it is not lawful to enslave fellow-Christians, at any rate during the course of the war. If necessary, when the war is over one may take prisoners, even innocent women and children, but not to enslave them, only to hold them to ransom; and this must not be allowed to go beyond the limits which the necessities of warfare demand, and the legitimate customs of war permit.⁵⁷

Grotius, also says:

⁵⁵ Balthazar Ayala, *De Jure et Officiis Bellicis et Disciplina Militari Libri III* (1582), Washington, 1912, p. 34. Idem (translated by John Pawley Bate), Washington, *Three Books on the Law of War and on the Duties Connected with War and on Military Discipline*, 1912, p. 35.

⁵⁶ B. Ayala, idem., pp. 41–42. J. P. Bate, p. 42.

⁵⁷ P. Victoria, op. cit., pp. 290–1. A. Pagden, op. cit., p. 318.

Moreover, that practice of Christians in this matter is followed also by Mohammedans among themselves. Nevertheless, even among Christians the custom still prevails of keeping prisoners under guard until a ransom is paid, the amount of which is decided by the victor, unless some definite agreement has been made.

Furthermore, the right of guarding captives is usually granted to the individuals who have taken them, except in the case of persons of high rank; for the custom of most nations gives the right over these to the state or its head.⁵⁸

The looting and ransoming of men in the just or public war were legal in pre-modern Europe. Almost every jurist in medieval and early modern times recognized such deeds and institutions as legal. Naturally the way of looting and ransoming was changing. In the 16th and 17th centuries a state was appearing instead of individuals for ransoming. The system of redemption was becoming public.

V. *Nationalization of Ransom and Its Lapse*

The ransoming of prisoners of war was an accepted legal institution of medieval and early modern Europe. In early modern times, however, the characteristics of ransom changed from individual to public one. One of the early examples is the agreement before fighting which Ferdinand of Spain and Louis XII of France concluded. R. Zouche (Richard Zouche, 1589–1660), an Oxford Professor, reported that it was argued between the French and Spanish armies that “a captured horsemen should, after being deprived of his horse and arms, be allowed to buy his liberty by the payment of a quarter of his annual pay”.⁵⁹

In the 17th century there appeared the agreement named “cartel” which was the convention “between warring armies regarding the exchange and ransoming of prisoners in which the ransom for almost every military rank was set in advance”.⁶⁰ The first “cartel” of the 17th century was concluded in 1602 between the Netherlands and Spain in the Hague. This cartel was confirmed and supplemented by Marquis Spinola in 1662. Similar agreements were found in 1626, 1641, 1642, 1646, 1648, 1651 and 1657–60, 1672 and 1673. A famous cartel was concluded in 1692 between the Emperor Leopold I and Louis XIV. Even in the 18th century cartels were often concluded. For example those between Frederic IV of Denmark and the King of Sweden in 1713, between Austria and Prussia in 1741 and between Russia and Prussia in 1759.⁶¹

Thus Bynkershoek says: “To the custom of enslaving prisoners succeeded the practice of exchanging them according to their respective rank and station, or of detaining them until redeemed. And treaties sometimes make redeeming obligatory and specify a certain amount of ransom money according to the rank of each person that may be captured. When this sum has been paid, that right of life and death which the victor may exercise over the

⁵⁸ H. Grotius, op. cit., p. 712. F. W. Kelsey, p. 696.

⁵⁹ R. Zouche, *Iuris et Iudicii Feccialis, Sive, Iuris Inter Gentes, et Quaestionum de Eodem Explicatio* (1650), Washington, 1911, p. 163. Idem (translated by J. L. Brierly), *An Exposition of Feccial Law and Procedure, or of Law between Nations, and Questions concerning the Same*, Washington, 1911, p. 153.

⁶⁰ F. Redlich, op. cit., p. 35.

⁶¹ Wilhelm Knorr, *Das Ehrenwort Kriegsgefangener in seiner rechtsgeschichtlichen Entwicklung*, Untersuchungen zur Deutschen Staats und Rechtsgeschichte, Heft 127, Breslau, 1916, S. 77.

vanquished comes to an end.”⁶²

Also Grotius says: “In some places the price put upon captives is fixed by agreements or by custom; as the sum of a mina among the Greeks of antiquity, and at present among soldiers at a month’s pay.”⁶³

From about the 17th century onwards ransoms were paid by the armies, not by the individual captives. According to Redlich, when the contract was concluded in 1629 between Gustavus Adolphus and Donald Mackay, Lord Reay, “it was stipulated that the king should ransom at his expense such officers and men as were taken prisoners”.⁶⁴ In 1631 the Elector J. George provided in his article charter XL that “when one was captured by an enemy, the prince must ransom him by his pay”.⁶⁵ Even in this case the payer was the war lord. The ransoming of prisoners of war became public, namely it was nationalized.

But the nationalization of ransom was yet medieval. Because the ransoming of prisoners of war itself was not humane in the modern sense. Grotius writes: “Among those people who do not avail themselves of the right of slavery which arises from war, the best course will be to exchange prisoners; the next best, to release them at a price that is not unfair. What that price is cannot be set forth in exact terms; but humanity teaches that it should not be raised to the point where its payment would place the prisoner in want of the necessities of life.”⁶⁶

Grotius wrote this in the chapter on “Moderation in regard to Prisoners of War”. He knew that “the best course will be to exchange prisoners”. In his time, however, it seemed to be difficult for him to exchange prisoners. He chose the second best that they should be released at a proper price. His “moderation” is what he desired. It reflects the deep-rooted circumstances permitting ransom in pre-modern Europe that Grotius wrote the just ransom even in his chapter on moderation. It was not until the French Revolution that the ransoming of prisoners lapsed and their exchange became common.

I think that the contractual nature of medieval European society, at least of the medieval army, created the looting system in pre-modern Europe. In medieval Europe men of semi-independent power were hired by the army by contract. They armed themselves at their own cost in principle. They were permitted to loot almost anything including persons in return. It may be said that they earned their living by wars. As M. Bloch says, looting was an economic activity. In a sense a medieval war was an action for profit for which semi-independent armed men gathered and fought under the order of their war lord as their manager. The king was a kind of manager of the gains of war. This activity was common enough to be recognized as legal and often honourable. Therefore it was not until the French Revolution that the ransoming of captives was discontinued in Europe. The French Revolution broke the medieval system of contract and independent local powers. There was no room for their making a profit from war. There were no independent individuals who armed themselves with their own money and supplied their power to the war lord. There appeared the state and nation. The nation-state was successful in the

⁶² C. v. Bynkershoek, *op. cit.*, p. 20. T. Frank, *op. cit.*, p. 28.

⁶³ H. Grotius, *op. cit.*, p. 789. F. W. Kelsey, p. 769.

⁶⁴ F. Redlich, *op. cit.*, p. 31.

⁶⁵ W. Knorr, *op. cit.*, p. 78.

⁶⁶ H. Grotius, *op. cit.*, p. 789. F. W. Kelsey, p. 769.

disarmament of medieval, armed, individual belligerents. And it was successful also in their changing mentality. The nation fights only for its national interest, not for the profit of individuals. It seemed to the people of the 19th century to be dishonourable and never permissible for individual soldiers to loot, ransom and make a profit from war. The honourable deed was fighting only for the mother land without any personal return. In these situations, the looting of persons has become illegal.

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