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The Iraqi National Museum and International Law: A Duty to Protect

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Shortly after U.S. troops reached the center of Baghdad in April 2003, looters pillaged the National Archaeological Museum in the city. The National Museum was a storehouse of priceless artifacts from the earliest stages of Mesopotamian civilization; thousands of pieces disappeared in a day or two of looting and vandalism. International reactions were immediate and vehement; the U.S. government was roundly criticized for failing to secure the museum and prevent the looting. This Article explores international legal questions that arise in the aftermath of the events at the Iraqi National Museum. In particular, by failing to protect the National Museum and its treasures, did the United States fall short of any obligations under international law? The answer to that question hinges on the extent to which key provisions of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict have developed into rules of customary international law. This Article offers: (1) a general conception of the dynamic of international norm change, seen as an ongoing interaction among rules, actions, and arguments; and (2) an assessment of the emergence of international rules for the protection of cultural treasures in war. The analysis concludes that there is a plausible argument that the United States was under an international obligation to secure the Iraqi National Museum. Even if the American failure

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to protect the Iraqi National Museum did not violate a duty under international law, it will certainly play a catalytic role in the next stage of development of international norms.

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INTRODUCTION

On March 20, 2003, following months of military buildup in the region and intense allied aerial bombardment the previous day, U.S. and British troops surged across the Iraqi border.¹ American forces reached Baghdad on April 5. Over the next few days, American Army and Marine units surrounded Baghdad and seized presidential palaces within the city. By April 10, U.S. troops reached the center of Baghdad, though fighting continued in some suburbs of the capital. On April 12, looters pillaged the National Archaeological

1. Patrick E. Tyler, *A Nation at War: The Attack*, N.Y. TIMES, Mar. 21, 2003, at A1.

Museum in Baghdad (National Museum).² Reports on the ransacking of the National Museum flashed around the globe in the following days.³ News services, quoting museum officials, reported that looters might have removed 170,000 pieces.⁴

International reactions were immediate and vehement; U.S. Secretary of Defense Donald Rumsfeld's clumsy initial responses only intensified the outrage. The National Museum was a storehouse of priceless artifacts from the earliest stages of Mesopotamian civilization. Why had U.S. troops not secured the museum compound? How could the American troops protect the Oil Ministry but not this site of exceptional world cultural and historical importance? This Article explores international legal questions that arise in the aftermath of the looting of the Iraqi National Museum. The United States clearly bore some ethical responsibility for the losses suffered by the Museum. But did the United States incur any legal responsibility for the looting? By failing to protect the National Museum from plundering and vandalism, did the United States fall short of any obligations under international law?

The laws of war clearly prohibit willful damage to or destruction of cultural treasures, as well as their seizure or removal.⁵ Article 4(3) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict also establishes a positive obligation for states parties, when sites of cultural or artistic

2. This brief account relies on the chronology compiled by the International Institute for Strategic Studies in London and posted on its website. International Institute for Strategic Studies, *Iraq War: Analysis and Review*, <http://www.iiss.org/iraqCrisis-more.php?itemID=25> (last visited Jan. 7, 2005).

3. See *Museum is History*, SUNDAY HERALD-SUN (Melbourne, Australia), Apr. 13, 2003, at 13; Richard Brooks & Jonathan Calvert, *Looters Walk Off with Antiquities*, SUNDAY TIMES (London), Apr. 13, 2003, at 3; John F. Burns, *A Nation at War: Looting; Pillagers Strip Iraqi Museum of its Treasures*, N.Y. TIMES, Apr. 13, 2003, at A1; *Iraq's National Library Torched*, AGENCE FRANCE-PRESSE, Apr. 13, 2003; *Iraqi National Museum Suffers at the Hands of Looters*, DEUTSCHE PRESSE-AGENTUR, Apr. 12, 2003, § POL.; *Looting Iraqi National Museum: Catastrophe to Human Civilization*, XINHUA (Beijing, China), Apr. 16, 2003, § SCI., CUL., EDUC., HEALTH, available at http://news.xinhuanet.com/english/2003-04/16/content_835900.htm.

4. See Burns, *supra* note 3, at A1.

5. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land art. 56, Oct. 18, 1907, entered into force Jan. 26, 1910, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention (IV)]; Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 289 [hereinafter Roerich Pact]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 53, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; 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. 16, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

importance fall under their control, to shield those sites from looting or vandalism by other actors.⁶ The United States, however, is not a party to the 1954 Hague Convention.

This Article seeks to clarify the status of international law on the issue of wartime protection for sites of extreme cultural significance. It argues that the duty set out in Article 4(3) of the 1954 Hague Convention to prevent others from looting or vandalizing cultural property has attained the status of customary international law. This Article further concludes that even if the argument for an obligation under customary law is not decisive, such a duty to protect would be consistent with developments in international law over the last decades and with the value stream that motivated those developments.

This Article also offers an argument regarding the development of international legal norms. International norms frequently develop as a result of the interaction among rules, actions, and principled debates. State actions routinely trigger transnational arguments about the meaning and application of international norms. Those debates necessarily modify international rules, variously rendering them stronger or weaker, clearer or more ambiguous.⁷ The U.S. failure to secure the Iraqi National Museum clearly catalyzed a transnational argument about the obligation to protect cultural treasures. The widespread condemnation of U.S. actions, and U.S. efforts to help repair the harm, pushed the development of international rules in the direction of a duty to protect. In future conflicts, when cultural treasures are at risk, the expectation will almost certainly be that the parties have an obligation to prevent looting of and damage to important cultural sites.

Part I of this Article examines in more detail the circumstances surrounding the looting of the Iraqi National Museum in April 2003, including the international and U.S. response. Part II summarizes the key international conventions relating to the protection of cultural property in wartime. Part III analyzes the applicability of those rules to the United States in 2003. The conclusion assesses the extent to which protections for cultural property in wartime have developed into customary international law.

6. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 4(3), May 14, 1954, *entered into force* Aug. 7, 1956, 249 U.N.T.S. 240 [hereinafter Convention for Protection of Cultural Property], *available at* <http://www.icomos.org/hague/hague.convention.html>.

7. For a fuller development of this argument, see Wayne Sandholtz, *Dynamics of International Norm Change* (Aug. 2005) (unpublished manuscript, on file with author).

I. THE EVENTS OF APRIL 2003

The looting of the Iraqi National Museum captured front-page headlines in major newspapers around the world. The incident was, by all accounts, a cultural disaster of the highest magnitude. The museum's collection of antiquities was one of the finest in the world; it was the premier collection of Mesopotamian artifacts, including those of major early civilizations like Sumer and Assyria. The museum housed treasures from Ninevah, Babylon, Nimrud, and Ur.⁸ The first accounts of the looting of the Iraqi National Museum portrayed a building in shambles, with its collections essentially gone. The *Süddeutsche Zeitung* reported the disaster under the headline "Barbaren in Bagdad (Barbarians in Baghdad)."⁹ *The Times* of London and the German magazine *Stern* reported that the deputy director of the museum, Nabhal Amin, claimed that the looters had stolen or destroyed 170,000 pieces; the British Museum declared the losses "tragic."¹⁰ The initial story in the *New York Times* cited the same figure and quoted museum officials to the effect that "nothing remained . . . at least nothing of real value."¹¹ In the *Los Angeles Times* report, a museum archaeologist asserted that "about 80 percent of the collection had been stolen."¹² In the same report, a prominent U.S. archaeologist lamented that "the looting of anything from this museum is a major, major consequence [sic]."¹³ Iraqi witnesses reported mobs of looters leaving the museum with artifacts stuffed into pockets, boxes, carts, and wheelbarrows.¹⁴ However, the museum staff also declared that at least some of the plundering had been more organized, as thieves had accessed locked storage rooms without forced entry and seized the most valuable pieces.¹⁵

8. THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD: THE LOST LEGACY OF ANCIENT MESOPOTAMIA 7, 20 (Milbrey Polk & Angela M. H. Schuster, eds., 2005).

9. Ira Mazzoni, *Barbaren in Bagdad [Barbarians in Baghdad]*, SÜDDEUTSCHE ZEITUNG (online edition), Apr. 14, 2003, <http://www.sueddeutsche.de/kultur/artikel/668/10658>.

10. Brooks & Calvert, *supra* note 3, at 3; *Antiquitäten waren Milliarden wert*, STERN (online edition), Apr. 12, 2003, <http://www.stern.de/politik/ausland/index.html?id=506579>.

11. Burns, *supra* note 3, at A1.

12. Michael Slackman, *War with Iraq: Looting the Past; Ancient Wonders are History as Mob Plunders Iraq Museum*, L.A. TIMES, Apr. 13, 2003, at A1.

13. *Id.*

14. Burns, *supra* note 3, at A1.

15. Louise Witt, *The End of Civilization*, SALON.COM, Apr. 17, 2003, http://archive.salon.com/news/feature/2003/04/17/antiquities/index_np.html

("Archaeologists and art curators think that some of the looting was organized by a conspiracy of antiquity dealers and smugglers [given] that the heavy metal doors on the storage room at the National Museum of Iraq weren't broken down, indicating that it was opened with a key.").

The news accounts also described the anger of the Iraqi museum officials toward the American troops, who had ignored pleas to protect the museum. The *Sunday Times* reported that a museum guard saw American troops near the museum and asked them to protect it, but to no avail.¹⁶ The museum's deputy director, Amin, told journalists, "[i]f they [the Americans] had just one tank and two soldiers nothing like this would have happened. I hold them responsible."¹⁷ An Iraqi archaeologist described finding an American tank at a square about 300 yards from the museum.¹⁸ Five Marines accompanied him to the museum and dispersed the mob of looters by firing into the air. "I asked them to bring their tank inside the museum grounds . . . but they refused."¹⁹ After thirty minutes, the Marines left and the vandals returned.²⁰ A deputy curator said he had walked to the Palestine Hotel on April 12 and asked American commanders to send troops to protect what was left in the museum, but received no immediate commitment.²¹ The archaeologist expressed anger toward President Bush: "If a country's civilization is looted, as ours has been here, its history ends. Please tell this to President Bush. Please remind him that he promised to liberate the Iraqi people, but that this is not a liberation, this is a humiliation."²²

A. *International Reactions*

International reactions ranged from critical to scathing, with moral blame uniformly placed squarely on the United States. Equally interesting was the number of foreign commentators who asserted that the United States, by failing to safeguard the Iraqi National Museum, violated obligations under international law. That claim, of course, is precisely what this Article seeks to assess.

Reactions from governments around the world echoed those expressed by the museum staff, mourning the apparent catastrophe and laying blame on the United States. The government of Jordan asked the United Nations to take charge of safeguarding Iraq's historic sites, which it described as "a national treasure for the Iraqi

16. Brooks & Calvert, *supra* note 3, at 3.

17. *Id.*

18. Burns, *supra* note 3, at A1.

19. *Id.*

20. *Id.*

21. *Id.* ("American officers had given [the deputy curator] no assurances that they would guard the museum around the clock, but other American commanders announced later in the day that joint patrols with unarmed Iraqi police units would begin as early as Sunday in an attempt to prevent further looting.").

22. *Id.*

people and an invaluable heritage to the Arab and Islamic worlds.”²³ Pakistan stated that it was “deeply concerned” about the plundering of the National Museum.²⁴ “International law and accepted standards,” the Pakistani Foreign Ministry declared, “demand protection be given to such treasures that are a common heritage of mankind.”²⁵ In a telephone conversation with U.S. Secretary of State Colin Powell, Greek Foreign Minister George Papandreou, reacting to the reports of looting at the National Museum, urged protection for Iraq’s cultural heritage.²⁶ Russian Culture Minister Mikhail Shvydkoi was more blunt, blaming American forces for permitting the plundering.²⁷ British cabinet member Clare Short broke with Prime Minister Blair and other cabinet members by calling for a “massively bigger effort” by coalition forces to stop the looting, which ravaged the Iraqi Museum in Baghdad, in addition to other offices and hospitals.²⁸ Perhaps more surprisingly, Short even suggested that by failing to prevent the looting in Baghdad, U.S. troops had violated the 1907 Hague and 1949 Geneva Conventions, which require occupiers to maintain civil order.²⁹ Australia, another coalition member, was forced to respond to questions, even though only U.S. troops had been involved in the assault on Baghdad. At a news briefing, the head of Australian Defense Forces, General Peter Cosgrove, “rejected suggestions that Australia, as an invading and occupying force with international legal responsibilities for protecting Iraq’s heritage, should share the blame for the loss of artefacts [sic].”³⁰

International press reactions were equally blistering. An editorial in New Delhi’s *Pioneer* proclaimed:

The sacking of the Baghdad archaeological museum—now home to smashed glass cases, broken pottery, torn books and mutilated statues—will forever remain a scathing indictment of this inexcusable and manifest

23. Slackman, *supra* note 12, at A1.

24. *Pakistan Shocked at Burning of Koran Library in Baghdad*, AGENCE FRANCE-PRESSE, Apr. 16, 2003.

25. *Id.*

26. *Papandreou, Powell Hold Telephone Conversation on Middle East, Iraq*, ATHENS NEWS AGENCY, Apr. 14, 2003, <http://www.hri.org/news/greek/apen/2003/03-04-15.apen.html#04>.

27. *Russian Minister Blames US for Baghdad Museum Looting*, AGENCE FRANCE-PRESSE, Apr. 14, 2003.

28. Michael White, *War in the Gulf: Short Breaks Ranks Again: Cabinet ‘Conscience’ Condemns Failure to Prevent Looting*, THE GUARDIAN (London), Apr. 16, 2003, at 2.

29. *Id.*

30. *Fed: Artefact Looting not our Fault: Cosgrove*, AAP NEWSFEED (Australia), Apr. 15, 2003, § DOMESTIC NEWS.

indifference towards the very people the coalition claims to have liberated The theft of irreplaceable antiquities, some going back over 7,000 years, represents a loss that cannot be calculated in material terms; it is an assault on collective historical consciousness and, hence, a spiritual dispossession and desecration of identity.³¹

Su Donghai, a Chinese specialist of cultural relics, described the looting as “a catastrophe to human civilization.”³² Donghai declared that “the U.S. forces should be held accountable as they should take the responsibility, in compliance with international laws, to protect Iraq’s historic, cultural and religious legacies from being destroyed or looted”³³ An article in the *Korea Herald* summarized the events in Baghdad and concluded:

American and British forces, their commanders and ultimately George W. Bush and Tony Blair, cannot avoid the blame for their negligence in protecting cultural assets of the nation they invaded. If some of the effort that they expended in winning control of Iraq’s many oil fields had been allocated to protecting cultural assets, they would have successfully guarded the precious contents of the Baghdad museum.³⁴

ITAR-Tass, the Russian news agency, reported that museum experts meeting in Lyon, France in May 2003 considered the looting “the greatest cultural disaster of the current century.”³⁵ The agency criticized President George W. Bush, who described the looting as “horrible,” yet failed to acknowledge “the complete passivity of American soldiers, who did not prevent those ‘horrors.’”³⁶ The report also noted that several delegates to the meeting asserted that international conventions required the United States and the United Kingdom to “guarantee the safety of Iraq’s national treasures.”³⁷ An opinion column in Edinburgh’s *Evening News* argued that “the loss of Iraq’s cultural heritage will go down in history—like the burning of the Library at Alexandria—and Britain and the U.S. will be to

31. Editorial, *Atlas Shrugged*, THE PIONEER (New Delhi, India) (online edition), Apr. 15, 2003, <http://wnc.dialog.com> (follow hyperlink “Advanced Search”; enter “atlas shrugged” into “Headline and Lead Paragraph” box; click “Search”).

32. XINHUA, *Looting Iraq National Museum: Catastrophe to Human Civilization*, *supra* note 3, § SCI., CUL., EDUC., HEALTH.

33. *Id.*

34. *Vandalism at Baghdad Museum*, THE KOREA HERALD, Apr. 16, 2003.

35. *Interpol: Looting of Iraq Museum—A Huge Cultural Disaster*, ITAR-TASS NEWS AGENCY (RUSSIA), May 6, 2003.

36. *Id.*

37. *Id.*

blame.”³⁸ Lord Renfrew of Kaimsthorn, an archaeologist and Conservative peer, had warned the British government about the need to protect Iraq’s historical and cultural sites. *The Sunday Herald* quoted Lord Renfrew as saying, with regard to the museum looting, “What has been allowed to happen has been nothing short of disgraceful. The invading country had a responsibility to look after its cultural heritage. It was foreseeable and preventable.”³⁹

International organizations also reacted quickly, less for the purpose of condemning the U.S. failure to prevent the looting than to reiterate the relevant international norms and to devise means for recovering the missing items. At a consultative meeting convened by the United Nations Educational, Scientific and Cultural Organization (UNESCO) within days of the looting, antiquities experts called on “coalition forces to observe the principles of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols.”⁴⁰ The UNESCO meeting went further, calling on states that had not ratified the 1954 Hague Convention to do so, and prior to ratification, to comply with its provisions, “especially with a view to ensuring return of cultural property already illicitly removed and/or exported from Iraq”⁴¹ Later in April 2003, the British Museum and UNESCO jointly sponsored a meeting of experts who called on the United States urgently to secure “the borders of Iraq to stop the export of antiquities.”⁴² At about the same time, the UNESCO Director-General, Koichiro Matsuura, meeting with Secretary-General Kofi Annan, urged the United Nations (UN) Security Council to adopt a resolution that would prohibit the importation of items stolen from the Iraqi National Museum.⁴³ The ninety-five states that were parties to the 1970 UNESCO convention banning the importation of stolen cultural properties were already obligated to prevent the cross-border transfer of Iraqi artifacts, but a Security Council resolution would bind

38. Trevor Watkins, *The Allies Will be Judged by History*, EVENING NEWS (Edinburgh, Scotland), May 8, 2003, at 10.

39. Liam McDougall, *Iraq: A Nation Robbed of its History*, THE SUNDAY HERALD (Glasgow), Apr. 20, 2003, available at <http://www.sundayherald.com/33187>.

40. UNESCO, *Final Report, First Experts’ Meeting on Iraqi Cultural Heritage: UNESCO Culture Sector (3.01b)* (Apr. 17, 2003), http://portal.unesco.org/culture/admin/ev.php?URL_ID=8511&URL_DO=DO_TOPIC&URL_SECTION=201.

41. *Id.*

42. Catherine Fay de Lestrac, *Art Experts Call on US to Secure Iraqi Borders to Save Looted Treasures*, AGENCE FRANCE-PRESSE, Apr. 29, 2003.

43. Judy Aita, *UNESCO Wants Security Council Ban on Trafficking in Iraqi Cultural Items*, U.S. DEP’T ST., International Information Programs, Washington File (Apr. 30, 2003), <http://usinfo.state.gov/xarchives> (follow “washfile-english” hyperlink; then follow “April” hyperlink under “2003”; then follow title hyperlink at bottom of page).

additional countries not party to the convention.⁴⁴

A week later, in early May 2003, Interpol hosted an "International Conference on Cultural Property Stolen in Iraq," which was attended by experts from the art markets, museums, and law enforcement agencies.⁴⁵ The purpose of the meeting was to begin preparing joint strategies for recovering the items looted from the Iraqi National Museum.⁴⁶ Finally, on May 22, 2003, the Security Council passed Resolution 1483, which had been sponsored by Spain, the United Kingdom, and the United States.⁴⁷ The Resolution stressed "the need for respect for the archaeological, historical, cultural, and religious heritage of Iraq, and for the continued protection of archaeological, historical, cultural, and religious sites, museums, libraries, and monuments."⁴⁸ The Security Council, acting under its Chapter VII authority, further decided "that all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraqi National Museum, the National Library, and other locations in Iraq"⁴⁹

B. U.S. Responses

Reactions within American society were just as vehement as those expressed abroad. Editorial writers, archaeologists, and archaeological associations expressed dismay at the museum losses and blamed, to varying degrees, American authorities. A commentator in the *San Francisco Chronicle* was relatively mild in writing, "We have to wonder how the Pentagon and the State Department could fail to see the cultural calamity coming, such a predictable consequence of urban war chaos," especially since groups of experts had explicitly warned of the dangers war would pose to Iraq's important cultural sites and collections.⁵⁰ An editorial in the *Pittsburgh Post-Gazette* called the looting a "cultural tragedy," and pointedly remarked:

44. *Id.*

45. Interpol, *Stolen Works of Art, Minutes: International Conference on Cultural Property Stolen in Iraq*, Lyon, May 5–6, 2003, <http://www.interpol.com/Public/WorkOfArt/Iraq/Minutes.asp>.

46. *Id.*

47. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

48. *Id.* intro. paras.

49. *Id.* ¶ 7.

50. Kenneth Baker, *At a Loss Over Theft of Artifacts; Calamity Should Have Been Foreseen*, S.F. CHRON., Apr. 17, 2003, at E1.

Mr. Rumsfeld ridiculed news reports of the looting, saying that film clips appeared to show “the same guy with the same vase” time after time. What had actually taken place was a cultural crime, the loss of an irreplaceable history of the region long referred to as the Cradle of Civilization.⁵¹

American officials seemed taken aback by the breadth and intensity of the criticism. The inept early reaction of Defense Secretary Donald Rumsfeld, referred to in the Pittsburgh editorial, only fueled the outrage. At a press conference on April 11, Rumsfeld responded to reporters’ questions about the looting:

The images you are seeing on television you are seeing over, and over, and over, and it’s the same picture of some person walking out of some building with a vase, and you see it 20 times, and you think, “My goodness, were there that many vases?” (Laughter.) “Is it possible that there were that many vases in the whole country?”

. . . .

Stuff happens! But in terms of what’s going on in that country, it is a fundamental misunderstanding to see those images over, and over, and over again of some boy walking out with a vase and say, “Oh, my goodness, you didn’t have a plan.” That’s nonsense. They know what they’re doing, and they’re doing a terrific job. And it’s untidy, and freedom’s untidy, and free people are free to make mistakes and commit crimes and do bad things⁵²

At an April 15 press briefing, both Secretary Rumsfeld and General Richard Myers, the Chairman of the Joint Chiefs of Staff, fielded more questions regarding the National Museum in Baghdad:

Q: Mr. Secretary, as impressive as the U.S. military operation has been, no military plan is perfect. Would you concede in retrospect that perhaps the plan failed to adequately protect Iraq’s antiquities, particularly the looting, providing enough security for the museum in Baghdad?

51. Editorial, *War Reparation: A Global Effort to Restore Iraq’s Lost Artifacts*, POST-GAZETTE (Pittsburgh, PA), June 28, 2004, at A8.

52. U.S. DEP’T DEF., *News Transcript: DoD News Briefing—Secretary Rumsfeld and Gen. Myers* (Apr. 11, 2003), <http://www.defenselink.mil/transcripts/2003/tr20030411-secdef0090.html>.

Sec. Rumsfeld: Looting is an unfortunate thing. Human beings are not perfect. We've seen looting in this country. We've seen riots at soccer games in various countries around the world. We've seen destruction after athletic events in our own country. No one likes it. No one allows it. It happens, and it's unfortunate. And to the extent it can be stopped, it should be stopped. To the extent it happens in a war zone, it's difficult to stop But to try to lay off the fact of that unfortunate activity on a defect in a war plan—it strikes me as a stretch.⁵³

Both Secretary Rumsfeld and General Myers did mention the primary American defense against charges that the United States had somehow fallen short of ethical or legal obligations: American forces were engaged in combat in Baghdad, and combat had to take priority over protecting the museum.⁵⁴ This justification was, in fact, offered by the U.S. Central Command itself, when Brigadier-General Vincent Brooks stated that when U.S. troops moved into Baghdad, involvement in active combat prevented them from stepping in to stop the looting of the museum.⁵⁵ U.S. officers in Iraq made similar claims; as the *New York Times* reported, "American commanders have said they lack the troops to curb the looting while their focus remains on the battles across Baghdad that are necessary to mop up pockets of resistance from paramilitary forces loyal to Mr. Hussein."⁵⁶ Jill Lawless of the Associated Press reported that the "United States [had] said it was surprised by the rampage and said its troops were too occupied by combat to intervene when they reached Baghdad."⁵⁷

American officials also asserted, incorrectly, that U.S. officials had not been forewarned about the need to protect Iraq's rich cultural heritage. For instance, at the April 15 press briefing, Secretary Rumsfeld denied having received any warnings, but he was corrected by General Myers:

Q: But weren't you urged specifically by scholars and others about the danger to that museum? And weren't

53. U.S. DEP'T DEF., *News Transcript: DoD News Briefing—Secretary Rumsfeld and Gen. Myers* (Apr. 15, 2003), <http://www.defenselink.mil/transcripts/2003/tr20030415-secdef0107.html>.

54. *Id.*

55. *US Rejects Charges Military to Blame for Looting at Baghdad Museum*, CHANNEL NEWSASIA, Apr. 16, 2003.

56. Burns, *supra* note 3, at A1.

57. Jill Lawless, *Museums beg U.S. to Stem Flow of Stolen Artifacts*, HAMILTON SPECTATOR (Ontario, Canada), Apr. 30, 2003, at C01.

you urged to provide a greater level of protection and security in the initial phases of the operation?

Sec. Rumsfeld: Not to my knowledge.

....

Gen. Meyers: [W]e did get advice on archaeological sites around Baghdad and in fact I think it was the Archaeological—American Archaeological Association – I believe that’s the correct title—wrote the Secretary of some concerns.⁵⁸

In apparent contradiction with General Myers’s statement, General Brooks also declared that no one foresaw that Iraqis would plunder their own country’s cultural treasures.⁵⁹ In fact, Myers was correct. For instance, weeks before the invasion, the Archaeological Institute of America published in its newsletter an “Open Declaration on Cultural Heritage at Risk in Iraq.”⁶⁰ Signed by thirteen organizations and over 200 individuals from around the world, the letter declared:

The extraordinary global significance of the monuments, museums, and archaeological sites of Iraq (ancient Mesopotamia) imposes an obligation on all peoples and governments to protect them. In any military conflict that heritage is put at risk, and it appears now to be in grave danger.

Should war take place, we call upon all governments to respect the terms of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and its First Protocol.⁶¹

Ashton Hawkins, president of the non-profit American Council for Cultural Policy, wrote to Secretary Rumsfeld, Secretary Powell, and National Security Advisor Condoleezza Rice, and officials in other agencies in mid-October 2002.⁶² Hawkins asked what measures the U.S. invading forces would take to protect Iraq’s antiquities from damage or destruction.⁶³ He received no response.⁶⁴

58. U.S. DEP’T DEF., *News Transcript*, *supra* note 53.

59. CHANNEL NEWSASIA, *US Rejects Charges Military to Blame for Looting at Baghdad Museum*, *supra* note 55.

60. Archaeological Institute of America, *Open Declaration on Cultural Heritage at Risk in Iraq*, AIA NEWS (Mar. 19, 2003), available at <http://www.archaeological.org/webinfo.php?page=10210>.

61. *Id.*

62. Witt, *supra* note 15.

63. *Id.*

64. *Id.*

Together with Maxwell L. Anderson, president of the American Association of Museum Art Directors and director of the Whitney Museum of American Art in New York, Hawkins wrote the following in an opinion piece published in the November 29, 2002, issue of the *Washington Post*:

In the event of hostilities, we urge that steps be taken to protect Iraq's heritage, in which we have a shared interest. Our military and civilian leaderships should be aware of the location of Iraq's most significant cultural and religious sites and monuments. To this end, we urge the administration to consider the creation now (and not later) of a planning mechanism specifically charged with ensuring that Iraq's material culture is protected. . . .

At the conclusion of hostilities, should they occur, the United States and its coalition partners will become heirs to responsibilities that include, in addition to the welfare of Iraq's people, the task of protecting Iraq's holy cities and ancient sites. Measures should be taken to ensure absolute respect for the integrity of Iraq's sites and monuments, and to prevent looting of any kind.⁶⁵

The piece also included a prescient warning: "Ultimately we may well be judged by how we behave toward Iraq's patrimony in the course of any military action and occupation we may undertake."⁶⁶

No one in the government responded until Joseph Collins, Deputy Assistant Secretary of Defense, proposed meeting with Hawkins and others to plan for the protection of Iraq's cultural treasures.⁶⁷ The meeting took place on January 24, 2003; in attendance were Collins and four other Pentagon officials plus Hawkins and a number of civilian experts, archaeologists, and curators.⁶⁸ McGuire Gibson, an archaeologist at the University of Chicago, provided a list of 5000 important cultural and historic sites in Iraq, headed by the National Museum. Collins reportedly provided informal assurances that the U.S. forces would be appropriately instructed.⁶⁹ In March 2003, just before the invasion of Iraq, a larger

65. Ashton Hawkins & Maxwell L. Anderson, *Preserving Iraq's Past*, WASH. POST, Nov. 29, 2002, (Final Edition), at A43.

66. *Id.*

67. Witt, *supra* note 15.

68. *Id.*

69. *Id.*

group of specialists met with Deputy Assistant Secretary of the Bureau of Near Eastern Affairs (State Department) Ryan Crocker to discuss protections for key sites in Iraq; the war started before substantive follow-up could occur.⁷⁰

More significantly, the U.S. Army's own civilian advisors had forewarned of the dangers that combat would pose to the museum. A memorandum from the Office of Reconstruction and Humanitarian Assistance (ORHA) reportedly identified the Iraqi National Museum as a "prime target for looters" and named the museum as a top priority for protection by coalition forces, second only to the national bank.⁷¹ Plundering would entail "irreparable loss of cultural treasures of enormous importance to all humanity."⁷² The chief of the ORHA, General Jay Garner, was described as "livid" after the lootings.⁷³

The issue of warning and foreseeable risk to the museum assumes some importance with respect to U.S. claims that the demands of combat precluded protection for the museum. U.S. military planners clearly foresaw potential dangers to other sites in Baghdad, notably the Oil Ministry, and implemented a plan to establish immediate control over those facilities.⁷⁴ The American claim that U.S. forces could not worry about the museum because they were still engaged in combat thus loses much of its force. If the war planners could prepare for securing the Oil Ministry even as combat continued, they could have done the same for the Iraqi National Museum.

Other officials within the U.S. government understood better than Secretary Rumsfeld the seriousness of the condemnation that the museum plundering had brought upon the United States. Three members of the White House Cultural Property Advisory Committee resigned over the incident.⁷⁵ In his letter of resignation, committee chairman Martin Sullivan lamented, "The tragedy was not prevented,

70. *Id.*

71. Paul Martin, Ed Vulliamy & Gaby Hinsliff, *Iraq After Saddam: US Army was Told to Protect Looted Museum*, THE OBSERVER (London), Apr. 20, 2003, at 4.

72. *Id.*

73. *Id.*

74. Peter Wilson, *Special Deal for Oil HQ*, COURIER MAIL (Queensland, Australia), Apr. 15, 2003, at 10; Robert Fisk, *The Iraq Conflict: Americans Defend Two Untouchable Ministries from the Hordes of Looters*, THE INDEPENDENT (London), Apr. 14, 2003, at 7.

75. Carl Hartman, *White House Art Advisers Quit to Protest Looting of Baghdad Museum*, ASSOCIATED PRESS, Apr. 17, 2003; see also Alan Riding, *Art Experts Mobilize Team to Recover Stolen Treasures and Salvage Iraqi Museums*, N.Y. TIMES, Apr. 17, 2003, at B2. The three who resigned were Martin E. Sullivan, Richard S. Lanier, and Gary Vikan; all three had been appointed by President Bill Clinton.

due to our nation's inaction."⁷⁶ He asserted that the President was under "a compelling moral obligation" to prevent looting.⁷⁷ In a subsequent interview Sullivan asserted that protection of the museum was "the kind of thing you should have planned for" in a pre-emptive war.⁷⁸

The Department of State also responded to the worldwide outrage. On April 14, 2003 Secretary Colin Powell released a statement on the museum, which included the following:

The people of the United States value the archeological and cultural heritage of Iraq that documents over 10,000 years of the development of civilization. In recent days, the National Museums in Baghdad and Mosul have been looted, as well as other cultural institutions and archeological sites. Such looting causes irretrievable loss to the understanding of history and the efforts of Iraqi and international scholars to study and gain new insight into our past.

Objects and documents taken from museums and sites are the property of the Iraqi nation under Iraqi and international law. They are therefore stolen property, whether found in Iraq or other nations. Anyone knowingly possessing or dealing in such objects is committing a crime. . . .

In addition to the well-reported efforts made to protect cultural, religious and historic sites in Iraq, CENTCOM has issued instructions to all troops inside Iraq to protect museums and antiquities throughout Iraq.⁷⁹

Secretary Powell also announced that the United States was cooperating with Interpol's effort to recover items taken from the museum, and with UNESCO to safeguard Iraq's antiquities.⁸⁰ In fact, FBI personnel, and Attorney General John Ashcroft himself, attended the meeting hosted by Interpol at Lyon on May 5—6, 2003.⁸¹ Even before that, FBI Director Robert Mueller had announced that the FBI was monitoring antiquities markets and that some twenty-four FBI agents would be assigned to work with

76. Hartman, *supra* note 75.

77. *Id.*

78. *Quoted in* Mcdougall, *supra* note 39.

79. Statement by Secretary Colin L. Powell, *Cooperation for the Safeguarding of Iraqi Antiquities and Cultural Property*, U.S. DEP'T ST. (Apr. 14, 2003), <http://www.state.gov/secretary/former/powell/remarks/2003/19628.htm>.

80. *Id.*

81. Interpol, *Stolen Works of Art*, *supra* note 45.

Interpol on recuperating pieces stolen from Iraq.⁸² “We recognize their importance not only to Iraqis but to the world,” Mueller commented.⁸³

Finally, the Department of Defense moved quickly to initiate an investigation of the ransacking of the Iraqi National Museum. On April 16, 2003, the thirteen-member U.S. team headed by Marine Colonel Matthew Bogdanos, a New York prosecutor before being recalled to active duty, launched the investigation at the museum less than two weeks after the looting.⁸⁴ The purpose of the investigation was to identify what precisely had been stolen and how, and to support international recovery efforts. The investigation lasted several months, with Bogdanos submitting a final report in September 2003.⁸⁵ The United States has fully supported subsequent efforts to recuperate antiquities removed from Iraq,⁸⁶ but that work cannot counterbalance the failure to prevent the looting in the first place.

C. *How Much Was Stolen?*

Early news accounts, in the days following the looting, quoted museum officials as stating that 170,000 items were missing.⁸⁷ As a more accurate picture of the museum’s fate emerged, it became apparent that the initial reports had grossly exaggerated the losses. Donny George, director general of research and study of the Iraqi State Board of Antiquities, who had been the quoted source for the 170,000 figure, later stated that it represented the museum’s total catalogued collection.⁸⁸ In fact, the most valuable items (except larger, immovable pieces) had been removed from the museum by

82. McDougall, *supra* note 39.

83. *Id.*

84. U.S. DEP’T DEF., *News Transcript: Briefing on the Investigation of Antiquity Loss from the Baghdad Museum* (Sept. 10, 2003), <http://www.defenselink.mil/transcripts/2003/tr20030910-0660.html>.

85. See Colonel Matthew Bogdanos, USMC, *Iraq Museum Investigation: 22 Apr.–8 Sept. 03*, U.S. DEP’T DEF. (Sept. 10, 2003), available at <http://www.defenselink.mil/news/Sep2003/d20030922fr.pdf>.

86. Rupert Cornwell, *The Iraq Conflict: FBI Sends Agents to Recover Looted Treasures in Baghdad*, INDEPENDENT (London), Apr. 19, 2003, at 13; McDougall, *supra* note 39; Martin Gottlieb, *Aftereffects: The Loot; Ashcroft Says U.S. Will Aid Effort to Save Iraq Treasures*, N.Y. TIMES, May 7, 2003, at A14; Christopher Lee, *Far From Homeland, Staff Deployed in Iraq; New Department Aids Reconstruction*, WASH. POST, Aug. 1, 2003, at A17; Roger Atwood, *Stop, Thieves! Recovering Iraq’s Looted Treasures*, WASH. POST, Oct. 3, 2004, at B2.

87. See Brooks & Calvert, *supra* note 3, at 3; see also Burns, *supra* note 3, at A1.

88. William Booth & Guy Gugliotta, *All Along, Most Iraqi Relics Were “Safe and Sound,”* WASH. POST, June 9, 2003, at A12.

its forward-looking staff.⁸⁹ Some treasures had been placed in a vault beneath the Iraqi Central Bank; others were hidden in a secret site.⁹⁰ The discrepancies provoked a backlash, directed against what some saw as deliberate misleading on the part of Iraqi museum officials and gullible reporting.⁹¹ However, it must be noted that those same April 13 accounts did temper the sensational estimates by reporting the substantial uncertainty surrounding the numbers. The *Los Angeles Times* piece remarked that “the specifics of the losses may not be known for some time.”⁹² The *New York Times* cautioned that “what officials told journalists today may have to be adjusted as a fuller picture comes to light,” and that it was “unclear whether some of the museum’s priceless gold, silver and copper antiquities, some of its ancient stone and ceramics and perhaps some of its fabled bronzes and gold-overlaid ivory, had been locked away for safekeeping elsewhere.”⁹³

The Bogdanos investigation, working with Iraqi antiquities officials and experts from the British Museum, began to compile a systematic register of the museum’s holdings and of the items that were missing. By mid-June 2003, news reports on the investigation of the looting of the museum quoted U.S. and Iraqi officials as estimating the number of stolen pieces at 3000; that number increased to 6000 a week later, and was expected to continue rising.⁹⁴ The final report submitted by Colonel Bogdanos on September 8, 2003, listed 40 major pieces taken from the public galleries, 3138 items taken from storage rooms on the first and second floors, and 10,337 pieces taken from the basement storage room, for a total of about 13,500 items.⁹⁵ To that date, 3411 artifacts had been recovered or returned, including ten of the major items.⁹⁶

89. *Id.*

90. Booth & Gugliotta, *supra* note 88, at A12; Alex Spillius, “Lost” Treasures Were Safe and Kept in Storage, *DAILY TELEGRAPH* (London), May 22, 2003, at 19.

91. See Dan Cruikshank, *Lost and Found in Iraq*, *THE TIMES* (London), June 16, 2003, at 16; see also Andrew Lawler, *Lifting the Fog of the Bias War*, 42 *COLUM. JOURNALISM REV.* 68 (2003); Alexander H. Joffe, *Museum Madness in Baghdad*, 11 *MIDDLE E.Q.* 31 (2004).

92. Slackman, *supra* note 12, at A1.

93. Burns, *supra* note 3, at A1.

94. Guy Gugliotta, *Looters Stole 6,000 Artifacts*, *WASH. POST*, June 21, 2003, at A16.

95. Bogdanos, *supra* note 85.

96. *Id.*

II. INTERNATIONAL LAW ON THE PROTECTION OF CULTURAL PROPERTY IN WARTIME

International rules frequently emerge and evolve in response to specific, contested events. The generic process works as follows.⁹⁷ One state takes actions that other states view as incompatible with international norms. The responding states invoke rules which they believe forbid the acts in question. The first state seeks to justify its conduct, either by claiming that the conduct qualifies as an exception to the rules invoked, or by referring to a different set of (partially conflicting) norms. Each side seeks to persuade its peers in international society that its interpretation of the rules and the events is the appropriate one. The outcomes of these normative disputes inevitably modify international norms. Of course, diverse outcomes are possible, but all of them imply some change in the normative structure. Debates can strengthen the rules, weaken them, or render them more ambiguous. They can also expand or constrict the application of rules, or clarify exceptions. And they can indicate relationships between conflicting sets of norms (for example, the prohibition on the use of force *versus* anticipatory self-defense, or the norm of non-intervention *versus* collective action to halt massive human rights abuses). Normative development, then, is the product of a continuous cycling among rules, actions, and arguments.⁹⁸ This section describes the early history of international rules on wartime plunder. The plundering carried out by the armies of Napoleon first catalyzed the development of protections for cultural treasures in war.⁹⁹ Subsequent events provoked the further development of those rules.

A. *Initial Developments*

Before the middle of the eighteenth century, international law writers held that any means were justified in war and that combatants possessed an "unlimited right" over the person and property of their enemies.¹⁰⁰ Hugo Grotius acknowledged that the law of nations permitted belligerents in just war to seize or destroy enemies and their possessions (though he also noted that what is lawful is not

97. See Sandholtz, *supra* note 7.

98. See *id.*

99. CHARLES DE VISSCHER, INTERNATIONAL PROTECTION OF WORKS OF ART AND HISTORIC MONUMENTS 826, Int'l Info. & Cul. Ser. 8, Pub. 3590 (U.S. Dep't St. 1949).

100. See SHARON A. WILLIAMS, THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY 5 (1978).

necessarily also morally laudable).¹⁰¹ Cornelius van Bynkershoek, writing in the Netherlands in 1737, held that "everything is lawful against enemies as such. We make war because we think that our enemy, by the injury done us, has merited the destruction of himself and his people. As this is the object of our welfare, does it matter what means we employ to accomplish it?"¹⁰²

In the mid-1700s, liberal ideals of the value and the natural rights of individuals began to make their way out of the philosophers' treatises and into politics and law, and theorists began to argue that humanitarian considerations established bounds on the conduct of armies fighting wars. Some took the position that, though international law permitted plunder, cultural monuments enjoyed a unique and protected status. Emmerich de Vattel, for instance, offered an early statement of the principle that artistic and architectural monuments should be protected in wartime. Vattel's *The Law of Nations* sustains the doctrine that states are justified in doing what they wish with enemy properties. Indeed, Vattel defines enemy property as broadly as possible, including the possessions of the sovereign, the state, and all its subjects,¹⁰³ and asserts that a belligerent has the right to confiscate enemy property or to destroy "what he can not conveniently carry off."¹⁰⁴ Thus, Vattel affirms that "it is not, generally speaking, contrary to the laws of war to plunder and lay waste to a country."¹⁰⁵ "But," he quickly adds, "the deliberate destruction of public monuments, temples, tombs, statues, pictures, etc., is . . . condemned on all occasions" even by the voluntary Law of Nations, as being under no circumstances conducive to the lawful objects of war.¹⁰⁶ Furthermore, Vattel articulates general principles that justify exempting cultural treasures from the right to plunder:

For whatever cause a country be devastated, those buildings should be spared which are an honor to the human race and which do not add to the strength of the enemy, such as temples, tombs, public buildings, and all edifices of remarkable beauty. What is gained by destroying them? It is the act of a declared enemy

101. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE*, bk. III, chs. 1-5 (Archibald Colin Campbell trans., M. Walter Dunne 1901) (1625).

102. CORNELIUS VAN BYNKERSHOEK, 2 *QUAESTIONUM JURIS PUBLICI LIBRI DUO* [QUESTIONS OF PUBLIC LAW] 16 (Tenney Frank trans., The Clarendon Press 1930) (1737).

103. EMMERICH DE VATTEL, 3 *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE* [THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW] 59 (bk. III, ch. 5, § 73) (1758).

104. *Id.* at 137 (bk. III, ch. 9, § 166).

105. *Id.* at 143 (bk. III, ch. 9, § 173).

106. *Id.* at 144 (bk. III, ch. 9, § 174).

of the human race thus wantonly to deprive men of these monuments of art and models of architecture . . .

¹⁰⁷

With Vattel, these ideas entered the international discourse on art plunder.¹⁰⁸

During the wars of the French Revolution (1792–1801) and the Napoleonic Wars (1801–1814), victorious French armies systematically plundered the conquered lands.¹⁰⁹ Paintings, tapestries, sculptures, and art objects of every variety made their way to Paris on carts and barges to stock the new national museum at the Louvre. When Napoleon was finally defeated, the allies argued with the French, and among themselves, as to the fate of the seized artworks. The Prussians led the charge for complete restitution. The French naturally opposed any returns, and the British were ambivalent. However, after Napoleon's return and the battle of Waterloo (June 18, 1815), the Prussian position found broader support. A consensus emerged among Austria, Great Britain, and Prussia, with support by the smaller states that had been plundered, that the seizure of cultural treasures, an accepted feature of wars in earlier epochs, was illegitimate and contrary to (emerging) civilized norms. Louis XVIII opposed returning the art treasures, and Czar Alexander of Russia opposed compulsory restitution. In the end, a

107. *Id.* at 139 (bk. III, ch. 9, § 168).

108. Vattel quickly became a decisive influence on international legal thinking in Great Britain and the United States. As Lapradelle declares, "De tous les auteurs, même anglais, qui ont écrit sur le droit des gens, il n'en est aucun de plus souvent ne de plus largement cité que Vattel" ("Of all the authors, even the English, who have written on the law of nations, there is not one who is more often nor more extensively cited than Vattel."); Albert de Lapradelle, *Introduction, in* EMMERICH DE VATTEL, 1 LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE [THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW] xxxiv (Carnegie Institution of Washington 1916) (1758). Similarly, Vattel became a preeminent authority in Spain. His influence in Germany was less marked, though significant. French international law writers did not embrace Vattel until well into the nineteenth century. Vattel's ideas reached also into the Netherlands, Scandinavia, and Russia. *Id.* at xl–xlii. Another means of assessing the influence of Vattel's *Le Droit des Gens* is by reviewing the list of its various editions. There were twenty editions in French between 1758 and 1863, published in various European cities; twenty-two English translations issued in Great Britain and the United States between 1759 and 1854; six Spanish editions between 1822 and 1836; plus German and Italian translations in 1760 and 1805, respectively. *Id.* at lvi–lix (*Bibliographie*).

109. For accounts of Napoleonic plunder and restitution, upon which this paragraph draws, see JEAN CHATELAIN, DOMINIQUE VIVANT ET LE LOUVRE DE NAPOLÉON [DOMINIQUE VIVANT AND NAPOLEON'S LOUVRE] (1973); CECIL GOULD, TROPHY OF CONQUEST: THE MUSÉE NAPOLÉON AND THE CREATION OF THE LOUVRE (1965); E. Müntz, *Les Annexions de Collections d'Art ou de Bibliothèques et leur Role dans les Relations Internationales, Principalement Pendant la Révolution Française*, 8 REVUE D'HISTOIRE DIPLOMATIQUE 481 (continued in vol. 9, at 375; and vol. 10, at 481); WILHELM TREUE, ART PLUNDER: THE FATE OF WORKS OF ART IN WAR AND UNREST (Basil Creighton trans., The John Day Company 1961).

substantial (though not complete) restitution sent hundreds of masterpieces back to their pre-Napoleon homes.¹¹⁰

B. *From the Lieber Code to the Hague Conventions*

No formal international law on the protection of cultural property in wartime existed until the Hague Conventions of 1899 and 1907. Of course, those treaties built upon a number of previous initiatives that had fallen short of formal international acceptance. All of these efforts to place humanitarian limits on the conduct of war, including protections for institutions and monuments of culture, had their roots in the Lieber Code.¹¹¹ Francis Lieber, a professor of politics and law at Columbia College in New York City, was a German immigrant who had fought as a young volunteer against Napoleon's army in Belgium in 1815.¹¹² The U.S. War Department commissioned Lieber in 1862 to draft rules of war for the Union armies. His *Code for the Government of Armies in the Field as Authorized by the Laws and Usages of War on Land* was approved by the Secretary of War and by President Abraham Lincoln himself, who issued it as General Orders No. 100, *Instructions for the Government of Armies of the United States in the Field*.¹¹³

The Lieber Code became immensely influential in Europe, where it inspired a number of progressive European jurists and publicists, who in turn lent their energies to various transnational efforts to codify a common set of rules of war. Johan-Kaspar Bluntschli, one of the most influential treatise writers of the nineteenth century, so thoroughly admired the Lieber Code that he authored his own study of the modern laws of war.¹¹⁴ Bluntschli's subsequent international law treatise (1868, with additional editions in 1872 and 1878, and French editions in 1869, 1874, 1881, and 1895) included the full text of General Orders No. 100 as an appendix.¹¹⁵

110. Sandholtz, *supra* note 7, at 20–21.

111. James F. Childress, *Francis Lieber's Interpretation of the Laws of War: General Orders No. 100 in the Context of his Life and Thought*, 21 AM. J. JURIS. 34 (1976); FRANK FREIDEL, FRANCIS LIEBER: NINETEENTH-CENTURY LIBERAL (1968); RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR (1983); Gustave Rolin-Jacquemyns, *Nécrologie: I. François Lieber*, 4 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 700 (1872); JIŘÍ TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 7–9 (1996).

112. Rolin-Jacquemyns, *supra* note 111.

113. Childress, *supra* note 111, at 34.

114. JOHANN CASPAR BLUNTSCHLI, DAS MODERNE KRIEGSRECHT DER CIVILISIRTEN STAATEN [THE MODERN LAW OF WAR OF CIVILIZED STATES] (1868).

115. JOHANN CASPAR BLUNTSCHLI, LE DROIT INTERNATIONAL CODIFIÉ [INTERNATIONAL

At the invitation of Czar Alexander II, in July and August 1874, representatives of fifteen European countries convened in Brussels. The subject of their discussions was a proposed declaration, drafted by Russia, on the rules of war. The delegates signed the document with minor changes.¹¹⁶ Article 8 of the Brussels Declaration (1874) included the following language:

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 or destruction of, or willful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities.¹¹⁷

For the first time, confiscation of monuments and works of art was to be prohibited. It was never ratified, since some governments did not wish to see the Brussels Declaration become a binding treaty.¹¹⁸ However, its influence was substantial: The 1880 Oxford Manual and the Hague Conventions (1899 and 1907) essentially incorporated almost the identical language of the Brussels Declaration into their relevant provisions.

Brussels Declaration, Article 8:

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 or destruction of, or willful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities.

Oxford Manual, Article 53:

The property of municipalities, and that of institutions devoted to religion, charity, education, art and science, cannot be seized.

All destruction of or willful damage to institutions of this character, historic monuments, archives, works of art, or science, is formally forbidden, save when

LAW CODIFIED] 485–518 (M. C. Lardy trans., Gillaumin et Cie 5th ed. 1895).

116. TOMAN, *supra* note 111, at 9.

117. DIETRICH SCHINDLER & JIŘÍ TOMAN, *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 28 (1988).

118. *Id.* at 25.

urgently demanded by military necessity.

Hague Convention (IV), Regulations, Article 56:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.¹¹⁹

In 1873, Bluntschli joined a group of progressive lawyers and thinkers to establish the Institute of International Law at Ghent.¹²⁰ The Institute was a private organization dedicated to the scientific study of international law, with membership by invitation only.¹²¹ The group's objective was "to record . . . the juridical opinion of the civilized world, and to give to this opinion an expression clear enough, and exact enough to be accepted by the different States as a rule of their external relations. The Institute will thus prepare, through gradual effort, this codification of international law . . ."¹²² At its 1875 meeting, the Institute praised the Brussels Declaration and called on governments to use it as the basis for a more complete international code on the laws of war.¹²³ Five years later, the Institute unanimously adopted a manual designed to serve as a model for each state's own military regulations. The 1880 *Laws of War on Land* (known since then as the *Oxford Manual* because the 1880 meeting took place in that city) drew on the Lieber Code, the 1874 Brussels Declaration, and recent national manuals that had incorporated many of their provisions. With respect to cultural property, the *Manual* included the following articles:

Article 32:

119. International Declaration Concerning the Laws and Customs of War [Brussels Declaration] art. 8, Aug. 27, 1874; The Laws of War on Land [Oxford Manual] art. 53, Sept. 8, 1880; Hague Convention (IV), *supra* note 5, Annex, art. 56. For ease of comparison, all three documents are reproduced in SCHINDLER & TOMAN, *supra* note 117, at 28, 44, 91–92, respectively.

120. Other leaders in founding the Institute were Gustave Moynier (Switzerland), Gustave Rolin-Jaequemyns (Belgium), Pasquale Mancini (Italy), Tobias Asser (Belgium), Carlos Calvo (Argentina), and David Dudley Field (United States). Prior to the founding of the Institute, Rolin-Jaequemyns had been in correspondence with Francis Lieber. See ALBÉRIC ROLIN, *LES ORIGINES DE L'INSTITUT DE DROIT INTERNATIONAL* [THE ORIGINS OF THE INSTITUTE OF INTERNATIONAL LAW] (1923); MARTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* 11–97 (2001).

121. See ROLIN, *supra* note 120; KOSKENNIEMI, *supra* note 120.

122. ROLIN, *supra* note 120, at 68.

123. See ROLIN, *supra* note 120; KOSKENNIEMI, *supra* note 120.

It is forbidden:

- (a) To pillage, even towns taken by assault;
- (b) To destroy public or private property, if this destruction is not demanded by an imperative necessity of war;

....

Article 53:

The property of municipalities, and that of institutions devoted to religion, charity, education, art and science, cannot be seized.

All destruction of or willful damage to institutions of this character, historic monuments, archives, works of art, or science, is formally forbidden, save when urgently demanded by military necessity.¹²⁴

The Hague Conventions of 1899 and 1907 codified these norms. The Regulations annexed to Hague Convention IV (1907) prohibit the confiscation of private property, forbid pillaging, and stipulate the following in Article 56:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure or destruction of, or willful damage to, institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.¹²⁵

The United States is a party to the Hague Conventions.

C. *The World Wars*

World War I produced notorious instances of grave damage to important cultural sites, especially in Belgium but also in France. Numerous historic buildings and churches suffered from bombardment, but the German shelling of the cathedral of Rheims, coronation site for generations of French monarchs, and the deliberate torching by the Germans of the library of the University of

124. SCHINDLER & TOMAN, *supra* note 117, at 41, 44. For the full text of the Oxford Manual, see *id.* at 35.

125. Hague Convention (IV), *supra* note 5, art. 56 (translated from German).

Louvain provoked international outrage.¹²⁶ After 1918, several initiatives aimed at providing greater protections for artistic and cultural monuments during wartime. One of these was *Rules of Aerial Warfare* drafted by a Commission of Jurists that met in The Hague from December 1922 to February 1923.¹²⁷ The representatives of six countries (the United States, Great Britain, France, Italy, the Netherlands, and Japan) participated in the preparation of the draft rules.¹²⁸ In addition to protections for civilian buildings, Article 25 of the *Rules of Aerial Warfare* declares:

In bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospital ships, hospitals and other places where the sick and wounded are collected, provided such buildings, objects or places are not at the time used for military purposes.¹²⁹

Italy, "justly concerned at the memory of the irreparable damage done to historic monuments and works of art, especially in Venice and Ravenna, by bombing from enemy aircraft during World War I," proposed additional provisions that were embodied in Article 26.¹³⁰ States could designate zones of immunity from aerial bombardment extending 500 meters around "important historic monuments" (which, the Commission noted, included "monuments . . . of great artistic value").¹³¹ For its part, the designating government would refrain from using the monuments and their surrounding areas for any military purpose whatsoever, and would be obligated to notify in peacetime other states of the zones so identified.¹³² Though the six countries responsible for them unanimously endorsed the *Rules of Aerial Warfare*, they never received sufficient ratifications to enter into effect. The draft rules thus expressed a partial, and emerging, international consensus on the privileged status of cultural treasures during war.

A further step occurred with the signing and ratification of the

126. WILLIAMS, *supra* note 100, at 18–19.

127. ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 121–23 (1989).

128. *Id.* at 122.

129. *Id.* at 127.

130. Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, *General Report*, 32 AM. J. INT'L L. 25 (Supp. 1938) [hereinafter Commission of Jurists]; DE VISSCHER, *supra* note 99, at 842.

131. Commission of Jurists, *supra* note 130, at 25–26.

132. *Id.*

Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments in April 1935.¹³³ The treaty was also known as the Roerich Pact, named after the Russian-born artist, Nicholas Roerich, who had proposed and advocated such an agreement.¹³⁴ Article 1 of the treaty declared that “[h]istoric monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents.”¹³⁵ The treaty had been drawn up under the auspices of the Pan-American Union and President Franklin D. Roosevelt hosted the signing at the White House in Washington, D.C. Eleven countries in the Americas, including the United States,¹³⁶ ratified the agreement, which came into effect in August 1935.¹³⁷ It was, nevertheless, the first international convention specifically devoted to the protection of artistic and cultural monuments in times of war.

The Second World War witnessed the most organized and massive looting of cultural objects since the time of Napoleon.¹³⁸ Various parts of the Nazi machine—including the Schutzstaffel (SS), the German military governments, and the specially created Einsatzstab Reichsleiter Rosenberg (ERR)—systematically combed the conquered territories for items of cultural value to be shipped back to the Third Reich. In the East (Poland and the Soviet Union), the Germans looted monuments, churches, museums, libraries, and private collections.¹³⁹ In the West (especially France and the Netherlands), private collections owned by Jews, in particular, were subject to seizure, though the Nazis acquired thousands of pieces through forced sales that offered a veneer of legality.¹⁴⁰ The ERR alone sent twenty-nine major shipments of paintings, sculptures, and art objects from Paris to Germany, filling at least 120 boxcars.¹⁴¹

Even before the Normandy invasion, Allied military planners had been receiving reports of the Nazi plundering. They had also taken steps to minimize, to the extent possible, damage inflicted on European cultural sites by Allied military campaigns. These efforts

133. Roerich Pact, *supra* note 5.

134. SCHINDLER & TOMAN, *supra* note 117, at 737.

135. Roerich Pact, *supra* note 5, art. 1.

136. Brazil, Chile, Colombia, Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, the United States, and Venezuela. See SCHINDLER & TOMAN, *supra* note 117, at 740.

137. *Id.* at 737.

138. See generally LYNN H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994).

139. See *id.* at 61–64.

140. See *id.* at 125–30.

141. HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART* 120 (1997).

ranged from forbidding the use of historic chateaux as billets or headquarters, to providing bombardiers with maps that indicated important cultural monuments to be avoided.¹⁴² In fact, both the British and the Americans created special units, the Monuments, Fine Arts and Archives (MFA&A) branches, staffed by officers with experience in museums or art history. Initially, the primary task of the MFA&A officers was to assess damage to churches, museums, and other culturally significant buildings.¹⁴³ Furthermore, prior to the invasions of Sicily and Normandy, General Dwight D. Eisenhower ordered the troops to avoid harm to such buildings whenever possible. The Normandy order read in part:

Shortly we will be fighting our way across the Continent of Europe in battles designed to preserve our civilization. Inevitably, in the path of our advance will be found historical monuments and cultural centers which symbolize to the world all that we are fighting to preserve.

It is the responsibility of every commander to protect and respect these symbols whenever possible

So, where military necessity dictates, commanders may order the required action even though it involves destruction to some honored site.

But there are many circumstances in which damage and destruction are not necessary and cannot be justified Civil Affairs Staffs at higher echelons will advise commanders of the locations of historical monuments of this type, both in advance of the front lines and in occupied areas¹⁴⁴

As the Allies began to accumulate information regarding Nazi plundering, the MFA&A shifted its focus to locating and securing the huge repositories where the Nazis had stashed their loot in order to protect it from Allied bombing. Allied forces were discovering the repositories in mines, monasteries, and castles in Germany and Austria.¹⁴⁵ Once the treasures and masterpieces were secured, the

142. NICHOLAS, *supra* note 138, at 283–306.

143. AMERICAN COMMISSION FOR THE PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS, REPORT OF THE AMERICAN COMMISSION FOR THE PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS 17–19, 47–48 (1946) [hereinafter AMERICAN COMMISSION].

144. *Id.* at 101–02.

145. See THOMAS CARR HOWE, JR., SALT MINES AND CASTLES: THE DISCOVERY AND RESTITUTION OF LOOTED EUROPEAN ART (1946); JAMES J. RORIMER IN COLLABORATION WITH GILBERT RABIN, SURVIVAL: THE SALVAGE AND PROTECTION OF ART IN WAR (1950); DAVID ROXAN & KEN WANSTALL, THE RAPE OF ART: THE STORY OF HITLER'S PLUNDER AND THE

question for Allied commanders and political leaders was what to do with them. By consensus, it was clear that the heart of Allied policy would be restitution—returning to their rightful owners cultural properties stolen by the Nazis.¹⁴⁶

To carry out restitution, the Allies established “collecting points” at Munich, Wiesbaden, and seven other locations in Germany.¹⁴⁷ The massive *Verwaltungsbau* in Munich (formerly the Nazi party headquarters) was designated as the central collecting point for stolen artworks. All of the plundered art found in the western sectors of occupied Germany flowed to the Central Collecting Point in Munich, where MFA&A personnel registered and catalogued it. Representatives from Allied countries formerly under German control arrived to attempt to connect specific pieces to their former owners.¹⁴⁸ The effort to restore artworks stolen by the Nazis to their pre-war owners continues today via litigation, in a growing number of suits involving both museums and private collectors.¹⁴⁹

The stunning scope of Nazi plundering led to two important developments in international law after the war. The first concerned individual responsibility for violating international norms that protect cultural property during war. In August 1945, the four major powers agreed to the Charter of the International Military Tribunal (IMT),¹⁵⁰ which specified the crimes over which the IMT held jurisdiction.¹⁵¹ “War crimes” referred to “violations of the laws or customs of war,” and included “plunder of public or private property.”¹⁵² Under Count Three of the Tribunal’s Indictment with regard to War Crimes, the “Statement of the Offence” included “Plunder of Public and Private Property.”¹⁵³ A list of general categories of crimes included: “In further development of their plan of criminal exploitation, they

GREAT MASTERPIECES OF EUROPE (1964); NICHOLAS, *supra* note 138, ch. 11.

146. See MICHAEL J. KURTZ, *NAZI CONTRABAND: AMERICAN POLICY ON THE RETURN OF EUROPEAN CULTURAL TREASURES, 1945–1955* (1985); WOJCIECH KOWALSKI, *LIQUIDATION OF THE EFFECTS OF WORLD WAR II IN THE AREA OF CULTURE* (1994); WOJCIECH W. KOWALSKI, *ART TREASURES AND WAR: A STUDY ON THE RESTITUTION OF LOOTED CULTURAL PROPERTY, PURSUANT TO PUBLIC INTERNATIONAL LAW* (1998).

147. AMERICAN COMMISSION, *supra* note 143, at 135.

148. JANET FLANNER, *MEN AND MONUMENTS* 282–86 (Harper & Bros. 1957) (1947).

149. See MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS* ch. 5 (2003); NORMAN PALMER, *MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE* (2000).

150. Charter of the International Military Tribunal art. 6, Aug. 8, 1945, *reprinted in* 13 ANN. DIG. 204 (Nuremberg), *available at* <http://www.yale.edu/lawweb/avalon/imt/jackson/jack60.htm>.

151. *Id.* art. 6.

152. *Id.* art. 6(b).

153. *In re Goering and others, Indictment, Count Three—War Crimes, Part E, 1 Int’l Mil. Trib. (Nuremberg) 55–56, summarized in* 13 ANN. DIG. 205–06, *available at* <http://www.yale.edu/lawweb/avalon/imt/proc/count3.htm>.

destroyed industrial cities, cultural monuments, scientific institutions, and property of all types in the occupied territories”¹⁵⁴ The indictment specified the bases in law for the accusations, namely, that the acts named:

were contrary to international conventions, particularly Articles 46 to 56 inclusive of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed and to Article 6(b) of the Charter.¹⁵⁵

The Indictment provided substantial detail on the spoliation carried out by the Nazis.

During the trial itself, prosecutors documented Nazi plundering, seeking to establish the guilt of individual leaders and of organizations like the ERR. The Tribunal, in the end, found Hermann Goering¹⁵⁶ guilty of “spoliation of conquered territory” (though the conviction mentioned specifically industrial and agricultural looting). Also convicted were Wilhelm Keitel¹⁵⁷ (for directing “the military authorities to cooperate with the Einsatzstab Rosenberg in looting cultural property in occupied territories”) and Alfred Rosenberg.¹⁵⁸

The second key post-war development in international law regarding wartime plunder was the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. In its preamble, the 1954 Convention declares that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind”¹⁵⁹ “Cultural property,” for purposes of the treaty, covers movable and immovable property “of great importance to the cultural heritage of every people,” as well as buildings housing such objects and areas containing a concentration of cultural monuments or buildings.¹⁶⁰ Parties to the Convention commit themselves to prepare in peacetime for the protection of their own cultural treasures in the event of war.¹⁶¹ During hostilities, state

154. *Id.* at Count Three, pt. E, ¶ 8.

155. *Id.* at Count Three, pt. E, ¶ 9.

156. Commander of the Luftwaffe and, as Reichs Marshall, second only to Hitler. 22 Int’l Mil. Trib. (Nuremberg) 526.

157. Field Marshal and head of the German Armed Forces High Command. *Id.* at 535.

158. Rosenberg was the chief ideologist of the Nazi Party and head of the special looting unit, the ERR. *Id.* at 540.

159. Convention for Protection of Cultural Property, *supra* note 6, pmbl.

160. *Id.* art. 1.

161. *Id.* art. 3.

parties to the Convention are obligated to “refrain . . . from any act of hostility directed against such property” and to refrain from using cultural properties or their surroundings “for purposes which are likely to expose it to destruction or damage in the event of armed conflict,” whether in their own territory or in the territory of another party.¹⁶² The Convention prohibits the seizure of cultural property in the territory of another state party. The parties also “undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”¹⁶³ The language of this clause, repeating the word “any,” indicates a duty to prevent or put a stop to the prohibited acts, regardless of who is committing them. Commanders of military forces thus have an obligation to prevent looting by their own soldiers and by the civilian population. Indeed, in his analysis of the 1954 Convention, Chamberlain declares:

This obligation extends not just to prohibiting and preventing theft, pillage etc. on the part of forces under the command of a party to the conflict but to acts of theft, pillage, etc. committed by the civilian population, for example, where there is a breakdown in law and order in the territory occupied by a party to the conflict.¹⁶⁴

Chamberlain further notes that this provision accords with the 1907 Hague Regulations, Article 43, which requires occupying powers to maintain law and order in occupied territories.¹⁶⁵ Article 4(3) of the 1954 Convention thus speaks directly to the issue of the U.S. failure to secure the National Museum in Baghdad in April 2003.¹⁶⁶

162. *Id.* art. 4(1).

163. *Id.* art. 4(3).

164. KEVIN CHAMBERLAIN, *WAR AND CULTURAL HERITAGE: AN ANALYSIS OF THE 1954 CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS TWO PROTOCOLS 39* (London, Inst. of Art and Law 2004).

165. *Id.*

166. For a contrary interpretation, see Sasha P. Paroff, *Comment: Another Victim of the War in Iraq: The Looting of the National Museum in Baghdad and the Inadequacies of International Protection of Cultural Property*, 53 EMORY L.J. 2021 (2004) (arguing that although the 1954 Hague Convention, in whole or in parts, may have achieved customary international law status, Article 4(3) does not impose on states an obligation to prevent theft, pillaging, or vandalism carried out by private actors (civilians)). Yet, as noted above, the language of the 1954 Hague Convention suggests no such distinction. Furthermore, the records of the 1954 Conference at the Hague provide no indication that the states negotiating the treaty intended Article 4(3) to apply only to state actors. See Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, Records of the Conference Convened by the United Nations Educational, Scientific and Cultural Organization (UNESCO), Held at the Hague from 21 April to 14 May 1954 (Staatsdrukkerij- en Uitgeverijbedrijf 1961). Indeed, the overarching purpose of the Convention—to protect

The 1954 conference at The Hague also produced a Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The purpose of the Protocol was to prohibit the exportation of cultural objects from occupied territories. State parties to the Protocol must also take custody of cultural property imported, directly or indirectly, into their territory from an occupied country. At the end of hostilities, states must return to the authorities of the territory previously occupied any cultural properties that had been illegally exported from that territory.¹⁶⁷ When the Hague conference concluded on May 14, 1954, representatives of thirty-four states signed the Convention for the Protection of Cultural Property in the Event of Armed Conflict, along with the Regulations for its Execution,¹⁶⁸ and delegates from twenty-two countries signed the Protocol.¹⁶⁹ The Convention entered into effect on August 7, 1956; as of July 2005, 114 countries have ratified or acceded to the Convention.¹⁷⁰ While the United States signed the Convention,¹⁷¹ it has not ratified it, nor has it signed the Protocol.

D. Recent Developments

Since the entry into effect of the 1954 Hague Convention, two additional UNESCO treaties have contributed to international law on cultural property, though with only brief references to armed conflict. The General Conference of UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property on November 14, 1970.¹⁷² The purpose of the convention is to curtail illicit imports,

cultural property during wartime—would not be served if occupying powers were required to prevent looting and vandalism by their own soldiers but not to prevent the same conduct by private actors.

167. Protocol for the Protection of Cultural Property in the Event of Armed Conflict art. I, May 14, 1954, 249 U.N.T.S. 358, *available at* <http://www.icomos.org/hague/hague.protocol.html>. The Protocol is also reproduced in TOMAN, *supra* note 111, at 777–82.

168. Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, *available at* <http://www.icomos.org/hague/hague.regulations.html>.

169. Protocol for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 167, Depository, *available at* http://portal.unesco.org/en/ev.php-URL_ID=15391&URL_DO=DO_TOPIC&URL_SECTION=201.html#DEPOSITORY.

170. For a list of signatories from 1954, see Convention on Protection of Cultural Property, *supra* note 6, Depository, *available at* http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html#DEPOSITORY

171. *Id.*

172. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, *entered into force* Apr. 24, 1972, 823 U.N.T.S. 231, *reprinted in* 10 I.L.M. 289 [hereinafter Convention on Ownership of Cultural Property].

exports, and transfers of ownership of cultural artifacts.¹⁷³ Concerning war and occupation, the convention makes illicit “the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power”¹⁷⁴ The 1970 UNESCO Convention entered into force on April 24, 1972; by early 2005, 106 states were parties, including the United States.¹⁷⁵ Two years later, the UNESCO General Conference passed the Convention Concerning the Protection of the World Cultural and Natural Heritage.¹⁷⁶ The 1972 Convention applies to immovable cultural objects of “outstanding universal value,” to be “preserved as part of the world heritage of mankind as a whole.”¹⁷⁷ States nominate sites in their territory for inclusion on the World Heritage List.¹⁷⁸ The List of World Heritage in Danger includes those places that appear in the World Heritage List and are in urgent need of preservation from specific harm, including the onset or threat of war.¹⁷⁹ The World Heritage Committee can, “in case of urgent need,” act on its own initiative to place sites on the danger list, making them eligible for assistance from the World Heritage Fund.¹⁸⁰ The 1972 UNESCO Convention entered into force on December 17, 1975; there are presently 178 state parties, including the United States.¹⁸¹

Three other international agreements related to armed conflict reiterate the privileged position of cultural property. An international conference at Geneva in 1977 produced two Additional Protocols to the 1949 Geneva Conventions. The first relates to international wars,¹⁸² the second to internal conflicts.¹⁸³ Both protocols forbid military actions directed at, or any military use of, “historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.”¹⁸⁴ The conference also passed a resolution urging more states to become parties to the 1954

173. *Id.* pmbl.

174. *Id.* art. 11.

175. Convention on Ownership of Cultural Property, *supra* note 172. A list of the 102 State Parties as of October 3, 2003 is available at http://www.unesco.org/culture/laws/1970/html_eng/page3.shtml.

176. Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 [hereinafter Convention for World Cultural and Natural Heritage], available at http://portal.unesco.org/en/ev.phpURL_ID=13055&URL_DO=DO_TOPIC&URL_SECTION=201.html

177. *Id.* pmbl.

178. *Id.* art. 11(1).

179. *Id.* art. 11(4).

180. *Id.*

181. Convention for World Cultural and Natural Heritage, *supra* note 176.

182. Protocol I, *supra* note 5.

183. Protocol II, *supra* note 5.

184. Protocol I, *supra* note 5, art. 53; Protocol II, *supra* note 5, art. 16.

Hague Convention.¹⁸⁵ As of November 2005, 163 states had ratified or acceded to the First Additional Protocol, and 159 countries were parties to the Second Additional Protocol. The United States is a signatory to both protocols, but has ratified neither.¹⁸⁶ In addition, the Second Protocol to the 1980 Geneva Convention on Certain Conventional Weapons also prohibits “in all circumstances” the use of “booby-traps which are in any way attached to or associated with . . . historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.”¹⁸⁷

Damage to, and grave looting and destruction of, cultural monuments during the Persian Gulf War and the wars in the former Yugoslavia had grabbed international attention in the early 1990s. Iraqi forces plundered the Kuwaiti National Museum, among other cultural institutions, in 1990, and hauled its treasures to Baghdad.¹⁸⁸ In the early 1990s, Croatia and Bosnia were the scene of disastrous cultural losses. The assaults on historic sites, mosques, churches, and museums were not simply an unfortunate sideshow to the crimes committed against human beings: mass rapes, expulsions, torture, and massacres. The razing of cherished sites was part of the ethnic cleansing, designed to erase the physical manifestations of peoples and cultures. Not only would the unwanted groups of people disappear, but so would all traces of their existence and identity. The shelling of the Old City of Dubrovnik, the felling of the historic bridge at Mostar, and the destruction of the Bosnian National Library in Sarajevo, provoked international outrage.¹⁸⁹

“Cultural atrocities” also stimulated demands for examining and strengthening international rules with respect to the protection of cultural property during wars. UNESCO and the Dutch government, responding to international concerns, commissioned and funded a

185. See TOMAN, *supra* note 111, at 26.

186. International Committee of the Red Cross, *International Humanitarian Law—Treaties and Documents by Date*, <http://www.icrc.org/ihl.nsf/INTRO?OpenView> (last visited Nov. 1, 2005).

187. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996), Annexed to the Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects art. 7(1)(i), Oct. 10, 1980, 1342 U.N.T.S. 168, *reprinted in* 35 I.L.M. 1206.

188. William Branigin, *Kuwait's Treasures Vandalized*, WASH. POST, Mar. 6, 1991, at A21.

189. John Chapman, *Destruction of a Common Heritage: The Archaeology of War in Croatia, Bosnia and Hercegovina*, 68 ANTIQUITY 120 (1994); Jerrilynn D. Dodds, *Bridge over the Neretva*, 51 ARCHAEOLOGY 48 (1998); The Secretary-General, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), Annex XI: Destruction of Cultural Property Report, *delivered to the Security Council*, U.N. Doc. S/1994/674/Add.2 (Vol. V) (Dec. 28, 1994).

study.¹⁹⁰ The resulting analysis examined the weaknesses in the 1954 Convention, as these had been thrown into sharp relief by “two armed conflicts: the Second Gulf War, fought in part over the Mesopotamian region that was one of the birthplaces of western civilization, and the conflicts in Yugoslavia, above all the attacks on the undefended World Heritage List Old Town of Dubrovnik, well known to millions of international tourists.”¹⁹¹ The study also called for a variety of measures to strengthen the 1954 treaty. A series of expert meetings convened to take up that charge.¹⁹²

In November 1995, UNESCO sponsored a meeting of the state parties to the 1954 Convention—only the second such meeting since the treaty was signed. Delegates agreed that the war in Yugoslavia in particular illustrated the necessity of improving implementation of the 1954 Convention,¹⁹³ and therefore called for proposals to improve the treaty. Following the 1995 meeting of state parties, the Secretariat received written comments from nine countries, suggesting changes to the Convention. Not surprisingly, a number of the suggestions came from countries affected by the recent wars. Croatia and Slovenia both recommended the removal of the clause creating a military necessity exception to the cultural property protections in the 1954 Convention; Kuwait proposed reconsidering the concept of military necessity in order to expand protections for cultural heritage.¹⁹⁴ The same three states (and others) urged strengthening the sanctions attached to the purposeful destruction of cultural property.¹⁹⁵ Croatia proposed that grave violations be subject to universal jurisdiction, including international tribunals.¹⁹⁶ Slovenia sought to solidify individual responsibility for serious violations.¹⁹⁷ Kuwait suggested that any crime against valuable cultural property be considered a war crime.¹⁹⁸

In 1998, at the request of the states parties, a meeting of

190. Patrick J. Boylan, *Protecting Cultural Property*, 47 MUSEUM INT'L 59 (1995).

191. Patrick J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict* 19, UNESCO Doc. CLT-93/WS/12 (1993).

192. Thomas Desch, *The Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 2 Y.B. INT'L HUMAN. L. 63–68 (1999).

193. UNESCO, *Second Meeting of the High Contracting Parties to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague 1954)*, Paris, Nov. 13, 1995, 2–3, UNESCO Doc. CLT-95/CONF.009/5 (1995).

194. UNESCO, *Meeting of Governmental Experts on the Review of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954*, Paris, Mar. 24–27, 1997, 2–3, UNESCO Doc. CLT-96/CONF.603/INF.4 (1997).

195. *Id.* at 7.

196. *Id.*

197. *Id.*

198. *Id.*

experts laid the groundwork for a diplomatic conference to take place in the first half of 1999. They agreed that the objective of the conference should be neither an amendment to nor a replacement of the 1954 Convention, but rather an optional protocol.¹⁹⁹ The diplomatic conference opened at The Hague on March 15, 1999. The basis for its deliberations was a draft protocol prepared by the UNESCO Secretariat and the government of the Netherlands.²⁰⁰ Delegations representing seventy-four States Parties to the 1954 Convention participated.²⁰¹ In addition, nineteen countries not parties to the 1954 agreement attended the conference, including the United Kingdom and the United States.²⁰² The Second Protocol²⁰³ embodied several notable developments:

1. A clearer definition of military necessity, following the example of Additional Protocol I to the Geneva Conventions, designed to delimit the conditions under which military necessity could be invoked.²⁰⁴
2. A new category of "enhanced protection" for cultural property of exceptional value to humanity, and procedures for registering sites under this rubric.²⁰⁵
3. A set of provisions establishing conditions for individual criminal responsibility and sanctions, along with obligations to prosecute.²⁰⁶
4. Creation of a new Intergovernmental Committee to oversee implementation of the Protocol.²⁰⁷

Article 9 of the Protocol specifies the following obligations

199. UNESCO Executive Board, *Report of the Secretary-General on the Results of the Meeting of Governmental Experts on the Revision of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954*, UNESCO Doc. 155 EX/51 (May 11–13, 1998).

200. UNESCO, Summary Report, Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, Mar. 15–26, 1999.

201. *Id.*

202. *Id.*

203. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 I.L.M. 769 [hereinafter Second Protocol to Hague Convention], available at http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html.

204. *Id.* art. 6.

205. *Id.* arts. 10–14.

206. *Id.* arts. 15–21.

207. *Id.* arts. 24–28; see also Jan Hladík, *Documents: Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, Netherlands (Mar. 15–26, 1999)*, 8 INT'L J. CUL. PROP. 526 (1999).

regarding “protection of cultural property in occupied territory”:

1. Without prejudice to the provisions of Articles 4 and 5 of the Convention, a Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory:

a. any illicit export, other removal or transfer of ownership of cultural property;

b. any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property;

c. any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence.

2. Any archaeological excavation of, alteration to, or change of use of, cultural property in occupied territory shall, unless circumstances do not permit, be carried out in close co-operation with the competent national authorities of the occupied territory.²⁰⁸

Thirty-nine states signed the Second Protocol during the period it was open for signature.²⁰⁹ The twentieth instrument of accession was deposited with UNESCO in December 2003, and the Second Protocol entered into force three months later (March 9, 2004). To date, thirty-four countries have ratified or acceded.²¹⁰ Among the major countries that have neither signed nor acceded to the Second Protocol are China, France, Japan, Russia, the United Kingdom, and the United States.²¹¹

III. INTERNATIONAL LAW AND THE IRAQI NATIONAL MUSEUM, APRIL 2003

At this point, the question is: Did any of this body of international law apply to the U.S. failure to secure the National Museum in Baghdad in April 2003? At first blush, the answer would appear to be no. The United States is a party to the Hague Convention (IV) of 1907. The regulations attached to that Convention, in Article 56, prohibit attacks directed against, or the seizure of, “the property of . . . institutions dedicated to religion . . .

208. Second Protocol to the Hague Convention, *supra* note 203, art. 9.

209. *Id.*

210. *Id.*

211. *Id.*

the arts and sciences,” and forbid “all seizure or destruction of, or willful damage to, institutions of this character, historic monuments, [and] works of art and science.”²¹² These rules restrict the conduct of belligerents vis-à-vis cultural properties, but they impose no positive duty to shield cultural sites from the depredations of others. And, to be sure, the United States was not accused of attacking or damaging the National Museum, or of removing its contents, but of failing to prevent others from vandalizing and looting it.

The 1954 Hague Convention, however, and its Second Protocol (1999), delineate positive obligations to protect cultural monuments in the territory of the enemy. Article 4(3) of the 1954 Convention requires parties to “undertake to prohibit, prevent, and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”²¹³ Article 9 of the Second Protocol is also germane:

1. Without prejudice to the provisions of Articles 4 and 5 of the Convention, a Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory:

a. any illicit export, other removal or transfer of ownership of cultural property²¹⁴

Of course, the United States is not a party to either of these agreements and would, therefore, be under no legal obligation to abide by their provisions. The only other basis for such an obligation would be customary international law.

The argument that the 1954 Hague Convention has achieved the status of customary international law is plausible. Certainly the prohibitions on using cultural sites for military purposes, and on attacking or plundering them, have emerged as norms of customary international law. The more far-reaching obligation to protect such sites from looting and vandalism would be consistent with how international law regarding cultural property has developed over the past fifty years. The United States’ leading role in promoting protections for cultural treasures in wartime, and its consistent avowals of careful compliance with the requirements of the 1954 Convention, support the conclusion that the United States should have recognized a legal obligation to protect the Iraqi National Museum. The remainder of this section explores the arguments

212. *Id.* art. 9.

213. *Id.* art. 4(3).

214. *Id.* art. 9.

supporting this conclusion.

A. *Wartime Protection of Cultural Property as Customary International Law*

The 1907 Hague Convention (IV), including its annexed “Regulations Respecting the Laws and Customs of War on Land,” has long since passed into the realm of customary international law. The 1907 Hague Convention (IV) included prohibitions on seizure of, willful damage to, or destruction of historical monuments, including works of art.²¹⁵ The Judgment of the International Military Tribunal at Nuremberg declared that “by 1939 these rules laid down in the [1907 Hague] convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war.”²¹⁶ By unanimous vote, the UN General Assembly on December 11, 1946, passed Resolution 95(I), which affirmed “the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.”²¹⁷ The UN’s International Law Commission in 1950 adopted a formulation of those same principles.²¹⁸ More recently, the International Court of Justice affirmed that “the provisions of the Hague Regulations have become part of customary law.”²¹⁹

The 1954 Hague Convention, however, is the first and still the primary international treaty specifically devoted to the protection of cultural property in armed conflict. As discussed above, it creates obligations that go beyond those of the 1907 Hague Convention (IV). To date, 113 countries, representing all of the world’s regions, have become parties to the 1954 Convention.²²⁰ In May 2004, the United Kingdom, the only major power besides the United States not yet a party, announced its intention to ratify.²²¹ Other treaties that have

215. Hague Convention (IV), *supra* note 5, art. 56.

216. *Quoted in* ROBERTS & GUELFF, *supra* note 127, at 156.

217. G.A. Res. 95 (I), at 188, U.N. Doc. A/236 (Dec. 11, 1946).

218. International Law Commission of the United Nations (I.L.C.), *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, REPORT OF THE INT’L LAW COMMISSION ON THE WORK OF ITS SECOND SESSION, 5 JUNE TO 29 JULY 1950, at 11–14, U.N. Doc. A/1316 (1950); reproduced in SCHINDLER & TOMAN, *supra* note 117, at 923–24.

219. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶ 89 (July 9).

220. Hague Convention (IV), *supra* note 5.

221. Press Release, U.K. Dep’t for Culture, Media, and Sport, *UK to Ratify Convention Safeguarding Cultural Heritage in War-time* (May 14, 2004), [http://www.culture.gov.uk/follow “press notices” hyperlink](http://www.culture.gov.uk/follow%20press%20notices); then follow “Archive 2004” hyperlink on right; and “May” hyperlink; then follow title hyperlink).

come into effect since the 1954 Convention²²² reaffirm and extend the fundamental principle that humanity as a whole has an interest in preserving cultural treasures.

One indication of the ripening of wartime protections for cultural property into customary law is their adoption into international criminal law. The statutes of both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC) provide for jurisdiction over crimes against cultural property.²²³

The United States supported the creation of the ICTY and has contributed to its work, not least by providing experienced investigators and prosecutors to the ICTY Office of The Prosecutor. Among the crimes falling within the jurisdiction of the ICTY are "seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science"²²⁴

The Tribunal has indicted a number of persons for crimes against cultural property, the most famous being Slobodan Milosevic.²²⁵ The indictment entered against Milosevic with respect to Croatia alleges that he was responsible, with others, for "intentional and wanton destruction and plunder [which] included the plunder and destruction of homes and religious and cultural buildings" ²²⁶ Count 19 of the indictment thus charges Milosevic with "[d]estruction or wilful damage done to institutions dedicated to education or religion, [in] violation of the laws or customs of war,

222. See *supra* Part II.

223. Statute of the International Tribunal art. 3, May 25, 1993, available at <http://www.un.org/icty/basic/statut/statute.htm> ("The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: . . . (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science"); Rome Statute of the International Criminal Court (ICC) art. 8(2), July 1, 1998, entered into force July 1, 2002, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 [hereinafter Rome Statute] available at <http://www.un.org/law/icc/statute/rome.htm> ("For the purposes of this Statute, 'war crimes' means: . . . (b)(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected").

224. Statute of the International Criminal Tribunal for the Former Yugoslavia Annex, art. 3(d), S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), reprinted in 32 I.L.M. 1192 (1993). The amended statute is available at <http://www.un.org/icty/legaldoc-e/index.htm>.

225. For a broad assessment of the practice and jurisprudence of the ICTY with respect to crimes against cultural property, see Hiram Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1 (2001).

226. Prosecutor v. Milosevic, Case No. IT-02-54-T, Second Amended Indictment, ¶ 71 (Oct. 23, 2002), available at <http://www.un.org/icty/indictment/english/mil-2ai020728e.htm>.

[and] punishable under Article 3(d) . . . of the Statute of the Tribunal.”²²⁷ Count 30 of the indictment charges Milosevic with “[d]estruction or wilful damage done to historic monuments and institutions dedicated to education or religion” during the bombardment of the Old Town of Dubrovnik, and mentions the status of that part of the city as a UNESCO World Cultural Heritage Site.²²⁸ The indictment regarding Bosnia accuses Milosevic of “[t]he intentional and wanton destruction of religious and cultural buildings of the Bosnian Muslim and Bosnian Croat communities including, but not limited to, mosques, churches, libraries, educational buildings and cultural centres.”²²⁹ Count 21 again references Article 3(d) of the ICTY Statute.²³⁰

During the still-ongoing Milosevic trial, the defendant, acting as his own counsel, offered arguments that reveal the extent to which the protection of cultural sites in wartime has become a global norm. Milosevic attempted to draw a distinction between religious heritage and cultural heritage. During his questioning of an expert witness called by the prosecutor, Milosevic argued that all sides had leveled the religious buildings of the others during the wars, on a retaliatory basis, and this “reciprocal destruction of religious structures is the religious component of a civil war.”²³¹ In contrast, noted Milosevic, the “destruction of monuments of culture would be tantamount to genocide.”²³² Thus, even Milosevic acknowledged the gravity of crimes against cultural property.

Later in the same session, Milosevic suggested that many of the cultural sites destroyed by Serb forces had been used for military purposes—as “firing positions”—by Bosnian or Croat forces.²³³ Any military use of a cultural property would, of course, terminate its protected status and justify attacks against it. Milosevic made specific reference to the Oriental Institute and the National Library, both located in Sarajevo and both destroyed with their collections by Serb artillery fire.²³⁴ The witness, whom Milosevic was examining,

227. *Id.* ¶ 72.

228. *Id.* ¶¶ 77–83.

229. Prosecutor v. Milosevic, Case No. IT-02-54-T, Amended Indictment, ¶ 42(c) (Nov. 22, 2002), available at <http://www.un.org/icty/indictment/english/mil-ai040421-e.htm>.

230. *Id.* ¶ 42.

231. Prosecutor v. Milosevic, Case No. IT-02-54, Open Session, Transcript, at 23839, ll. 3–5 (July 8, 2003), available at <http://www.un.org/icty/transe54/030708ED.htm>.

232. *Id.* at 23839, ll. 5–6.

233. *Id.* at 23871–72.

234. András J. Riedlmayer, Destruction of Cultural Heritage in Bosnia-Herzegovina, 1992–1996: A Post-war Survey of Selected Municipalities, Report submitted to the Office of the Prosecutor of the International Criminal Tribunal for Yugoslavia 18–19 (2002), available at <http://hague.bard.edu/reports/BosHeritageReport-AR.pdf>.

replied that there had been no evidence that the two structures had been utilized by military forces.²³⁵ The significant point, however, is that invoking an exception to a rule affirms the validity of the rule. Milosevic's attempt to depict the shelling of the Oriental Institute and the Bosnian National Library as justified exceptions to the general rule in fact legitimizes the rule.

A handful of additional prosecutions have resulted in convictions under Article 3 of the ICTY Statute. Bosnian Croat officers Tihomir Blaskic and Dario Kordic were convicted and sentenced for charges that included plunder of public or private property and destruction or willful damage to institutions dedicated to religion or education in Bosnia.²³⁶ Six Bosnian Croat officers have been indicted under Article 39(d) for, among other acts, the deliberate damage to or destruction of a number of mosques in Mostar, plus the demolition of the famous Stari Most bridge in the same city.²³⁷ Serbian officers Pavle Strugar, former lieutenant-general in the Yugoslav Army (JNA), and Miodrag Jokic, former admiral in the Yugoslav Navy, were both tried for their roles in the bombardment of Dubrovnik's historic Old City.²³⁸ Strugar's trial centered on the attacks carried out by the JNA in and around Dubrovnik, focusing especially on the bombardment of the Old Town on December 6, 1991. The Trial Chamber found Strugar guilty on Count 6 of the indictment against him: "Destruction or willful [sic] damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works [of] art and science, a Violation of the Laws or Customs of war, under Article 3 of the Statute."²³⁹ Strugar received a sentence of eight

235. *See id.*

236. Blaskic was convicted on numerous counts under Article 3 and received a single sentence of forty-five years in prison. *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment, at 267–70 (Mar. 3, 2000), available at <http://www.un.org/icty/blaskic/trialc1/judgement/index.htm>. The Article 3 convictions were upheld on appeal, though the verdicts on many of the counts under Article 7 were reversed and the sentence reduced to nine years. *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment, at 257–58 (July 29, 2004), available at <http://www.un.org/icty/blaskic/appeal/judgement/bla-aj040729e.pdf>. Kordic was also convicted under Article 3(d) of the ICTY Statute. *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T, Judgment (Feb. 26, 2001), available at <http://www.un.org/icty/kordic/trialc/judgement/kor-tj010226e.pdf>. The verdicts against Kordic were mostly upheld on appeal. *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Judgment (Dec. 17, 2004), available at <http://www.un.org/icty/kordic/appeal/judgement/index.htm>.

237. *Prosecutor v. Prlic et al.*, Case No. IT-04-74, Indictment, ¶ 116 (Mar. 2, 2004), available at <http://www.un.org/icty/indictment/english/prl-ii040304e.htm>.

238. Vladimir Kovacevic, former captain in the JNA, was indicted along with Strugar. The proceedings against Kovacevic are in the pre-trial stage.

239. *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment, ¶¶ 2, 478 (Jan. 31, 2005), available at <http://www.un.org/icty/strugar/trialc1/judgement/index2.htm>.

years in prison.²⁴⁰

Jokic reached a plea agreement with the prosecutor. The agreement included six counts, the last of which covered “destruction or wilful damage done to institutions dedicated to religion, charity, and education, the arts and sciences, historic monuments and works of art and science.”²⁴¹ In its sentencing judgment, the Trial Chamber declared that:

since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town Damage was caused to more than 100 buildings, including various segments of the Old Town’s walls, ranging from complete destruction to damage to non-structural parts. The unlawful attack on the Old Town must therefore be viewed as especially wrongful conduct.²⁴²

The ICTY has also produced jurisprudence relevant to the status of the 1954 Hague Convention as customary international law. The Appeals Chamber, ruling on a defense appeal in the case against Dusko Tadic regarding the Tribunal’s jurisdiction, addressed the question of subject matter jurisdiction. In assessing the customary rules of international humanitarian law governing both international and internal armed conflicts, the panel of judges declared that customary law and treaty law “mutually support and supplement each other” and that “some treaty rules have gradually become part of customary law.”²⁴³ The judges included Article 19 of the 1954 Hague Convention among the treaty rules attaining the status of customary law.²⁴⁴ That article states that in the event of an armed conflict occurring within the territory of one of the parties, “each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.”²⁴⁵

Those provisions are found in Article 4 of the Convention, which is titled “Respect for Cultural Property.” Article 4 delineates

240. *Id.* ¶ 481.

241. Prosecutor v. Jokic, Case No. IT-01-42/1-S, Sentencing Judgment, ¶ 8 (Mar. 18, 2004).

242. *Id.* ¶ 53 (internal citations omitted).

243. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 98 (Oct. 2, 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.

244. *Id.*

245. Hague Convention (IV), *supra* note 5, art. 19.

the obligations of the parties, including paragraph 3, which requires states to "prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation" of cultural property.²⁴⁶ It follows that, at least in the view of the ICTY Appeals Chamber, the requirement to prevent looting has become part of customary international law. The ICTY Trial Chamber, in its judgment in the *Strugar* case, cited the Appeals Chamber decision in the *Tadic* case, which "explicitly referred to Article 19 of the Hague Convention of 1954 as a treaty rule which formed part of customary international law"²⁴⁷

Following the model established by the Yugoslav Tribunal, the International Criminal Court (ICC) also has jurisdiction over crimes against cultural property. Article 8(2)(b)(ix) of the Statute of the ICC makes subject to prosecution intentional "attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives."²⁴⁸

Finally, recent legal scholarship concludes that at least the key provisions of the 1954 Hague Convention have evolved into customary international law. Some scholars reach that conclusion hesitantly. For example, Joshua Kastenberg concludes that the 1954 Convention is "binding law in most of its provisions."²⁴⁹ Though he does not specify which provisions have become norms of customary law, they would reasonably include the treaty's main, general requirements, which are set forth in Article 4. Victoria Birov similarly argues that "[m]any of the provisions of the 1954 Hague Convention . . . are rapidly achieving the universally binding standard of customary international law."²⁵⁰

Other scholars offer more decisive assessments. For instance, Adam Roberts and Richard Guelff, in their compilation of documents relating to the laws of war, conclude that given the "long-established and general acceptance of the principle of special protection of cultural property . . . this special protection may be viewed as part of customary international law."²⁵¹

Howard Levie's *Code of International Armed Conflict* is an

246. Convention for Protection of Cultural Property, *supra* note 6, art. 19.

247. *Strugar*, *supra* note 239, ¶ 229 (internal citations omitted).

248. Rome Statute, *supra* note 223, art. 8(2)(b)(ix).

249. Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277, 302 (1997).

250. Victoria A. Birov, *Prize or Plunder?: The Pillage of Works of Art and the International Law of War*, 30 N.Y.U. J. INT'L L. & POL. 201, 226 (1998).

251. ROBERTS & GUELFF, *supra* note 127, at 339-40.

attempt to compile “all of the material which . . . could be said to constitute the present-day law of international armed conflict, both conventional rules and those customary rules which have in some manner attained formal, internationally-stated, status”²⁵² Levie’s *Code* thus contains “all of those specific items of the law of war which have some international basis and as to which there are valid reasons for believing that they are (or may be) binding rules which are applicable . . . in all international armed conflicts.”²⁵³ Levie incorporates in his compilation the main provisions of the 1954 Hague Convention, including Article 4(3).²⁵⁴

David Meyer also argues that the basic principles of the 1954 Convention have attained the status of customary international law: “The absence of significant reservations to the 1954 Convention supports its status as customary international law,” at least with respect to general principles (which include Article 4(3)), and the convention may, therefore, be binding on non-parties.²⁵⁵

In short, the jurisprudence of international tribunals and the assessments of international law scholars converge on the conclusion that the key norms embodied in the 1954 Hague Convention—including Article 4—have achieved customary international law status. Still, despite the substantial grounds for regarding the main norms of the 1954 Hague Convention as customary international law, the world’s only superpower remains a non-party to the treaty. The American position thus merits more detailed examination.

B. *What to Infer from the Absence of U.S. Ratification*

Though the United States has not ratified the 1954 Hague Convention, neither has it criticized or objected to any specific provisions. In fact, the reason for the lack of U.S. ratification is instructive. The U.S. delegation played an active role in the diplomatic conference that produced the treaty, and obtained important concessions from other governments. The primary point of contention during the conference was whether or not to include language creating an exception for “military necessity.” The United States argued forcefully in favor of retaining such a clause, without

252. HOWARD S. LEVIE, 1 *THE CODE OF INTERNATIONAL ARMED CONFLICT* xxi (1986).

253. *Id.*

254. *Id.* vol. II, at 554–56.

255. David A. Meyer, *The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law*, 11 B.U. INT’L L.J. 356 (1993); see also *id.* at 349, 356, 387.

which the treaty would be inapplicable to the military.²⁵⁶ The conference voted to include the military necessity exception, recognizing that the United States and other countries would not sign the treaty, much less ratify it, without the exception.²⁵⁷ Thus Article 4, defining the duty to respect cultural property, states that the "obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver."²⁵⁸ Interestingly, the military necessity clause explicitly refers to paragraph 1 of Article 4, which prohibits the military use of, or attacks directed against, cultural property. The military necessity exception clause therefore does not apply to the duty to prevent or halt looting and vandalism, which follows it in paragraph 3. The United States apparently did not insist on qualifying the Article 4(3) requirement. In fact, the United States signed the 1954 Hague Convention at the conclusion of the conference on May 14, 1954.

The United States has not, at the conference or since, expressed objections to the substantive provisions of the Convention. Its reticence about ratification had other grounds related to the Cold War. Those reasons became clear in correspondence between the State Department and Anne Coffin Hanson, president of the College Art Association of America.²⁵⁹ In 1972, Hanson transmitted to President Richard Nixon the Association's resolution urging the U.S. government to submit the 1954 Hague Convention for ratification. The resolution asked for "a full and public explanation of the military and security considerations which have caused the Secretary of Defence to oppose its ratification."²⁶⁰ A reply came from Ronald J. Bettauer, an attorney in the Office of the Legal Adviser in the State Department. Bettauer wrote, "The major difficulty is that adherence to the Convention would seriously limit the options of the United States in the event of nuclear war or even in some cases of conventional bombardment."²⁶¹

256. Conférence Intergouvernementale sur la Protection des Biens Culturels en cas de Conflit Armé, Actes de la Conférence Convoqué par l'Organisation des Nations Unies pour l'Éducation, la Science et la Culture Tenue à La Haye du 21 avril au 14 mai 1954 [Records of the Conference Convened by the United Nations Educational, Scientific and Cultural Organization held at The Hague from 21 April to 14 May 1954] 141-57 (1961). Australia, Ireland, Israel, the Netherlands, Spain, Switzerland, Turkey, and the United Kingdom also spoke in favor of the military necessity clause.

257. *Id.*

258. *Id.*, art. 4(2).

259. The letters are reproduced in JOHN HENRY MERRYMAN & ALBERT E. ELSSEN, *LAW, ETHICS AND THE VISUAL ARTS* 56-57 (3d ed. Kluwer Law International 1998) (1979).

260. *Id.* at 56.

261. *Id.* at 57.

Apparently, the Department of Defense was concerned "that the Kremlin would be designated for special protection to make it immune from [presumably nuclear] attack."²⁶² The Kremlin never did receive that designation. In fact, special protection for the Kremlin was ruled out by Chapter II of the Convention.²⁶³ The Bettauer letter also stated that the United States complied in practice with the Convention's requirements. In other words, the United States did not object to the requirements of the treaty as such, but only to the possibility that becoming a party might later inhibit the United States' ability to conduct nuclear war against the Soviet Union. Of course, the United States would, presumably, only undertake nuclear war in a case of imperative military necessity, and the military necessity clause was already written into the accord. Furthermore, in the event of nuclear war, the destruction of cultural treasures would probably be far down the world's list of concerns.

In the early 1990s, the U.S. government again contemplated ratification of the 1954 Hague Convention. Several changes in the international context led up to the U.S. reconsideration of the treaty:

1. The reduced threat of nuclear war following the collapse of the Soviet Union;

2. Technological developments improving the accuracy of U.S. weapons (laser guided bombs and other "precision" munitions) and reducing the danger of collateral damage;

3. The desire to hold perpetrators accountable for offenses against cultural property in the wars in the ex-Yugoslavia and the Persian Gulf.²⁶⁴

More immediately, the Senate Appropriations Committee in mid-1991 considered reports of damage that American bombing may have inflicted on historic and archaeological sites in Iraq during that year's Persian Gulf War. In its September 1991 Report, attached to the Defense Appropriation Bill for 1992, the Committee asked the Departments of Defense and State jointly to review policies and international treaties relating to the protection of natural and cultural heritage during war. The following January, a Defense-State panel submitted the requested report and informed Congress that the government was reconsidering ratification of the 1954 Hague Convention.²⁶⁵

262. Keith W. Eirinberg, *The United States Reconsiders the 1954 Hague Convention*, 1 INT'L J. CUL. PROP. 27, 28 (1994).

263. See Convention for Protection of Cultural Property, *supra* note 6, ch. 2; see also MERRYMAN & ELSEN, *supra* note 259, at 52.

264. Eirinberg, *supra* note 262, at 28.

265. See *id.* at 28.

President William Clinton transmitted the 1954 Convention to the Senate, for its advice and consent, on January 6, 1999 (along with the 1954 Hague Protocol and the 1977 Protocol II Additional to the Geneva Conventions). The Department of State and the Department of Defense both recommended ratification.²⁶⁶ Before the treaty can come before the Senate for ratification, it must pass through the Committee on Foreign Relations; that committee, however, has so far declined to act on the treaty.²⁶⁷ In short, as of 1999, the White House and the Departments of State and Defense have concluded that nothing in the 1954 Convention posed an obstacle to U.S. ratification.

C. *The United States Has Consistently Affirmed its Acceptance of the 1954 Hague Norms*

Not only has the United States not objected to the provisions of the 1954 Hague Convention, it has repeatedly affirmed that U.S. armed forces comply with the treaty's requirements both in military policy and in practice. Indeed, the United States has consistently promoted international norms protecting cultural property in wartime. It was the first country to establish protections for cultural institutions in its own military regulations, i.e. the Lieber Code. The United States ratified the 1907 Hague Conventions, as well as the Roerich Pact. During World War II, American forces took active measures to protect culturally significant sites in Europe from unnecessary damage, and led the effort to recover artworks plundered by the Nazis and to restore them to their pre-war owners. The United States famously refrained from bombing Kyoto precisely because of its cultural and artistic significance.

Official U.S. statements have affirmed that the United States considers itself legally obliged to conform with the 1954 Hague Convention, and has done so in situations of armed conflict. The 1972 letter from State Department attorney Robert Bettauer, explaining the government's reasons for declining to submit the 1954 Convention for ratification, also stated that the United States did, in practice, conform to the Convention's requirements: "The United States Government has, by its actions, shown itself ready to take all possible measures to provide protection to important cultural

266. U.S. Senate, *The Hague Convention and the Hague Protocol: Message from the President of the United States*, x, 106th Congress, 1st Session, Treaty Document 106-1, Jan. 6, 1999 (U.S. Gov't Printing Office 1999).

267. *Id.*

property Our military instructions are clear in this regard.”²⁶⁸

With respect to military instructions, the Army *Field Manual* on the law of land warfare notes that, in addition to treaties binding on the United States, “the customary law of war is part of the law of the United States.”²⁶⁹ Evidence of custom “may be found in judicial decisions, the writings of jurists, diplomatic correspondence, and other documentary material concerning the practice of States.”²⁷⁰ The *Manual* cites the 1907 Hague Convention (IV) protection of buildings dedicated to religion, art, science, or charitable purposes, historical monuments,” and other locales, and its prohibition of pillage.²⁷¹ The *Manual* also mentions the Roerich Pact protections for cultural institutions, but notes that only the United States and some other American countries are parties to it.²⁷²

In the Persian Gulf War of 1991, U.S. forces had planned in advance to protect Iraqi cultural and archaeological sites (including the National Museum) from the effects of its bombing campaign. During the war, American military officials offered public reassurances that the use of precision bombs and missiles in Iraq would avoid damage to Iraq’s cultural heritage. General Colin Powell himself (then Chairman of the Joint Chiefs of Staff) averred that American aircraft would not attack cultural and religious sites.²⁷³ According to W. Hays Parks (then Chief of the International Law Branch of the International and Operational Law Division and Special Assistant for Law of War Matters, Office of the Judge Advocate General of the Army), the U.S. military considered the 1954 Hague Convention applicable to the Persian Gulf War. Parks noted that though the Convention was legally binding on only some parties to the conflict (including Iraq, Kuwait, Egypt, Saudi Arabia, and France), “the treaty has been fully implemented by U.S. military forces for more than three decades, and Canadian, British, and U.S. military personnel receive training on its provisions.”²⁷⁴ Furthermore, he declared, “the treaty was followed by all coalition forces throughout the Gulf War.”²⁷⁵

268. MERRYMAN & ELSÉN, *supra* note 259, at 56–57.

269. U.S. DEP’T OF ARMY, FIELD MANUAL 27–10, THE LAW OF LAND WARFARE 178, ¶ 57 (1956), available at <http://www.globalsecurity.org/military/library/policy/army/fm/27-10/index.html> (last visited Apr. 1, 2005).

270. *Id.* ¶¶ 6–7.

271. *Id.* ¶¶ 45, 47.

272. *Id.* at ¶ 57.

273. Larry Tye, *Bombings Endanger Ancient Sites*, THE TORONTO STAR, Feb. 3, 1991 (Sunday Edition), at C6.

274. W. Hays Parks, *The Gulf War: A Practitioner’s View*, 10 DICK. J. INT’L L. 393, 413 (1992).

275. *Id.*

In its final report to Congress on the Persian Gulf War, the Department of Defense reviewed the laws of war it considered applicable to that conflict. The 1954 Hague Convention was among the treaties listed.²⁷⁶ The report noted that Canada, Great Britain, and the United States were not parties to the convention, but also declared that “the armed forces of each receive training on its provisions, and the treaty was followed by all Coalition forces in the Persian Gulf War.”²⁷⁷ Indeed, “U.S. and Coalition operations in Iraq were carefully attuned to the fact those operations were being conducted in an area encompassing ‘the cradle of civilization,’ near many archaeological sites of great cultural significance.”²⁷⁸ Military planners weighed laws of war requirements in making targeting decisions: “Some targets were specifically avoided because the value of destruction of each target was outweighed by the potential risk to nearby civilians or, as in the case of certain archaeological and religious sites, to civilian objects.”²⁷⁹ The Department of Defense report also referred to a widely reported instance in which Iraq had parked two MiG fighter aircraft close to the ancient temple of Ur, apparently in an effort to protect them from attack. The report declared:

While the law of war permits the attack of the two fighter aircraft, with Iraq bearing responsibility for any damage to the temple, Commander-in-Chief, Central Command (CINCCENT) elected not to attack the aircraft on the basis of respect for cultural property and the belief that positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple. Other cultural property similarly remained on the Coalition no-attack list, despite Iraqi placement of valuable military equipment in or near those sites.²⁸⁰

In summary, the report declared: “Since U.S. military

276. U.S. DEP'T DEF., *Final Report to Congress: Conduct of the Persian Gulf War, Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991*, Pub. L. No. 102-25, Appendix O: The Role of the Law of War, 605-06 (Apr. 1992), available at <http://www.ndu.edu/library/epubs/cpgw.pdf> (last visited Aug. 1, 2005).

277. *Id.* at 606.

278. *Id.* at 610.

279. *Id.* at 611-12.

280. *Id.* at 615.

doctrine is prepared consistent with U.S. law of war obligations and policies, the provisions of Hague IV, GC [Geneva Conventions], and the 1954 Hague Convention did not have any significant adverse effect on planning or executing military operations.”²⁸¹ In contrast, the United States accused Iraq of committing various war crimes during its 1990 invasion of Kuwait. Among the war crimes alleged by the United States was “looting of cultural property, in violation of the 1954 Hague Cultural Property Convention.”²⁸²

Subsequently, a research note published in *Army Lawyer*, discussing the 1954 Hague Convention, pointed out that “although the United States has not yet ratified this treaty, U.S. forces comply with the Convention during armed conflict.”²⁸³ After making reference to the Geneva Additional Protocols I and II, the same note declares that “the duty of armed forces to protect cultural property applies to both international and internal armed conflicts” and adds, “[t]his universal application, during both types of armed conflict, supports the development of the principle as a fundamental principle of the law of war.”²⁸⁴ In other words, an analysis by a U.S. Army lawyer depicts the 1954 Hague Convention protections for cultural property as part of the basic laws of war, universally applicable.

Finally, in his letter transmitting the 1954 Convention to the Senate, President Clinton declared that U.S. “military policy and the conduct of operations are entirely consistent with the Convention’s provisions.”²⁸⁵ The United States, in other words, by incorporating the Convention’s provisions in its military regulations, had already acknowledged the obligations entailed by the 1954 Convention; furthermore, the United States had adhered to those obligations in practice. The State Department letter accompanying President Clinton’s message also noted that “U.S. military forces have not only followed but exceeded [the Convention’s] terms in the conduct of military operations.”²⁸⁶ The State Department pointed out that the United States had long “recognized special protection for cultural property in armed conflict,” mentioning the Lieber Code.²⁸⁷

281. *Id.* at 611.

282. *Id.* at 621.

283. Larry D. Younger, Jr., *Principle 6: Protection of Cultural Property During Expeditionary Operations Other Than War*, ARMY LAW. 25–26 (Mar. 1999).

284. *Id.* at 26–27.

285. U.S. Senate, *Hague Convention and the Hague Protocol: Message from the President*, *supra* note 266, at iv.

286. *Id.* at vii.

287. *Id.*

D. *The United States Implicitly Recognized a Reasonable Expectation of Protection for the Iraqi National Museum*

Despite Rumsfeld's clumsy and uncomprehending reaction to international outrage over the American failure to protect the National Museum, other U.S. officials did implicitly acknowledge that there was a reasonable expectation that U.S. forces would secure the museum. For instance, General Myers, at the Pentagon news briefing of April 15, 2003, directly contradicted Secretary Rumsfeld:

Q: But weren't you urged specifically by scholars and others about the danger to that museum? And weren't you urged to provide a greater level of protection and security in the initial phases of the operation?

Sec. Rumsfeld: Not to my knowledge. It may very well have been

Gen. Meyers: [W]e did get advice on archaeological sites around Baghdad and in fact I think it was the Archaeological—American Archaeological Association—I believe that's the correct title—wrote the Secretary of some concerns. Those were passed to Central Command²⁸⁸

In fact, both private groups and a Defense Department team had explicitly warned the U.S. military of the need to protect key cultural and archaeological sites. The Pentagon's own agency for supervising the reconstruction of Iraq, the Office of Reconstruction and Humanitarian Assistance (OHRA), had listed sixteen key sites that "merit securing as soon as possible to prevent further damage, destruction and or pilferage of records and assets."²⁸⁹ First on the list was the Central Bank, and second was the National Museum, looting of which would cause "irreparable loss of cultural treasures of enormous importance to all humanity."²⁹⁰ The Oil Ministry was last on the list. The officer in charge of the ORHA, General Jay Garner, was reportedly "livid" after the lootings.²⁹¹ One unidentified OHRA official complained, "We asked for just a few soldiers at each building or, if they feared snipers, then just one or two tanks The tanks were doing nothing once they got inside the city, yet the

288. U.S. DEP'T DEF., *News Transcript: DoD News Briefing—Secretary Rumsfeld and Gen. Myers* (Apr. 15, 2003), <http://www.defenselink.mil/transcripts/2003/tr20030415-secdef0107.html> (last visited Dec. 9, 2004).

289. The ORHA warnings were contained in documents seen by reporters for *The Observer* (London). Paul Martin, Ed Vulliamy & Gaby Hinsliff, *After Saddam: US Army was Told to Protect Looted Museum*, *THE OBSERVER* (London), Apr. 20, 2003, at 4.

290. *Id.*

291. *Id.*

generals refused to deploy them, and look what happened.”²⁹² U.S. commanders involved in the invasion could have argued that U.S. troops were under no obligation to secure the museum. That was not their response. Instead, their defense against the criticism was that combat operations took precedence over protecting the museum.²⁹³ But that rationale rings hollow. After all, U.S. forces had moved immediately, during the same period (April 10–12) to secure the Oil Ministry in Baghdad with dozens of troops equipped with armored vehicles. Certainly, a smaller contingent could have secured the museum.

Clearly, the United States had prepared plans for securing key sites in Baghdad. More generally, American officials had repeatedly predicted a rapid victory, which necessarily implied an expectation that U.S. forces would quickly be involved in responsibilities related to the occupation of Iraq. In fact, coalition forces involved in the invasion moved immediately to secure important infrastructure, especially the oil fields and related facilities and terminals. In short, it was no surprise when the United States quickly found itself in possession of Baghdad; American officials expected and planned for that outcome. The failure to protect the National Museum thus cannot be written off as an unavoidable consequence of war. Given the swift securing of the Oil Ministry, the claim that similar provision for the museum was beyond American capacity simply is not credible.

CONCLUSION

Analogizing cultural treasures to physical infrastructure is quite instructive. The historic and artistic treasures of a country are its cultural infrastructure. They are palpable pieces of its heritage, traditions, and identity, connecting its people one to another. The war in Bosnia included the destruction of libraries, archives, mosques, and historic buildings precisely because for the Serbs, ethnic cleansing meant not only removing people but also erasing the physical embodiments of their history and culture. The international outrage over cultural atrocities—like the shelling of Dubrovnik, the destruction of the bridge at Mostar, the burning of the national library in Sarajevo—demonstrated that outsiders also perceived the cultural dimension of ethnic cleansing.

292. *Id.*

293. CHANNEL NEWSASIA, *US Rejects Charges Military to Blame for Looting at Baghdad Museum*, *supra* note 55.

The clear trend in international law has been to reaffirm and expand protections for cultural property. International treaties enunciate the common interest of international society in preserving historical, architectural, and artistic treasures (the 1970 UNESCO Convention, the 1972 Convention for the Protection of the World Cultural and Natural Heritage). A substantial body of treaty law applies specifically to the protection of cultural property in war: the 1907 Hague Convention (IV), the Roerich Pact, the 1954 Hague Convention and its Protocols, and the 1977 Protocols Additional to the Geneva Conventions. The basis for that protection has likewise expanded. Cultural treasures enjoy privileged status, meriting protective measures, not just because they are vital to the heritage of specific peoples and countries, but because (in the words of the 1954 Convention) "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind."²⁹⁴ Given this trend, the presumption should be in favor of greater, not more restrictive, obligations to protect cultural property in wartime.

The analysis of this Article justifies the conclusion that the central provisions of the 1954 Hague Convention, including the obligation to prevent or halt looting of or vandalism to cultural property, have achieved the status of customary international law. The 1954 Hague Convention presently has 113 state parties, representing all regions of the world. The only other major power not a party to the treaty, the United Kingdom, announced in May 2004 its intention to ratify. The British government noted that the United Kingdom had signed but not ratified the Convention in 1954 because of "issues surrounding interpretation and implementation."²⁹⁵ The Second Protocol to the 1954 Convention, signed in 1999, had "remedied these defects and . . . made it possible for the U.K. to ratify the treaty."²⁹⁶ Finally, as noted above, recent scholarship converges on the assessment that the key provisions of the 1954 Hague Convention have achieved the status of customary international law.²⁹⁷

The remaining questions have to do with the relationship of the United States to the 1954 Convention. In principle, it would be possible for the treaty to develop into custom, binding on non-parties, even without the consent of one or a few of the major powers. However, given the position of the United States as the world's sole superpower, additional weight must be given to the U.S. stance.

294. Hague Convention (IV), *supra* note 5, pmbl.

295. U.K. Dep't for Culture, Media, and Sport, *UK to Ratify Convention Safeguarding Cultural Heritage in War-time*, *supra* note 221.

296. *Id.*

297. *Supra* notes 164, 249–50, 255.

Even by that more demanding standard, there is a plausible case that the United States has in effect accepted that the key norms established by the Convention are legally binding. The principal supports for that argument are the following:

1. The United States was the first country to codify protections for cultural property in its military regulations, via the Lieber Code (1863).

2. The United States ratified subsequent treaties establishing international rules for the protection of cultural property in war (1907 Hague Convention, 1933 Roerich Pact).

3. The United States has participated as a state party in other treaties expanding international legal protections for cultural property generally, not just in wartime (1970 UNESCO Convention, 1972 World Heritage Convention).

4. The United States has never objected to specific obligations embodied in the 1954 Hague Convention.

5. The consideration that impeded U.S. ratification (that the Convention might hinder the conduct of nuclear war) has faded to virtual insignificance in the post-Cold War era.

6. Recognizing the changed context, the U.S. president in 1999 submitted the 1954 Convention for ratification, with the endorsement of the Departments of State and Defense.

7. The United States has consistently taken active measures in wartime to safeguard cultural treasures. In World War II, Fine Arts officers in Europe worked to shield significant sites from damage and led the efforts to repatriate works of art plundered by the Nazis. The United States participated in the Nuremberg prosecutions, which produced convictions for cultural property crimes. In the 1991 Persian Gulf War, U.S. war planners avoided targeting objectives that might have entailed collateral damage to sites of cultural importance.

8. The U.S. Department of Defense affirmed that U.S. military planning was consistent with the laws of war and that international treaties, including specifically the 1954 Hague Convention, did not impede U.S. military operations.²⁹⁸ This amounts to recognition that the U.S. military considers itself bound by the 1954 Hague Convention with respect to the conduct of war.

If American practice amounts to an acceptance of the obligations contained in the key portions of the 1954 Hague Convention, i.e. Article 4, "Respect for Cultural Property," then it

298. U.S. DEP'T DEF., *Final Report to Congress*, *supra* note 276, at 611.

follows that at least those rules have attained the status of customary international law. Even if that argument is plausible but not decisive, other inferences are still viable. First, the norm expressed in the 1954 Hague Convention, Article 4(3), that states must act to prevent or halt the theft or misappropriation of, or vandalism to, cultural property, is at a minimum consistent with the development of international law over the past several decades. The duty to protect fits the value stream that has produced rules that prohibit states from plundering, damaging, or destroying cultural treasures. It is but a short step from that prohibition to a positive duty to prevent or halt those same depredations by others, subject to reasonable conditions of feasibility and cost.

Second, that short step toward a duty to protect is the next one that international law on wartime protection of cultural property should take. In a secularizing world, historical, cultural, and artistic monuments are akin to temples. International rules recognize that humanity's shared heritage is, in some sense, sacred, and worthy of protection by all.

Finally, even if the American failure to protect the Iraqi National Museum did not violate an obligation under international law, it will almost certainly play a catalytic role in the next stage of development of international norms. Events that provoke universal outrage tend to provoke demands for strengthening and clarifying the rules. The cultural losses of World War I led to the Roerich Pact. Nazi plundering gave way to Nuremberg and the 1954 Hague Convention. The cultural atrocities in the former Yugoslavia triggered the process that produced substantial improvements on the 1954 Convention, in the form of its Second Protocol, as well as prosecutions at the ICTY for crimes against cultural property. If, in some future war, a cultural treasure like the Iraqi National Museum stands vulnerable, all parties should remember Baghdad in April 2003, and recognize a duty to protect it.