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Citation: 37 Geo. J. Int'l L. 245 2005-2006



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## ARTICLES

# FROM BAMİYAN TO BAGHDAD: WARFARE AND THE PRESERVATION OF CULTURAL HERITAGE AT THE BEGINNING OF THE 21ST CENTURY

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\* Professor, DePaul University College of Law. I would like to thank Heather Wallack and Nancy Datres for their research assistance in completing this Article. An early version of this Article was presented at the Conference of the Istanbul Initiative, Is There a Future for Our Past?, Bilgi University, Istanbul, in June 2004.

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In just over two years, the world witnessed two crises that led to the destruction of cultural monuments, sites, and objects that are universally recognized as embodiments of the world's cultural heritage. In March 2001, the Taliban, who at that time were the rulers of Afghanistan, set about the intentional destruction of two monumental Buddha statues that had been carved into the cliffs at Bamiyan.<sup>1</sup> The exact date they were carved is not known, but it is estimated to have been in about the sixth century. These were the two largest known representations of the Buddha, one of which once stood at fifty-eight meters and the other at thirty-eight meters. These carvings had endured, despite earlier attempts to destroy them, for more than fourteen centuries.<sup>2</sup>

The destruction of the Bamiyan Buddhas, which was preceded by years of warfare and anarchy, was merely shorthand for the far more extensive cultural devastation wreaked upon Afghanistan by the Taliban.<sup>3</sup> Afghanistan was the Central Asian crossroads and part of the Silk Road throughout much of ancient and medieval history; it was the location of sites and monuments of the Hellenistic, Gandharan, and Persian, as well as Islamic, cultures.<sup>4</sup> These sites had yielded wondrous artistic creations representative of these civilizations. The Kabul Mu-

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1. David Bosco, *Waking the Buddha*, *ARCHAEOLOGY*, Jan.-Feb. 2005, at 18; KEVIN CHAMBERLAIN, *WAR AND CULTURAL HERITAGE* 3 (2004).

2. Barry Bearak, *Over World Protests, Taliban Are Destroying Ancient Buddhas*, *N.Y. TIMES*, Mar. 4, 2001, at A10.

3. For the history of archaeology in Afghanistan and the impact of war on Afghan cultural heritage over the past twenty-five years, see Abdul Wasey Feroozi, *The Impact of War upon Afghanistan's Cultural Heritage*, Statement Presented at the 105th Annual Meeting of the Archaeological Institute of America (Jan. 3, 2004), available at [http://www.archaeological.org/pdfs/papers/AIA\\_Afghanistan\\_address\\_lowres.pdf](http://www.archaeological.org/pdfs/papers/AIA_Afghanistan_address_lowres.pdf).

4. Barbara Crossette, *The World; Once More at the Crossroads of History*, *N.Y. TIMES*, Oct. 21, 2001, at D16; Celestine Bohlen, *Afghan Art Dispersed by the Winds of War; A Nation Loses Its Heritage to Smugglers and Dealers*, *N.Y. TIMES*, Nov. 1, 2001, at E1.

seum housed an extensive collection of antiquities including gold and silver coins, the Begram ivories, the Bactrian gold treasures, and a unique collection of images of the Buddha.<sup>5</sup> Others, of course, were still buried in the ground, awaiting eventual excavation.

Since 1979, these cultural repositories had suffered extensively at the hands of Soviet occupiers, the mujahedeen, and the Taliban and as a result of the general lawlessness and lack of effective civil authority.<sup>6</sup> The museum had been attacked and looted numerous times,<sup>7</sup> although it was later discovered that much of the museum's collection, including the Bactrian hoard of gold objects excavated by the Soviets in the late 1970s, was safely hidden in the palace complex.<sup>8</sup> The final indignity was the Taliban's destruction of all works of art that contained human images, including the Bamiyan Buddhas, because they were considered to be an affront to Islam.<sup>9</sup>

But even that was not enough. While the Taliban were routed from Afghanistan in October and November of 2001 by U.S. forces in the wake of the September 11th attacks, much of Afghanistan has now returned to the control of warlords who permit the looting of sites.<sup>10</sup> Lawlessness, lack of centralized civil authority, and economic poverty are now the accepted recipe for cultural heritage destruction—

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5. See Bohlen, *supra* note 4.

6. *Id.*; see also Andrea Cunning, *The Safeguarding of Cultural Property in Times of War & Peace*, 11 TULSA J. COMP. & INT'L L. 211, 233-35 (2003).

7. Nancy Hatch Dupree, *Museum Under Siege*, ARCHAEOLOGY, Apr. 20, 1998, <http://www.archaeology.org/online/features/afghan/index.html>.

8. Pat McDonnell Twair, *American Archaeologist Authenticates Afghanistan's Recovered National Treasures*, WASHINGTON REPORT ON MIDDLE EAST AFFAIRS, May-June 2005, at 42; Carlotta Gall, *2,000-Year-Old Heritage Narrowly Escaped the Taliban*, N.Y. TIMES, June 24, 2004, at E1; Carlotta Gall, *Afghan Artifacts, Feared Lost, Are Discovered Safe in Storage*, N.Y. TIMES, Nov. 18, 2004, at A7.

9. Barry Bearak, *Afghan Says Destruction of Buddhas Is Complete*, N.Y. TIMES, Mar. 12, 2001, at A4. The Taliban carried out these destructions despite the protest of the international community. See, e.g., Cunning, *supra* note 6, at 234-35. In October 2003, UNESCO adopted its Declaration concerning the Intentional Destruction of Heritage, which is available at [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=17126&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=17126&URL_DO=DO_TOPIC&URL_SECTION=201.html). The international conventions concerning protection of cultural property during armed conflict did not apply as the Taliban's actions were not of an international character and were not carried out during warfare. This illustrates some of the shortcomings of the current legal regime.

10. See, e.g., Feroozi, *supra* note 3 (detailing with photographs the looting at such Afghan sites as Ai Khanum, Balkh, Tepe Zargaran, Robatak, Samangan-Haibak, and Surkh Kotal); Norimitsu Onishi, *A Nation Challenged: The New, Old Order; Afghan Warlords and Bandits Are Back in Business*, N.Y. TIMES, Dec. 28, 2001, at B1; Neil Brodie, *Spoils of War*, ARCHAEOLOGY, July-Aug. 2003, at 16, 16-17.

particularly the looting of unexcavated archaeological sites.<sup>11</sup> This is the most devastating type of cultural loss—not only are objects lost to history, but the contexts in which those objects were embedded are also permanently lost.

Just two years after the Bamiyan Buddha destructions, in March 2003 the United States launched the Second Gulf War in Iraq against Saddam Hussein's regime. The study of the fate of cultural heritage in Iraq is on-going and much is not yet known. However, it is possible to: (1) make a preliminary assessment of the effect of war on Iraq's cultural heritage; (2) assess the efficacy of existing international and national legal instruments that are intended to protect cultural heritage in a time of war; and (3) propose needed modifications to existing law so that more effective protection can be provided in the future.

This Article will first outline the development of the law of warfare as it applies to cultural sites and movable cultural property. It will then recount, to the extent possible, what happened to Iraq's cultural heritage, both during and in the aftermath of the war. Finally, this Article will attempt a preliminary assessment of how the war and the occupation of Iraq by the coalition forces were conducted in light of international controls on the conduct of war intended to protect cultural heritage. This section will also consider legal responses to the situation in Iraq as part of both the international and the national legal regimes of several market nations and will include an evaluation of the international conventions intended to protect cultural property during peace as well as during war.<sup>12</sup> This Article will conclude with a proposal for a new protocol to the 1954 Hague Convention on the Protection of

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11. Brodie, *supra* note 10, at 17 (describing the looting of other national museums during time of war and civil unrest, including the national museums of Somalia in Mogadishu and Hargeysa, the Dépôt de la Conservation d'Angkor in Cambodia, the National Museum of Beirut, as well as at archaeological sites in these countries).

12. Cherif Bassiouni recognized more than twenty years ago that a division of the law intended to protect cultural property into the conventions that address cultural property during time of war and those that address cultural property in time of peace is an artificial dichotomy. He wrote:

The distinction is no longer helpful or useful because the question concerns not the context, but the object of the protection. Since archaeological, national, historical, and other property of national and cultural heritage are the intended objects of international protection, there is no conceptual difference in the legal nature of the protection. The differences concern the types of protective measures and sanctions which should apply, such as those measures applicable to individuals acting in their private or personal capacity, and those applicable to states and individuals acting in their official capacity or pursuant to state-sponsored policy. The applicable conventions do not make

Cultural Property in the Event of Armed Conflict. These modifications are intended to take account of both the modern conduct of warfare and occupation, and our current understanding of cultural heritage preservation.

I. THE HISTORY OF THE LAW OF WARFARE REGARDING CULTURAL HERITAGE SITES AND OBJECTS

A. *Early History*

The looting of art works has a long history, going back to Roman times and probably earlier. In ancient times and in the Middle Ages, the taking of war booty was considered a normal aspect of the conduct of war and often served as a means of compensating both soldiers and military leaders.<sup>13</sup> However, in the Roman period, this viewpoint was tempered by an understanding that at least sacred sites and works of art that were dedicated to religious purposes should be spared.<sup>14</sup> In addition, the Romans believed that a sense of proportionality should limit the amount of plunder taken and leaders should not personally enrich themselves to an excessive degree. For example, according to Professor Margaret Miles, the Roman historian Polybius, in the second century B.C., questioned excessive plundering and commented on Rome's actions after the siege of Syracuse:

The Romans, then, decided . . . to transfer all these objects to their own city and leave nothing behind. As to whether in doing so they acted rightly and in their own interest or the reverse, there is much to be said on both sides, but the more weighty arguments are in favor of their conduct having been wrong then and still being wrong . . . . At any rate these remarks will serve to teach all those who succeed to empire, that they should

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such distinctions, but reflect the very questionable historical division of the international law of war and peace.

Cherif Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYRACUSE J. INT'L L. & COM. 281, 287 (1983). While this Article will attempt to meld the law of war and the law of peace as applied to cultural property, particularly movable cultural objects, it will begin in the traditional fashion by focusing on the development of the law of war.

13. See JIRÍ TOMAN, *THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT* 3 (1996); Bassiouni, *supra* note 12, at 287 n.18.

14. TOMAN, *supra* note 13, at 4.

not strip cities under the idea that the misfortunes of others are an ornament to their own country.<sup>15</sup>

This theme was greatly elaborated by Cicero in his prosecution, in 70 B.C., of Gaius Verres, the governor of Sicily, for corruption, including excessive pillage of both private and publicly dedicated religious works of art. Cicero distinguished between ordinary war booty (*spolia*), which a conqueror was free to take, and illegal removal of art and architectural decoration (*spoliatio*).<sup>16</sup> This notion was perpetuated in the writings of Livy and Pausanias as well.<sup>17</sup> Another theme found in Cicero's Verrine orations, as well as in Pliny's writings, is the distinction between the good uses of art (for public, commemorative, and religious purposes) and bad uses of art (for private, consumptive, and decadent purposes).<sup>18</sup>

Cicero's writings were known during the Middle Ages and Renaissance. The Verrine orations became a staple of early travelers of the 16th century, particularly those who went to Sicily.<sup>19</sup> In his work published in 1553, international law commentator Jacob Przyluski stated that works of a religious, literary, or artistic nature should be protected.<sup>20</sup> Justin Gentilis, writing at the end of the 17th century, held a similar view,<sup>21</sup> and the Peace of Westphalia of 1648 included provisions for the restitution of cultural objects.<sup>22</sup> On the other hand, the legal right to claim prizes was perpetuated by the founder of modern international law, Hugo Grotius, writing in the early and mid-17th century.<sup>23</sup>

In 1758, the Swiss jurist Emmerich de Vattel drew a distinction

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15. Translated in Margaret M. Miles, *Cicero's Prosecution of Gaius Verres: A Roman View of the Ethics of Acquisition of Art*, 11 INT'L J. CULTURAL PROP. 28, 30-31 (2002); see also TOMAN, *supra* note 13, at 4.

16. Miles, *supra* note 15, at 31.

17. *Id.*

18. *Id.* at 37.

19. See *id.* at 38-39.

20. TOMAN, *supra* note 13, at 4.

21. *Id.* at 5.

22. *Id.* This followed the looting of Prague by Queen Christina of Sweden. CHAMBERLAIN, *supra* note 1, at 7.

23. Miles notes that Hugo Grotius, one of the earliest writers on international law, did not follow the earlier views of Cicero, Livy and Pausanias. See Miles, *supra* note 15, at 39; CHAMBERLAIN, *supra* note 1, at 7.

between cultural objects and legitimate war booty.<sup>24</sup> By the end of the 18th century, Edmund Burke referred to Cicero's prosecution of Verres as an example of an attempt to eradicate greed and corruption.<sup>25</sup> It can be assumed that the British elite was familiar with the Verres prosecution; echoes of it may also be found in Byron's campaign against Elgin's taking of the Parthenon sculptures and their subsequent purchase by Parliament for the British Museum.<sup>26</sup>

The modern history of the treatment of cultural objects can be traced to the Napoleonic wars and their aftermath. Napoleon adopted a new justification for his widespread usurpation of works of art from throughout Europe in contrast to earlier appropriations of artistic and cultural objects as the spoils of war. In pursuit of his dream of re-creating Paris as the "new Rome,"<sup>27</sup> Napoleon moved Italian and Roman art works, including the Apollo Belvedere, the Laocoon, and the Discobolus from the Vatican and Capitoline museums en masse to Paris. He also relocated Renaissance paintings, mineral and natural history collections, valuable Vatican manuscripts, and even animals from zoos.<sup>28</sup> His justification for cultural looting was quite different from those used in the past and was based on a belief in the superiority of the French nation.<sup>29</sup> However, Napoleon's actions were not without criticism, even within contemporary France. The French artist and

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24. Miles, *supra* note 15, at 40; Bassiouni, *supra* note 12, at 288. De Vattel singled out for protection "buildings . . . which are an honour 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." See TOMAN, *supra* note 13, at 5.

25. Miles, *supra* note 15, at 40-41.

26. *Id.* at 41.

27. Napoleon's actions and the attitude of the French were matched by Lord Elgin's appropriation of the Parthenon sculptures from Athens and their eventual acquisition by Parliament for the British Museum. Part of Elgin's motivation was to prevent the French from acquiring the sculptures and was thus part of the rivalry between France and England. The literature on the Parthenon sculptures from the perspectives of art history, cultural history and legal history is extensive. See, e.g., WILLIAM ST. CLAIR, LORD ELGIN AND THE MARBLES (1998); William St. Clair, *The Elgin Marbles: Questions of Stewardship and Accountability*, 8 INT'L J. CULTURAL PROP. 391 (1999); Timothy Webb, *Appropriating the Stones: The "Elgin Marbles" and the English National Taste*, in CLAIMING THE STONES, NAMING THE BONES: CULTURAL PROPERTY AND THE NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY 51 (Elazar Barkan & Ronald Bush eds., 2002); John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985).

28. Bassiouni, *supra* note 12, at 288; Cecil Gould, *Trophies of Conquest*, in JOHN HENRY MERRYMAN & ALBERT ELSEN, LAW, ETHICS AND THE VISUAL ARTS 2-5 (3d ed. 1998). Napoleon attempted to legitimate many of these appropriations by inserting them into the peace treaties he negotiated. *Id.*

29. TOMAN, *supra* note 13, at 6-7. This justification is summarized in a petition presented to Napoleon in 1796 and signed by many of the great French artists of the day. The petition stated:



architectural theorist Quatremère de Quincy severely criticized Napoleon's appropriations, comparing him to Verres. Quatremère "believed that the best art had a universal quality and therefore could not be possessed but ought to be held in the original context in which it was nurtured."<sup>30</sup>

While Napoleon's approach was a reactionary one that harkened back to earlier views concerning the status of art works during war, a nearly contemporary and little-known case from the time of the War of 1812 illustrates the more prevalent view.<sup>31</sup> A ship, the *Marquis de Somerueles*, was carrying art works from Italy to the newly founded Academy of Arts in Philadelphia. The ship was seized by the British and taken to a court in Nova Scotia where the judge held that the ship's cargo should be freed and permitted to proceed to Philadelphia. In his opinion, the judge first denigrated Napoleon for his seizure of art works and pointed out that the British should act in a superior manner.

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The Romans, once an uncultivated people, became civilized by transplanting to Rome the works of conquered Greece . . . . Thus . . . the French people . . . naturally endowed with exquisite sensitivity will . . . by seeing the models from antiquity, train its feeling and its critical sense. The French Republic, by its strength and superiority of its enlightenment and its artists, is the only country in the world which can give a safe home to these masterpieces. All other Nations must come to borrow from our art, as they once imitated our frivolity.

See MERRYMAN & ELSÉN, *supra* note 28, at 5. We see in this statement the enduring justifications for the looting of cultural objects. This justification is now often referred to as the "rescue narrative" because the appropriator believes itself to be acting out of altruistic motives in saving the cultural objects. First, the justification focuses exclusively on the benefits that will accrue to the individual or nation by taking possession of the cultural objects; second, at the same time, it asserts a right to the object based on a moral or intellectual superiority. The third element of this justification is an expression of altruism—because the possessor has a greater ability to care for the object, the possessor is, in fact, not acting primarily for its own benefit but rather for the benefit of everyone else (all humanity), including the original owner. Hence, we see the rescue narrative at work—the act of looting is done for the benefit of others, not just the looter. *Id.* Bassiouni commented, "Napoleon reasoned that all Europeans shared a common heritage, but that France was the most appropriate center for the great works of art." Bassiouni, *supra* note 12, at 288 n.22. This demonstrates that the phrase "common heritage" can be taken to mean different things and can be misinterpreted as granting license to theft and plunder. The rescue narrative was revived in reaction to the looting of the Iraq Museum in Baghdad and the Bamiyan Buddha destructions. See, e.g., James Cuno, *The Whole World's Treasures*, BOSTON GLOBE, March 11, 2001, at E7; John Tierney, *Did Lord Elgin Do Something Right?*, N.Y. TIMES, Apr. 20, 2003, § 4, at 10.

30. Miles, *supra* note 15, at 42.

31. The *Marquis de Somerueles*, [1813] Stewart's Vice-Admiralty Reports 482 (Can.), reprinted in John Henry Merryman, *The Marquis de Somerueles*, 5 INT'L J. CULTURAL PROP. 319 (1996); see also Bassiouni, *supra* note 12, at 288 n.22.

Judge Croke then stated that the art works “are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.”<sup>32</sup> Ironically, the judge also saw that it was the role of Britain to help the young American nation (despite the war between them) because, once the United States was educated in the arts, it would become a worthwhile ally and partner with Britain.

At the end of the Napoleonic Wars, the Duke of Wellington and Lord Castlereagh forced the French to give up many of the art works taken from other European nations.<sup>33</sup> In addition, the Duke declined the opportunity to take some of the Italian art works and antiquities back to England. The denouement of the Napoleonic Wars thus gives us both the first large-scale repatriation of art works and the clearest statement of the principle that art works do not belong to the victors.<sup>34</sup>

Miles suggests that we can next trace the ideas of Cicero from the acts of the Duke of Wellington directly to the founding of the modern principles of warfare as applied to cultural sites and objects.<sup>35</sup> Francis Lieber, a young Prussian soldier present at the Battle of Waterloo, studied the classics, moved to the United States, and later became a law professor at Columbia University. In 1863, President Lincoln asked Lieber to draft a code of military conduct for the United States Army during the Civil War. The result was the first manual for the conduct of

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32. The Marquis de Somerueles, *reprinted in* Merryman, *supra* note 31, at 319. According to Merryman, this phrase is echoed in the Preamble to the 1954 Hague Convention. Merryman, *supra* note 31, at 326. This notion was used by Napoleon to justify his seizure of art works and by Judge Croke to hold that art works are protected from seizure.

33. Only about 55% of the art works taken by Napoleon were in fact returned to their original owners in Europe. Miles, *supra* note 15, at 42-43. There was no provision for the return of art works and archaeological artifacts taken by Napoleon’s army during the Egyptian campaign. However, some of these, most notably the Rosetta Stone, were taken by the British and are now housed in the British Museum.

34. *Id.* Professor Bassiouni commented that with the restitution of art works at the end of the Napoleonic wars,

the concept of protecting cultural property had evolved from a theory developed by scholars to a practiced legal principle . . . [T]he provisions contained in international agreements over the ensuing 150 years firmly established that the protection of cultural property is a basic and fundamental rule in the regulation of armed conflict. Its purpose is to preserve what can now be called the inalienable right of all peoples to their natural cultural heritage.

Bassiouni, *supra* note 12, at 288-89.

35. Miles, *supra* note 15, at 44.

armies during war that explicitly acknowledged a special role for charitable institutions, collections, and works of art.<sup>36</sup> The Lieber Code distinguished property belonging to churches and to “establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character” from other types of movable property and stated that such property could not be used as normal war booty.<sup>37</sup> While reflecting the earlier approaches of legal scholars, this was the first codification of the obligation to safeguard cultural sites and objects during war.

The Brussels Conference of 1874, organized at the instigation of Henry Dunant, one of the founders of the Red Cross, proposed a declaration concerning the law of war. Article 8 of the Declaration protected “institutions dedicated to religion, charity and education,

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36. TOMAN, *supra* note 13, at 7-8.

37. The relevant sections of the Lieber Code state:

31. A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete.

34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.

35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

The Lieber Code of 1863, Instructions for the Government of Armies of the United States in the Field, Series III, Vol. 3, sec. 124, General Orders no. 100. (Apr. 24, 1863), *available at* <http://www.civilwarhome.com/liebercode.htm> [hereinafter Lieber Code].

the arts and sciences” and provided that the “seizure or destruction of, or wilful [sic] 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.”<sup>38</sup> Buildings “dedicated to art, science, or charitable purposes” should be protected from bombardment if at all possible, and a new concept was added: that such buildings should be marked by a distinctive emblem so that the attacker would know what buildings to avoid.<sup>39</sup> Although this Declaration was never ratified, its provisions were repeated in the Oxford Manual of the Institute of International Law in 1880.<sup>40</sup> These instruments laid the groundwork for the two peace conferences held at the Hague in 1899 and 1907, and they led to the incorporation of similar principles concerning cultural property in the 1899 and 1907 Hague Conventions on the Laws and Customs of War on Land and, in particular, the Regulations annexed to the Conventions.<sup>41</sup>

Articles 23, 28 and 47 of the 1899 Convention Annex prohibited pillage and seizure by invading forces and Article 56 required armies to take all necessary steps to avoid seizure, destruction, or intentional damage to “religious, charitable, and educational institutions, and those of arts and science” as well as to “historical monuments [and] works of art or science.”<sup>42</sup> The 1907 Hague Convention on Land Warfare expanded the 1899 Convention. The Regulations annexed to this Convention had two key provisions. The first, contained in Article

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38. Project of an International Declaration Concerning the Laws and Customs of War art. 8, Aug. 27, 1874, available at <http://www.icrc.org/ihl.nsf/WebPrint/135-FULL?OpenDocument>.

39. *Id.* art. 17.

40. TOMAN, *supra* note 13, at 9-10; Lieber Code, *supra* note 37.

41. The 1899 and 1907 Hague Conventions are particularly important because several military powers, including the United States and the United Kingdom, which did not ratify the 1954 Hague Convention, did ratify the earlier conventions, and they remain in effect as applied to these nations. See International Humanitarian Law—Treaties & Documents: Ratifications/Accessions, <http://www.icrc.org/ihl.nsf/WebPAYS?OpenView&Start=150&Count=150&Expand=232.1#232.1> (listing ratifications and accessions to international conventions).

42. Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, July 29, 1899, available at <http://www.icrc.org/ihl.nsf/WebPrint/150-FULL?OpenDocument> [hereinafter 1899 Hague Convention]. Article 56 represents a change from the principles of the Lieber Code. *Id.* art. 56. Article 36 of the Lieber Code permitted armies to remove movable cultural objects; their status would be resolved in the ultimate peace treaty. Lieber Code, *supra* note 37, art. 36. Article 56 of the 1899 Hague Convention prohibits removal and seizure of all cultural objects, thereby acknowledging the interests of the nation or current owner. 1899 Hague Convention, *supra* note 42, art. 56; see also David Keane, *The Failure to Protect Cultural Property in Wartime*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 1, 4-5 (2004).

27, dealt with the obligation to avoid damaging particular structures.

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.<sup>43</sup>

There are two important caveats for the protection granted to such buildings. First, the phrase “as far as possible” limits the obligation to avoid causing damage to these buildings, and, therefore, the obligation will give way to the exigencies of warfare. The second caveat is that two obligations are imposed on the besieged: to mark the buildings with a distinctive sign (which must be communicated to the enemy in advance) and to avoid using the buildings for military purposes. If the buildings are used for military purposes then the protection of this provision is forfeited.

The second provision is 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 of, destruction or wilful [sic] 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.<sup>44</sup>

Here, the obligation to protect both movable and immovable property, belonging to institutions of a religious, charitable, educational, historic

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43. Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 27, Oct. 18, 1907, *available at* <http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument> [hereinafter 1907 Hague Convention]. Article 5 of Convention (IX) applies similar restrictions to naval bombardment and mandates the design of the emblem that marks such structures as consisting of “large, stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white.” Convention (IX) Concerning Bombardment by Naval Forces in Time of War art. 5, Oct. 18, 1907, *reprinted in* TOMAN, *supra* note 13, at 11-13.

44. 1907 Hague Convention, *supra* note 43, art. 56.

and artistic character, is absolute. Furthermore, it is a complement to Article 55, which emphasizes that an occupying power has an obligation to preserve and safeguard the value of immovable property, including forests and agricultural lands.<sup>45</sup>

During World War I, the library at the University of Louvain, Belgium, was burned in 1914 and the cathedral of Rheims was severely damaged by aerial bombardment.<sup>46</sup> The Hague Conventions were only utilized in the Treaty of Versailles and Treaty of Berlin as a mechanism for requiring restitution of cultural objects or reparations when the objects could not be returned.<sup>47</sup> Following World War I, there was interest in a new international convention, but none was adopted. In 1935, the Washington Pact for the Protection of Artistic and Scientific Institutions and of Historic Monuments,<sup>48</sup> also known as the Roerich Pact, was signed by twenty-one countries and ratified by eleven. However, it had little impact during World War II because only nations in the Americas were parties to it. In response to the Spanish Civil War, the League of Nations asked the International Museums Office to draft yet another international convention,<sup>49</sup> but war broke out before any formal action could be taken. The 1899 and 1907 Hague Conventions were, therefore, the relevant legal instruments governing the conduct of war with respect to cultural sites, monuments, and objects during World War II.<sup>50</sup>

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45. The occupier is obligated to administer these properties "in accordance with the rules of usufruct." *Id.* art. 55.

46. TOMAN, *supra* note 13, at 14.

47. Bassiouni, *supra* note 12, at 291-92. Several tribunals were established to arbitrate restitution and reparations claims for property, including cultural objects and art works. The Treaty of Peace contained three provisions for restitution of cultural objects: Article 245 required Germany to return to France cultural property taken during World War I and during the war of 1870-71, Article 246 required Germany to return to Britain the original Koran of the Caliph Othman and the skull of the Sultan Mkwawa, and Article 247 required the restitution to the University of Louvain of manuscripts, maps, books, and other archival materials comparable to those destroyed by Germany in the burning of the Library of Louvain and required Germany to return to Belgium two leaves from the Adoration of the Lamb triptych of the Van Eyck brothers in Ghent and the leaves of the triptych of the Last Supper of Dierick Bouts. TOMAN, *supra* note 13, at 337. The requirement that Germany restore art works, particularly to France, was one of the justifications utilized by Hitler for Nazi appropriations of art works during World War II.

48. TOMAN, *supra* note 13, at 16-17. The text may be found in CHAMBERLAIN, *supra* note 1, at 284-85.

49. TOMAN, *supra* note 13, at 10-11. The text may be found in CHAMBERLAIN, *supra* note 1, at 286-93.

50. The major combatants of World War II were parties to either one or both of the 1899 and 1907 Hague Conventions, including the United States and the United Kingdom. In addition, the

The largest destruction and displacement of cultural sites and objects known to human history occurred during World War II.<sup>51</sup> German forces ignored the provisions of the Hague Conventions and established a systematic method for plundering and looting art works, particularly in Western Europe, while intentionally and indiscriminately destroying art collections and libraries in Eastern Europe. In contrast, the Allied forces attempted to preserve as much of the cultural heritage of Europe as possible. General Eisenhower issued two sets of orders directing the preservation and safeguarding of cultural heritage except where this would result in loss of human life.<sup>52</sup> The 1943 Inter-Allied Declaration of London condemned the looting and destruction of cultural property and reserved the right to nullify any transactions involving the transfer of property rights in occupied territories.<sup>53</sup> One of the most effective efforts of the Allied military was the creation of the Monuments, Fine Arts and Archives officer corps.<sup>54</sup> This group was assigned to learn the location of art works and other cultural objects, secure their safety as soon as the Allied forces moved into a particular area, and assist in the restitution of looted art works to their original owners at the end of the war.

At the end of the war, the Germans were required to restore plundered art works to their original owners. Forced sales and sales under duress were nullified under the Declaration of London. Nonetheless, many art works were never restored to their owners for numerous and complex reasons, and litigation concerning the rightful disposition of such art works continues sixty years after the war's conclusion.<sup>55</sup> The Nuremberg International Military Tribunal indicted and convicted, for war crimes and crimes against humanity, Alfred Rosenberg, the head of the Einsatzstab der Dienststellen des Reichsleiter, which was

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Nuremberg war crimes tribunals established that these Conventions are part of customary international law. TOMAN, *supra* note 13, at 10.

51. The fullest discussion of the fate of cultural property during World War II is presented by LYNN NICHOLAS, *THE RAPE OF EUROPA* (1994).

52. TOMAN, *supra* note 13, at 20.

53. *Id.*; see also Cuning, *supra* note 6, at 220-21 (stating that the Declaration of London abrogated the good faith purchase doctrine as applied to objects looted during World War II but that it was not applied effectively or for long).

54. TOMAN, *supra* note 13, at 20; NICHOLAS, *supra* note 51, at 274-82, 297-305, 370-405.

55. Examples of current and recent litigation related to art works looted during the Holocaust include *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *United States v. Portrait of Wally*, 2002 WL 553532 (S.D.N.Y.); *Adler v. Taylor*, 2005 U.S. Dist. LEXIS 5862 (C.D.Cal. 2005); *United States v. One Oil Painting Entitled "Femme en Blanc" by Pablo Picasso*, 362 F. Supp. 2d 1175 (C.D.Cal. 2005).

the primary organization with responsibility for carrying out confiscations of art works and cultural objects. The indictment stated that between March 1941 and July 1944, the ERR's confiscations amounted to 21,903 art objects in the western countries alone.<sup>56</sup>

The horrific experiences of World War II led the international community to establish the United Nations and adopt several international conventions focused on humanitarian issues, including the four Geneva Conventions of 1949, the Universal Declaration of Human Rights, and the Genocide Convention.<sup>57</sup> The first international convention to address exclusively the fate of cultural property during war time soon followed: the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention).

## B. *The 1954 Hague Convention and Its Protocols*

### 1. The Main Convention

The 1954 Hague Convention must be evaluated in light of the massive destruction and looting of cultural property during World War II. This explains both its strengths and some of its current weaknesses.<sup>58</sup> The Convention begins with a Preamble, which sets out the reasons for

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56. Indictment, Trial of the Major War Criminals Before the International Military Tribunal 29, 55-56 (Nuremberg 1948), available at <http://www.yale.edu/lawweb/avalon/imt/proc/count.htm>; see also TOMAN, *supra* note 13, at 20-21; Menzel v. List, 49 Misc. 2d 300, 309-10 (N.Y. Sup. Ct. 1966).

57. Article 33 of the Fourth Geneva Convention of August 12, 1949 Relative to the Protection of Civilian Persons in Time of War forbids pillage and Article 53 prohibits the destruction of real or personal property, whether publicly or privately owned, and this can be extended to include cultural property. The 1977 Protocols I and II Additional to the 1949 Geneva Conventions provide for the protection of cultural property, including Article 53 of Protocol I and Article 16 of Protocol II, which prohibit acts of hostility against historic monuments, works of art, or places of worship, the use of such property for military purposes, and direct reprisals against such property. Bassiouni, *supra* note 12, at 294-96; CHAMBERLAIN, *supra* note 1, at 14-16; Sasha P. Paroff, *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, 2039-40 (2004). The 1954 Hague Convention should be viewed as part of the development of humanitarian law and related to the 1949 Geneva Conventions. Bassiouni, *supra* note 12, at 294-96; CHAMBERLAIN, *supra* note 1, at 6. While the United States is a party to the 1949 Conventions, it has not ratified the 1977 Protocols. The full text of the Convention and the Protocols, as well as a current list of States Parties, may be found both on the ICRC web site, <http://www.icrc.org>, and on the UNESCO web site, [www.unesco.org](http://www.unesco.org).

58. The following description of the 1954 Hague Convention is not intended to cover every aspect of the Convention but rather only its main substantive provisions, primarily Articles 4 and 5. For more detailed discussion of each Article of the Convention, see TOMAN, *supra* note 13, and CHAMBERLAIN, *supra* note 1. While the Convention was based on the draft prepared by the



the adoption of the Convention. It is worth noting two of the introductory paragraphs in particular:

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world; Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection . . . .<sup>59</sup>

The reference to cultural property as “the cultural heritage of all mankind” has been interpreted by some scholars, particularly John Henry Merryman, as indicating the universality of the Hague Convention and emphasizing the notion that cultural heritage belongs to everyone, thereby weakening or negating claims by nations to own and control the disposition of such objects.<sup>60</sup> However, in light of the development of the law of war with respect to safeguarding and protecting cultural property, these phrases in the Preamble represent a tradition of imposing obligations on nations to care for the cultural property located within their borders and to avoid causing harm to the cultural property of adversaries during warfare.<sup>61</sup>

Article 1 of the Hague Convention offers a broad definition of

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International Museum Office before World War II, *see supra* note 49, the impact of the cultural devastation carried out by Nazi Germany can be clearly seen in the Convention’s provisions.

59. Convention on the Protection of Cultural Property in the Event of Armed Conflict pmbl., May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention], *available at* [http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html).

60. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 837 (1986).

61. As Professors Paterson and Karjala commented:

The phrase cultural heritage of all mankind in the Convention was intended to emphasize the responsibilities of states and not to define their rights of appropriation or ownership. According to this theory, war and other events that place cultural properties at risk oblige states to observe certain international minimum standards of protection and preservation. Such international obligations may not extend to all cultural property but only to that which is of sufficient importance to all of humanity. . . . All that can be reliably claimed in respect of the Hague Convention is that it seeks to develop international minimum standards for the treatment of certain cultural property. . . . The Hague Convention is not concerned with individual or state property rights in relation to cultural property but with state responsibilities in respect of such property.

“cultural property” as “movable or immovable property of great importance to the cultural heritage of every people.”<sup>62</sup> There follows a list of examples of cultural property, which is clearly intended not to be exhaustive.<sup>63</sup> In addition to movable and immovable property, “cultural property” also includes repositories of cultural property, such as museums, libraries, and archives, as well as refuges created specifically to shelter cultural property during hostilities.<sup>64</sup>

Article 2 defines the “protection of cultural property” as consisting of

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Robert K. Paterson & Dennis S. Karjala, *Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples*, 11 CARDOZO J. INT'L & COMP. L. 633, 653 (2003). Another commentator has criticized the “internationalist” approach to cultural property protection because it does not sufficiently value the importance of structures, particularly religious buildings, to local communities. The importance of such buildings “is to their communities, and the international community should more thoroughly consider its duty to those communities to ensure the protection of locally important religious property.” Gregory M. Mose, *The Destruction of Churches and Mosques in Bosnia-Herzegovina: Seeking a Rights-based Approach to the Protection of Religious Cultural Property*, 3 BUFF. J. INT'L L. 180, 205-06 (1996).

62. 1954 Hague Convention, *supra* note 59, art. 1(a). This may be compared to the definition of cultural property in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention), which states that cultural property is of “importance for the archaeology, prehistory, history, literature, art or science.” Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention]. For a comparison of the definitions of cultural property in the 1954 Hague Convention and the UNESCO Convention, see Cunning, *supra* note 6, at 223-26. The 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Property utilizes the same definition as the UNESCO Convention.

63. This list includes:

monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.

1954 Hague Convention, *supra* note 59, art. 1(a). The UNESCO Convention definition lists eleven categories (each including several types of property) and is therefore more extensive than the list given in the Hague Convention. UNESCO Convention, *supra* note 62, art. 1(a)-(k). However, it is not as clear whether the UNESCO Convention list is intended to be all-inclusive.

64. 1954 Hague Convention, *supra* note 59, art. 1(b). Article 1(c) includes “centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as ‘centres containing monuments’” in the definition of cultural property. *Id.* art. 1(c).

two components: “the safeguarding and respect for such property.”<sup>65</sup> “Safeguarding” refers to the actions a nation is expected to take during peacetime to protect its own cultural property.<sup>66</sup> This is embodied in Article 3, which elaborates that nations are obligated to safeguard cultural property located within their territory during peacetime from “the foreseeable effects of an armed conflict.” Demonstrating “respect” refers to the actions that a nation must take during hostilities to protect both its own cultural property and the cultural property of another nation.<sup>67</sup> This obligation is embodied in the two main substantive provisions of the Convention: Article 4, which regulates conduct of parties during hostilities, and Article 5, which regulates the conduct of occupation.

The central premise of these articles is that parties to the convention are to show respect for cultural property by avoiding both exposure of cultural property situated in their own territory to danger and causing harm to cultural property situated within the territory of another State Party to the convention. Under Article 4(1), nations are to avoid jeopardizing cultural property located in their territory by refraining from using such property in a way that might expose it to harm during hostilities.<sup>68</sup> This means that nations should not use cultural property as the location of strategic or military equipment nor should such equipment be housed in proximity to cultural property. Also under Article 4(1), a belligerent nation should not target the cultural property of another nation.<sup>69</sup> In what is perhaps the most controversial aspect of the Hague Convention, Article 4(2) provides that the obligations of the first paragraph “may be waived only in cases where military

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65. 1954 Hague Convention, *supra* note 59, art. 2; *see also* PATRICK J. BOYLAN, REVIEW OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 53 (1993), *available at* <http://unesdoc.unesco.org/images/0010/001001/100159eo.pdf>.

66. 1954 Hague Convention, *supra* note 59, art. 3; BOYLAN, *supra* note 65, at 53.

67. *See* 1954 Hague Convention, *supra* note 59, art. 4; BOYLAN, *supra* note 65, at 53.

68. Article 4(1) states:

The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict, and by refraining from any act of hostility directed against such property.

1954 Hague Convention, *supra* note 59, art. 4(1).

69. *Id.*

necessity imperatively requires such a waiver.”<sup>70</sup>

Article 4(3) sets out the obligation “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. . . .”<sup>71</sup> Until the Second Gulf War, this provision elicited little commentary or interpretation. Its lack of clarity and status as part of customary international law are now among the key provisions used in evaluating whether international law was violated during the war.<sup>72</sup> Paragraph 3 also prohibits the requisitioning of movable cultural property located in the territory of another Party to the Convention. Paragraph 4 of this Article prohibits carrying out acts of reprisal against cultural property. Paragraph 5 states that if one State Party has failed to comply with Article 3 by not safeguarding its cultural property during peacetime, this failure does not mean that another State Party can evade its obligations under Article 4.

Article 5 sets out the obligations of a State Party during occupation. One difficulty is that the Hague Convention does not provide a definition of occupation, nor does it clarify exactly when a state of hostilities becomes an occupation.<sup>73</sup> Article 5 emphasizes that the primary responsibility for securing cultural property lies with the competent national authority of the State that is being occupied. Thus,

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70. *Id.* art. 4(2). See TOMAN, *supra* note 13, at 72-79. The inclusion of the military necessity waiver has been much criticized. See Keane, *supra* note 42, at 17-20; Merryman, *supra* note 60, at 837-42 (regarding this as an unfortunate concession to nationalism in what he otherwise views as an essentially internationalist document). The military necessity waiver was included largely at the insistence of the United States and the United Kingdom, nations that ultimately did not ratify the convention. *Id.* at 838, 838 n.24. It is even more ironic that the Roerich Pact, to which the United States is a party, does not include a military necessity waiver. *Id.* Chamberlain concludes that States are not free to interpret “military necessity” however they wish, but rather must do so within the context of earlier international law. Military necessity therefore must be interpreted narrowly and is subject to “the principles of reasonableness and proportionality.” CHAMBERLAIN, *supra* note 1, at 37-38.

71. 1954 Hague Convention, *supra* note 59, art. 4(3).

72. This issue will be considered at greater length, *infra* notes 281-87 & accompanying text.

73. Article 42 of the Hague Regulations of 1907 defines “occupation” as: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” See Toman, *supra* note 13, at 84. Article 18(2) of the Hague Convention clarifies that it applies in “all cases of partial or total occupation . . . , even if the said occupation meets with no armed resistance.” 1954 Hague Convention, *supra* note 59, art. 18(2). However, Chamberlain points out that the Convention applies only to belligerent occupation and not to other situations such as where the occupier has been invited with the consent of the occupied country or pursuant to a peace treaty. CHAMBERLAIN, *supra* note 1, at 42.

the first obligation imposed on the occupying power is to support these national authorities.<sup>74</sup> The obligation of the occupying power to care for and preserve the cultural property of the occupied territory is very limited. It applies only "as far as possible" when the national authorities of the occupied territory are unable to meet their obligation and the cultural property has been "damaged by military operations."<sup>75</sup> The limitation on the obligation to preserve cultural property to circumstances where the property was damaged during hostilities may be viewed as an attempt to protect such cultural property from undue interference by the occupying power. This interpretation is bolstered by other provisions of this Article, which emphasize the primacy of the role of competent national authorities, and by viewing this provision in the light of the events of World War II.

Article 6, permitting the distinctive marking of cultural property by a special emblem, and Article 7, requiring that State Parties undertake to educate their military and introduce regulations concerning observance of the Convention, complete the general substantive provisions of the Convention. Articles 8 through 14 are concerned with the conditions of special protection which may be accorded to certain categories of cultural property under specific conditions. These provisions, however, have rarely been used.<sup>76</sup> The remaining articles address such topics as personnel (Article 15), the distinctive emblem (Articles 16-17), the scope of the Convention's applicability (Article 18-19), and procedural matters (Articles 20-40). One of the main criticisms of the Hague Convention is that it does not contain provisions for punishment of those who violate its terms. In order to prosecute violations, it

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74. Article 5(1) states: "Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property." 1954 Hague Convention, *supra* note 59, art. 5(1).

75. Article 5(2) states: "Should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent national authorities be unable to take such measures, the Occupying Power shall, as far as possible, and in close co-operation with such authorities, take the most necessary measures of preservation." 1954 Hague Convention, *supra* note 59, art. 5(2).

76. Only five refuges and one center (all in Europe) have been designated on the "International Register of Cultural Property" under Article 8(6). CHAMBERLAIN, *supra* note 1, at 48; See International Register of Cultural Property Under Special Protection (Convention for the Protection of Cultural Property in the Event of Armed Conflict), Aug. 1997, available at <http://unesdoc.unesco.org/images/0011/001134/113431eo.pdf>. The system of special protection will be replaced by the system of enhanced protection created under the Second Protocol for those nations that ratify the Second Protocol. *Id.*

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is necessary for some other mechanism to be established, probably through national domestic law.<sup>77</sup>

### 2. The First Protocol

The First Protocol of the 1954 Hague Convention was written at the same time as the main Convention and focuses exclusively on the status of movable cultural objects. The first part of the Protocol contains four paragraphs addressing: (1) an obligation to prevent the export of cultural objects from occupied territory;<sup>78</sup> (2) an obligation to take into custody any cultural objects imported either directly or indirectly from occupied territory;<sup>79</sup> (3) an obligation to return at the end of hostilities any cultural objects illegally removed from occupied territory;<sup>80</sup> and (4) an obligation by the State which was obliged to prevent removal of cultural objects from occupied territory to compensate any good faith

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77. Article 3 of the 1907 Hague Convention requires States whose armed forces violate the Convention to pay compensation. 1907 Hague Convention, *supra* note 43, art. 3. The 1954 Convention contains no comparable provision. 1954 Hague Convention, *supra* note 59; *see also* Cuning, *supra* note 6, at 227. The 1954 Convention leaves any punishment to the domestic criminal system of the different member states. This lack of universal jurisdiction for violations of the Convention was much criticized by Bassiouni, *supra* note 12, at 313-16.

78. Paragraph 1 states: "Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property as defined in Article 1 of the Convention . . . ." Protocol for the Protection of Cultural Property in the Event of Armed Conflict ¶ 1, May 14, 1954, 249 UNTS 240 [hereinafter Protocol I]. This provision seems to apply regardless of whether the occupied territory belongs to a Party to the Protocol. TOMAN, *supra* note 13, at 344; CHAMBERLAIN, *supra* note 1, at 144. Several provisions of the 1970 UNESCO Convention would also apply to the theft or illegal removal of cultural objects from occupied territory, most particularly Article 11, which states: "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 shall be regarded as illicit." UNESCO Convention, *supra* note 62, art. 11.

79. Paragraph 2 states: "Each High Contracting Party undertakes to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory. This shall either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory." Protocol I, *supra* note 78, ¶ 2.

80. Paragraph 3 states:

Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.

Protocol I, *supra* note 78, ¶ 3.

possessor of such cultural objects.<sup>81</sup> Section II of the Protocol requires that any cultural property removed from one State Party and placed in the territory of another State Party for safekeeping during armed conflict must be returned at the end of the conflict.<sup>82</sup>

As of early 2006, ninety-two nations have ratified the First Protocol, which is fewer than those that have ratified the main Convention,<sup>83</sup> and there seems to be no example of a nation that is a party to the Protocol taking action under the Protocol to prohibit trade in cultural objects removed from occupied territory.<sup>84</sup> There are several reasons why the First Protocol has proved less popular.<sup>85</sup> In particular, market nations dislike the obligation to return movable cultural objects and other obligations that might interfere with the operation of their art market. More problematic is the fact that paragraph 9 of the Protocol makes it possible for a nation to ratify the Protocol but declare that it will not be bound by the provisions of either Section I or Section II. As the provisions of Section II do not impose any burden on the market in cultural objects, a nation could easily join the Protocol while repudiating the obligations of Section I, thus giving the Protocol virtually no substantive effect.

### 3. The Second Protocol

In 1991, UNESCO and the Netherlands commissioned a study of the

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81. Paragraph 4 states: "The High Contracting Party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it shall pay an indemnity to the holders in good faith of any cultural property which has to be returned in accordance with the preceding paragraph." Protocol I, *supra* note 78, ¶ 4.

82. Paragraph 5 states:

Cultural property coming from the territory of a High Contracting Party and deposited by it in the territory of another High Contracting Party for the purpose of protecting such property against the dangers of an armed conflict, shall be returned by the latter, at the end of hostilities, to the competent authorities of the territory from which it came.

Protocol I, *supra* note 78, ¶ 5. The remaining articles comprise Part III of the Protocol and cover the procedural aspects.

83. There are 114 parties to the main Convention. Several nations that attended the conference and signed the main Convention did not sign the Protocol, including the United States, the United Kingdom, Australia and Israel. TOMAN, *supra* note 13, at 349. Several countries, including Canada and Israel, first ratified the Convention and later acceded to the First Protocol.

84. See BOYLAN, *supra* note 65, at 101.

85. Patrick J. O'Keefe, *The First Protocol to the Hague Convention Fifty Years On*, 9 ART ANTIQUITY & L. 99, 100-03 (2004).

Hague Convention to determine its effectiveness and whether it needed to be amended. This study produced the Boylan Report.<sup>86</sup> Many of the report's recommendations were adopted in the form of the Second Protocol, which was written in 1999 to update the Convention, particularly in light of the experiences of the Balkan Wars. It went into effect on March 9, 2004, and at the beginning of 2006, it had thirty-seven States Parties.<sup>87</sup>

The main Convention, in Article 4, paragraph 2, permits waiver of the obligation to respect cultural property "in cases where military necessity imperatively requires such a waiver." The Second Protocol narrows the circumstances where a waiver applies to situations in which "cultural property has, by its function, been made into a military objective" and "there is no feasible alternative available to obtain a similar military advantage."<sup>88</sup> Furthermore, the waiver provisions in the Second Protocol apply to excuse the use of cultural property for purposes that are likely to expose the cultural property to harm only when there is no other option that will give a similar military advantage.<sup>89</sup> Article 7 of the Second Protocol requires the taking of precautions to ascertain whether a military objective includes cultural property, avoidance and minimization of incidental damage to cultural property, and refraining from undertaking an attack that will cause harm to cultural property that is disproportionately excessive in comparison to the expected military advantage.<sup>90</sup>

The Second Protocol provides for the granting of enhanced protec-

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86. See generally BOYLAN, *supra* note 65.

87. The following is not intended as a thorough discussion of the Second Protocol, particularly as its relevance to the war in Iraq (other than the extent to which it may represent customary international law) is doubtful. For a more extended discussion, see CHAMBERLAIN, *supra* note 1, at 168-240; Megan Kossiakoff, Comment, *The Art of War: The Protection of Cultural Property During the "Siege" of Sarajevo (1992-95)*, 14 DEPAUL-LCA J. ART & ENT. L. 109, 126-30 (2004) (discussing the four main areas of the 1954 Convention that were clarified and strengthened by the Second Protocol: the military necessity exception, protective measures, special protection, and individual responsibility); Keane, *supra* note 42, at 27-36. The Boylan Report and the extent to which its recommendations were incorporated in the Second Protocol are discussed at greater length, *infra* notes 373-93 & accompanying text.

88. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 6(1)(a)-(b), Mar. 26, 1999, 38 I.L.M. 769 [hereinafter Protocol II], available at [http://www.unesco.org/culture/laws/hague/html\\_eng/protocol2.shtml](http://www.unesco.org/culture/laws/hague/html_eng/protocol2.shtml). Keane points out that under the Second Protocol it is the *function* (i.e., use) of the cultural property, not its location, that makes something a valid military objective. Keane, *supra* note 42, at 30-31.

89. Protocol II, *supra* note 88, art. 6(1)(c).

90. *Id.* art. 7(a)-(c).



tion to cultural property that meets the following three criteria:

- a. it is cultural heritage of the greatest importance for humanity;
- b. it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;
- c. it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.<sup>91</sup>

Cultural property that meets these criteria must be placed on a list managed by a committee established by the Second Protocol and is then entitled to enhanced protection. Any cultural property under enhanced protection is entitled to absolute immunity from attack except under narrow circumstances delineated in Article 13.

Article 9 of the Second Protocol strengthens the provisions for protection of cultural property during occupation by prohibiting the illegal export or transfer of ownership of cultural property. Furthermore, it forbids the carrying out of archaeological excavation except "where this is strictly required to safeguard, record or preserve cultural property."<sup>92</sup> The Second Protocol also clarifies the criminal responsibil-

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91. Protocol II, *supra* note 88, art. 10. The Second Protocol eliminates the requirement in the main Convention that cultural property under special protection must be located more than a certain distance from an industrial center or military objective. This reflects increased accuracy in modern precision targeting. Keane, *supra* note 42, at 32.

92. Article 9 provides:

Protection of cultural property in occupied territory:

- (1) . . . 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.

Protocol II, *supra* note 88, art. 9(a)-(b).

ity of individuals who violate its provisions and requires nations that are party to the Protocol to establish criminal offenses under their domestic law.<sup>93</sup> Finally, it clarifies that the Protocol applies to armed conflicts that are not of an international character, although it does not apply to “situations of internal disturbances and tensions.”<sup>94</sup>

C. *Subsequent International Instruments and Developments*

In response to the intentional destruction, mass murder, and ethnic cleansing of the Balkan wars, the United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>95</sup> The intentional destruction, particularly of religious

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93. Protocol II, *supra* note 88, arts. 15-21. Article 15 lists five specific serious violations of the Protocol:

- (a) making cultural property under enhanced protection the object of attack;
- (b) using cultural property under enhanced protection or its immediate surroundings in support of military action;
- (c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
- (d) making cultural property protected under the Convention and this Protocol the object of attack;
- (e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

*Id.* art. 15; *see also* Paroff, *supra* note 57, at 2042-43; Keane, *supra* note 42, at 33-34 (comparing these violations to provisions of the Geneva Conventions and Additional Protocol I of 1977).

94. This provision intends to clarify that the Hague Convention and the Second Protocol apply to situations such as that of the Balkans but would not apply to purely internal conflict. Protocol II, *supra* note 88, art. 22.

95. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 (1993); *see also* CHAMBERLAIN, *supra* note 1, at 19; Walter Gary Sharp, Sr., *The International Criminal Tribunal for the Former Yugoslavia: Defining the Offenses*, 23 MD. J. INT'L L. & TRADE 15, 20-22 (1999); 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, 3-4 (2001); 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, 220-22 (1997/1998). The 1954 Hague Convention was utilized, although to minimal extent, in earlier conflicts in Cambodia and in the Middle East. David A. Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law*, 11 B.U. INT'L L. J. 349, 358-61 (1993). Perhaps the most significant action taken between the Nuremberg prosecutions and the establishment of the International Criminal Tribunal for Yugoslavia with regard to the status of cultural property during military conflict was the restitution by Israel to Egypt of archaeological artifacts excavated in the Sinai while under Israeli occupation following the 1967 war. Although both Israel and Egypt are parties to the 1954 Convention and the First Protocol, the Convention was not cited in the restitution

structures, and eradication of a people's cultural past was part of the goal of ethnic cleansing and an aid in cultural genocide.<sup>96</sup> Among the historic sites damaged or destroyed were the World Heritage Site of Dubrovnik, the Neretva Bridge in Mostar, and the library of Sarajevo.<sup>97</sup> As with World War II, the international conventions did not prevent the destruction of cultural heritage,<sup>98</sup> but they provided a means for the punishment of perpetrators after the conclusion of hostilities. Several convictions were recently attained against Serb military leaders.<sup>99</sup> However, the Statute creating the ICTY did not refer to the 1954 Hague Convention.<sup>100</sup> Article 2 of the Statute granted authority to

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agreement. Talia Einhorn, *Restitution of Archaeological Artifacts: The Arab-Israeli Aspect*, 5 INT'L J. CULTURAL PROP. 133, 142 (1996).

96. See Abtahi, *supra* note 95, at 2. Cunning comments,

[T]he Serbian expulsion of non-Serbs was a form of ethnic cleansing supported by the destruction of cultural property. . . . [T]he Tribunal 'addresses crimes involving the destruction of a mosque because they harmed the Muslim population.' This link is significant because there is a general tendency to 'place crimes against cultural property below crimes against persons,' but the Tribunal is making the destruction of cultural property a crime against persons.

Cunning, *supra* note 6, at 230-31; see also Abtahi, *supra* note 95, at 25-28 (describing the intentional destruction of Moslem holy sites and cities important to the Bosnian Moslems as a form of religious persecution and a crime against humanity).

97. CHAMBERLAIN, *supra* note 1, at 3; Cunning, *supra* note 6, at 230; Abtahi, *supra* note 95, at 1-2 (listing in detail historic sites and buildings destroyed); Karen J. Detling, Note, *Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 MD. J. INT'L L. & TRADE 41, 43, 43 n.11, 65-69 (1993); Mose, *supra* note 61, at 191-95 (describing the destruction of religious property in the town of Gradacac in northern Bosnia, based on a Council of Europe report); Kossiakoff, *supra* note 87, at 136-47 (describing in detail the effect of war on the museums and other cultural institutions of Sarajevo); Keane, *supra* note 42, at 20-26; Branka Šulc, *The Protection of Croatia's Cultural Heritage During War 1991-95*, in DESTRUCTION AND CONSERVATION OF CULTURAL PROPERTY 157, 161-62 (Robert Layton, Peter G. Stone & Julian Thomas eds., 2001) (describing damaged sites in Croatia, particularly Dubrovnik and Vukovar).

98. Keane, *supra* note 42, at 20-26 (describing futile international efforts to protect cultural property); Šulc, *supra* note 97, at 158-61 (describing international and national laws in Croatia that should have protected cultural property).

99. Lucian Harris, *Former Yugoslav General Sent to Jail for Shelling Dubrovnik*, ART NEWSPAPER, Feb. 25, 2005, available at <http://www.theartnewspaper.com/news/article.asp?idart=11726>.

100. Yugoslavia was a party to the 1954 Hague Convention and the successor states of Croatia, Bosnia-Herzegovina and Serbia and Montenegro continued as parties (Croatia and Bosnia-Herzegovina as of 1992 and 1993, respectively). Serbia and Montenegro is listed as a party since 1956. See State Parties, Convention for the Cultural Property in the Event of Armed Conflict, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=400&ps=P>; see also Kossiakoff, *supra* note 87, at 115-17. It is possible that the 1954 Hague Convention was not included as a basis for war

prosecute violations of the four Geneva Conventions of 1949, while Article 3 granted authority to prosecute violations of the laws or customs of war.<sup>101</sup> Article 5 covered crimes against humanity, including persecution on religious grounds; it could also implicate cultural property, particularly religious buildings.<sup>102</sup> The Statute gives little detail of these offenses, but the Geneva Conventions include prohibitions on the destruction and appropriation of property when not justified by military necessity.<sup>103</sup> The Statute lists five crimes that violate the laws or customs of war including wanton destruction or devastation not justified by military necessity, plunder of public or private property,<sup>104</sup> and seizure or destruction of cultural property.<sup>105</sup>

The ICTY prosecutions involving cultural property present a mixed

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crimes prosecutions because of lack of certainty as to whether the Convention applied to an armed conflict that was largely internal, rather than international, in nature. *See, e.g.,* Abtahi, *supra* note 95, at 12 (referring to one of the advantages of Article 3(d) is that it “has a wide scope because it applies to both international and non-international armed conflicts.”). Nonetheless, Article 19(1) of the 1954 Convention states: “In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting 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.” The provisions that relate to respect for cultural property are embodied in Article 4. *See also* Detling, *supra* note 97, at 69-71 (describing the international law of internal conflicts as applied to protection of cultural property). Croatia called upon UNESCO for assistance under the 1954 Convention in 1991, but UNESCO, unable to protect Croatia’s cultural property, was only able to send a mission to document the destruction. *Id.* at 71-72. Kossiakoff presents a detailed comparison of the Hague Convention provisions and the destructions carried out in violation of the Convention during the wars of the former Yugoslavia, as well as the unsuccessful efforts of UNESCO and other international organizations to protect cultural property. Kossiakoff, *supra* note 87, at 117-25, 148-57.

101. Sharp, *supra* note 95, at 24-25.

102. *See* Abtahi, *supra* note 95, at 9, 20-28; Mose, *supra* note 61, at 195-99 (describing the relationship of religion and religious buildings in Bosnia-Herzegovina to the practice of ethnic cleansing during the war).

103. Sharp, *supra* note 95, at 24-25; *see* Abtahi, *supra* note 95, at 13-17.

104. *See* Abtahi, *supra* note 95, at 17-21. These more general offenses, which may be interpreted to include cultural property, are listed in Article 3(b), (c), and (e). One of the trial judgments held that “Article 3(e)’s ‘prohibition on the wanton appropriation of enemy public or private property extends to both isolated acts of plunder for private interest and to “the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory.”’” *Id.* at 19 (quoting Blaskic Trial, Case No. IT-95-14-T, Judgment, ¶184 (Mar. 3, 2000), available at <http://www.un.org/icty/blaskic/trialc1/judgement/index.htm>).

105. Sharp, *supra* note 95, at 25. The ICTY Statute does not actually use the term “cultural property.” Article 3(d) lists “institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.” Abtahi, *supra* note 95, at 5-6. Abtahi attributes this absence to the lack of a uniform definition of “cultural property” in international instruments. *Id.*

message. They should advance the protection of cultural property, at least against intentional destruction and appropriation, because the prosecutions indicate that the international community takes these violations seriously. On the other hand, the inapplicability of the Hague Convention means that this central international instrument on cultural property was not advanced. Perhaps the most interesting aspect of these prosecutions is the use of international law intended to protect people as a means to protect property. As one commentator wrote:

The ICTY's prosecution . . . blurred the traditional distinction between crimes against persons and crimes against property. The ICTY equates a crime against property to a grave breach of the Geneva Conventions of 1949, a violation of the laws or customs of war, and especially the crime against humanity of persecution. This practice of the ICTY may collapse in the long term the distinction between those two categories of crimes, at least for religious cultural property . . . . The ultimate step, which has yet to be taken by international criminal justice, would be [to] adopt a less anthropocentric approach with regard to cultural property and to indict solely on the basis of damage inflicted on cultural property.<sup>106</sup>

The final international instrument that deals with the protection of cultural property during armed conflict is the Statute of the International Criminal Court (ICC).<sup>107</sup> Article 8 of the ICC Statute includes violations of the 1949 Geneva Conventions and the laws and customs of war.<sup>108</sup> It specifically lists as "serious violations": "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes [and] historic monuments . . . provided they are not military objectives."<sup>109</sup>

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106. Abtahi, *supra* note 95, at 31. In somewhat prophetic terms, Abtahi also commented that an expansion of the protection of cultural property through international criminal law might also make major military powers, such as the United States, more reluctant to join the International Criminal Court because "the fragile nature of cultural property makes it always subject to damage at least collaterally." *Id.*

107. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf. 183/9, 37 I.L.M. 999; *see also* Cunning, *supra* note 6, at 232; Paroff, *supra* note 58, at 2040-41. Neither the United States nor Iraq is a party to the International Criminal Court and so its provisions do not apply to the 2003 Gulf War.

108. Sharp, *supra* note 95, at 27.

109. CHAMBERLAIN, *supra* note 1, at 19; *see* Abtahi, *supra* note 95, at 7.

II. THE EFFECT OF WAR ON THE CULTURAL HERITAGE OF IRAQ

A. *Significance of Ancient Mesopotamian Civilization*

The role of ancient Mesopotamian civilization in the development of world culture and history cannot be overstated. Mesopotamia,<sup>110</sup> the “land between the rivers” (the Tigris and the Euphrates), was the locus of many “firsts” in the development of human civilization. Beginning about 10,000 years ago, the revolution of agriculture based on the domestication of plants and animals and irrigation, which made sedentary life possible, took place along the hills that flanked the fertile valleys of Mesopotamia.<sup>111</sup> In the fourth and third millennia B.C., the first writing developed in Mesopotamia. Its original form was pictographs and abstract symbols which later developed into cuneiform-wedge-shaped symbols that are pressed into wet clay tablets with a stylus.<sup>112</sup> Small stone cylinder seals were carved on the outside with a variety of scenes, including those with religious and symbolic meaning.<sup>113</sup> The seals were used to “sign” the wet clay tablets and remained one of the most persistent forms of ancient Mesopotamian art for several millennia.<sup>114</sup> Although the earliest texts were administrative in nature, cuneiform texts recorded all aspects of ancient life, from

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110. “Mesopotamia,” derived from Greek meaning the land between the two rivers, is the name by which the region of modern Iraq was known in Europe until the twentieth century. The name *al-Iraq* is first known from Arab geographers of the eighth century. The name means “the shore of a great river along its length, as well as the grazing land surrounding it” and was used to refer to the alluvial plain between the Tigris and Euphrates rivers. CHARLES TRIPP, *A HISTORY OF IRAQ* 8 (2d ed. 2002); see also BENJAMIN A. FOSTER, KAREN POLINGER FOSTER & PATTY GERSTENBLITH, *IRAQ BEYOND THE HEADLINES: HISTORY, ARCHAEOLOGY, AND WAR* 1-4 (2005) (describing the meaning of the word “Iraq” as unclear but perhaps referring to “alluvium”).

111. Adam Falkenstein, *The Prehistory and Protohistory of Western Asia*, in *THE NEAR EAST: THE EARLY CIVILIZATIONS* 14-16 (Jean Bottéro et al. eds., 1967); FOSTER ET AL., *supra* note 110, at 7-8; Harriet Crawford, *The Dawn of Civilization*, in *THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD: THE LOST LEGACY OF ANCIENT MESOPOTAMIA* 50, 52-55 (Milbry Polk & Angela M.H. Schuster eds., 2005) [hereinafter *THE LOOTING OF THE IRAQ MUSEUM*]. Irrigation made it possible to settle in the southern plain of Sumer, where villages of the Ubaid period are known from the late sixth millennium B.C. *Id.* at 57.

112. Falkenstein, *supra* note 111, at 38-42. The first writing is now dated to between 3400 and 3300 B.C. Robert D. Biggs, *The Birth of Writing, The Dawn of Literature*, in *THE LOOTING OF THE IRAQ MUSEUM*, *supra* note 111, at 106-109.

113. SETON LLOYD, *THE ART OF THE ANCIENT NEAR EAST* 44-45, 92-98 (1965); HENRI FRANKFORT, *THE ART AND ARCHITECTURE OF THE ANCIENT ORIENT* 14-17, 36-40 (Penguin Books 1969).

114. Stamp seals predated cylinder seals; some of the earliest date to about 4000 B.C. and come from the site of Tepe Gawra in northeastern Iraq. Impressions were stamped onto lumps of clay attached to an object or container to mark its owner. Crawford, *supra* note 111, at 62.

religious myths to court cases and laws to economic and trading documents. The earliest written language was Sumerian, a language that is not related to any other known language.<sup>115</sup> Beginning later in the third millennium B.C., the Sumerian peoples were largely replaced by a series of Semitic-speaking people including Akkadians,<sup>116</sup> the people of the Old Babylonian period,<sup>117</sup> Neo-Assyrians,<sup>118</sup> and Neo-Babylonians,<sup>119</sup> all of whom continued to use cuneiform writing. These ancient texts give us nearly 3,000 years of unbroken historical documents recorded in numerous languages and reflecting the various kingdoms, rulers, merchants, religious figures, and ordinary people that inhabited this land.<sup>120</sup>

The earliest city-states developed in Mesopotamia with an organized ruling hierarchy and extensive temple systems that played an important role in government and economic life.<sup>121</sup> These early cultures are known from such sites as Ur, Uruk, and Kish.<sup>122</sup> The third millennium B.C. saw the first empire, which was established by the Akkadian rulers Sargon and Naram-Sin, his grandson. This was a time of military strength, conquest, advances in political and administrative organization, literature, and artistic output of carved cylinder seals, monumental statues, and stelai.<sup>123</sup> The first law codes were written in the third millennium B.C.,<sup>124</sup> but the best

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115. LLOYD, *supra* note 113, at 19. Although Sumerian died out as a spoken language in about 2000 B.C., it continued to be used as a liturgical language for several hundred years more. Cuneiform was adapted to write the later languages of Mesopotamia. Biggs, *supra* note 112, at 109.

116. LLOYD, *supra* note 113, at 106-28; Paul Collins, *From Village to Empire: The Rise of Sumer and Akkad*, in *THE LOOTING OF THE IRAQ MUSEUM*, *supra* note 111, at 82, 95-96 (describing the ascendancy of Sargon, the founder of the Akkadian Dynasty).

117. Julian Reade, *Babylonians and Assyrians*, in *THE LOOTING OF THE IRAQ MUSEUM*, *supra* note 111, at 124, 124-31.

118. LLOYD, *supra* note 113, at 193-213; Reade, *supra* note 117, at 132-40.

119. Reade, *supra* note 117, at 140.

120. Biggs, *supra* note 112, at 121.

121. Some of the earliest complex settlements with shrines and temples date to the Ubaid period of about 4500 B.C., such as that at Eridu in southern Iraq, which according to Sumerian myths was the first town. Crawford, *supra* note 111, at 59.

122. LLOYD, *supra* note 113, at 79-80; Collins, *supra* note 116, at 84-88, 92-94; FOSTER ET AL., *supra* note 110, at 11-18, 22-27. The culture of the fourth millennium B.C. is best known from the site of Uruk or Warka and is exemplified by the Warka Vase and Warka Head of this period. *Id.* at 14. In the later part of the third millennium, Ur was a center of Mesopotamian civilization and is known now from the royal tombs excavated by Sir Leonard Woolley in the 1920s. These tombs contained sculptures and jewelry of gold, lapis lazuli, carnelian and shell. *See, e.g.*, LLOYD, *supra* note 113, at 84-86, 89-96; Collins, *supra* note 116, at 92-94.

123. FOSTER ET AL., *supra* note 110, at 29-36.

124. The Code of Ur-Nammu dates to approximately 2100 B.C. Dietz Otto Edzard, *The Third Dynasty of Ur—Its Empire and Its Successor States*, in *THE NEAR EAST: THE EARLY CIVILIZATIONS* 133, 137

known ancient law code, the Code of Hammurabi, was written in approximately 1750 B.C. by the ruler of the Old Babylonian kingdom.<sup>125</sup> During this and several other time periods, Mesopotamian civilizations had extensive contact with peoples and cultures in the surrounding regions, particularly the areas that today are Syria, Turkey, and Iran.<sup>126</sup> In the early second millennium B.C., trading colonies extended into Central Anatolia (modern Turkey), with extensive correspondence preserved that documents this trade.<sup>127</sup>

Mesopotamian civilization reached another peak in the Neo-Assyrian period of the ninth to seventh centuries B.C., boasting many of the rulers known to us today from Biblical accounts as well as contemporary documents.<sup>128</sup> The Neo-Assyrian Empire extended west to the Mediterranean and to the east toward modern Iran.<sup>129</sup> The Babylonian Empire followed in the sixth century B.C.<sup>130</sup> After that, Mesopotamia was ruled by a succession of foreign empires including the Persians under Cyrus, Darius, and Xerxes<sup>131</sup> and later the Hellenistic Greeks under Alexander and his successors, the Seleucids.<sup>132</sup> The Parthian<sup>133</sup>

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(Jean Bottéro et al. eds., 1967). Evidence of private law, including contracts and land sales, is known from the Shuruppak archive of the Early Dynastic III period, approximately 2600-2500 B.C. Dietz Otto Edzard, *The Early Dynastic Period*, in *THE NEAR EAST: THE EARLY CIVILIZATIONS* 52, 75 (Jean Bottéro et al. eds., 1967).

125. FOSTER ET AL., *supra* note 110, at 47-48. The best known version of the Hammurabi Code is today located in the Louvre. It had been looted in antiquity when Babylon fell to the Persians and taken to Susa (located in modern Iran). The stele was recovered by the French excavators and from there taken to the Louvre. Biggs, *supra* note 112, at 117. The best known work of ancient Mesopotamian literature, the Epic of Gilgamesh, also dates from this period. FOSTER ET AL., *supra* note 110, at 50-51.

126. A. LEO OPPENHEIM, *ANCIENT MESOPOTAMIA: PORTRAIT OF A DEAD CIVILIZATION* 63-65 (Univ. of Chicago 1977).

127. Reade, *supra* note 117, at 127-28.

128. LLOYD, *supra* note 113, at 193-213; FRANKFORT, *supra* note 113, at 73-105; FOSTER ET AL., *supra* note 110, at 73-83.

129. OPPENHEIM, *supra* note 126, at 60; Reade, *supra* note 117, at 133-34.

130. LLOYD, *supra* note 113, at 229-32; FOSTER ET AL., *supra* note 110, at 85-94.

131. LLOYD, *supra* note 113, at 232; FOSTER ET AL., *supra* note 110, at 94-98.

132. OPPENHEIM, *supra* note 126, at 49; FOSTER ET AL., *supra* note 110, at 101-07; Elisabetta Valtz Fino, *In the Wake of Alexander the Great*, in *THE LOOTING OF THE IRAQ MUSEUM*, *supra* note 111, at 147, 147-49.

133. The Parthians were an Iranian semi-nomadic tribe that overthrew the Seleucid Dynasty founded by one of Alexander the Great's generals in about 150 B.C. They ruled until their defeat by the Sassanians in 227 A.D. and controlled the Silk Route. Fino, *supra* note 132, at 149-50; FOSTER ET AL., *supra* note 110, at 110-13. The well-preserved site of Hatra, located in northern Iraq, was one of the Parthians' main cities. Fino, *supra* note 132, at 161-68. It was placed on the List of World Heritage in 1985. The site of Ashur (Qal'at Sherqat) was listed in 2003 shortly before the start of



and Sassanian empires followed.<sup>134</sup>

The area of present-day Iraq also had great significance during the Islamic periods.<sup>135</sup> The 'Abbasid caliphate, centered in the newly-founded capital of Baghdad,<sup>136</sup> ruled from the mid-eighth century until the thirteenth century.<sup>137</sup> However, by the eleventh century its authority was limited primarily to the regions of modern Iraq, Iran, and parts of Syria and Turkey.<sup>138</sup> The 'Abbasids moved their capital to Samarra for about fifty years in the second half of the ninth century and built there one of the best known and largest ancient cities.<sup>139</sup> During this period, the southern city of Basra controlled much of the trade in spices, precious stones, fine cloth, and porcelain from the East; furs from the north; and coral, ivory, armaments, and textiles from the eastern Mediterranean.<sup>140</sup> Baghdad and many other Iraqi cities were

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the war and, at the same time, placed on the List of World Heritage in Danger. See World Heritage List, <http://whc.unesco.org/en/list/>; List of World Heritage in Danger, <http://whc.unesco.org/en/danger/>. Ashur was nominated before the start of the 2003 war and placed simultaneously on both lists, because it was threatened by the planned construction of the Makhoul dam. Joanne Farchakh, *Comment protéger l'archéologie en Irak juste avant la guerre?*, ARCHEOLOGIA, Feb. 2003, at 20, 30-31 [hereinafter Farchakh, *Comment protéger l'archéologie*]. Ashur was the capital of the Assyrian Empire during the Middle Assyrian period. See FRANKFORT, *supra* note 113, at 68-72.

134. The Sassanian Empire was contemporary with the Byzantine Empire and struggled with it for control of the Eastern Mediterranean region during the sixth and seventh centuries. The Sassanian Empire encompassed modern Iraq and Iran and stretched to Central Asia. The Sassanians revived the older Iranian religion, Zoroastrianism, and located their capital at Ctesiphon in central Iraq. In addition, Judaism and different sects of Christianity flourished during this time. The Caliph Omar defeated the Sassanians in 636 A.D., and the last Sassanian ruler died in 652. See ALBERT HOURANI, *A HISTORY OF THE ARAB PEOPLES* 9-11 (1992); Alastair E. Northedge, *The Coming of Islam, in THE LOOTING OF THE IRAQ MUSEUM*, *supra* note 111, at 174; Fino, *supra* note 132, at 150-51; FOSTER ET AL., *supra* note 110, at 119-26. The Sassanian and Parthian capital at Ctesiphon is one of the most prominent sites in Iraq. The audience hall of the palace is well preserved and its parabolic barrel vault is thirty-five meters high with a span of twenty-six meters. It is the largest vault in the world built without centering. *Id.* at 168.

135. FOSTER ET AL., *supra* note 110, at 138-40.

136. Northedge, *supra* note 134, at 179-81. Nothing remains of Baghdad of the eighth and ninth centuries.

137. Northedge, *supra* note 134, at 178-90; FOSTER ET AL., *supra* note 110, at 149-63; HOURANI, *supra* note 134, at 32-36. The city of Baghdad was besieged and then destroyed by the Mongol invaders in 1258. FOSTER ET AL., *supra* note 110, at 162.

138. HOURANI, *supra* note 134, at 32, 81, 84.

139. Northedge, *supra* note 134, at 182-86. The mosque of the caliph al-Mutawakkil at Samarra was constructed in 847 and encompasses 9.4 acres. The remains of the 'Abbasid palaces at Samarra provide information today about the form of Islamic palaces. *Id.* at 183-84; HOURANI, *supra* note 134, at 56.

140. HOURANI, *supra* note 134, at 44. These trade routes stretched from China to Constantinople and east Africa. *Id.* Reliance on water transport made the region of Iraq crucial to the trade

well known for their mosques, medreses, law courts, learned communities, and extensive libraries.<sup>141</sup> One of the achievements of the 'Abbasids was the translation of Greek works of philosophy, philology, and science into Arabic. This translation movement, based in Baghdad, was the means by which ancient Greek literature, civilization, and learning were preserved and ultimately transmitted to Europe through Islamic Spain.<sup>142</sup> During the period of 'Abbasid rule, the theological underpinnings of what later became Sunnism developed.<sup>143</sup> At the same time, towns in southern Iraq, particularly Najaf and Karbala, were centers of learning, scholarship, and pilgrimage for Shi'ism.<sup>144</sup> Although less well known to the West, the Islamic period was a time of flowering of civilization and culture in Mesopotamia.

Under the Ottoman Empire, from the sixteenth century until the early twentieth century, Iraq consisted of three provinces and was the frontier between the Ottoman Empire and the Safavid Empire of Persia.<sup>145</sup> With the demise of the Ottoman Empire at the end of World War I, Iraq was occupied by the British.<sup>146</sup> A monarchy was established under Faisal, who was the son of Hussein, the sherif of Mecca, and a client of the British.<sup>147</sup> The monarchy was overthrown by a military coup in 1958 and was followed by the Republic. The new government, which was dominated by military

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routes between Asia and the Mediterranean, particularly the Tigris and Euphrates rivers and the location of Basra on the Arabian Gulf facilitated travel. *Id.* at 92. As a result of this trade, new crops were introduced into the West, including rice, sugar-cane, cotton, watermelons, eggplants, oranges and lemons, or their cultivation significantly expanded. Irrigation works were restored in southern Iraq and new agricultural technology was also introduced to the West including the water-wheel, the underground canal, and methods of crop-rotation. *Id.* at 45. Economic development followed agricultural development and, among other innovations, the 'Abbasid gold dinar "remained an instrument of exchange for centuries." *Id.* at 46.

141. *Id.* at 47, 110. During this period, Arabic literature, both poetry and history, developed and was aided by the introduction of paper from China. *Id.* at 49-54.

142. FOSTER ET AL., *supra* note 110, at 157-60.

143. HOURANI, *supra* note 134, at 36-37.

144. TRIPP, *supra* note 110, at 12. The tomb at Najaf of the imam 'Ali ibn Abu Talib, who is regarded by Shi'ites as the proper successor to Muhammed, and the tomb of al-Husayn at Karbala date from the ninth or tenth century and were important centers of pilgrimage. HOURANI, *supra* note 134, at 55; see Northedge, *supra* note 134, at 191; FOSTER ET AL., *supra* note 110, at 142-44.

145. TRIPP, *supra* note 110, at 8; Northedge, *supra* note 134, at 191; FOSTER ET AL., *supra* note 110, at 166-79. The three provinces were based on the three main administrative centers of Mosul, Baghdad and Basra.

146. TRIPP, *supra* note 110, at 28-45 (providing an account of the British conquest and occupation of Iraq). The British sought as early as 1914 to control Basra and the oil fields of southern Iraq. However, the initial British military campaigns of 1914 and 1915 ended in disaster. FOSTER ET AL., *supra* note 110, at 181-82.

147. FOSTER ET AL., *supra* note 110, at 185-87.

leaders, led to the establishment of Baathist rule in 1963 and precipitated Saddam Hussein's rise to power in 1979.<sup>148</sup>

B. *The First Gulf War and Its Aftermath*

Until the First Gulf War,<sup>149</sup> Iraq managed its cultural heritage resources, in particular its archaeological heritage, very successfully.<sup>150</sup> With well-trained archaeologists, educated both abroad and at home, and a well-developed Department of Antiquities, there was virtually no looting of archaeological sites. Excavations had been carried out in Iraq beginning in the 1840s<sup>151</sup> and continued with little interruption until the 1980s.<sup>152</sup> Teams of British, French, German, Italian, and later American, Polish, Russian and Japanese, as well as Iraqi, archaeologists worked at archaeological sites.<sup>153</sup> The British orientalist Gertrude Bell

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148. *Id.* at 199-200, 202; TRIPP, *supra* note 110, at 145-99, 214-23 (providing an account of this historical period).

149. Some writers refer to the Iran-Iraq War of the 1980s as the first Gulf War. This Article will use the term "First Gulf War" to refer to Operation Desert Storm of early 1991, which followed Iraq's invasion of Kuwait. The "Second Gulf War" refers to the war of 2003.

150. Neil Brodie, *The Plunder of Iraq's Archaeological Heritage 1991-2004 and the London Antiquities Trade*, in *ARCHAEOLOGY, CULTURAL HERITAGE, AND THE TRADE IN ANTIQUITIES* 1 (N.J. Brodie et al. eds.) (forthcoming 2006) (manuscript on file with author); Marion Forsyth, *Casualties of War: The Destruction of Iraq's Cultural Heritage as a Result of U.S. Action During and After the 1991 Gulf War*, 14 *DEPAUL-LCA J. ART & ENT. L.* 73, 76-78 (2004).

151. The first excavations carried out in Mesopotamia by a European were those of Paul Émile Botta at the palace of the Assyrian king Sargon at Nineveh and at the Assyrian site of Khorsabad between 1843 and 1846. In 1845, Sir Austen Henry Layard began his excavations of the palace of Assurnasirpal II at the site of Nimrud. In 1849, he began excavations at Nineveh and discovered the palace of Sennacherib with a rich library of cuneiform texts. C.W. CERAM, *GODS, GRAVES, AND SCHOLARS: THE STORY OF ARCHAEOLOGY* 209-17, 246-65 (E.B. Garside trans., Alfred A. Knopf, Inc. 1952) (1949) (narrating Botta's and Layard's discoveries); NORA BENJAMIN KUBIE, *ROAD TO NINEVEH: THE ADVENTURES AND EXCAVATIONS OF SIR AUSTEN HENRY LAYARD* 167-77, 238-44 (1964). All of these sites of the Neo-Assyrian period are located in the north near the modern city of Mosul. The first noted excavations carried out in the south were those of the German archaeologist Robert Koldewey at Babylon, beginning in 1898. He discovered primarily remains of the time of the Neo-Babylonian Empire of Nebuchadnezzar. See CERAM, *supra*, at 279-86. In 1927 and 1928, Sir Leonard Woolley began excavations at the site of Ur, where he found extensive remains of the earlier Sumerian culture, particularly the royal tombs of Ur dating near the end of the third millennium B.C. *Id.* at 309-12. For the history of the twentieth-century excavations in Iraq and particularly the role of Iraqi women archaeologists, see Lamia Al-Gailani Werr, *A Museum Is Born*, in *THE LOOTING OF THE IRAQ MUSEUM*, *supra* note 111, at 27.

152. Excavations were interrupted for war, particularly the Iran-Iraq war, which lasted from 1980 to 1988. Foreign excavation work had just resumed in 1989 when it was soon brought to a halt by Iraq's invasion of Kuwait and the subsequent war and sanctions.

153. FOSTER ET AL., *supra* note 110, at 193-95, 204-05.

served as the Director of Antiquities for Iraq from 1923 until her death in 1926,<sup>154</sup> and was the founder of the Iraq Museum.<sup>155</sup> The legal regime to protect archaeological heritage was also well developed. Dating from 1936,<sup>156</sup> Iraqi law has consistently vested ownership of archaeological sites and artifacts in the nation, regulated construction projects around historic sites and monuments, and provided for the licensing of excavations.<sup>157</sup>

With the beginning of sanctions against Iraq for its invasion of Kuwait in August 1990<sup>158</sup> and the First Gulf War in January 1991, this

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154. The Department of Antiquities was established by Gertrude Bell, who had worked in Iraq as the Oriental Secretary for the British during World War I and encouraged the Arab uprising against the Ottoman Empire. See TRIPP, *supra* note 110, at 39; Werr, *supra* note 151, at 27-28 (detailing the history of the Iraq Museum). Bell had perhaps the best understanding of Arabic and the history of the region among the British who were trying to administer the area following World War I. She was instrumental in the British creation of modern Iraq after World War I as an independent nation and in the drawing of its modern borders. FOSTER ET AL., *supra* note 110, at 184-85. For a biography of Gertrude Bell, see generally JANET WALLACH, *DESERT QUEEN* (1996).

155. FOSTER ET AL., *supra* note 110, at 225.

156. The first antiquities law was passed in 1924, but the current law is based on the law enacted in 1936, which has since been amended. Antiquities Law No. 59 of 1936 (Iraq) (as amended by amendments 120 (1974) and 164 (1975)), available at <http://old.developmentgateway.org/download/181160/Iraq-Antiquities-Law.rtf/rtf> [hereinafter Antiquities Law]. The antiquities law was reportedly amended in late 2002, but as its content and legal status are unclear, this Article will rely on the 1936 law as amended in 1974 and 1975. Bell was the author of the 1924 law. It provided that all exceptional finds and half of the remaining finds from excavations would be given to the Iraq Museum. FOSTER ET AL., *supra* note 110, at 225. The constitution adopted by referendum on October 15, 2005, vests ownership of antiquities and sites in the nation, stating in Article 109: "Antiquities and antiquity sites, traditional constructions, coins and manuscripts are considered part of the national wealth which are the responsibility of the national authorities. They will be administered in cooperation with the regions and governates, and this will be regulated by law." IRAQ CONST., translated by Associated Press.

157. See, e.g., Antiquities Law, *supra* note 156, art. 3 (declaring all movable and immovable antiquities to be the common property of the State), arts. 11, 17 (requiring the reporting of the discovery of antiquities), art. 23 (requiring the display of government-owned antiquities to the public and scientists), art. 26 (prohibiting the removal of antiquities from Iraq except for purposes of exhibition, exchange, and scientific study), arts. 40-54 (regulating the excavation of archaeological sites and the issuance of permits to qualified excavators). Article 71 of the 1936 law explicitly repealed the earlier law of 1924. Antiquities Law, *supra* note 156, art. 71; see also Lindsay E. Willis, *Looting in Ancient Mesopotamia: A Legislation Scheme for the Protection of Iraq's Cultural Heritage*, 34 GA. J. INT'L & COMP. L. 221, 237-42 (2005) (detailing provisions of the 1936 law).

158. Trade sanctions were originally imposed under U.N. Security Council Resolution 661 of August 1990. These sanctions called on nations to prohibit imports of all Iraqi goods. S.C. Res. 661, ¶ 3(a), U.N. Doc. S/RES/661 (Aug. 6, 1990). Without singling out cultural materials, the sanctions automatically applied to cultural objects. In fulfillment of obligations under the Security Council Resolution, the President of the United States imposed sanctions under the International

situation changed dramatically. Although somewhat belatedly, as the war was beginning the United States military contacted American archaeologists who had worked in Iraq to develop a list of sites and locations that should not be targeted because of their historic value.<sup>159</sup> These contacts produced a list of about 2,000 to 3,000 sites. It seems that no archaeological, cultural, or historic site was intentionally targeted. However, several sites were damaged. The brickwork of the ziggurat<sup>160</sup> at Ur was damaged by rocket or shell fire and there was minor looting at Ur as well.<sup>161</sup> Standing ancient architecture is particularly vulnerable to unintentional damage caused by the shocks and reverberations of explosives. For example, during the First Gulf War the arch at Ctesiphon, the largest vault in the world without centering, which dates to the fourth century A.D.,<sup>162</sup> developed cracks, and a tenth century church in Mosul was partially destroyed.<sup>163</sup> Construction of American military bases damaged the archaeological sites of Tell al-Lahm and Tell el-Obeid, located in southern Iraq.<sup>164</sup> Some of the

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Emergency Economic Powers Act. See 50 U.S.C. §§ 1701-07; Exec. Order No. 12744, 56 Fed. Reg. 2663 (Jan. 22, 1991); Exec. Order No. 12722, 55 Fed. Reg. 31,803 (Aug. 3, 1990).

159. Forsyth, *supra* note 150, at 91 (quoting the archaeologist John Russell); see BOYLAN, *supra* note 65, app. VIII, 201, 205 (reprinting a report by the Department of Defense to the U.S. Congress on the protection of cultural property in time of war). The Department of Defense listed several steps that were taken to avoid damage to cultural sites, including the use of munitions and aircraft that would be the most accurate so as to reduce the risk of collateral damage. While the United States and the United Kingdom were not parties to the 1954 Hague Convention, Iraq, Kuwait and several members of the coalition were.

160. The word *ziggurat* means "to be high" or "pointed" and refers to temple towers constructed throughout much of ancient Mesopotamian history. They were intended to be sacred mountains where the gods dwelled. FRANKFORT, *supra* note 113, at 6, 236 n. 16.

161. Eleanor Robson, *The Threat to World Heritage in Iraq* (2003), <http://users.ox.ac.uk/~wolf0126/#intro/>; Friedrich T. Schipper, *The Protection and Preservation of Iraq's Archaeological Heritage, Spring 1991-2003*, 109 AM. J. ARCHAEOLOGY 251, 253-55 (2005); see also Forsyth, *supra* note 150, at 79-80. Schipper notes that five large bomb craters around the ziggurat's tower and 400 splinter holes in a reconstructed wall of the tower were seen. Some of this damage resulted from attacks on an Iraqi military base built near the site. Schipper, *supra*, at 253-55. The Department of Defense later wrote that two MiG-21 fighter aircraft were placed at the entrance of the ancient temple of Ur. Although it was permitted to attack the site because of the presence of the aircraft, the United States decided not to do so, in part because the aircraft "were incapable of military operations from their position" and because of concern for collateral damage. BOYLAN, *supra* note 65, app. VIII, 201, 204 (citing from Department of Defense report to the U.S. Congress on the protection of cultural property in time of war).

162. See *supra* note 133.

163. Robson, *supra* note 161.

164. Schipper, *supra* note 161, at 255; see Robson, *supra* note 161. Damage was also done to historic sites during the Iran-Iraq war of the 1980s, particularly at the site of Der, which was used as

most valuable and significant archaeological objects from the Iraq Museum were stored in the basement vaults of the Central Bank for safekeeping. These included the gold finds from both Ur and the royal tombs discovered in 1989 beneath the floors of the Northwest Palace of Ashurnasirpal II at Nimrud.<sup>165</sup> Although the gold objects' location was not known for nearly thirteen years, most of these objects were undamaged.<sup>166</sup>

Two additional sequences of events were significant for the future of Iraq's cultural heritage. The first of these was the removal by the Iraqis of many art works and cultural objects from the museums and private collections of Kuwait.<sup>167</sup> The Iraqis claimed that they acted under the First Protocol of the Hague Convention as part of their obligation to protect the cultural objects of occupied territory.<sup>168</sup> Others view this removal as less innocent.<sup>169</sup> Iraq ultimately returned most of the objects to Kuwait under pressure from the United Nations and sanctions.<sup>170</sup> However, some of the objects were never returned and are

a military camp by the Iraqi army. Trenches were cut through the main temple of 2500 B.C. In addition, the site of Godin Tepe, located in western Iran, suffered considerable damage from air attack. See Cuning, *supra* note 6, at 228 (referring to damage done to Iranian sites by Iraq). It was also reported that Iraq attacked the Jomé Mosque in Isfahan. Meyer, *supra* note 95, at 365.

165. Collins, *supra* note 116, at 92-94; Reade, *supra* note 117, at 138; Diana McDonald, *The Recovery of the Nimrud Gold*, in *THE LOOTING OF THE IRAQ MUSEUM*, *supra* note 111, at 212; Samuel M. Paley, *Nimrud, the War, and the Antiquities Markets*, 6 IFAR J. 50, 51 (2003), available at <http://www.ifar.org/nimrud.htm>.

166. Paley, *supra* note 165, at 51. U.S. archaeologists did not know that these objects had been placed in the Bank, and so the Central Bank, which is located very near to a strategic site, was not placed on the list of sites to be avoided. At some point, possibly during the first war or possibly during the second war or both, the vaults were flooded. This did not cause much harm to the metal objects, but Assyrian ivories suffered considerable damage from their wet environment. Some of the storerooms of the Iraq Museum were apparently flooded in 2003 and this caused damage to some of the best known Assyrian ivories in the Museum. Reade, *supra* note 117, at 124.

167. Harvey E. Oyer III, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict—Is It Working? A Case Study: The Persian Gulf War Experience*, 23 COLUM.-VLA J.L. & ARTS 49, 58-60 (1999).

168. See TOMAN, *supra* note 13, at 349; Oyer, *supra* note 167, at 60; MCGUIRE GIBSON & AUGUSTA MCMAHON, 1 HERITAGE: ANTIQUITIES STOLEN FROM IRAQ'S REGIONAL MUSEUMS vi (1992), available at <http://oi.uchicago.edu/OI/IRAQ/lh1df>. Another interpretation would be that Iraq removed these cultural objects to protect them from looting and vandalism under Article 4, paragraph 3, of the main Convention. See Meyer, *supra* note 95, at 375.

169. Detling, *supra* note 97, at 43 n.10 (describing media reports of the destruction of Kuwait's museum complex, planetarium and university laboratories). However, after Iraq returned the Kuwaiti objects, most commentators accepted the more altruistic explanation.

170. TOMAN, *supra* note 13, at 349; Etienne Clément, *Some Recent Practical Experience in the Implementation of the 1954 Hague Convention*, 3 INT'L J. CULTURAL PROP. 11, 17 (1994) (stating that

reported to be available on the art market.

The second sequence of events was the removal of many objects from the Iraq Museum to provincial regional museums. Again, different explanations have been given. Some of this removal occurred during the 1980s as a way of creating a regional museum system and distributing cultural objects throughout the country.<sup>171</sup> Some of the removal may have been to make room in the Iraq Museum for the collections brought from Kuwait.<sup>172</sup> Finally, the removal might have been motivated by the belief that regional museums would be safer repositories during the war than the Iraq Museum. Regardless of the explanation, the removal led to serious unintended consequences.

Following the conclusion of the First Gulf War, coalition allies encouraged Kurds and Shiites to engage in uprisings against Saddam Hussein's government. Those who rebelled turned against government buildings, including local museums. Ultimately eleven of the thirteen local museums were ransacked and looted and more than 4,000 objects were stolen.<sup>173</sup> Approximately 400 of these objects have been documented,<sup>174</sup> and approximately twenty-four have reportedly surfaced on the art market.<sup>175</sup> However, the exact number stolen at that time and

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thousands of objects were returned to Kuwait under the supervision of the United Nations between September 14 and October 20, 1991); Cunning, *supra* note 6, at 229-30. Meyer cites sources estimating that 17,000 artifacts were returned to Kuwait and that approximately 10% of the collection was lost or destroyed. Meyer, *supra* note 95, at 375.

171. Forsyth, *supra* note 150, at 77-78.

172. *Id.* at 82.

173. See Farchakh, *Comment protéger l'archéologie*, *supra* note 133, at 27; Donny George, *Foreword*, in *THE LOOTING OF THE IRAQ MUSEUM*, *supra* note 111, at 1. Brodie states that between 1991 and 1994 approximately 3000 objects and 484 manuscripts were stolen. Brodie, *supra* note 150, manuscript at 38. Paley, *supra* note 165, at 51-55, describes the looting of the site museum at Nimrud. Several bas reliefs, originally from the Northwest Palace of King Ashurnasirpal II and the Central Palace of King Tiglathpileser III, were stolen.

174. See generally GIBSON & McMAHON, *supra* note 168 (documenting approximately 200 pieces); H.D. BAKER ET AL., 2 LOST HERITAGE: ANTIQUITIES STOLEN FROM IRAQ'S REGIONAL MUSEUMS (1993) (documenting more pieces), available at <http://oi.uchicago.edu/OI/IRAQ/lh2.pdf>; HIDEO FUJII & KAZUMI OGUCHI, 3 LOST HERITAGE: ANTIQUITIES STOLEN FROM IRAQ'S REGIONAL MUSEUMS (1996) (documenting more pieces), available at <http://oi.uchicago.edu/OI/IRAQ/lh3.pdf>.

175. Guy Gugliotta, *Global Hunt Is Launched for Iraq's Looted Heritage: Treasure Trove of Antiquities May Prove Difficult to Recover*, WASH. POST, May 2, 2003, at A3. The only object from the regional museums known to have been located is a Sumerian foundation figurine stolen from the Kirkuk Museum in 1991. The figure had been excavated by Donald Hansen in the temple of the goddess Inanna at al-Hiba. The Art Loss Register identified the figure from the *Lost Heritage* series when it was consigned to Christie's for sale in 2001. Four objects were recovered in London. The first was a stone head from the site of Hatra, which was smuggled out of Iraq through Jordan and recovered by a London antiquities dealer. The second was a fragment of an Assyrian relief

the fate of the remaining objects will likely never be known. In addition to anger at the Saddam regime, there was a second impetus for these lootings: Sotheby's and Christie's conducted several auctions of a major private collection of Mesopotamian antiquities at about the same time. Known as the Erlenmeyer collection, these objects were particularly valuable because they had excellent provenience from a documented old collection.<sup>176</sup> The sales achieved significant sums at auction and this indicated to the Iraqis, probably for the first time, just how valuable their antiquities were on the international art market.

During the 1990s, looting began at both unexcavated archaeological sites and some of the best-known sites.<sup>177</sup> The Iraqi government diverted funds to military purposes, and foreign archaeologists were forbidden to work in Iraq because of sanctions.<sup>178</sup> As most ancient Mesopotamian sites are composed of mud brick, they are constantly under threat from time and the elements and require sophisticated preservation methods to prevent their deterioration. The period of sanctions, therefore, saw much damage to many of the best known sites due to lack of funding and access to sophisticated methods of conservation.<sup>179</sup> The sanctions also prevented Iraq from receiving academic works, newer technology, and supplies needed to document and preserve both sites and museum collections.<sup>180</sup> The site of Umma,

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purchased by the collector Shlomo Moussaieff. This is discussed in note 186, *infra*. More recently, a relief from the Palace of Ashurnasirpal II at Nimrud was recovered in 2002, and in 2003 an eleventh century book stolen from the Awqaf Library in Mosul was turned in by Christie's. Brodie, *supra* note 150, manuscript at 407-08; Paley, *supra* note 165, at 51-55.

176. See generally SOTHEY'S, WESTERN ASIATIC CYLINDER SEALS AND ANTIQUITIES (PART I) FROM THE ERLNMEYER COLLECTION (1992) (cataloguing collection items for sale); CHRISTIE'S LONDON, THE ERLNMEYER COLLECTION OF ANCIENT NEAR EASTERN STAMP SEALS AND AMULETS (1989) (cataloguing collection items for sale); CHRISTIE'S LONDON, ANCIENT NEAR EASTERN TEXTS FROM THE ERLNMEYER COLLECTION (1988) (cataloguing collection items for sale).

177. Forsyth, *supra* note 150, at 80-81; George, *supra* note 173, at 1 (stating that objects were stolen from the site museum at Ashur in 1995, the Kut Museum was looted in 1996, and cylinder seals were stolen from the Nebuchadnezzar Museum in Babylon); Brodie, *supra* note 10, at 16.

178. Forsyth, *supra* note 150, at 78.

179. Schipper, *supra* note 161, at 256-62 (discussing deterioration at the sites of Nimrud, Uruk, Borsippa, Babylon, and Ur).

180. Forsyth, *supra* note 150, at 79. The United States and United Kingdom vetoed the sending of a UNESCO mission of scientists to Iraq. *Id.* at 82-83. The Sanctions committee also prevented the import of photographic paper that would have allowed the printing of images of the objects stolen from the Iraqi museums. *Id.* at 83-84. Iraqi museum professionals were unable to obtain or use chemicals and modern technology to conserve and clean objects in museum collections. Farchakh, *Comment protéger l'archéologie*, *supra* note 133, at 27. The sanctions, of course, had more far-reaching effects on Iraq, including widespread hunger, unemployment and poverty.



located in southern Iraq, was particularly hard hit by looting.<sup>181</sup> In 1999, Iraqi archaeologists were able to conduct excavations at Umma and the nearby site of Umm al-Aqarib and thereby stop the looting.<sup>182</sup> However, networks had developed during the years of sanctions by which looted artifacts were smuggled out of Iraq and brought to the international art market.<sup>183</sup> Again, motivations were mixed. Local peasants and farmers, particularly in the South, turned to looting because of the poverty caused by sanctions imposed by the international community.<sup>184</sup> Some of the Baathists leaders, including members of Saddam Hussein's family, have also been implicated in looting and, particularly, in the smuggling of antiquities out of Iraq.<sup>185</sup>

Perhaps the best-documented case of vandalism, looting, and smuggling involved the reliefs from the palace of the Assyrian king Sennacherib at the site of Nineveh. These reliefs had been documented in situ in 1989 and 1990 by John Malcolm Russell, who was part of a team

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FOSTER ET AL., *supra* note 110, at 207-08. Ironically, the sanctions did not prevent the smuggling of looted artifacts out of Iraq or their import into the market nations. Forsyth, *supra* note 150, at 84. Forsyth notes that illegal importation is often achieved by the mislabeling of the country of origin of antiquities. For example, if an importer declares the country of origin as Syria, a customs agent might not realize the sanctions would apply. It would require a fairly sophisticated level of training in archaeology for a customs officer to distinguish an antiquity that originated from Iraq, rather than Syria. *Id.* at 92. *See cf.* United States v. An Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999) (affirming a district court opinion ordering civil forfeiture of an antiquity because its country of origin was declared to be Switzerland rather than Italy).

181. Micah Garen & Marie-Hélène Carleton, *Erasing the Past: Looting of Archaeological Sites in Southern Iraq*, in THE LOOTING OF THE IRAQ MUSEUM, *supra* note 111, at 15-16, 18. Brodie, *supra* note 150, manuscript at 403. Hundreds of armed looters were reported to be working at Umma and a cuneiform archive was dug up at the site. For photographs illustrating damage done to sites both before and after the current war, taken by Joanne Farchakh-Bajjaly between 2002 and 2004, visit <http://oi.uchicago.edu/OI/IRAQ/sites/sitesintro.htm>.

182. Joanne Farchakh, *Le Massacre du Patrimoine irakienne*, ARCHEOLOGIA, July-Aug. 2003, at 14, 27 (2003) [hereinafter Farchakh, *Le Massacre*]. In 2000, funding was made available to Iraq archaeologists to purchase vehicles and other equipment and to carry out excavations. Farchakh, *Comment protéger l'archéologie*, *supra* note 133, at 27.

183. FOSTER ET AL., *supra* note 110, at 208-09.

184. In addition, looting of sites in the South was exacerbated by Saddam's draining of the marshes, which was done to suppress an uprising among the "marsh Arabs." The draining revealed previously unknown sites, which were then ripe for the looting. Micah Garen, *The War Within the War*, ARCHAEOLOGY, July-Aug. 2004, at 28, 31.

185. George, *supra* note 173, at 1. Some of this looting, or at least the marketing of the products of the looting, was associated with Baathist party leaders. Arshad Yasin, an officer in the Special Guard and Saddam Hussein's brother-in-law, is reported to have been one of the organizers and financiers of much of the looting at sites in the south of Iraq. Garen, *supra* note 184, at 30. On the other hand, harsh penalties including the death sentence were given to those directly engaged in the looting. Brodie, *supra* note 150, manuscript at 391.

from the University of California at Berkeley. Portions of these reliefs were therefore easily identified when they appeared on the market in the mid-1990s.<sup>186</sup> In 1995, Russell was shown photographs of three fragments of Assyrian reliefs that were being offered for sale.<sup>187</sup> In November 1996, Russell was shown photographs of an additional ten fragments, all but one from Sennacherib's palace. In 1998 Russell wrote:

Each fragment came from a different slab, and most of them had been broken from the middle of a slab. Recent photographs of the site show that the looters destroyed whole slabs to extract the best-preserved bits. A few months later, the lower part of a corner slab appeared on the market, broken in half, leaving only a hole in the ground where it had been.<sup>188</sup>

Russell further described the fragments whose photographs he was shown by noting that fragments often had edges broken away, were squared off to give the impression that they were complete scenes, and were reoriented or tilted so as to give a more visually-pleasing impression. He wrote:

These examples of trimming and reorienting show how important context is in understanding the significance of each fragment, and how much crucial information is lost in the breaking up of a sculptured slab into fragments for the antiquities market. Viewed in isolation, these fragments carry no hint of

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186. See JOHN MALCOLM RUSSELL, *THE FINAL SACK OF NINEVEH* 15 (1998); Spencer P.M. Harrington, *Assyrian Wall-Reliefs for Sale*, *ARCHAEOLOGY*, Nov.-Dec. 1996, at 20. Israeli collector Shlomo Moussaieff attempted to export several Assyrian sculptural reliefs from London to Israel in 1996. When he applied for an export license, at least one piece was identified as coming from Nineveh. Moussaieff attempted to claim title to the piece under the good faith purchaser doctrine of Switzerland, where he had acquired the piece in the free port zone of the Geneva airport. He ultimately returned the piece but only after Iraq compensated him. See Martin Gottlieb & Barry Meier, *Aftereffects: The Plunder*, *N.Y. TIMES*, Apr. 30, 2003, at A16; Dalya Alberge, *Collector to Fight Over Stolen Sculpture*, *TIMES* (London), Oct. 29, 1998, at 9. Another object identified on the market was a second century A.D. head stolen from the Parthian site of Hatra and located in a London gallery in 2001. Farchakh, *Comment protéger l'archéologie*, *supra* note 133, at 30; Gugliotta, *supra* note 175.

187. RUSSELL, *supra* note 186, at 15; John M. Russell, *Stolen Stones: The Modern Sack of Nineveh*, *ARCHAEOLOGY*, Dec. 6, 1996, <http://www.archaeology.org/online/features/nineveh/>. The looting of the reliefs was facilitated by the deterioration of the walls resulting from the loss of the roof over the palace that had protected the reliefs from rain and winter weather. Schipper, *supra* note 161, at 267.

188. RUSSELL, *supra* note 186, at 16-17.

their original meaning or context. Not only have unique cultural artifacts been destroyed, but even fragments that remain have been reduced to incomprehensible ciphers, the meaning of which was lost with the destruction of the full composition.<sup>189</sup>

Samuel Paley also identified several bas-reliefs which were looted from the Central Palace of King Tiglathpileser III at Nimrud and which appeared on the market at about the same time as the Nineveh reliefs. He categorizes the reliefs that appeared on the market in three groups: those that were in the same condition as when they were excavated, those that had been cut down to obscure their origins, and those that were smashed and broken.<sup>190</sup>

As with the sale of the Erlenmeyer collection before the First Gulf War, looting of Assyrian reliefs may have been spurred by the success of another sale on the market. The 1994 sale of a Nimrud relief fragment for almost \$12 million, which Austin Henry Layard, the first excavator of Nimrud, had given to Canford Manor in England, provided an example of the marketability and economic worth of Assyrian antiquities.<sup>191</sup> In many respects, the stage was set for the cultural disaster that would follow the Second Gulf War. Within Iraq, a cadre of looters had been created where none existed before.<sup>192</sup> A network of smugglers and routes out of Iraq had been established, and the desirability of certain categories of Mesopotamian artifacts (and the high prices they would bring on the market) had been demonstrated.

### C. *The Second Gulf War and Its Aftermath*

The Second Gulf War has had a significant impact on the cultural heritage of Iraq that cannot be overstated. As at the beginning of the First Gulf War, but in a more organized fashion, archaeologists in contact with military planners drew up a list of several thousand archaeological and other cultural sites, along with their coordinates,

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189. *Id.* at 48.

190. Paley, *supra* note 165, at 52. Only one of the Tiglathpileser III palace reliefs' fragments has been located on the market or in collections, and the whereabouts of the rest are unknown. See Spencer P.M. Harrington, *Nimrud Reliefs for Sale*, *ARCHAEOLOGY*, Nov.-Dec. 1997, at 20.

191. See John Malcolm Russell, *Saga of the Nineveh Marbles*, *ARCHAEOLOGY*, Mar.-Apr. 1998, at 38.

192. Karin E. Borke, *Searching for a Solution: An Analysis of the Legislative Response to the Iraqi Antiquities Crisis of 2003*, 13 *DEPAUL-LCA J. ART & ENT. L.* 381, 389 (2003); Farchakh, *Comment protéger l'archéologie*, *supra* note 133, at 26-27; Brodie, *supra* note 10, at 18 (also detailing smuggling and trade networks out of Iraq to neighboring countries).

which were not to be targeted.<sup>193</sup> In addition, these archaeologists warned of the likelihood of looting during the gap in civil authority after the fall of the Saddam Hussein government.<sup>194</sup> A list of important buildings in Baghdad that were to be protected was drawn up, and the Iraq Museum, the largest repository of Mesopotamian artifacts in the world, was reportedly second on the list.<sup>195</sup> Iraqi archaeologists and museum staff also prepared for the war by moving artifacts in museum collections to safe storage and by marking museums with the symbol indicating that they were protected under the Hague Convention.<sup>196</sup>

As best as can be determined at this time, it seems that no archaeological or cultural sites were targeted for bombing during the initial phase of the military offensive. Due to several factors, including the insurgency that followed this initial phase, there has been no systematic survey of damage caused by the war to archaeological and cultural sites.<sup>197</sup> However, it is now possible to piece together several aspects of significant damage that was done. The rest remains unknown.

193. See Selma Al-Radi, *The Ravages of War and the Challenge of Reconstruction*, in *THE LOOTING OF THE IRAQ MUSEUM*, *supra* note 111, at 207, 209; John Noble Wilford, *War in Iraq Would Halt All Digs in Region*, N.Y. TIMES, Feb. 25, 2003, at E5. The number changed as additional sites were added to the list over a period of time, but included at least 5,000 sites.

194. Paroff, *supra* note 57, at 2023-25. Many archaeological and cultural organizations, including the Archaeological Institute of America and the British Museum, attempted to warn the governments of the United States and United Kingdom of the likely consequences of the war for Iraq's cultural heritage. See Press Release, Archaeological Inst. of Am., AIA Urges Protection of Iraq's Archaeological Heritage, <http://www.archaeological.org/webinfo.php?page=10174>; Holland Cotter, *Oldest Human History Is at Risk: A Prime Center of Islamic Art and Culture May Be in Harm's Way*, N.Y. TIMES, Feb. 25, 2003, at E1; *Protecting Ancient History in Iraq: Archaeologists Worry Antiquities, Artifacts Will Be Lost in War* (NPR radio broadcast Feb. 20, 2003), available at <http://www.npr.org/templates/story/story.php?storyId=978050>. For statements by other professional organizations, see Archaeos, Inc., *The Iraq War and Archaeology* (2005), <http://iwa.univie.ac.at/professional.html>. The looting of sites and cultural institutions occurred despite these warnings. Paroff quotes senior U.S. military officials as admitting that there was a "void in security" and inadequate protection of the museum due to a failure "to anticipate Iraq's cultural riches would be looted by its own people." Paroff, *supra* note 57, at 2026-27.

195. Paul Martin, *Troops Were Told to Guard Treasures*, WASH. TIMES, Apr. 20, 2003, at A1. According to this report, the Central Bank was the first building on the list of sixteen to be protected. According to this same article, the only building that was protected was the Ministry of Oil, which was last on the list; see also Brodie, *supra* note 150, manuscript at 392.

196. Farchakh, *Comment protéger l'archéologie*, *supra* note 133, at 22; Joanne Farchakh, *The Specter of War*, *ARCHAEOLOGY*, May-June 2003, at 14.

197. Nevertheless, two web sites have collected and analyzed information and news articles relating to the cultural heritage losses in Iraq. See Oriental Inst. of the Univ. of Chicago, *The Lost Treasures of Iraq* (Apr. 15, 2003), <http://oi.uchicago.edu/OI/IRAQ/iraq.html>; Archaeos, Inc., *The Iraq War and Archaeology* (2005), <http://iwa.univie.ac.at/>.

# 1. The Iraq Museum and Other Cultural Repositories

The story that received the most attention initially was the looting of the Iraq Museum. As the Coalition forces gained gradual control of various cities, particularly Baghdad, looting of government buildings by the local populace was tacitly permitted by the lack of intervention of coalition forces. As a result, the Iraq Museum, the National Library, the National Archives, and the Religious Library (Awqaf Library) were all looted in Baghdad; the buildings, with the exception of the museum, were all burned.<sup>198</sup> Libraries in Basra and Mosul and the museum in Mosul were also looted and suffered considerable damage.<sup>199</sup> The site museum at Nimrud was looted and several bas-reliefs were smashed, with some fragments removed and others left behind because they were too damaged to be saleable.<sup>200</sup> At Hatra, a relief was cut away, and at Nineveh, a wall with reliefs in the throne room of Sennacherib was destroyed.<sup>201</sup>

Between approximately April 8 and April 12, 2003, the Iraq Museum, home of the world's largest collection of Mesopotamian artifacts, was looted.<sup>202</sup> Dr. Donny George, currently the director of the Iraq Mu-

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198. See JOHN M. RUSSELL, *ARCHAEOLOGICAL INST. OF AM., A PERSONAL ACCOUNT OF THE FIRST UNESCO CULTURAL HERITAGE MISSION TO BAGHDAD, MAY 16-20, 2003* (2003) (providing an account of UNESCO site visits to several of these sites), [http://www.archaeological.org/pdfs/papers/J\\_Russell\\_IraqA5S.pdf](http://www.archaeological.org/pdfs/papers/J_Russell_IraqA5S.pdf); Brodie, *supra* note 150, manuscript at 392-93. For early reports on the state of the manuscript collections, archives, and libraries of Baghdad, see NABIL AL-TIKRITI, *IRAQ MANUSCRIPT COLLECTIONS, ARCHIVES & LIBRARIES SITUATION REPORT* (2003), *available at* <http://oi.uchicago.edu/OI/IRAQ/docs/nat.html>; JEAN-MARIE ARNOULT, *ASSESSMENT OF IRAQI CULTURAL HERITAGE: LIBRARIES AND ARCHIVES 7-10* (2003), <http://www.ifla.org/VI/4/admin/iraq2207.pdf>. It is now estimated that 60% of the Ottoman and royal Hashemite records in the Archive were lost, along with substantial records of the Ba'ath period. Approximately 25% of the book collection was lost. JEFF SPURR, *INDISPENSABLE YET VULNERABLE: THE LIBRARY IN DANGEROUS TIMES* (2005), <http://oi.uchicago.edu/OI/IRAQ/mela/indispensable.html#THE>. Archival documents that were removed were placed in the basement of the General Board of Tourism and were soaked when the water pipes broke. *Id.* These documents are in extreme danger from deterioration and are being stored in coolers, which retards but does not prevent mold growth and further deterioration. *Id.*

199. ARNOULT, *supra* note 198, at 10-12; Farchakh, *Le Massacre*, *supra* note 182, at 30-31 (describing the Mosul museum).

200. Paley, *supra* note 165, at 55. Other reliefs were damaged and have bullet holes caused by a gun battle between site guards and looters during the 2003 war. *Id.*

201. Farchakh, *Le Massacre*, *supra* note 182, at 30.

202. The fullest description of the looting of the museum is given in a briefing by Colonel Matthew Bogdanos, who conducted the initial investigation of the looting on behalf of the United States military. Matthew Bogdanos, Marine Colonel, Dep't of Def., Briefing on the Investigation of Antiquity Loss from the Baghdad Museum (Sep. 10, 2003), <http://www.defenselink.mil/>

seum, described the losses as follows:

Fifteen thousand objects were stolen from the galleries and stores of the museum, including Abbasid wooden doors; Sumerian, Akkadian, and Hatraean statues; around five thousand cylinder seals from different periods; gold and silver material, along with necklaces and pendants; and other pottery material. The looters broke through the main museum galleries and the store rooms, stealing and destroying everything they could get their hands on. In many cases, what they could not take they smashed and destroyed, including the head of a terra-cotta lion from Tell Harmal, from the Old Babylonian period around 1800 B.C., and Roman statues found in the city of Hatra, from the first century B.C., in addition to a large number of pottery materials from the storerooms. Many empty showcases from the main halls of the museum were also smashed.<sup>203</sup>

While museum staff had removed most of the well-known display objects to off-site storage shortly before the war began,<sup>204</sup> approximately forty of the display-quality objects, which were too fragile or too heavy to move, were stolen.<sup>205</sup> Of these, several of the most important and distinctive, including the Warka Vase,<sup>206</sup> the Warka Head,<sup>207</sup> and

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transcripts/2003/tr20030910-0660.html; see also Matthew Bogdanos, *The Casualties of War: The Truth about the Iraq Museum*, 109 AM. J. ARCHAEOLOGY 477 (2004) [hereinafter Bogdanos, *Casualties of War*]; Farchakh, *Le Massacre*, *supra* note 182, at 14-23 (detailing the looting based on the author's personal interviews conducted in Baghdad a few weeks after the looting); Borke, *supra* note 192, at 398-401; Brodie, *supra* note 150, manuscript at 398; FOSTER ET AL., *supra* note 110, at 226-28; Paroff, *supra* note 57, at 2025-28.

203. George, *supra* note 173, at 1-2.

204. Bogdanos reports that 8,366 artifacts, including all of the jewelry and ivories from the display cases in the public galleries, had been removed to a "secret place." Museum staff have used this storage area since 1990 to protect artifacts, and its location is known to only five staff members (and Colonel Bogdanos). Bogdanos, *Casualties of War*, *supra* note 202, at 490.

205. Borke, *supra* note 192, at 399-400; FOSTER ET AL., *supra* note 110, at 226.

206. LLOYD, *supra* note 113, at 36-39; Diana McDonald, *The Warka Vase*, in *THE LOOTING OF THE IRAQ MUSEUM*, *supra* note 111, at 80, 80-81; Collins, *supra* note 116, at 88. The Warka (or Uruk) Vase is an alabaster vase, dating to the late fourth millennium B.C. It is one of the first depictions of ritual and religious practices, showing the bringing of gifts to the goddess Inanna. *Id.*

207. LLOYD, *supra* note 113, at 42-44. The Warka Head, also of the late fourth millennium B.C., is considered one of the finest early examples of sculpture. The head was found buried in a garden in Baghdad and had been offered for sale for \$25,000. Joanne Farchakh, *Témoignages d'une Archéologie Héroïque*, ARCHEOLOGIA, May 2004, at 14, 20 [hereinafter Farchakh, *Témoignages*].

the Bassetki statue,<sup>208</sup> were recovered in Baghdad over the next few months. Other well-known pieces are still missing.<sup>209</sup> The investigation of what was taken from the storage areas was severely hampered because the documentation in the museum was ransacked.<sup>210</sup> In addition, some of the objects in storage had not been entered into the museum's accession registry.<sup>211</sup> It is likely that it will either never be known or take years to determine exactly how many objects were taken from the museum.<sup>212</sup> As of January 2005, about 15,000 objects were reported lost from the archaeological collection at the Iraq Museum. About 4,000 of these objects have been returned or recovered within Iraq or in foreign countries including the United States, Jordan, Syria, Iran, Kuwait, Saudi Arabia, and Turkey.<sup>213</sup> Of the stolen objects, 5,144

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208. Collins, *supra* note 116, at 95-97. This statue was found near the modern town of Bassetki in northeast Iraq. It is a hollow-cast copper sculpture of the lower part of a male figure. An inscription indicates that it was made at the time of the Akkadian ruler, Naram-Sin, in about 2250 B.C. The sculpture was dragged down the stairs from the second floor of the Iraq Museum. The sculpture had been purchased for \$300 and was being offered for resale for \$100,000 when it was returned to the museum. Farchakh, *Témoignages*, *supra* note 207, at 20 (reporting on the statue's purchase and selling price at the time of recovery).

209. See, e.g., Biggs, *supra* note 112, at 120 (describing statuary heads from Hatra which were stolen and are still missing). These pieces are well known and would not be openly saleable on the market.

210. The administrative offices, with all their furniture and equipment, were looted. Borke, *supra* note 192, at 400; Bogdanos, *Casualties of War*, *supra* note 202, at 488. Bogdanos divides the thefts in the museum into three categories: the thefts from the public galleries and adjacent rooms; thefts from the above-ground storage rooms, where thefts were random and indiscriminate; and thefts from a basement storage room, from which most of the stolen cylinder seals and jewelry were taken. *Id.* at 507-14.

211. Some of the objects in the museum's study collection, which was both extensive and important, and recently excavated finds had not been inventoried. Borke, *supra* note 192, at 400; Bogdanos, *Casualties of War*, *supra* note 202, at 489. Therefore, it is impossible to know how many of these objects were stolen. Perhaps adding to the confusion is that, in light of the 1991 looting of regional museums, at least some of the regional museums had sent artifacts from their collections to the Iraq Museum in Baghdad for safekeeping. Farchakh, *Le Massacre*, *supra* note 182, at 30-31 (noting that the Mosul museum sent 5,500 works of art to Baghdad).

212. Bogdanos, *Casualties of War*, *supra* note 202, at 491.

213. Donny George, Dir. of the Iraq Museum, Iraq State Bd. of Antiquities & History, Presentation at the Annual Meeting of the Archaeological Institute of America (Jan. 8, 2005) (on file with author). George also reports that the objects recovered in other countries include 1,054 objects in Jordan, about 200 in Syria, around 35 in Kuwait, more than 300 in Italy, over 600 in the United States, and an unspecified number in Saudi Arabia and Lebanon. George, *supra* note 173, at 2. It is unlikely that all of the objects recovered so far were taken from the museum; some were likely looted directly from sites. The International Council of Museums created a Red List of Iraqi Antiquities at Risk. This list illustrates artifact categories that are likely to be vulnerable to theft or

were cylinder seals, which are easily transported and hidden.<sup>214</sup>

## 2. Archaeological Sites

Despite considerable world attention paid to the looting of the museum, the looting of undocumented artifacts directly from archaeological sites is of greater detriment to our understanding of the past. As one author commented,

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looting, rather than naming specific artifacts. See generally Int'l Council of Museums, Emergency Red List of Iraqi Antiquities at Risk, <http://icom.museum/redlist/irak/en/index.html>.

Initial reports of the looting of the entire collection of the museum, estimated to comprise 170,000 or more objects, turned out to be incorrect. See Bogdanos, *Casualties of War*, *supra* note 202, at 491-92 (collecting news stories reporting inaccurate numbers of stolen artifacts). The exact reasons for this incorrect report are unclear, but the error is most likely due to mistakes on the part of Iraqis in the vicinity of the museum and misunderstandings by the reporters who first arrived at the scene. However, the story took on significant political overtones with those who advocated the military offensive in Iraq, charging that the mistake was an intentional fabrication motivated by anti-war political sentiments. See *id.* at 494. Bogdanos points out that the unfortunate consequence of the original exaggerated number is that then the world reacted to the news that "only" about 15,000 objects had been stolen. He wrote:

[T]he real victim of such inaccuracies was the museum itself: once it came clear that the number of 170,000 was wrong by a factor of at least 10, the world breathed a collective sign of relief that "only" 15,000 objects were stolen. The word "only" should never be used in such a context and never would have been but for the original reporting. The further tragedy was that once the lower numbers became known, many governmental and private organizations quickly moved on to other crises, thereby depriving the international investigation of essential resources and funding.

*Id.* at 494.

214. For a description of cylinder seals, see *supra* note 112 & accompanying text. The market value of cylinder seals varies considerably from an average of about \$1,000 per seal achieved at an auction in London in May 2003, Brodie, *supra* note 150, manuscript at 400-01, to a single seal that was auctioned at Christie's for \$424,000 in 2001. Suzanne Charle, *Tiny Treasures Leave Big Void in Looted Iraq*, N.Y. TIMES, July 18, 2003, at E3. It is estimated that many of the cylinder seals that appear on the market, particularly those of lower value, may be fakes. The seals taken from the Iraq Museum were not of the first quality and so their market value would likely be at the lower end of the range, but they had significant historical value because they were all excavated from closed stratigraphic contexts and are known to be genuine. These seals represented much of the collection of the Museum that was accessioned before 1990. Brodie, *supra* note 150, manuscript at 400; Bogdanos, *Casualties of War*, *supra* note 202, at 513-14. Earlier accounts placed the number of stolen seals at 4,795, but a newer inventory by Dr. Lamia al-Gailani has corrected the number upward. *Id.* Three seals with traces of their "I.M." number still visible and known to be from the Iraq Museum were recovered from Joseph Braude, who attempted to smuggle them into the United States. They were bought in Baghdad for about \$200. See *infra* note 346.



[I]f we come to understand the story of looting in its universal aspects—that great volumes of information about our past have been destroyed, that great works of literature and poetry no longer exist, that chapters in our understanding of human development will never be written—then we can begin to feel the scope and depth of our loss.<sup>215</sup>

Archaeological sites, particularly those in the Eastern Mediterranean and Middle East where buildings were constructed primarily from dried mud brick, are composed of layers of soil, each with a complex of artifacts, architectural remains, and floral and faunal remains. Each layer represents a specific time period in the history of the site and in human history. When a site is scientifically excavated, each layer, with all its associated remains, can be reconstructed to give a complete snapshot of ancient life at a particular time. Burials are similar time capsules, which often contain human remains and burial goods; they can convey information about religious customs and beliefs, economic status, health, and gender roles. However, when a site is looted to obtain those artifacts prized for sale on the international art market, the archaeological context is forever lost. As a result, fragile remains are destroyed, and our ability to fully reconstruct and understand the past is permanently diminished.<sup>216</sup> When sites are looted to obtain artifacts for sale on the international market, those artifacts that are not desired by the market or are incomplete are often discarded.

As soon as the war started in March of 2003 and Saddam Hussein's army withdrew from southern Iraq, looting began at the major Sumerian sites in the south.<sup>217</sup> Immediately following the collapse of the Iraqi government, looters returned to Nineveh and Nimrud for more re-

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215. Garen & Carleton, *supra* note 181, at 15.

216. See FOSTER ET AL., *supra* note 110, at 215-16.

217. RUSSELL, *supra* note 198, at 12; McGuire Gibson, *Nippur and Iraq at Time of War*, in THE ORIENTAL INSTITUTE ANNUAL REPORT 2002-2003 88, 88 (2003) (noting looter incursions at Nippur when the war started March 20), available at [https://oi.uchicago.edu/OI/AR/02-03/02-03\\_Nippur.pdf](https://oi.uchicago.edu/OI/AR/02-03/02-03_Nippur.pdf); Edmund L. Andrews, *Global Network Speeds Plunder of Iraqi Antiquities*, N.Y. TIMES, May 28, 2003, at A12 ("The looting . . . exploded into an orgy of theft in the weeks since American forces toppled the government of Saddam Hussein."). Ambassador Pietro Cordone, the Advisor to the Iraqi Ministry of Culture for the Coalition Provisional Authority, toured sites in southern Iraq in May 2003 and stated that dozens or even hundreds of diggers were working at sites. Borke, *supra* note 192, at 401. Garen and Carleton note that there is a "direct relationship between security and looting—looting happens in the absence of authority." Garen & Carleton, *supra* note 181, at 17. They explain that there is an increase in looting when there is an increase in insecurity, as during clashes between the Mahdi army and the Coalition forces in spring 2004. *Id.*

liefs,<sup>218</sup> but these sites were given protection within a few weeks. Similarly, coalition forces moved to protect a few of the best-known sites in the south, such as Babylon and Ur,<sup>219</sup> but extensive looting has continued virtually unabated at numerous southern sites including Isin, Umma, Umm al-Aqarib, and Mashkan Shapir.<sup>220</sup> The sites most exposed to looting are those that date from the Sumerian civilization (fourth to third millennia B.C.).<sup>221</sup>

The destruction of these sites is difficult to quantify. It is estimated that in two years looters removed as much earth from sites in southern Iraq as was removed during all the archaeological excavations carried out in the past 180 years.<sup>222</sup> As many as 400,000 to 600,000 objects,

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218. P. Salopek, *Looters Go to the Source to Steal Iraq Artifacts*, CHI. TRIB., May 7, 2003, at C1. For photographs of damage at Nineveh and Nimrud taken by journalist Joanne Farchakh, see [http://oi.uchicago.edu/OI/IRAQ/dbfiles/farchakh/farchmain.htm#larsa\\_a](http://oi.uchicago.edu/OI/IRAQ/dbfiles/farchakh/farchmain.htm#larsa_a).

219. Borke, *supra* note 192, at 401-02.

220. See Neela Banerjee & Micah Garen, *Saving Iraq's Archaeological Past from Thieves Remains an Uphill Battle*, N.Y. TIMES, Apr. 4, 2004, at A16; Farchakh, *Le Massacre*, *supra* note 182, at 25-29 (describing the author's visit to the sites of Jokha and Umm al-Aqarib and interviews with looters); Cindy Ho, *Heritage Lost: Looting of Archaeological Sites Continues in Iraq*, <http://savingantiquities.org/h-feature.htm>; Harriet Crawford, *Turning a Blind Eye*, MUSEUMS J., Feb. 2005, at 16. Garen reports a gun battle between Iraqi police and looters armed with Kalishnikovs and grenade launchers at the site of Umma in April 2004. Eventually, the police were forced to retreat to the town of Nasariyah. Garen, *supra* note 184, at 31. For aerial photographs of pockmarked sites taken by the Italian carabinieri in 2004, see Ho, *supra*. Other photographs may be found at <http://oi.uchicago.edu/OI/IRAQ/sites/sitesintro.htm>.

221. Burhan Shakir, Director of Excavations, Iraq State Board of Antiquities and Heritage, Presentation at the Annual Meeting of the Archaeological Institute of America (Jan. 8, 2005). Shakir listed the sites of Fara, Isin, Umma, and Umm al-Aqarib. Garen and Carleton report that almost nothing remains of the top three meters of Isin, Adab, Zabalam, Shuruppak and Umma. They describe a visit to Umma as follows:

[F]lying by helicopter over the site reveals an unimaginably grim reality, a scene of complete destruction that unfolds before you as a sea of holes in the desert—negative spaces in history—a pockmarked landscape with craters up to five meters deep. A landscape as desolate as the surface of the moon during the day springs to life after sunset with generators, lightbulbs, trucks, and shovels, as hundreds of looters dig till dawn. Looking down at the succession of holes that was once Umma, one can only wonder at the loss of history, the untold number of looted artifacts and documents of our collective past that will never make it to the Iraq Museum and into the world's consciousness.

Garen & Carleton, *supra* note 181, at 18-19.

222. Abdul Amir Hamdani, director of antiquities for Dhi Qar Province in the south of Iraq where many important Sumerian sites, including Umma, are located, said that there was as much looting in the first three months of the war as had occurred during the previous decade. Garen, *supra* note 184, at 29.

including cylinder seals and cuneiform tablets, have been looted during this time.<sup>223</sup> Looters discard broken or fragmentary cuneiform tablets because they are not saleable on the international market.<sup>224</sup> The World Monuments Fund (WMF) took the unprecedented step of placing the entire country of Iraq on its 2006 list of 100 Most Endangered Sites.<sup>225</sup>

Responsibility for providing security for archaeological sites, particularly in the south, was transferred to the Italian Carabinieri in the fall of 2003 with the Coalition Provisional Authority's appointment of former ambassador Mario Bandioli-Osio as Senior Advisor to the Iraqi Ministry of Culture.<sup>226</sup> The Italian carabinieri have a specially trained squad (il Tutela Patrimonio Culturale) that deals with art theft, fraud, illegal trafficking, and looting of archaeological sites in Italy. A small team of this squad was based at Nasiriyeh and given this specialized responsibility.<sup>227</sup> A group of 1,750 Iraqi police, known as the Facility Protection Service, has been trained to guard sites, but they have not been deployed because they need vehicles, communications equipment, and

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223. This could be the equivalent of an annual trade of about \$10 million to \$20 million. David Johnston, *Picking Up the Stolen Pieces of Iraq's Cultural Heritage*, N.Y. TIMES, Feb. 14, 2005, at A10. The journalist Joanne Farchakh reported that a looted cuneiform tablet could be sold for \$4 and that a looted decorated vase could be sold from \$20 to \$50. Farchakh, *Témoignages*, *supra* note 207, at 25. A sculpture can be worth about \$100. *Id.* The looting, particularly in the south, seems now to be run in an organized fashion by a particular tribal clan known to have made its fortune by smuggling antiquities. *Id.* (quoting Abdel Amir Hamadani, Nasiriyeh's Director of Antiquities).

224. Joanne Farchakh, Lecture at the University of California Berkeley, Mesopotamia Endangered: Witnessing the Loss of History (Feb. 7, 2005), available at [http://webcast.berkeley.edu/events/details.html?event\\_id=182](http://webcast.berkeley.edu/events/details.html?event_id=182); FOSTER ET AL., *supra* note 110, at 209 (noting that most cuneiform tablets are found broken and therefore large numbers would be lost). It is estimated that for every saleable object, 2,000 sherds and 1,000 small finds are discarded. *Id.* at 222.

225. The WMF explained its decision as a "response to such widespread damage and continuing threats to our collective cultural heritage and the significance of the sites at risk." World Monuments Fund, 100 Most Endangered Sites 2006 (listing, among other sites, country-wide Iraq cultural heritage sites), [http://www.wmf.org/html/programs/resources/sitepages/iraq\\_cultural\\_heritage\\_sites.html](http://www.wmf.org/html/programs/resources/sitepages/iraq_cultural_heritage_sites.html). The FBI Art Crime Team lists looted and stolen Iraqi artifacts as number one on its top ten list of art crimes. See FBI Top Ten Art Crimes, <http://www.fbi.gov/hq/cid/arttheft/topten/iraqi.htm>.

226. Garen, *supra* note 184, at 29; Farchakh, *Témoignages*, *supra* note 207, at 22-23. Ambassador Bondioli-Osio was preceded in that position by Pietro Cordone and followed by John Malcolm Russell, Zainab Bahrani and Rene Teygeler.

227. Farchakh, *Témoignages*, *supra* note 207, at 23-24. The work of the Carabinieri was curtailed later in 2004 as the security situation further deteriorated. Brodie, *supra* note 150, manuscript at 404. Some of the looting was discouraged when the leading Shi'ite cleric, Ayatollah Ali al-Sistani, issued a fatwa prohibiting looting. Farchakh, *Témoignages*, *supra* note 207, at 27.

weaponry.<sup>228</sup>

The destruction of large portions of sites and their archaeological contexts, as well as the loss of objects of cultural importance, will severely impair the reconstruction of Mesopotamian civilization and permanently diminish our understanding of the past. These losses are even more tragic than those that occurred at the museums because not only are objects plundered directly from sites lost, but historical and scientific data retrievable from their contexts and more fragile remains are forever destroyed.<sup>229</sup> It is this chapter, still in progress, that will likely cause the greatest cultural loss.

### 3. Military Construction at Babylon

In addition to the damage caused to archaeological sites through looting, considerable damage was done to the site of Babylon through construction of a military base on the site.<sup>230</sup> Babylon is one of the world's most significant archaeological sites. It served as the capital of the Old Babylonian Empire, in the time of Hammurabi in the eighteenth century B.C., and of the Neo-Babylonian Empire in the time of Nebuchadnezzar in the sixth century B.C. Excavations carried out for 100 years had revealed much of the site,<sup>231</sup> but much remained yet to be excavated. While the site easily could have been included on the List of World Heritage Sites, it was not listed during the Saddam Hussein regime.<sup>232</sup> American forces established a military camp at the site in

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228. Jason Edward Kaufman, *Iraq: Museums Closed and Looting Rampant*, ART NEWSPAPER, Feb. 5, 2005, at 4 (quoting Abdul Aziz Hameed, Director of Iraq's State Board of Antiquities and Heritage).

229. There is also some indication that antiquities smuggling is associated with the funding of terrorism and the insurgency. See *Iraq Ops Yield Suspects, Weapons, Missing Artifacts*, AM. FORCES PRESS SERVICE, June 4, 2005 (detailing finds from a raid of a terrorist hideaway, including artifacts looted from the museum), [http://www.dod.mil/news/Jun2005/20050604\\_1553.html](http://www.dod.mil/news/Jun2005/20050604_1553.html); see also Matthew Bogdanos, *The Terrorist in the Art Gallery*, N.Y. TIMES, Dec. 10, 2005, at A29.

230. See generally John Russell, Former Senior Advisor to the Iraqi Ministry of Culture, Presentation at the Annual Meeting of the Archaeological Institute of America, Jan. 8, 2005; JOHN E. CURTIS, REPORT ON MEETING AT BABYLON, 11 – 13 DECEMBER 2004 (2004) (reporting on the impact of military construction at Babylon), available at <http://www.thebritishmuseum.ac.uk/iraqcrisis/reports/Babylon%20Report04.pdf>; Zainab Bahrani, *The Fall of Babylon*, in THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD: THE LOST LEGACY OF ANCIENT MESOPOTAMIA 214 (Milbry Polk & Angela M.H. Schuster eds., 2005) (describing how the construction and use of a helipad, among other activities, caused destruction at the site).

231. FOSTER ET AL., *supra* note 110, at 86.

232. Saddam Hussein had carried out a reconstruction of the site and constructed new buildings on parts of the site. Forsyth, *supra* note 150, at 77; FOSTER ET AL., *supra* note 110, at 86;

April 2003. Command of the camp was turned over to Polish forces in September 2003.<sup>233</sup> According to the report of John E. Curtis, infrastructure work was carried out by Kellog, Brown and Root (KBR) at the site during the period in which Coalition forces were present.

The main types of damage documented by Curtis include cutting of trenches into ancient deposits; construction of a helicopter landing pad, which involved leveling of new areas; covering earth with compacted gravel and treating it with a petroleum product; leveling and grading areas; placement of fuel containers with earth, dug up from the surrounding areas, heaped up around them; evidence of fuel leakage causing environmental contamination; trenches dug near the ziggurat with fragments of pottery and cuneiform inscriptions embedded in their banks; damage, caused by heavy vehicle traffic, to the sixth century B.C. brick pavement of the Processional Street;<sup>234</sup> placement of sand bags filled with dirt from other archaeological sites, which contaminates the original archaeological site as the bags holding the dirt deteriorate; and damage to bricks in the foundations of the Ishtar Gate.<sup>235</sup> According to Zainab Bahrani, the construction of a helipad and the resulting helicopter vibrations caused the wall of the Temple of Nabu and the roof of the Temple of Ninmah, both dating to the sixth century B.C., to collapse between May and August 2004.<sup>236</sup> Finally, heavy machines and vehicles were parked on the remains of the Greek theater dating from the time of Alexander the Great.<sup>237</sup>

Curtis concluded that, even though a military presence at Babylon helped prevent looting of the site in the early days of the war, the construction of a large military camp directly on the site was "regrettable." As he wrote: "This is tantamount to establishing a military camp around the Great Pyramid in Egypt or around Stonehenge in Britain."<sup>238</sup> An estimated 300,000 square meters of the site have been

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Schipper, *supra* note 161, at 261. Bricks stamped with Saddam Hussein's name were inserted in the new wall reconstructions and a palace was erected next to the palace of Nebuchadnezzar. It is unclear how much this reconstruction compromised the site's integrity.

233. At that time, the Poles established a regional base for the Multinational Division South Central at Babylon. Halliburton-KBR then set up a regional logistic center there as well. Eventually 2,500 troops were stationed at the site. Gary Schwartz, *An Insider's Account of the Evacuation of Babylon*, ART NEWSPAPER, Aug. 18, 2005 (interview with Rene Teijgeler, former Senior Advisor to the Iraqi Ministry of Culture).

234. *Id.*

235. See generally CURTIS, *supra* note 230.

236. Bahrani, *supra* note 230, at 214.

237. *Id.*

238. CURTIS, *supra* note 230, at 7.

covered with gravel, sometimes compacted and chemically treated. The extent to which these areas were leveled is not clear. All the gravel was brought in from elsewhere, causing contamination of archaeological deposits. Fuel seepage is causing environmental pollution and may harm the archaeological deposits beneath.<sup>239</sup> Some of the trenches were dug into previously undisturbed archaeological deposits and the spoil from these trenches included pottery, bones, and fragments of bricks with cuneiform inscriptions. Parts of the site have been mined. Sand bags and HESCO barriers were originally filled with dirt from the site of Babylon. This practice stopped in November 2003, but the bags were subsequently filled with dirt and sand from other locations. As Curtis wrote, "[T]his is in effect substituting one problem for another. By bringing in large quantities of sand and earth from elsewhere (some of these probably in themselves archaeological deposits), the deposits at Babylon will be irrevocably contaminated."<sup>240</sup> Movement of heavy vehicles and of helicopters has caused ruts and depressions to the surface of the site and may have damaged fragile archaeological remains below the surface.

A thorough documentation and assessment of the site is required, as is a study of who caused the damage. However, according to information supplied to Curtis by Iraqi archaeologists, including Dr. Maryam Umran Musah, Mr. Haidar Abdul Wahid, and Mr. Raed Hamed, much of the damage was caused recently. The Iraqis are supposed to be preparing a report, but it is not available as of this writing. In some press reports, the United States military claims that all of these activities were carried out under the supervision of archaeologists (presumably Polish archaeologists), but it does not seem credible that competent professional archaeologists would approve these types of activities at one of the world's most important archaeological sites.<sup>241</sup>

#### 4. Military Activity near Other Cultural Sites

Several examples of military activity near cultural sites have been reported. One of these is the controlled explosion of ordnance near the World Heritage site of Hatra, which dates from the Parthian era.<sup>242</sup>

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239. At least some of the damage from oil spills has been reversed through use of oil-eating bacteria. See Schwartz, *supra* note 233.

240. CURTIS, *supra* note 230, at 8.

241. In contrast, Rene Teiggeler reported that the Polish archaeologists succeeded in preventing some damage. Schwartz, *supra* note 233.

242. Crawford, *supra* note 111; Aziz Hameed, *A Heritage That Remains in Grave Danger*, WALL ST. J., Jan. 5, 2005, at D10 (also reporting damage to historic structures in Mosul caused by

These explosions are reported to be endangering the stability of the ancient structures at this site.

For a while the United States military used the minaret of the ninth century al-Mutawakkil mosque in Samarra (known as the Malwiya because of its spiral minaret)<sup>243</sup> as a sniper position. The military apparently chose to use the minaret because it provided an excellent view of the surrounding area.<sup>244</sup> While the United States used it as a sniper position, Iraqis fired at it, causing damage.<sup>245</sup> When the U.S. military finally withdrew from the minaret in March 2005, some Iraqis set off small bombs and slightly injured the top.<sup>246</sup> In the fall of 2005, the U.S. military constructed a berm around the city of Samarra as part of its counterinsurgency strategy to control access to the city.<sup>247</sup> The berm was constructed by bulldozing earth and piling it up into an embankment. Professor Alastair Northedge of the Sorbonne estimated that the berm has cut through important remains of the ninth century Abbasid palaces and other structures, as well as possibly a Chalcolithic cemetery.

Finally, fighting in urban centers such as Najaf<sup>248</sup> both endangers historic structures during the course of the fighting and leads to their dismantlement after the end of hostilities as part of clearing and reconstruction efforts. Some of this damage may be unavoidable or may fall under the rubric of military necessity. As at the end of the First Gulf War, one of the greatest needs is a systematic assessment of damage to cultural heritage resources and of measures necessary to avert further damage and to begin reconstruction in a responsible

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fighting; Dr. Hameed at that time was chairman of the Iraq State Board of Antiquities and Heritage); see also *supra* note 133. Crawford also reports that the famed arch at Ctesiphon has been destabilized but does not specify how this occurred.

243. See *supra* note 139. The minaret is considered so emblematic of Iraq that it is depicted on the Iraqi currency. Rory Carroll & Krysia Diver, *Iraqi Insurgents Blast Top Off Historic Monument*, THE GUARDIAN, Apr. 2, 2005, at 14.

244. Lucian Harris, *US Snipers on Samarra's Spiral Minaret*, THE ART NEWSPAPER, Feb. 25, 2005; Josh White, *For U.S. Troops a Frustrating and Fulfilling Mission*, WASH. POST, Jan. 2, 2005, at A12; Geoffrey S. Corn, "Snipers in the Minaret—What is the Rule?" *The Law of War and the Protection of Cultural Property: A Complex Equation*, THE ARMY LAWYER, July 2005, at 28; Col. Richard B. Jackson, *Stick to the High Ground*, THE ARMY LAWYER, July 2005, at 2, 4.

245. White, *supra* note 244.

246. Carroll & Diver, *supra* note 243. The portion damaged was primarily a reconstruction.

247. Lucian Harris, *US Security Measures Threaten Samarra's Heritage*, THE ART NEWSPAPER, Nov. 10, 2005, available at <http://www.theartnewspaper.com/article01.asp?id=69>.

248. Hameed, *supra* note 242; Jackson, *supra* note 244, at 4 (detailing the care taken by U.S. forces to avoid damage to the mosque and shrine in Najaf); see also *supra* note 144 and *infra* note 283.

manner. However, this has been impossible, largely due to the instability and danger caused by the insurgency.<sup>249</sup>

### III. THE IMPACT OF THE SECOND GULF WAR IN LIGHT OF THE HAGUE CONVENTION AND OTHER INTERNATIONAL LAW

In evaluating the impact of the Second Gulf War on Iraq's cultural heritage against the backdrop of international law, one must begin by determining precisely what substantive content of international law applies. This task is complicated by the fact that the different States that were involved in the Second Gulf War are parties to different international conventions. This then leads to the question of applicability of customary international law, of other sources of international law and, in particular, of their relevant content.

The United States is not a party to the 1954 Hague Convention but claims to follow its principles as a matter of customary international law.<sup>250</sup> In light of these assertions, it is necessary to consider the status of the Convention's principles as part of customary international law.

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249. The danger of attempting to protect archaeological sites in Iraq is illustrated by the recent kidnapping and fortunate release of the German archaeologist, Susanne Osthoff. Osthoff had remained in Iraq to help protect the site of Isin, at which she had worked, and to carry out humanitarian efforts. She was kidnapped on November 25, 2005 and released three weeks later. See Iraq War and Archaeology, <http://iwa.univie.ac.at/index.html#Latest>. The journalist Micah Garen was kidnapped in August 2004 while investigating the looting of sites in southern Iraq, but he escaped ten days later.

250. The United Kingdom has the same position with respect to the 1954 Hague Convention as does the United States. Both nations are party to the earlier 1899 and 1907 Hague Conventions and both signed the 1954 Convention. Signing a convention indicates that "the provisions were conceptually acceptable," although they are not binding until the convention is ratified. Meyer, *supra* note 95, at 354. Furthermore, "customary international law imposes an obligation on states that have expressed intent to be bound to a treaty through signature to refrain from any activity that might defeat the 'object and purpose' of that treaty for the period of time ratification is pending." Corn, *supra* note 244, at 35. This obligation persists until "a signatory state has taken appropriate steps to demonstrate a clear intention not to become a party to the treaty." *Id.* The 1954 Convention is a supplement to, not a replacement for, the earlier Hague Conventions. Oyer, *supra* note 167, at 51; see also 1954 Hague Convention, *supra* note 59, art. 36.. The United States and United Kingdom remain bound by the earlier conventions, and the United States is also a party to the Roerich Pact. Other members of the Coalition have ratified the 1954 Convention, including Italy, Spain, Canada and Poland, as has Iraq. These nations are explicitly bound by all of the Convention's provisions. See 1954 Hague Convention, *supra* note 59, art. 18, para. 3 (stating that "[i]f one of the Powers in conflict is not a Party to the present Convention, the Powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations."). This situation raises interesting questions of asymmetry when some nations in a conflict are party to one convention and not to another.



Customary international law is defined as “a general practice accepted as law”<sup>251</sup> and requires that the rule be a part of State practice (*usus*) and that there be “a belief that such practice is required, prohibited or allowed . . . as a matter of law (*opinio juris sive necessitates*).”<sup>252</sup>

The first element, that of State practice, is evaluated by two criteria. The first criterion is State selection of rules, as demonstrated through their methods of combat, types of weaponry used, national legislation, and training of their militaries.<sup>253</sup> The second criterion is an assessment of State practice in that the practice must be “virtually uniform, extensive and representative.”<sup>254</sup> If a particular rule is violated, it may still be viewed as uniform if the violation is widely condemned.<sup>255</sup> To determine if the rule is extensive, one must evaluate not only the number of States that adhere to it, but also which States, in particular whether States “whose interests are specially affected,” follow the rule.<sup>256</sup> A rule does not need universal acceptance but must be generally accepted.

The element of *opinio juris* is more difficult to demonstrate because it is often difficult to determine whether a State engages in or refrains from an act because it is a matter of practice or of legal conviction.<sup>257</sup> A final consideration in determining whether a rule has become part of customary international law is whether the rule has been embodied in a multilateral treaty. If this is the case, the extent of the ratification of the treaty,<sup>258</sup> and particularly whether States that are not party to it consistently follow the rule, and how States that have ratified the treaty act with respect to States that are not party to it, are all relevant

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251. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

252. E.g., Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. OF THE RED CROSS 175, 178 (2005) (citing to the Continental Shelf (Libya v. Malta), 1985 I.C.J. 29-30 (June 3) and the North Sea Continental Shelf (F.R.G. v. Den. & Neth.) 1969 I.C.J. 3 (Feb. 20) International Court of Justice decisions).

253. *Id.* at 179.

254. *Id.* at 180.

255. *Id.*

256. *Id.*

257. *Id.* at 181-82.

258. As of August 2005, there were 114 State Parties to the 1954 Hague Convention. Ten States have joined since the beginning of the Second Gulf War. For ratification information regarding the 1954 Hague Convention, see <http://erc.unesco.org/cp/convention.asp?KO=13637&language=E>. In addition, there are ninety-two Parties to the First Protocol, with six nations ratifying or acceding since the start of the war. For ratification information regarding the First Protocol, see <http://erc.unesco.org/cp/convention.asp?KO=15391&language=E>.

considerations.<sup>259</sup>

The International Committee of the Red Cross recently undertook a study to determine what principles or rules had become part of customary international humanitarian law based primarily on the 1949 Geneva Conventions and the 1977 Protocols,<sup>260</sup> although the influence of the 1954 Hague Convention and its First Protocol are readily apparent. The authors of this study adduced that several rules pertaining to cultural property have become part of customary international law:

Rule 38. Each party to the conflict must respect cultural property:

A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.

B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.

Rule 39. The use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity.

Rule 40. Each party to the conflict must protect cultural property:

A. All seizure of or destruction or willful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited.

B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.

Rule 41. The occupying power must prevent the illicit export of cultural property from occupied territory and must return

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259. Henckaerts, *supra* note 252, at 182-83.

260. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005). For a summarized version of the results of this study, see generally Henckaerts, *supra* note 252.

illicitly exported property to the competent authorities of the occupied territory.<sup>261</sup>

Other rules that pertain to the destruction and seizure of all types of property are also relevant to the treatment of cultural property. In particular, one may look to Rule 50, which states: "In occupied territory: (b) immovable public property must be administered according to the rule of usufruct."<sup>262</sup>

The statements and conduct of the United States are relevant in determining whether the United States accepts the provisions of the 1954 Convention as part of its State practice. The position of the United States government has been that it regards the protection of "natural, civilian, and cultural property" to be part of customary international law.<sup>263</sup> Although the United States signed the Convention in 1954, in 1958 the Executive Branch decided not to transmit it to the Senate for ratification.<sup>264</sup> With the collapse of the Soviet Union in 1990, the Department of Defense officially withdrew its objection to ratification.<sup>265</sup> In January 1999, President Clinton transmitted the Convention and the First Protocol (which the United States had not

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261. Henckaerts, *supra* note 252, at 201-02.

262. *Id.* at 203.

263. BOYLAN, *supra* note 65, app. VIII, 201, 202 (citing from Department of Defense report to the U.S. Congress on the protection of cultural property in time of war).

264. *Id.* app. VIII, 205. Boylan presents some detail about this about-face by the United States government. In 1958, the Joint Chiefs of Staff apparently could not reach a unanimous opinion concerning the advisability of ratification. *Id.* at 103-04. While the Army Chief of Staff had no problem, the other Chiefs of Staff objected, although the United States was already bound to these principles through the Roerich Pact and General Eisenhower's Staff Orders of 1943 and 1944. *Id.* In a letter from Ronald J. Bettauer, Attorney, Office of the Legal Adviser, Department of State written in 1972, the reason that the United States gave to justify its failure to ratify the Convention was: "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." MERRYMAN & ELSEN, *supra* note 28, at 57 (reproducing Bettauer letter). At the time the Defense Department prepared its 1993 report to Congress, the Executive Branch was undertaking a review as to whether to ratify the Convention. President Clinton's letter of transmittal in 1999, *see infra* note 266, clearly indicates a change in policy.

265. Chip Colwell-Chanthaphonh & John Piper, *War and Cultural Property: The 1954 Hague Convention and the Status of U.S. Ratification*, 10 INT'L J. CULTURAL PROP. 217, 235 (2001); Keith W. Eirinberg, *The United States Reconsiders the 1954 Hague Convention*, 3 INT'L J. CULTURAL PROP. 27, 29-30 (1994). Among the reasons given for the change in U.S. policy were: with precision targeting, it would be easier to fulfill the Convention's obligations; the use of nuclear weapons was unlikely following the collapse of the Soviet Union; the contradiction that the United States claims to already follow the Convention's provisions; the United States's obligations under the 1907 Convention; the failure to ratify has limited the United States's ability to participate in later

previously signed) to the Senate for ratification.<sup>266</sup> However, no further action has been taken. The reasons for this are not entirely clear.

One reason that has been suggested for the failure to ratify is that the United States and the United Kingdom found that the Convention was overly restrictive and it stretched beyond customary international law.<sup>267</sup> These assertions are, however, contradicted by the views expressed in the Letter of Transmittal, by which President Clinton transmitted the Convention and the First Protocol to the Senate for ratification:

United States military policy and the conduct of operations are entirely consistent with the Convention's provisions. In large measure, the practices required by the Convention to protect cultural property were based upon the practices of U.S. military forces during World War II. . . . I believe that ratification of the Convention and accession to the Protocol will underscore our long commitment, as well as our practice in combat, to protect the world's cultural resources.<sup>268</sup>

This position is also consistent with the provisions of the 1899 and 1907

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negotiations (such as those involving the Second Protocol) and its ability to address cultural heritage crises in other nations.

266. Letter of Transmittal, S. TREATY DOC. NO. 106-1 (1999). The letter of transmittal summarized the position of the United States with respect to the Hague Convention as follows:

For practical purposes, U.S. military operations since the promulgation of the Convention have been entirely consistent with its provisions. During Operation Desert Storm, for example, intelligence resources were utilized to look for cultural property in order to properly identify it. Target intelligence officers identified cultural property or cultural property sites in Iraq; a "no-strike" target list was prepared, placing known cultural property off limits from attack, as well as some otherwise legitimate targets if their attack might place nearby cultural property at risk of damage.

In attacking legitimate targets in the vicinity of cultural objects, to the extent possible, weapons were selected that would accomplish destruction of the target while minimizing the risk of collateral damage to nearby cultural or civilian property. However, the proximity of military objectives to cultural property did not render those military objectives immune from attack, nor would it under the Convention.

*Id.* at viii.

267. Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277, 290 (1997) (adding that the Convention is unworkable in cases of massive retaliation in nuclear war).

268. Letter of Transmittal, *supra* note 266, at iv. The other explanation offered for ratification at the time was the desire to participate more fully in the drafting of the Second Protocol. *Id.*

Conventions, to which the United States is clearly bound. These provisions prohibit pillage, seizure, and intentional destruction or damage to cultural institutions and monuments.<sup>269</sup> But the Letter of Transmittal goes much further and recognizes that the entire 1954 Convention and the First Protocol are acceptable to and consistent with United States policy. In addition to the Letter of Transmittal, the 1993 Report to Congress of the Department of Defense repeatedly cites the 1954 Convention, again indicating that the government regards its provisions relevant to the conduct of the U.S. military.<sup>270</sup>

In addition to the statements of the United States government, one may also look to its actions. While the United States followed many of the 1954 Convention principles in the First Gulf War, some have suggested that the United States did so primarily as a matter of political expediency and as a means to justify its departures from cultural property protection under the military necessity waiver.<sup>271</sup> Nonetheless, the United States military receives training in the Convention's principles, which are incorporated into military war manuals.<sup>272</sup> The actions and statements of the United States, as a non-State party, in claiming to follow the 1954 Convention are highly relevant in concluding that the Convention has attained the status of customary international law.<sup>273</sup>

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269. See *supra* notes 41-45 & accompany text.

270. See BOYLAN, *supra* note 65, app. VIII, 201, 205 (reproducing the 1993 Department of Defense report to Congress on the protection of cultural property in time of war). The only case in which the Convention is cited is the concurring opinion of Judge Cudahy in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 295-97 (7th Cir. 1990). (Cudahy, J., concurring). Although the case involved the disposition of sixth century Byzantine mosaics stolen from northern Cyprus following the 1974 war, the Convention was not directly relevant to the resolution of the dispute. See also Meyer, *supra* note 95, at 374.

271. Meyer, *supra* note 95, at 372 (noting that military training emphasizes the military necessity exception rather than the obligation to avoid targeting cultural sites). Meyer commented:

The United States' understanding, implemented in the [First] Gulf War, was consistent with customary international law with respect to the means of determining situations where protection lapses. This interpretation, however, was more than the 1954 Hague Convention would permit. . . . [A]lthough the United States claimed that it fully implemented the requirements of the 1954 Hague Convention, the military actually implemented its own permutation of that Convention to suit situations of military necessity.

*Id.* at 372-73.

272. *Id.* at 372; Kastenbergh, *supra* note 267, at 299-300.

273. See *supra* note 259 & accompany text; Meyer, *supra* note 95, at 373.

It is therefore appropriate to consider the United States and the United Kingdom as bound by the provisions of the 1954 Convention and therefore to evaluate whether the conduct of the Coalition forces during active hostilities and the ensuing occupation<sup>274</sup> would constitute a violation of the Convention principles and other principles of international law.<sup>275</sup> However, a thorough evaluation of the cultural heritage resources in Iraq remains extremely challenging, largely because there has still been no comprehensive survey of the state of these resources. News reports are scattered, as most journalists are restricted to a few areas of the country because of the insurgency. These factors clearly limit the comprehensiveness of the evaluation that follows, but it is necessary that the process of evaluation begin.

A. *Immovable Cultural Sites and Monuments*

1. Restraints on Targeting of Cultural Sites, Buildings, and Monuments

The first provision to analyze is Article 4, Section 1, of the 1954 Convention, which calls on Parties to the Convention “to respect cultural property situated within their own territory as well as within the territory of other . . . Parties . . . by refraining from any act of hostility directed against such property.” This is one of the core responsibilities with respect to cultural property and seems firmly embedded in customary international law as well as in the earlier Hague Conventions.<sup>276</sup> As far as can be determined, the United States did not violate this provision. As previously discussed, the United States military devel-

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274. From at least May 22, 2003, until June 28, 2004, the United States was considered an occupying power of Iraq under United Nations Security Resolution 1483. Although the United States turned over authority to the interim Iraqi government on June 28, 2004, thereby formally ending the period of occupation, it is clear that military conflict continues up to the present. The policy of the Department of Defense, as established in DOD Directive 5100.77, is to treat all operations in which the armed forces of the United States are involved as international armed conflicts and therefore subject to the law of war, regardless of how the conflicts are characterized. Corn, *supra* note 244, at 29-34.

275. The precise status of some of the particular provisions, particularly those of the First Protocol, will be considered in greater detail in the analysis that follows.

276. See, e.g., 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. 609 [hereinafter Geneva Protocol I], available at <http://www.icrc.org/ihl.nsf/WebART/470-750068?OpenDocument>; Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments art. 1, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 290 [hereinafter Roerich Pact], available at <http://www.icrc.org/ihl.nsf/FULL/325?OpenDocument>; 1907 Hague Convention, *supra* note 43, art. 27. Forsyth also suggests that this obligation is binding through *jus*

oped a “no-strike” list with at least 5,000 cultural sites. None of these sites was targeted during the United States bombing campaign. There is some indication that the United States refrained from bombing sites that it would have been justified in bombing because of their location near legitimate strategic and military targets.<sup>277</sup> On the other hand, there is also little indication that the Saddam Hussein government placed Iraqi cultural property in jeopardy by intentionally situating strategic military installations in close proximity to cultural sites.<sup>278</sup> The

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*cogens*, a body of international norms “derived from the nature of the international system and the cooperation inherent in the working of the international order.” Forsyth, *supra* note 150, at 98.

277. Article 27 of the 1907 Hague Regulations permits targeting of cultural sites if they are being used at the time for military or strategic purposes. 1907 Hague Convention, *supra* note 43, art. 27. This is a broader provision than Article 4 of the 1954 Convention, which permits the targeting of cultural sites only in cases of imperative military necessity. 1954 Hague Convention, *supra* note 59, art. 4, para. 2. Protocol I of the Geneva Conventions appears stricter in that it prohibits any act of hostility against cultural and historic sites, monuments and objects. Geneva Protocol I, *supra* note 276, art. 53. However, the article states that its obligation is “without prejudice” to the 1954 Convention provisions and is therefore presumably also subject to the military necessity waiver. *Id.* At least as of the time of the First Gulf War, the Air Force manual stated that buildings devoted to religion, art or charitable purposes and historical monuments could not be targeted unless they were being used for military purposes and are “valid military objectives.” Further, “[l]awful military objectives located near protected buildings are not immune from aerial attack by reason of such location, but, insofar as possible, necessary precautions must be taken to spare such protected buildings along with other civilian objects.” UNITED STATES DEPARTMENT OF THE AIR FORCE, AIR FORCE PAMPHLET NO. 110-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 5-13, ¶ 5-5(c) (1976), *reprinted in* Robert K. Goldman, *The Legal Regime Governing the Conduct of Operation Desert Storm*, 23 U. TOL. L. REV. 363, 389-90 (1992). The provision in the Air Force pamphlet seems consistent with the observed conduct that the United States avoided targeting cultural sites, even when this might have been permitted under the 1954 Hague Convention and certainly under the 1907 Hague Regulations. Furthermore, according to Eirinberg, the United States reads Article 23(g) of the 1907 Hague Regulations “as precluding destruction that may be caused by collateral damage of civilian objects that is clearly disproportionate to the military objective gained by the attack of military objectives. The United States regards this precept to be part of customary international law.” Eirinberg, *supra* note 265, at 31.

The United States distributed leaflets throughout Iraq in the early days of the war giving information and instructions to the Iraqi civilian population and to its military. Some of these leaflets announced the Coalition’s desire to avoid damaging historic landmarks. As the U.S. Central Command stated, “The leaflet reinforces the Coalition’s policy to strike only targets of military significance while avoiding facilities of religious or cultural significance.” Press Release, U.S. Cent. Command, Coalition Leaflets Emphasize Intention to Avoid Landmarks (Mar. 26, 2003), [http://www.centcom.mil/CENTCOMNews/News\\_Release.asp?NewsRelease=20030364.txt](http://www.centcom.mil/CENTCOMNews/News_Release.asp?NewsRelease=20030364.txt).

278. This contrasts with the claim of the United States that a bomber plane was located next to the ziggurat of Ur during the First Gulf War. During one of the Central Command briefings, Brigadier General Vincent Brooks displayed photographs of strategic military and communications equipment placed within proximity of the site of Ctesiphon. The briefing notes that the site

issue of targeting cultural sites has changed significantly since the writing of the earlier Hague Conventions or even the 1954 Convention. The concern then was for both intentional targeting and accidental bombing. Today, with the high degree of precision targeting, cultural sites are at much less risk, at least from accidental damage.

A more difficult question is whether the United States violated these provisions by using the minaret of the Samarra mosque as a vantage point for snipers.<sup>279</sup> Paragraph 1 of Article 4 prohibits the “use of the property . . . for purposes which are likely to expose it to destruction or damage . . . .” One might question whether the United States regards this particular provision as part of customary international law, but it would seem to be the case based on its condemnation of Saddam Hussein’s placement of aircraft near the Ur ziggurat in the First Gulf War.<sup>280</sup> Because all of Paragraph 1 is subject to the military necessity waiver of Paragraph 2, the question then would be whether the use of the Samarra minaret as a sniper’s nest was a legitimate use of the waiver provision. The standard for determining military necessity is not convenience or desirability or even, according to Chamberlain, unavailability.<sup>281</sup> The U.S. military could have prevented insurgents from using the minaret without themselves using it as a sniper’s nest, as this would inevitably make the minaret a target. On the other hand, it is virtually impossible to judge military necessity without firsthand knowledge of all the circumstances.<sup>282</sup> Thus, while there is a substantial likelihood

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(or a particular building at the site) was marked with a symbol indicating a cultural site. Vincent Brooks, Deputy Dir. of Operations, U.S. Cent. Command, Remarks During CentCom Briefing (Mar. 26, 2003), [http://www.centcom.mil/CENTCOMNews/News\\_Release.asp?NewsRelease=20030368.txt](http://www.centcom.mil/CENTCOMNews/News_Release.asp?NewsRelease=20030368.txt). Much of the briefing (and others from the same time period in the early days of the war) is devoted to demonstrating how the precision capabilities of the U.S. military allowed it to avoid damage to civilian targets even when bombing military targets located nearby. The placement of strategic sites in proximity to civilian or cultural sites seems to be unavoidable, particularly in Iraq where much of the country is occupied by cultural and historic sites. See Meyer, *supra* note 95, at 374.

279. See *supra* notes 244-46 & accompanying text. The placement of snipers in the mosque minaret is used as an example because it was covered in the media. Whether other similar incidents occurred cannot be determined.

280. See *supra* note 161.

281. CHAMBERLAIN, *supra* note 1, at 39. The Lieber Code defines military necessity as “those measures which are *indispensable* for securing the ends of war . . . .” (emphasis added). Lieber Code, *supra* note 37, art. 14. Corn phrases this as whether “no other feasible alternate was available to achieve the important military objective.” Corn, *supra* note 244, at 37.

282. Corn views the protection of friendly forces and the local population as a valid military objective. Whether this fits within the military necessity exception would then depend on whether feasible alternatives existed. Corn, *supra* note 244. Emphasizing the religious, rather than



that this use constituted a violation, it is not possible to draw a definitive conclusion.

During the insurgency, fighters have used mosques and perhaps other historic sites, particularly in the city of Najaf in the summer of 2004,<sup>283</sup> as refuges and places from which to conduct attacks on Coalition and Iraqi forces. Such use clearly legitimates any counterattack taken by the Coalition forces, although they remain bound by the contours of military necessity and a degree of proportionality. The Convention does not explicitly apply to non-state actors, such as the insurgents, and this demonstrates how difficult it can be to apply the Convention's provisions in cases of non-traditional warfare.<sup>284</sup>

## 2. Restraints on Looting and Vandalism

Of greater concern is the looting and vandalism of the Iraq Museum in Baghdad and other cultural institutions, such as archives and librar-

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historical, nature of the minaret, Corn concludes that "if some feasible alternate to the use of the minaret had been available to the commander—it is difficult to reconcile the unnecessary transformation of the minaret into a valid and highly significant military objective for an opponent as being consistent with the fundamental purpose of the [1954 Hague] Convention." *Id.* at 39. Jackson takes a somewhat more stringent view of the use of the minaret:

[T]he temporary positional advantage, perceived by a young coalition soldier on the ground, is heavily outweighed by the perception that is created of a military that fails to respect the culture and traditions of the people they are protecting. Criticism that can be leveled against misuse of the mosque can expose the coalition soldier to war crimes accusations and jeopardize the good will that military units have developed in the area.

Jackson, *supra* note 244, at 4.

283. The forces of Moqtada al-Sadr occupied the Imam 'Ali mosque in Najaf during three weeks of intensive fighting in August 2004. It was reported that significant portions of the historic city were destroyed. Evan Osnos, *Rebel Cleric Calls for Peace*, CHI. TRIB., Aug. 31, 2004, at C1; *see also* Jackson, *supra* note 244, at 4.

284. As one commentator has noted:

[T]he legal protections currently in place are not designed to address the realities of modern-day warfare. Now terrorist attacks, wars of liberation, and guerilla actions are more common than traditionally envisioned conflicts like World War II. In these situations, the rule of law cannot realistically be expected to prevail, particularly if there is no state to be held accountable . . . . It is now necessary to consider how to encompass these more modern types of conflict into international law.

Kossiakoff, *supra* note 87, at 159; *see also* Jackson, *supra* note 244 (noting the asymmetries in the conduct of warfare against terrorists and other non-State actors but still arguing for observance of the law of war in these contexts).

ies,<sup>285</sup> and the question of whether the United States and other Coalition members violated one of the Hague Conventions or customary international law. The provisions of Article 4, paragraph 3, place an obligation on a state party to “put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”<sup>286</sup> A prohibition against pillage and theft appears in many of the Hague Conventions and seems well ingrained in customary international law.<sup>287</sup> The question of whether this provision was violated, however, depends on its interpretation—whether it applies only to the conduct of the military of a State Party or whether it requires the military to prevent such acts by the local civilian population.

At first glance, the obligation seems unqualified, requiring the prevention of theft carried out by anyone. If read literally, the provision states “any form of theft” without clarifying who is the actor engaging in the theft, pillage, misappropriation, or vandalism.<sup>288</sup> Kevin Chamberlain concludes that this provision applies to acts carried out by both the military forces of a State Party and to acts carried out by the civilian population “where there is a breakdown in law and order in the territory occupied by a party to the conflict.”<sup>289</sup>

However, the other provisions in Article 4 clearly apply to constraints that a State Party should place on its own military and on its own conduct. Furthermore, when one views the Convention in the context of the immediate post-World War II period it seems most likely that the drafters of the Convention were thinking of the massive cultural looting and misappropriation that had been sponsored by the Nazi state. These actions were entirely carried out by the military, government agencies, or sometimes individual citizens of the aggressor and not, generally speaking, by the local population looting its own cultural

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285. See *supra* notes 198-214 and accompanying text.

286. 1954 Hague Convention, *supra* note 59, art. 4, para. 3.

287. See, e.g., 1907 Hague Convention, *supra* note 43, arts. 28, 56.

288. 1954 Hague Convention, *supra* note 59, art. 4, para. 3.

289. CHAMBERLAIN, *supra* note 1, at 39. Chamberlain bolsters his position by referring to Article 43 of the 1907 Hague Regulations, which requires an occupying power to maintain law and order in an occupied territory. However, he is mixing the requirements of Article 5 of the 1954 Convention (and Article 43 of the 1907 Convention) with the requirements of Article 4. Until the events during the Second Gulf War, this provision attracted little commentary; Toman spends little time discussing it and does not raise the question of the status of the actor carrying out these prohibited acts. TOMAN, *supra* note 13, at 70-71. Although the United States should be regarded as the occupier of Iraq after May 22, 2003, most of the looting of cultural institutions took place during April in a period of active hostilities rather than occupation.

institutions.<sup>290</sup>

The most persuasive argument that Article 4 pertains only to state-sponsored action is that the law of war in general refers to and attempts to constrain only state action. While this dichotomy between the law of war and the law of peace may justifiably be criticized, particularly in the realm of cultural property protection:<sup>291</sup>

Conventions relating to a wartime context are predicated on the unarticulated premise that the violative conduct is state-sponsored, while those conventions relating to a peacetime context are predicated on the premise that the violative conduct is not state-sponsored, but rather is sponsored essentially by individuals for their personal or pecuniary interest.<sup>292</sup>

This provision is therefore intended to require nations to restrain only their own military forces from engaging in acts of vandalism, looting, and pillage directed against the territory of an opposing nation. While there is some evidence that members of the United States military did bring back looted cultural items,<sup>293</sup> the large-scale looting of Iraqi cultural institutions, which attracted so much public attention,<sup>294</sup> does

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290. It is also interesting to note that in the draft Convention proposed by UNESCO, the provisions that are now contained in paragraphs 1 and 3 were both subject to the military necessity waiver. CHAMBERLAIN, *supra* note 1, at 38. In the final Convention, only the first paragraph is. The fact that the obligation to refrain from engaging in vandalism and looting is not subject to the military necessity waiver is another indication that it refers only to the conduct of the State Party's own military.

291. See, e.g., Bassiouni, *supra* note 12, at 287; Paroff, *supra* note 57, at 2036; Birov, *supra* note 95, at 222-23.

292. Bassiouni, *supra* note 12, at 298.

293. In what may be only the tip of the iceberg, a Marine who purchased eight cylinder seals at a military base in Iraq brought them to the United States, despite claims by the military that the equipment and baggage of returning military are searched. When he returned to the United States, he voluntarily turned them over to the FBI for restitution to Iraq. Press Release, FBI, FBI Returns Eight Ancient Stone Seals Looted from Iraq, (Feb. 23, 2005), *available at* <http://www.fbi.gov/page2/feb05/iraqstones022305.htm>; Johnston, *supra* note 223.

294. The looting of the cultural institutions should be viewed in the context of the looting of most other government buildings and the general lawlessness that the Coalition forces allowed to prevail for many weeks after the fall of Baghdad. The 1907 Hague Regulations state: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety." 1907 Hague Convention, *supra* note 43, art. 43. The fact that the United States military may not have had adequate forces to deal with the looting that occurred seems to be a failure in the planning of the military strategy, especially in light of the extensive warnings given to the military in advance of the war and the experiences following the First Gulf War. This widespread looting

not seem to have involved a violation of either the 1954 Hague Convention or customary international law on the part of the United States or the other Coalition members.

### 3. Restraints on Interference with Cultural Sites

Article 5 sets out the principles by which an occupying power should manage the cultural heritage of occupied territory. These obligations include supporting the competent national authorities of the occupied country in safeguarding and preserving its cultural property and refraining from undertaking activities that alter the occupied nation's cultural property, except to the extent that this is necessary to safeguard and preserve it if it was damaged during military hostilities.<sup>295</sup>

Probably the most flagrant violation of Hague Convention principles was the construction of the military base at the site of Babylon. Because the military necessity waiver incorporated in Article 4 does not apply to the provisions of Article 5,<sup>296</sup> there seems to be no justification whatsoever for constructing a military camp on a historic site, whose significance was clear to all. The filling of sand bags with sand containing archaeological objects from other sites, the leveling of portions of Babylon to accommodate helicopter landing pads, the presence of helicopters and heavy trucks, and fuel spills have all caused serious, irreparable, and entirely unnecessary damage to one of the world's most important cultural sites.

In addition to the Article 5 violations, Article 43 of the 1907 Hague Regulations requires occupying powers to "respect[], unless absolutely

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has had grave consequences for all aspects of the reconstruction effort in Iraq, but the failure to adequately protect the incomparable cultural heritage of Iraq is one for which history may well judge the United States and its Coalition partners harshly in the future.

295. 1954 Hague Convention, *supra* note 59, art. 5, ¶¶ 1-2. These provisions incorporate a non-interference principle—that the occupying power cannot interfere with the cultural property of the occupied territory. The only exception, in paragraph 2, applies when the competent national authority is unable to act to preserve cultural property "damaged by military operations." *Id.* This exception clearly does not apply to the construction of the military base at Babylon. The Fourth Geneva Convention mandates a broader non-interference principle: "Any destruction by the Occupying Power of real or personal property belonging . . . to the State, or to other public authorities . . . is prohibited, except where such destruction is rendered absolutely necessary by military operations." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 53, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

296. There does not seem to have been any military necessity involved in the construction of the base. The explanation offered for the location of the base was that this was a means of protecting the site from looting.

prevented, the laws in force in the country.”<sup>297</sup> The Iraqi Antiquities law clearly sets out limits on construction activities conducted on or near archaeological sites.<sup>298</sup> There was nothing that “absolutely prevented” the United States from following Iraqi law and turning to the Iraqi State Board of Antiquities and Heritage for guidance. These actions would have prevented unnecessary damage to one of the world’s major cultural heritage sites. Those nations that are party to the Convention remain bound by it in their mutual relationship.<sup>299</sup> Therefore, the role of Poland in occupying the site becomes particularly problematic and is a clear breach of the 1954 Convention,<sup>300</sup> while the United States violated the 1907 Hague Convention.

The construction of the military base at Babylon also constituted a violation of United States domestic law embodied in the National Historic Preservation Act (NHPA).<sup>301</sup> The NHPA established the National Register of Historic Places, which lists historic sites and structures that are significant in the history, architecture, archaeology, and culture of the United States and that are more than fifty years old. The primary purpose of the NHPA is to provide a mechanism by which adverse effects of federal undertakings on historically significant properties are assessed and mitigated.<sup>302</sup> Although the primary effect of the NHPA is domestic, a provision that applies to historic sites outside of

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297. 1907 Hague Convention, *supra* note 43, art. 43.

298. *See, e.g.*, Antiquities Law, *supra* note 156, art. 13 (stating that “[n]o person shall, without special permission, render any immovable antiquity or dispose of any of its constructional materials or utilize such antiquity in a manner which is likely to injure or destroy it or alter its character”).

299. 1954 Hague Convention, *supra* note 59, art. 18, para. 3.

300. Teijgeler’s statement that the Polish military was reluctant to leave the camp at Babylon only compounds the violation. Schwartz, *supra* note 233.

301. 16 U.S.C. §§ 470-470w-6.

302. The NHPA is primarily procedural in nature, that is, it establishes procedures by which various groups with an interest in a project are consulted and potential harm to historic properties is considered. The key provision is § 106, which provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

16 U.S.C. § 470f.

A “federal undertaking” is defined as:

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the United States was added at the time the United States ratified the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage.<sup>303</sup> This provision requires the avoidance or mitigation of any harmful effects caused by a federal undertaking to a World Heritage site or to a historic site that is listed on another country's equivalent of the National Register.<sup>304</sup>

The construction of the military base clearly qualifies as a "federal undertaking" in that it was carried out by or on behalf of a federal agency (the Department of Defense) and it utilized federal funding. The extent to which the construction was carried out by either the U.S. military or the Polish military is not relevant in determining the applicability of the NHPA so long as United States federal funds were

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a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—

- (A) those carried out by or on behalf of the agency;
- (B) those carried out with Federal financial assistance;
- (C) those requiring a Federal permit, license, or approval; and
- (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

16 U.S.C. § 470w(7). For a description of the NHPA's consultation procedure, see *Indiana Coal Council, Inc. v. Lujan*, 774 F. Supp. 1385, 1388-89 (D.D.C. 1991).

303. This Convention established the World Heritage List, which records immovable cultural and natural sites of "outstanding universal value," and the List of World Heritage in Danger. See *Convention Concerning the Protection of the World Cultural and Natural Heritage*, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151, available at <http://unesdoc.unesco.org/images/0013/001333/133369e.pdf>.

304. This provision states:

Prior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country's equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.

16 U.S.C. § 470a-2. One should also note that the statute refers specifically to other nations and the international setting in stating the purpose of the NHPA:

It shall be the policy of the Federal Government, in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organizations and individuals . . . [to] provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations.

16 U.S.C. § 470-1(2).

used, as is indicated by the participation of Halliburton. Additionally, although Babylon is not listed on the World Heritage List, it is listed on Iraq's equivalent of the National Register.

The only reported decision to analyze this provision of the NHPA addresses the question of whether the Japanese Law for the Protection of Cultural Properties is equivalent to the National Register.<sup>305</sup> As it was raised in the case, the question was particularly compelling because the property for which protection was sought was the dugong, a marine mammal that is a protected national monument under the Japanese law.<sup>306</sup> The district court held that the foreign country's register or list did not have to be identical to the U.S. National Register; it only had to be a "counterpart" and have the same purpose, effect, and consequence.<sup>307</sup> The court concluded that the Japanese list and the National Register "have corresponding and indeed virtually identical effects (to designate the cultural and historical heritage of the nation for special protections) and the same function (using the mechanism of a cultural protection register)."<sup>308</sup>

The Iraqi Antiquities Law establishes a list of sites that, according to the district court's definition in *Okinawa Dugong*, is equivalent to the United States' National Register of Historic Places. The Iraqi law defines "antiquities" as "[m]ovable and [i]mmovable possessions which were erected, made, produced, sculptured, written, drawn or photographed by man, if they are two hundred years old or more."<sup>309</sup>

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305. *Okinawa Dugong v. Rumsfeld*, No. C 03-4350 MHP, 2005 U.S. Dist. LEXIS 3123 (N.D. Cal. 2005).

306. The Okinawa dugong is a small population of the dugong, consisting of only about fifty animals, and "is central to the creation mythology, folklore, and rituals of traditional Okinawan culture." *Id.* at \*7. The military base that the Department of Defense planned to construct would potentially have a significant detrimental impact on the habitat of the Okinawa dugong.

307. *Id.* at \*20-21.

308. *Id.* at \*22. The question of equivalence was complicated by the fact that the dugong is an animal and the U.S. National Register does not include animals as "historic properties," although, as the court pointed out, the U.S. National Register does protect wildlife habitats solely for their value in relation to culturally significant animals. *Id.* at \*22-26. The court observed that:

[a]n interpretation of section 470a-2 requiring that the foreign list be 'identical' to the American one would . . . contradict the international aspect of the section. To require that foreign lists include only those types of resources which are of cultural significance in the United States would defy the basic proposition that just as cultures vary, so too will their equivalent legislative efforts to preserve their culture.

*Id.* at \*22.

309. Antiquities Law, *supra* note 156, art. 1(1)(e).

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Movable and immovable property that is less than two hundred years old can be considered an antiquity “if the public interest requires its protection, due to its historical, national, religious or artistic value.”<sup>310</sup> Finally, the law requires the Directorate of Antiquities to register “all ancient buildings and historical sites existing in Iraq.”<sup>311</sup> The Iraqi statute, despite some differences from the NHPA (such as the difference in the age requirement), is very similar to the NHPA in that both statutes have the purpose of protecting archaeological sites and historic structures.<sup>312</sup> In light of the court’s analysis of the Japanese law, the Iraqi registry of immovable antiquities is clearly the equivalent to the National Register of Historic Places.

It was therefore a legal requirement that the relevant United States agency undertake a process of consultation to determine how to avoid or mitigate damage to the historic site of Babylon before it undertook or funded construction of the military base.<sup>313</sup> At this point, because

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310. *Id.* art. 2.

311. *Id.* art. 6.

312. Another question raised in *Okinawa Dugong* was whether an animal could qualify as “property.” While the court replied in the affirmative as there is no requirement that a “property” be defined as immovable property, *Okinawa Dugong*, 2005 U.S. Dist. LEXIS 3123, at \*27-36, the site of Babylon is precisely the type of immovable property that would also be eligible for listing on the U.S. National Register.

313. The Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act make specific reference to this provision of the NHPA under Standard 4 (An agency gives historic properties full consideration when planning or considering approval of any action that might affect such properties):

(m) In accordance with section 402 of the National Historic Preservation Act Amendments of 1980 (Pub. L. 96-515) and with Executive Order 12114 (issued January 4, 1979), the agency’s preservation program should ensure that, when carrying out work in other countries, the agency will consider the effects of such actions on historic properties, including World Heritage Sites and properties that are eligible for inclusion in the host country’s equivalent of the National Register.

(n) The agency’s preservation program should ensure that those agency officials, contractors, and other parties responsible for implementing section 402 of the NHPA (16 U.S.C. 470a-z) and Executive Order 12114 have access to personnel with appropriate levels and kinds of professional expertise in historic preservation to identify and assist in the management of such properties.

(o) Efforts to identify and consider effects on historic properties in other countries should be carried out in consultation with the host country’s historic preservation authorities, with affected communities and groups, and with relevant professional organizations.



the site has returned to Iraqi control and no further work is being carried out under United States auspices, a suit against the United States government for failure to follow the NHPA would likely not be possible.<sup>314</sup> However, this breach of both United States domestic law and of international law provides a moral and a legal basis to require the United States to fund efforts to reconstruct and mitigate the damage that has been done. This episode also provides a foundation for future planning on the part of the United States military and a warning for preservationist groups that might want to avert similar harm in the future.<sup>315</sup>

#### 4. Obligation to Maintain Security at Cultural Sites

The 1954 Hague Convention also imposes an obligation on occupying powers to "support," as far as possible, "the competent national authorities of the occupied country in safeguarding and preserving its cultural property."<sup>316</sup> The lack of security provided at archaeological sites must, of course, be viewed in light of the lack of security throughout Iraq during the occupation and the subsequent period.<sup>317</sup> Yet the Hague Convention does not require that the occupying power safe-

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63 Fed. Reg. 20,496 (Apr. 24, 1998). While these are guidelines and not mandatory regulations, it should be apparent that these were followed in neither the letter nor the spirit. Consultation with Polish archaeologists does not constitute consultation with the host country's historic preservation authorities (which, in this case, is the Iraqi State Board of Antiquities and Heritage, which operated throughout the war period). It is also worth noting that there is a provision for the Secretary of the Interior to promulgate regulations "in the event of a major natural disaster or an imminent threat to the national security." 16 U.S.C. § 470h-2(j). However, the Secretary has not yet done so.

314. The statutory provisions can be enforced at any stage of an ongoing federal activity, including each stage at which a funding expenditure is subject to federal agency approval. *Okinawa Dugong*, 2005 U.S. Dist. LEXIS 3123, at \*45-46 (citing *Morris County Trust for Historical Preservation v. Pierce*, 714 F.2d 271, 280 (3d Cir. 1983); *CA 79-2516 Watch v. Harris*, 603 F.2d 310, 319-23 (2d Cir 1979); *Romero-Barcelo v. Brown*, 643 F.2d 835, 859 n.50 (1st Cir. 1981)).

315. More widespread activities that might have violated the 1954 Convention were not undertaken largely because of the insurgency and lack of security. For example, archaeologists, many of whom may have been barred from working in Iraq during the years of the sanctions, might have attempted to initiate excavation work under the auspices of the Coalition authorities. This would also have violated the provisions of Article 5. Little detail is known of the federally-funded reconstruction projects that may be being carried out throughout Iraq and the extent to which mitigation of adverse consequences to cultural heritage resources is being considered.

316. 1954 Hague Convention, *supra* note 59, art. 5, para. 1.

317. As previously discussed, Article 43 of the 1907 Hague Regulations requires an occupying power to restore and maintain order and security in occupied territory. *See supra* note 289.

guard cultural property, only that it assist the national authorities in doing so. The Iraqis now have trained guards who are capable of guarding the archaeological sites, but these guards require vehicles and communication equipment before they can be deployed.<sup>318</sup>

Another source of an obligation to protect Iraq's archaeological sites may be found in the 1907 Hague Regulations. Article 55 states that "[t]he occupying State shall be regarded only as administrator and usufructuary<sup>319</sup> of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."<sup>320</sup> While it may seem incongruous to consider the "capital" of archaeological sites, these areas are not only a source of knowledge in which the whole world might share, but they also provide a sustainable economic benefit through non-destructive means such as cultural and archaeological tourism.<sup>321</sup> Article 55 thus imposes a positive obligation on an occupying power to safeguard this capital for the benefit of the people of Iraq; this the United States has failed to do.

#### B. *Movable Cultural Objects*

The First Protocol to the Hague Convention imposes the obligation on an occupying power to prevent illegal removal of cultural objects from occupied territory and the obligation on all States Parties to

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318. Johnston, *supra* note 223. The funding required is estimated at \$2,250,000 and is fairly modest in light of the funds appropriated by Congress for general reconstruction in Iraq. See Archaeological Institute of America, AIA Supports the US Funding Proposal for Archaeological Site Protection in Iraq, <http://archaeological.org/webinfo.php?page=10285>. Unlike the other security efforts in Iraq, this is an area in which the Iraqis seem ready and capable of taking control. Many government, non-government, and private entities have contributed funding to cultural heritage protection and reconstruction efforts in Iraq. These include the U.S. Department of State, the Packard Humanities Foundation, the World Monuments Fund, the Getty Conservation Institute, Japan, Italy and UNESCO.

319. "Usufructuary" refers to "the nature of a usufruct," that is, "[a] right to use another's property for a time without damaging or diminishing it, although the property might naturally deteriorate over time." BLACK'S LAW DICTIONARY 1542, 1543 (Bryan A. Garner ed., 7th ed. 1999), *quoted in* New Mexico v. General Electric Co., 335 F. Supp. 2d 1185, 1240 (D.N.M. 2004).

320. 1907 Hague Convention, *supra* note 43, art. 55. Although archaeological sites or other cultural property are not specifically listed, they can be considered a part of real estate and are certainly part of the "capital" of the land in Iraq.

321. The archaeological heritage of Iraq is likely the second largest source of economic potential, after its oil resources. For case studies of the marketing of heritage and tourism, see the papers collected in *MARKETING HERITAGE: ARCHAEOLOGY AND THE CONSUMPTION OF THE PAST* (Yorke Rowan & Uzi Baram eds., 2004).

return to each State Party any moveable objects of cultural heritage removed from the territory of that State during occupation.<sup>322</sup> The attitude of the United States toward this document has evolved over time. The United States did not sign the First Protocol at the time that it signed the main Convention. In 1999, however, President Clinton transmitted the First Protocol to the Senate for ratification at the same time that he transmitted the main Convention. In doing so, President Clinton recommended against inclusion of Section I.<sup>323</sup> The reasons given for this in the accompanying State Department letter are that the term "export" was found to be unclear and because the requirement to indemnify good faith holders of cultural property exported from occupied territory imposed "complexities and burdens of implementation under both U.S. and other legal systems."<sup>324</sup> The stated position of the United States today is not opposed to the First Protocol provisions requiring restitution of cultural property but rather to the requirement of paying compensation, which contradicts established U.S. property and commercial law.<sup>325</sup>

According to the ICRC Report, the obligation to prevent export of cultural property from occupied territory and return what is illegally exported is now part of customary international law.<sup>326</sup> The overlap between these aspects of the First Protocol and other international legal instruments, as well as the domestic law of many of the major market nations, allows these provisions to be enforced in many of their more substantive aspects, regardless of whether a particular nation has ratified the First Protocol. Furthermore, in the case of Iraq, more specific and often more stringent measures have been enacted that inhibit the trade in stolen and illegally exported Iraqi cultural materials in an equivalent manner or perhaps even more effectively than does the First Protocol itself.<sup>327</sup>

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322. See O'Keefe, *supra* note 85, at 100-03.

323. Letter of Transmittal, *supra* note 266, at iv.

324. *Id.* at ix.

325. Nations that follow the common law of property do not view a transferor as transferring any greater ownership interest in property than he or she had, and there is no requirement to compensate a good faith purchaser. This is summed up in the expression *nemo dat quod non habet*. See, e.g., U.C.C. § 2-403(1). A compensation requirement is typical of the civil law nations that follow the good faith purchaser doctrine.

326. See *supra* note 261 & accompanying text.

327. See generally O'Keefe, *supra* note 85, at 113-15 (analyzing the law of the United States, United Kingdom and Australia).

## 1. General Legal Mechanisms

The provisions of the First Protocol overlap with the requisites of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention).<sup>328</sup> The goal of this convention is to regulate the international trade in cultural property<sup>329</sup> so as to protect the original contexts of these objects, to encourage nations to regulate their domestic trade in art objects, and to provide an international mechanism for recognition of different countries' import and export schemes with respect to cultural objects. One of the first market nations to ratify the 1970 UNESCO Convention, the United States enacted implementing legislation, the Convention on Cultural Property Implementation Act (CPIA) in 1983.<sup>330</sup> The United States adopted only two provisions of the UNESCO Convention, Article 7(b)(i) and Article 9.

Article 7 of the UNESCO Convention calls on State Parties to prohibit the import of stolen cultural property that had been documented as part of the inventory of a museum or similar public institution,<sup>331</sup> and this provision is codified in the CPIA.<sup>332</sup> Immigration and

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328. Nov. 17, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971) [hereinafter 1970 UNESCO Convention]. The most extensive and authoritative discussion of the 1970 UNESCO Convention is that of PATRICK J. O'KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILICIT TRAFFIC (2000) [hereinafter O'KEEFE, COMMENTARY].

329. The 1970 UNESCO Convention defines cultural property as: "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to" one of eleven numerated categories. These categories include "products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;" "elements of artistic or historical monuments or archaeological sites which have been dismembered;" "objects of ethnological interest;" "property of artistic interest" and "rare manuscripts and incunabula." 1970 UNESCO Convention, *supra* note 328, art. 1.

330. 19 U.S.C. §§ 2601-2613. For discussion of the CPIA, see also Borke, *supra* note 192, at 407-26.

331. Article 7 states: "The States Parties to this Convention undertake . . . (b)(i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution." 1970 UNESCO Convention, *supra* note 328, art. 7.

332. The CPIA states:

No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this title, or after

Customs Enforcement<sup>333</sup> may seize and forfeit cultural objects that can be shown to have been documented in a museum collection, without establishing knowledge or intent on the part of the importer. This process simplifies significantly the elements that the government must establish and the procedures for seizure of objects stolen from a museum in another State Party.

Objects stolen from museums in Iraq<sup>334</sup> in both 1991 and in 2003 fall under this provision of the CPIA, so long as the documentation is available to establish that the object was part of the museum's inventory. The publication of the *Lost Heritage* series assists in providing this type of documentation for the objects stolen from the regional museums in 1991.<sup>335</sup> However, the inventory records of the Iraq Museum were severely compromised in the ransacking of 2003. Although these records are in the process of reconstruction, it is not likely that there will be documentation of all the objects stolen from the museum.<sup>336</sup> This provision does not apply to objects stolen from the Kabul museum because Afghanistan is not a party to the 1970 UNESCO Convention.<sup>337</sup> The CPIA carries no criminal penalties, as it is purely a civil statute, and the only remedy is forfeiture of the objects.

Article 9 of the 1970 UNESCO Convention is intended to provide a mechanism by which State Parties will provide assistance to each other in cases of pillage of archaeological and ethnological materials.<sup>338</sup>

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the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States.

19 U.S.C. § 2607.

333. The Bureau of Immigration and Customs Enforcement replaced the Customs Service in the reorganization that was part of the creation of the Department of Homeland Security. The Bureau has primary responsibility for enforcement of the CPIA at points of entry.

334. Iraq ratified the 1970 UNESCO Convention in 1973. Therefore objects stolen from museums after 1983 fit the criteria of this provision.

335. See *supra* note 174.

336. See *supra* notes 210-211 & accompanying text.

337. Other statutory provisions might apply to the case of objects stolen from Afghan museums, as well as Iraqi museums. For application of the National Stolen Property Act and Customs provisions, see *infra* notes 350-355 & accompanying text.

338. Article 9 states:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and

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While the 1970 UNESCO Convention does not provide a definition for the terms “archaeological” and “ethnological” materials, the CPIA does. However, because archaeological materials must be at least 250 years old, this definition is restrictive<sup>339</sup> and curtails the potential applicability of the CPIA in some circumstances.<sup>340</sup>

The United States’ implementation of Article 9 is complex and splits this provision into two sections of the statute. The first statutory provision is found in Section 303 of the Act,<sup>341</sup> which provides a mechanism by which the United States can enter into bilateral agreements with other State Parties for the imposition of import restrictions on certain categories of designated archaeological or ethnological materials. These bilateral agreements are negotiated between the

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international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

1970 UNESCO Convention, *supra* note 328, art. 9.

339. The CPIA definitions are:

The term “archaeological or ethnological material of the State Party” means—

- (A) any object of archaeological interest;
- (B) any object of ethnological interest; or
- (C) any fragment or part of any object referred to in subparagraph (A) or (B); which was first discovered within, and is subject to export control by, the State Party. For purposes of this paragraph—
  - (i) no object may be considered to be an object of archaeological interest unless such object—
    - (I) is of cultural significance;
    - (II) is at least two hundred and fifty years old; and
    - (III) was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water; and
  - (ii) no object may be considered to be an object of ethnological interest unless such object is—
    - (I) the product of a tribal or nonindustrial society, and
    - (II) important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.

19 U.S.C. § 2601(2).

340. O’KEEFE, COMMENTARY, *supra* note 328, at 111. For example, objects from sites of much of the historic or Colonial periods in North America and from historic shipwrecks will not qualify as archaeological materials because they do not reach the 250-year threshold requirement.

341. 19 U.S.C. § 2602.

United States and a requesting State Party without the necessity of Senate ratification of a new treaty. A State Party must first bring a request to the United States to enter into a bilateral agreement. The request is referred to the Cultural Property Advisory Committee,<sup>342</sup> which makes recommendations to the President or, more typically, a designated decision-maker concerning the four determinations that the statute outlines.<sup>343</sup> If the statutory criteria are satisfied, the United States enters into negotiations to finalize a bilateral agreement.<sup>344</sup> Once import restrictions are in place, objects that fall into the designated categories may only be imported into the United States if they are accompanied by an export certificate from the country of origin or if the importer can demonstrate that they left the country of origin before the effective date of the import restriction.

The third statutory determination, 19 U.S.C. § 2602(a)(1)(C)(1), anticipates that the United States' actions will be taken within a concerted or multilateral context. The nature and extent of this concerted action is not, however, spelled out in the statute, although it clearly includes actions that are expected to be implemented within a reasonable time. There is also an important exception to this concerted

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342. The Cultural Property Advisory Committee consists of eleven members, appointed by the President. Three represent the interests of the archaeological/anthropological community, three represent dealers, two represent museums, and three represent the public.

343. The statutory determinations are:

(A) that the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party;

(B) that the State Party has taken measures consistent with the Convention to protect its cultural patrimony;

(C) that—

(i) the application of the import restrictions . . . with respect to archaeological or ethnological material of the State Party, if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations (whether or not State Parties) individually having a significant import trade in such material, would be of substantial benefit in deterring a serious situation of pillage, and

(ii) remedies less drastic than the application of the restrictions set forth in such section are not available; and

(D) that the application of the import restrictions . . . in the particular circumstances is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.

19 U.S.C. § 2602(a)(1).

344. Such a bilateral agreement may not last more than five years, but it may be renewed an indefinite number of times.

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action requirement.<sup>345</sup> When the basic provision concerning the concerted action requirement is read with the exception, the United States can enter into a bilateral agreement even in the absence of concerted action (1) when the United States alone has a significant import trade in the material being considered, or (2) it is not essential to the deterrence of the pillage for another nation with a significant import trade to impose import restrictions. In the second circumstance, it is sufficient if the United States' own action regarding import restrictions will be of substantial benefit to deterring the pillage.

The second provision of the CPIA allows the United States to impose unilateral import restrictions, without the negotiation of a bilateral agreement, in case of an "emergency." The CPIA describes three circumstances that constitute an "emergency condition."<sup>346</sup> However, this provision is available only if the other State Party has already

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345. The statute provides:

[T]he President may enter into an agreement if he determines that a nation individually having a significant import trade in such material is not implementing, or is not likely to implement, similar restrictions, but—

(A) such restrictions are not essential to deter a serious situation of pillage, and

(B) the application of the import restrictions . . . in concert with similar restrictions implemented, or to be implemented, by other nations (whether or not State Parties) individually having a significant import trade in such material would be of substantial benefit in deterring a serious situation of pillage.

19 U.S.C. § 2602(c) (2).

346. The CPIA provides:

[T]he term "emergency condition" means, with respect to any archaeological or ethnological material of any State Party, that such material is—

(1) a newly discovered type of material which is of importance for the understanding of the history of mankind and is in jeopardy from pillage, dismantling, dispersal, or fragmentation;

(2) identifiable as coming from any site recognized to be of high cultural significance if such site is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; or

(3) a part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; and application of the import restrictions . . . on a temporary basis would, in whole or in part, reduce the incentive for such pillage, dismantling, dispersal or fragmentation.



submitted a request for a bilateral agreement under Section 303 of the Act. This emergency provision seems to be the implementation of the last part of Article 9, which calls on States Parties to take “provisional measures” to prevent irremediable injury while an agreement on more permanent measures is pending. Import restrictions that have been applied under this provision have been tailored to specific categories of materials, such as those coming from the Cara Sucia region of El Salvador or the Sipan region of Peru.<sup>347</sup>

Although restrictions on the import of undocumented archaeological materials would seem to be one of the most effective methods of deterring trade in such materials, this was not the case with the looting of archaeological sites in either Iraq or Afghanistan. Afghanistan is not a party to the 1970 UNESCO Convention, and it therefore cannot avail itself of this process.<sup>348</sup> Even though Iraq is a State Party, it was not able to bring a request for import restrictions when the looting of sites became a problem in the 1990s because such requests are submitted through diplomatic channels. Because the United States and Iraq did not have diplomatic relations during this time period, it was not possible for Iraq to submit a request. Although diplomatic relations between the United States and Iraq were established after the 2003 war, because of a lack of clear governmental authority in Iraq at first and the continuing chaotic situation, it has still not been possible for Iraq to bring such a request.<sup>349</sup>

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19 U.S.C. § 2603(a). The other requirements for a bilateral agreement, such as the concerted action requirement, do not apply to emergency actions. Import restrictions pursuant to an emergency action may last initially only five years; they may be renewed for a maximum of three additional years only one time, in contrast with a bilateral agreement which can have an unlimited number of renewals.

347. For a list of current and expired import restrictions, see U.S. State Department, Chart of Current and Expired Import Restrictions Under the Convention on Cultural Property Implementation Act, <http://www.exchanges.state.gov/culprop>.

348. Afghanistan became a Party to the 1970 UNESCO Convention in September 2005. However, the obstacles that confront Iraq in submitting a request apply equally to Afghanistan. See *infra* note 372.

349. O’Keefe has pointed out that this process of requesting a bilateral agreement imposes burdens on a State Party that were not anticipated by the Convention itself, particularly as a nation must prepare a request for a bilateral agreement in order to seek import restrictions in an emergency situation. The information to be provided is described as:

To the extent information is known to the requesting country, such a request should offer background regarding the national cultural patrimony and how it is in jeopardy from pillage; it should provide information about what internal protective measures

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Despite the inadequacies and inefficiencies in the United States' implementation of the 1970 UNESCO Convention, other mechanisms provided by general United States statutes are also useful in deterring trade in looted archaeological objects. These mechanisms would apply, in particular, to archaeological objects looted from sites in Iraq. The most useful of these general laws is the National Stolen Property Act (NSPA), which prohibits the transport, across state or international boundaries, as well as the receipt and possession of, stolen property.<sup>350</sup> Objects that are stolen from institutions are clearly categorized as stolen property, and anyone who knowingly handles such objects is violating the NSPA.

The NSPA also applies to archaeological artifacts whose ownership is vested in the nation. If the object is excavated and removed from that nation without the consent of the government, then the object is stolen property, and it retains that characterization after it is brought to the

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have been put in place; it should indicate the significance of the U.S. market for the material in question; and it should say why U.S. import restrictions would be in the best interest of the international community for education, cultural, and scientific purposes.

Maria P. Kouroupas, *Illicit Trade in Cultural Objects*, CONSERVATION (The Getty Conservation Institute, Los Angeles, Calif.), Spring 1998, at 5,6, *quoted in* O'KEEFE, COMMENTARY, *supra* note 328, at 112. Furthermore, as Brodie noted, "U.S. policy is responsive—there needs to be a clear request from a recognized central authority before any action can proceed, and the authority requesting action must have an effective jurisdiction and be able to implement measures designed to protect cultural heritage. In wartime, these requirements may be compromised." Brodie, *supra* note 10, at 19. In addition to the burdens imposed by the CPIA process, from the time a request is submitted to imposition of import controls it can take anywhere from several months to several years. Finally, the limited duration of the import restrictions (although the bilateral agreements can be renewed) may negate the deterrent effect that the import restrictions are intended to have.

350. The National Stolen Property Act states:

Whoever receives, possesses, conceals, stores, barter[s], sells, or disposes of any goods, wares, or merchandise, securities or money of the value of \$ 5,000 or more . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken . . . shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 2315. The other section of the National Stolen Property Act states:

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$ 5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 2314.

United States. This legal principle was first formulated in *United States v. McClain*<sup>351</sup> and was reaffirmed in the conviction of a prominent New York antiquities dealer, Frederick Schultz, for conspiring to deal in antiquities stolen from Egypt.<sup>352</sup> Iraq has had a strong national ownership law since 1936,<sup>353</sup> which clearly vests ownership of antiquities in

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351. 545 F.2d 988 (5th Cir. 1977), *aff'd on reh'g* 593 F.2d 658 (5th Cir. 1979). This case involved the prosecution of dealers for conspiring to trade in and transport pre-Columbian artifacts stolen from Mexico. The court held that the 1972 Mexican vesting law was truly a national ownership law and was sufficiently clear so as to giving warning to Americans of what conduct was prohibited. In explaining the parameters of the NSPA, the court stated:

[I]n addition to the rights of ownership as understood by the common law, the N.S.P.A. also protects ownership derived from foreign legislative pronouncements, even though the owned objects have never been reduced to possession by the foreign government. . . . [N]either statute nor treaty nor our historical policy of encouraging the importation of art more than 100 years old had the effect of narrowing the N.S.P.A. so as to make it inapplicable to artifacts declared to be the property of another country and illegally imported into this country.

593 F.2d at 664. The *McClain* decision was presaged by the conviction in *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), which involved the transport of portions of a Maya stele from Guatemala. However, the Ninth Circuit did not analyze the law of Guatemala in detail.

352. *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003). In *Schultz*, the court subjected Egypt's Law 117, the national vesting law, to two tests: whether the statute on its face clearly vests newly-discovered archaeological artifacts in the nation, and whether the law was internally enforced within Egypt. The court held that this law passed both tests. The court also held that enactment of the CPIA in 1983 did not alter in any way the *McClain* application of the NSPA to archaeological artifacts whose ownership was vested in a foreign nation. In concluding, the Second Circuit stated:

Although we recognize the concerns raised by Schultz and the *amici* about the risks that this holding poses to dealers in foreign antiquities, we cannot imagine that it "creates an insurmountable barrier to the lawful importation of cultural property into the United States." Our holding does assuredly create a barrier to the importation of cultural property owned by a foreign government. We see no reason that property stolen from a foreign sovereign should be treated any differently from property stolen from a foreign museum or private home. The *mens rea* requirement of the NSPA will protect innocent art dealers who unwittingly receive stolen goods, while our appropriately broad reading of the NSPA will protect the property of sovereign nations.

*Id.* at 410.

353. Antiquities Law, *supra* note 156. Article 3 states: "All antiquities in Iraq whether movable or immovable that are now on or under the surface of the soil shall be considered to be the common property of the State. No individuals or groups are allowed to dispose of such property or claim the ownership thereof except under the provisions of this Law." "Antiquities" are defined as "Movable and Immovable possessions which were erected, made, produced, sculptured, written,

the nation of Iraq.

Given the clear statement of national ownership in the Iraqi antiquities law and what is known of internal enforcement of this law, at least prior to the Second Gulf War, archaeological artifacts removed from Iraqi sites are stolen property, and anyone who knowingly deals in, possesses, or transfers such objects (if they are worth more than \$5,000) would be violating the NSPA. The import of such objects would also be barred under the customs statute, which prohibits the import of goods "contrary to law."<sup>354</sup> Objects that are imported into the United States by means of false statements are also subject to seizure and forfeiture.<sup>355</sup>

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drawn or photographed by man, if they are two hundred years old or more." *Id.* art.1(1)(e). Movable and immovable property less than 200 years old may be considered antiquities "if the public interest requires its protection, due to its historical, national, religious or artistic value." *Id.* art. 1(2); *see also* IRAQ CONST. art. 109 (vesting ownership of antiquities in the Iraqi nation).

354. Merchandise that is "stolen, smuggled, or clandestinely imported or introduced" into the United States contrary to law may be seized and forfeited under 19 U.S.C. § 1595(a)(c). This provision is relevant if the merchandise is considered to be stolen property under the NSPA. *See* *United States v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997); *United States v. One Lucite Ball Containing Lunar Material (One Moon Rock)*, 252 F. Supp. 2d 1367, 1377-78, 1380-81 (S.D. Fla. 2003) (forfeiture of a stolen moon rock that had been given to the nation of Honduras). The Civil Asset Forfeiture Reform Act now makes the proceeds of a violation of the National Stolen Property Act directly forfeitable under 18 U.S.C. § 981(a)(1)(c).

355. The importation of merchandise "by means of any fraudulent or false invoice, declaration . . . or by means of any false statement . . . without reasonable cause to believe the truth of such statement . . ." is prohibited. 18 U.S.C. §542. Another provision, 18 U.S.C. § 545, allows for forfeiture of any merchandise knowingly brought into the United States "contrary to law." *See also* *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999).

The American author Joseph Braude was charged with three counts for smuggling and making false statements in violation of 18 U.S.C. § 545. When he entered the United States on June 11, 2003, Braude was found to be carrying three cylinder seals of the Akkadian period (2340-2180 B.C.), which were taken from the collection of the Iraq Museum in Baghdad. The seals still carried the partially preserved registration numbers used by the Iraq Museum's cataloging system. Although the seals were undoubtedly stolen property, Braude was not charged under the National Stolen Property Act, nor was he charged for violating the sanctions against importing illegally removed Iraqi cultural materials. When questioned, Braude initially denied having traveled to Iraq, but he later admitted that he had been to Iraq where he had purchased the seals. He was therefore charged under the customs statute for making false declarations. Braude ultimately pled guilty and was sentenced to six months of house arrest and two years of probation. The three seals were returned to his Excellency Samir Sumaidaie, the Ambassador of Iraq to the United Nations, on January 18, 2005. Press Release, U.S. Immigration and Customs Enforcement, Cultural Antiquity Returned to Iraqi Government After ICE Investigation (January 18, 2005), [http://www.ice.gov/graphics/news/newsreleases/articles/iraqiartifact\\_011805.htm](http://www.ice.gov/graphics/news/newsreleases/articles/iraqiartifact_011805.htm).

Because the import of archaeological and other cultural materials from Iraq has been barred for so many years, there is a reasonable possibility that import of such objects may be attempted by means of false statements as to the country of origin. New York antiquities dealer, Hicham

## 2. Iraq-Specific Legal Mechanisms

All goods from Iraq, including cultural objects, have been barred from entry into the United States since August of 1990 under the general sanctions.<sup>356</sup> United Nations Security Council Resolution 1483, passed on May 22, 2003, called for the lifting of those sanctions. However, it also provides in paragraph 7 that the Security Council:

Decides 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 Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph.<sup>357</sup>

This provision thus calls on all United Nations Member States to prohibit trade in any illegally removed cultural objects and to adopt means to ensure their return to Iraq. This includes not only those objects taken from the museums and other public institutions, but also those taken from other locations, including archaeological sites. It is useful to examine how three of the major market nations, the United States, the United Kingdom, and Switzerland, have implemented this provision.

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Aboutaam, was charged with importing an ancient silver rhyton (a drinking vessel) from Iran, contrary to the sanctions that forbid the import of goods from Iran. Aboutaam declared the vessel's country of origin as Syria, perhaps in the attempt to evade the sanctions. His gallery subsequently sold the rhyton for \$950,000. Aboutaam ultimately admitted to falsifying customs import documents and pled guilty to a misdemeanor. Barry Meier, *Art Dealer Pleads Guilty in Import Case*, N.Y. TIMES, June 24, 2004, at E7.

356. See *supra* note 158.

357. The resolution was adopted under Chapter VII of the United Nations Charter and is therefore legally binding on all UN member States. Kevin Chamberlain, *The Iraq (United Nations Sanctions) Order 2003—Is It Human Rights Compatible?* 8 ART ANTIQUITY AND LAW 357, 358 (2003); see also, S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf?OpenElement>.

a. *Response of the United States*

On May 23, 2003, the day after Security Council Resolution 1483 was passed, the United States lifted trade sanctions on goods from Iraq by granting a general license for such goods. However, certain goods were exempted from this general license, including "Iraqi cultural property or other items of archaeological, historical, cultural, rare scientific, and religious importance . . . Any trade in or transfer of such items remains prohibited . . . ." <sup>358</sup> A more permanent means of prohibiting import of stolen or illegally removed Iraqi cultural materials was provided by passage of the Emergency Protection for Iraqi Cultural Antiquities Act in late 2004. <sup>359</sup> This legislation authorizes the President to exercise his authority under the CPIA to prohibit import of designated archaeological and ethnological materials from Iraq without need for Iraq to bring a request under the CPIA for a bilateral agreement. <sup>360</sup> Furthermore, this legislation defines the archaeological and ethnological materials of Iraq in accord with Resolution 1483 in place of the normal CPIA definitions of these types of materials. <sup>361</sup> This legislation fulfills the

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358. 31 C.F.R. § 575.533(b)(4) states in full:

This transaction does not authorize any transactions with respect to Iraqi cultural property or other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since August 6, 1990. Any trade in or transfer of such items, including items with respect to which reasonable suspicion exists that they have been illegally removed, remains prohibited by subpart B of 31 C.F.R. part 575.

These sanctions have been extended annually, most recently on May 20, 2005, when President Bush issued Executive Order 13350, declaring that a state of emergency exists with respect to Iraq. Continuation of the National Emergency Protecting the Development Fund for Iraq and Certain Other Property in Which Iraq Has an Interest, 70 Fed. Reg. 29,435 (May 19, 2005).

359. Pub. L. No. 108-429, § 3001-03, 118 Stat. 2434. Legislation was introduced in the House in May 2003, H.R. 2009, which would have imposed import restrictions on illegally removed Iraqi cultural materials and would have amended the CPIA in several aspects. Most relevantly, the legislation would have eliminated the requirement that nations bring a request for a bilateral agreement before the United States could impose import restrictions on an emergency basis. For a more detailed discussion of H.R. 2009 and other legislation introduced in 2003, see Borke, *supra* note 192, at 427-43.

360. *Id.* § 3002(a). The EPIC Antiquities Act suspends subsection (c) of section 304 of the CPIA, 19 U.S.C. § 2603(c). This allows the President to undertake emergency action without need for Iraq to first bring a request for a bilateral agreement.

361. *Id.* § 3002(b). The Act states: "the term 'archaeological or ethnological material of Iraq' means cultural property of Iraq and other items of archaeological, historical, cultural, rare scientific, or religious importance illegally removed from the Iraq National Museum, the National

United States' obligations under Article 48 of the United Nations Charter to implement this Security Council Resolution.<sup>362</sup>

b. *Response of the United Kingdom*

In June 2003, the United Kingdom adopted Statutory Instrument 2003 No. 1519,<sup>363</sup> which, in Section 8, prohibits the import or export of illegally removed Iraqi cultural property and creates a criminal offense for "[a]ny person who holds or controls any item of illegally removed Iraqi cultural property . . . unless he proves that he did not know and had no reason to suppose that the item in question was illegally removed Iraqi cultural property."<sup>364</sup> This provision not only bans the

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Library of Iraq, and other locations in Iraq, since the adoption of United Nations Security Council Resolution 661 of 1990." For the CPIA definition, see *supra* note 339.

362. U.N. Charter, art. 48, *available at* <http://www.un.org/aboutun/charter/chapter7.htm>. The President has not yet exercised his authority under this legislation to impose import restrictions. Mirror legislation has been introduced in the House of Representatives to allow the President to impose import restrictions on cultural materials illegally removed from Afghanistan but no action has yet been taken on this bill. H.R. 915, 109th Cong. (2005).

363. The United Kingdom implements binding U.N. Security Council Resolutions through an Order in Council, in which Parliament has little participation, rather than through Parliamentary legislation. Chamberlain, *supra* note 357, at 358.

364. The full text of Section 8 states:

- (1) The importation or exportation of any item of illegally removed Iraqi cultural property is prohibited.
- (2) Any person who holds or controls any item of illegally removed Iraqi cultural property must cause the transfer of the item to a constable. Any person who fails to do so shall be guilty of an offence under this Order, unless he proves that he did not know and had no reason to suppose that the item in question was illegally removed Iraqi cultural property.
- (3) Any person who deals in any item of illegally removed cultural property shall be guilty of an offence under this Order, unless he proves that he did not know and had no reason to suppose that the items in question was illegally removed Iraqi cultural property.
- (4) "Illegally removed Iraqi cultural property" means Iraqi cultural property and any other item of archaeological, historical, cultural, rare scientific or religious importance illegally removed from any location in Iraq since 6<sup>th</sup> August 1990. It is immaterial whether the removal was illegal under the law of a part of the United Kingdom or of any other country or territory.
- (5) A person deal in an item if (and only if) he—
  - (a) acquires, disposes of, imports or exports it,
  - (b) agrees with another to do an act mentioned in paragraph (a), or
  - (c) makes arrangements under which another person agrees with a third person to do such an act.
- (6) In this article—

## FROM BAMMIYAN TO BAGHDAD

trade in illegal Iraqi cultural materials but also creates a criminal offense, which places a burden of proof on the possessor of such materials to prove that he or she did not know or have reason to know that the materials were illegally removed from Iraq, thus reversing the normal burden of proof in criminal prosecutions.<sup>365</sup> This seems to have been very effective in reducing the amount of Iraqi cultural materials that have appeared on the market in Britain since the beginning of the war<sup>366</sup> and demonstrates that strong legal measures can have an

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- (a) "acquires means buys, hires, borrows or accepts.
  - (b) "disposes of" means sells, lets on hire, lends or gives,
  - (c) in relation to agreeing of arranging to do an act, it is immaterial whether the act is agreed or arranged to take place in the United Kingdom or elsewhere.

Iraq (United Nations Sanctions) Order 2003, § 8 (Eng.), *available at* <http://www.hmso.gov.uk/si/si2003/20031519.htm>.

365. These criminal provisions have been analyzed for compliance with the European Convention on Human Rights by Chamberlain, *supra* note 357, at 361-68. Chamberlain questions whether the reversal of the burden of proof contravenes the presumption of innocence in Article 6(2) of the European Convention, whether the extension of the prohibitions to Iraqi cultural materials illegally removed after August 6, 1990 constitutes a retroactive application of criminal law in violation of Article 7, and whether the requirement to transfer cultural items to a constable violates the right to peaceful enjoyment of possessions guaranteed by Article 1 of the First Protocol to the Convention. *Id.* at 361-62. Chamberlain suggests that the problems with the burden of proof can be cured by reading the statutory instrument as requiring a defendant to have the initial burden of producing evidence that he or she did not know the cultural items were illegally removed; once the defendant produces this evidence, the burden would then shift back to the government to prove that the defendant did know or had reason to know. *Id.* at 365. In terms of his concern for retroactive application, the reference to August 1990 is legitimate because any cultural items that left Iraq after August 1990 were already prohibited entry under the general Iraq sanctions. Furthermore, the offense of dealing in these materials applies only to dealing that occurred after the effective date of the Statutory Instrument. *Id.* at 366. Finally, Chamberlain notes that Article 1 of the First Protocol allows for deprivation of property when in the public interest. Although he expresses doubt as to whether all of the provisions of the Statutory Instrument would withstand scrutiny under the European Convention, the emergency nature recognized by the U.N. Security Council resolution may provide sufficient justification for the measures taken.

366. Brodie, *supra* note 150, manuscript at 409-10. Brodie studied the appearance of cylinder seals for sale at auction in the London market before and after 2003. While auction sales are not necessarily representative of the entire market because auctions, in light of their public nature, are more transparent and therefore may well represent the more legitimate aspects of the trade, Brodie nonetheless observed the complete disappearance of unprovenanced seals sold in 2003 and 2004. Christie's London also reported a sharp drop in the number of cylinder seals and cuneiform tablets offered to them for sale. Brodie's survey of websites offering Mesopotamian material revealed that while a total of 29 cuneiform tablets were on offer in April 2003 before the looting of the Iraq Museum, the number of tablets on offer in October had dropped to five, although at least one of the web sites continued to offer cylinder seals and other types of



impact.

The United Kingdom acceded to the 1970 UNESCO Convention in 2002 but did not pass implementing legislation until after the Iraq-related events of 2003. In the fall of 2003, the British Parliament enacted a new Dealing in Cultural Objects (Offences) Act 2003, which created a new offense for dealing in “tainted cultural objects.”<sup>367</sup> One commits this offense by “dishonestly deal[ing] in a cultural object that is tainted, knowing or believing that the object is tainted.”<sup>368</sup> The statute defines a “tainted object” under the following circumstances: “(2) A cultural object is tainted if, after the commencement of this Act— (a) a person removes the object in a case falling within subsection (4) or he excavates the object, and (b) the removal or excavation constitutes an offence.”<sup>369</sup> Subsection 4 refers to objects removed from “a building or structure of historical, architectural or archaeological interest” or from an excavation.<sup>370</sup> For purposes of the statute, it does not matter whether the excavation or removal takes place in the United Kingdom or in another country, or whether the law violated is domestic or foreign.<sup>371</sup>

This new criminal offense largely represents a codification of the law under which Schultz’s British co-conspirator, Jonathan Tokeley-Parry, had previously been convicted.<sup>372</sup> However, the British statute uses a fairly expansive definition of “tainted” objects that includes those resulting from illegal excavation and those that are stolen in a more traditional sense. Therefore, the British statute may apply where the foreign nation does not have an ownership law but merely protects its archaeological sites through a prohibition of unlicensed excavation. A British court would not then need to engage in an extensive analysis of foreign law to determine whether it is truly in the nature of an ownership law. This result would be broader than the *McClain/Schultz* doctrine as the action in removing the archaeological object only has to constitute an offense under local law and not necessarily theft.

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Mesopotamian artifacts into 2004. The prices for these objects were generally stated in dollars, leading Brodie to conclude that they were intended for export to the United States.

367. Dealing in Cultural Objects (Offences) Act 2003, c. 27 (U.K.), available at <http://www.uk-legislation.hmso.gov.uk/acts/acts2003/20030027.htm>.

368. *Id.* § 1(1).

369. *Id.* § 2(2).

370. *Id.* § 2(4).

371. *Id.* § 2(3).

372. *R. v. Tokeley-Parry*, [1999] Crim L.R. 578 (1998) (U.K.).

c. *Response of Switzerland*

On May 28, 2003, the Swiss Federal Council imposed a ban that

covers importation, exportation and transit, as well as selling, marketing, dealing in, acquiring or otherwise transferring Iraqi cultural assets stolen in Iraq since 2 August 1990, removed against the will of the owner, or taken out of Iraq illegally. It includes cultural assets acquired through illegal excavations. Such assets are presumed to have been exported illegally if they can be proved to have been in the Republic of Iraq after 2 August 1990.<sup>373</sup>

Like the Iraq-specific measures taken by Britain, this Swiss provision creates a presumption of illegal export. However, like the United States' provisions taken pursuant to the CPIA, the Swiss provision seems to be purely civil in nature, rather than criminal.

Before the war in Iraq started, Switzerland was on the verge of ratifying the 1970 UNESCO Convention and enacting implementing legislation. As with Britain, the devastation to Iraq's cultural heritage provided the impetus to conclude ratification and enact the domestic legislation. This new Swiss legislation, the Federal Act on the International Transfer of Cultural Property,<sup>374</sup> implements the UNESCO Convention in a manner that is closer to the United States' model of implementation, through a series of bilateral agreements that impose import restrictions. The new Swiss legislation permits the Swiss Federal Council to enter into agreements with other nations that are party to the UNESCO Convention to protect "cultural and foreign affairs interests and to secure cultural heritage."<sup>375</sup> The Federal Council can also take additional measures when a "state's cultural heritage [is] jeopardized by exceptional events."<sup>376</sup>

The other significant change in the Swiss legislation is its definition

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373. Ordinance on Economic Measures against the Republic of Iraq of 28 May 2003, SR 946.206 (Switz.), *available at* [www.kultur-schweiz.admin.ch/arkgt/kgt/e/e\\_kgt.htm](http://www.kultur-schweiz.admin.ch/arkgt/kgt/e/e_kgt.htm).

374. Loi federale sur le transfert international des biens culturels [LTBC] [Federal Act on the International Trade of Cultural Property], Code civil suisse [Cc] Jun. 20, 2003, RS 444.1 (Switz.).

375. Cc RS 444.1, art. 7. Unlike the U.S. bilateral agreements, the Swiss agreements will be of unlimited duration and do not need to be renewed. Requests for an agreement are not subject to review by a committee of private citizens (including dealers) but rather are directly negotiated by officials of the Swiss Ministry of Culture.

376. Cc RS 444.1, art. 8.

of “due diligence.” Article 16 sets forth the following definition:

In the art trade and auctioning business, cultural property may only be transferred when the person transferring the property may assume, under the circumstances, that the cultural property:

- a. was not stolen, not lost against the will of the owner, and not illegally excavated;
- b. not illicitly imported.<sup>377</sup>

A clear definition of due diligence under Swiss law is significant because of the Swiss good faith purchaser doctrine, which permits the transfer of good title even of stolen goods to a good faith purchaser. The phrase “under the circumstances” would seem to require that one who wishes to claim to have acted in good faith must have considered all the circumstances of the transaction, including the extent to which stolen art objects and particularly looted archaeological objects are present in the art market. Article 16 also imposes additional obligations on those who are active in the art trade to maintain written records concerning their acquisition of cultural property, to acquire a written declaration from sellers concerning their right to dispose of the object, and to inform customers of existing import and export regulations of other nations that are UNESCO Convention parties.<sup>378</sup>

This analysis of international law and of the domestic law of three of the largest market nations demonstrates that much has and can be done to prevent the import of movable cultural objects taken illegally from occupied territory. As applied to Iraq, these alternative measures seem to be the equivalent of implementation of the First Protocol of the Hague Convention and are particularly effective because they perpetuate the prohibition on the importation of materials from Iraq that were in place since August 1990. However, the more general measures that are currently in place, generally pursuant to ratification of the 1970 UNESCO Convention, would prove inadequate in any comparable future situation. Only the Swiss system, which seems to allow swift imposition of import restrictions in emergency situations, is adequate to respond to future crises.<sup>379</sup>

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377. Cc RS 444.1, art. 16, ¶ 1.

378. Cc RS 444.1, art. 16, ¶ 2.

379. As was previously discussed, the United States emergency actions do not work effectively in times of crisis because the country that is suffering the crisis situation must first bring a request for a bilateral agreement, the Cultural Property Advisory Committee would need to review the

IV. PROGNOSIS FOR THE FUTURE

A. *Assessment of the Hague Convention*

In 1993, in part in response to events during the Balkan Wars, Patrick Boylan's study of the Hague Convention was commissioned.<sup>380</sup> The experiences in the Gulf Wars, particularly the most recent conflict, mandate another evaluation of the Hague Convention. The failure of the Convention to prevent the widespread and deliberate destruction of cultural objects and buildings in the Balkan wars led to the generally accepted conclusion that the substantive provisions of the Convention were not the problem; instead, the issue was the lack of enforcement of the Convention's existing provisions.<sup>381</sup> The most recent Gulf War presents a different problem. While issues of adequate enforcement remain, as is typical of international instruments, here we see that there are problems with the substantive provisions as well as questions of enforcement.

An excellent starting point for evaluation of the Hague Convention is the recommendations contained in the Boylan Report. Boylan divided his recommendations into seven categories. The first set was addressed to UNESCO, other inter-governmental international organizations, State Parties to the Hague Convention, non-State Parties, and interested non-governmental organizations.<sup>382</sup> These recommendations emphasized that while there had been many cases of failure to protect cultural sites and monuments, these failures were not the result of any inherent flaws in the international instruments but rather were the result of a failure of compliance and application. Many of the principles of the Convention are accepted as part of customary international law and, while technical improvements could be made, the major problem is one of "achieving greater recognition, acceptance and application of their provisions."<sup>383</sup> Boylan emphasized that more countries need to ratify the Convention and Protocol because "formal ratification or accession and legislative implementation at the national level is clearly desirable, if only for the avoidance of doubt on its

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request, and then the decision maker would first determine whether import restrictions are warranted under the CPIA. This cumbersome process does not give the United States the flexibility to respond in a timely fashion to emergency situations.

380. See generally BOYLAN, *supra* note 65.

381. See, e.g., Keane, *supra* note 42, at 26.

382. BOYLAN, *supra* note 65, at 7-8.

383. *Id.* at 7.

applicability.”<sup>384</sup> He also pointed out that very few sites of pre-eminent world cultural importance had been registered for special protection. Finally, he responded to the criticism that preservation of cultural sites must be given a lower priority than preservation of life in wartime. In light of the destruction of cultural property in the Balkans, he wrote:

[I]t is important that all parties recognize that in many recent cases the destruction of the physical evidence of the existence of the national, ethnic and/or religious community under attack has been an integral part of the various types and levels of humanitarian abuse of the civilian peoples, through to the level of alleged genocide . . . . Consequently, it is most important that all parties take urgent action to increase understanding of, and respect for, the culture, symbols and values of all peoples, especially of minority peoples.<sup>385</sup>

Boylan’s second set of recommendations was addressed specifically to UNESCO.<sup>386</sup> These focused again on the necessity of encouraging more states to ratify or accede to the Hague Convention, its Protocol, and the 1970 UNESCO Convention, greater dissemination of information and education concerning appreciation and understanding for the world’s cultural patrimony and its diversity, the appointment of special representatives by the UNESCO Director-General in cases of armed conflict, and dissemination of technical information concerning how to protect monuments, museums, libraries, and archives during war.<sup>387</sup> The third set of recommendations was addressed to the United Nations and focused on recognition of the role of cultural and religious monuments in sometimes exacerbating conflicts, the need for expertise and training with respect to cultural matters in United Nations peacekeeping efforts, the need for cultural rights to be recognized as a part of humanitarian efforts, and the need to address the crimes against cultural property committed during the conflict in the Balkans.<sup>388</sup> The United Nations was also urged to consider the cultural protection implications for actions taken under Chapters VI and VII of

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384. *Id.* at 8 n.3.

385. *Id.* at 8.

386. *Id.* at 9-12.

387. *Id.* at 9-11.

388. *See id.* at 12-13. The Balkan war crimes were addressed later by the United Nations, *see supra* note 95-105 & accompanying text.

the Charter.<sup>389</sup>

The nations that were already party to the 1954 Convention were urged to take practical measures, such as designating cultural repositories, consistent with the Convention.<sup>390</sup> Of particular concern was the need to train military personnel adequately, to implement provisions within national military and civilian criminal law for the investigation and punishment of any alleged war crimes against cultural property, and to provide greater education of both the military and general public concerning cultural issues. Finally, Boylan called on nations to prevent trade in illicitly acquired and stolen cultural objects consistent with the First Protocol and the 1970 UNESCO Convention. Nations that had not ratified the Convention were asked to review their decision while being reminded that the principles of the Convention were part of customary international law and the provisions of earlier Conventions, such as the 1899 and 1907 Hague Conventions and the Roerich Pact, remained in effect for those nations that had ratified one of these earlier instruments.<sup>391</sup> Non-governmental organizations were asked to participate with UNESCO and comparable regional organizations in encouraging acceptance of the 1954 Convention and in providing technical expertise and assistance, particularly in situations where international organizations such as UNESCO might not be able to act.<sup>392</sup>

Boylan's last set of recommendations addressed the possibility of amendments<sup>393</sup> or an additional protocol to the Convention to address several issues raised in his study. The first issue was the lack of consistency in the definition of cultural property in the various international instruments.<sup>394</sup> Second, it was recommended that the waiver based on military necessity be omitted from the Convention, in part based on inconsistency with the 1949 Geneva Conventions. Boylan highlighted ineffective legal enforcement of the Convention and lack

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389. BOYLAN, *supra* note 65, at 12. This may have been a reference to the effect of the sanctions imposed on Iraq in 1990. The sanctions also had a devastating (if unintended or indirect) effect on Iraq's cultural heritage as was discussed *supra* notes 178-180 & accompanying text.

390. BOYLAN, *supra* note 65, at 13.

391. *Id.* at 15.

392. *Id.* at 15-16.

393. *Id.* at 143-45.

394. *Id.* at 16. In addition to the inconsistent definitions in the Hague Convention and the 1970 UNESCO Convention, Boylan also pointed out the differing definitions in the 1972 UNESCO Convention on the World's Cultural and Natural Heritage and in several UNESCO Recommendations that had been issued over the years.

of a means of resolving inter-governmental disputes. The concept of "special protection" and provisions for appointment of Commissioners-General for Cultural Property in time of armed conflict needed to be revised and extended, while Boylan also suggested the creation of an Intergovernmental Advisory Committee on the Protection of Cultural Property in the Event of Armed Conflict.<sup>395</sup>

Many of the recommendations of the Boylan Report have been adopted over the past decade, primarily through the Second Protocol.<sup>396</sup> The main features of the Second Protocol include a stricter and more precise definition of the conditions in which imperative military necessity exists;<sup>397</sup> more detailed provisions for the protection of movable cultural property in occupied territory and prohibitions on archaeological excavation or other alterations to cultural property in occupied territory;<sup>398</sup> creation of a scheme of "enhanced protection" to replace the main Convention's "special protection";<sup>399</sup> provisions for establishing jurisdiction over and prosecution of those committing serious violations;<sup>400</sup> and establishment of a standing Committee for the Protection of Cultural Property in the Event of Armed Conflict.<sup>401</sup> Although the provisions of the Second Protocol largely reflect the recommendations of the Boylan Report, these provisions were not always adopted in the exact form suggested by Boylan. For example, rather than eliminating the military necessity waiver, the Second Protocol establishes more stringent conditions under which the waiver is

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395. *Id.* at 16-18. Boylan also addressed whether the 1954 Convention should apply to natural, as well as cultural, heritage. However, he rejected this as a modification to the 1954 Convention because it would have required a fundamental change in its underlying purpose. *See id.* at 18.

396. The Second Protocol was based on a document, known as the Lauswolt document, drafted soon after the Boylan Report was issued. CHAMBERLAIN, *supra* note 1, at 169-70. For a summary of the provisions, see *id.* at 171; also see Colwell-Chanthaphonh & Piper, *supra* note 265, at 232-34. The Second Protocol is supplementary, rather than amendatory, to the main Convention and applies only between States that ratify it. CHAMBERLAIN, *supra* note 1, at 171. It is too early to assess the efficacy of the Second Protocol as it only went into effect in March 2004.

397. Protocol II, *supra* note 88, art. 6; *see also* CHAMBERLAIN, *supra* note 1, at 179-86.

398. Protocol II, *supra* note 88, art. 9; *see also* CHAMBERLAIN, *supra* note 1, at 189-91; *supra* note 92 & accompanying text.

399. Protocol II, *supra* note 88, arts. 10-13; *see also* CHAMBERLAIN, *supra* note 1, at 192-204.

400. Protocol II, *supra* note 88, art. 15(1). This Article defines five serious violations of the Second Protocol. *See supra* note 93. Articles 16-21 set out the actions that each State Party should take within their domestic law to establish jurisdiction, allow prosecution and provide for extradition of those who violate Article 15. Protocol II, *supra* note 88, arts. 16-21; *see also* CHAMBERLAIN, *supra* note 1, at 205-16.

401. Protocol II, *supra* note 88, art. 24; *see also* CHAMBERLAIN, *supra* note 1, at 222-23.

available. Other provisions, such as those addressing protection of movable cultural property and the conduct of archaeological excavations in occupied territory, appear in the Second Protocol,<sup>402</sup> although they were not considered in the Boylan Report.

In addition to the writing of the Second Protocol, perhaps the most significant development since the Boylan Report has been the conviction of several leaders during the Balkan Wars for cultural property crimes.<sup>403</sup> These convictions and the Statute of the International Criminal Tribunal for Yugoslavia have significantly advanced our understanding of the cultural heritage protection aspects of customary international law.<sup>404</sup> A more modest but still important advance is the agreement between UNESCO and Italy to establish a team of cultural heritage experts who can be deployed on short notice to any area where a crisis, either military or natural, threatens cultural heritage.<sup>405</sup> Another step, applicable to the United States, is a training program in cultural heritage issues developed by the Archaeological Institute of America for U.S. military personnel who will be deployed in Iraq and Afghanistan.<sup>406</sup> Most recently, Corine Wegener has initiated formation of a United States national committee of the Blue Shield, which, if

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402. See *supra* note 92 & accompanying text.

403. Four former Yugoslav leaders were charged by the International Criminal Tribunal for the Former Yugoslavia with willful destruction of or damage to cultural monuments during the 1991 bombing of the historic city of Dubrovnik and the destruction of the Sarajevo library. See *Dubrovnik 'Bomber' in Hague Trial*, REUTERS, Oct. 23, 2003; Press Release, ICTY, Vladimir Kovacevic Transferred to the International Criminal Tribunal for the Former Yugoslavia, (Oct. 23, 2003), <http://www.un.org/icty/pressreal/2003/p793-e.htm>. Pavle Strugar, former general of the Yugoslav Peoples' Army, was sentenced to eight years in prison in connection with the shelling of the historic town of Dubrovnik, a UNESCO World Heritage Site. Admiral Miodrag Jokic of the Yugoslav Navy pled guilty to the same charges and was given a seven-year sentence. This is only the second time that a military commander has been convicted by an international criminal court for destruction of cultural property. It is expected that additional indictments will be brought in connection with the siege of Mostar, including the destruction of Mostar's Old Bridge. Harris, *supra* note 99.

404. See *supra* notes 95-106 & accompanying text.

405. Press Release, UNESCO, UNESCO-Italy Agreement on Emergency Actions to Protect Heritage (Oct. 10, 2004), [http://portal.unesco.org/en/ev.php-URL\\_ID=23339&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=23339&URL_DO=DO_TOPIC&URL_SECTION=201.html) (issuing a Joint Declaration for the Safeguarding, Rehabilitation and Protection of Cultural and Natural Heritage). In addition to threats from armed combat, cultural heritage is threatened by sudden natural disasters, such as earthquakes, hurricanes and tsunamis. A rapid deployment force of trained specialists could be very effective in reducing the extent of damage and destruction.

406. This program was developed by C. Brian Rose on behalf of the Archaeological Institute and was presented to U.S. Central Command by Colonel Bogdanos. It was introduced during 2005. Bogdanos, *Casualties of War*, *supra* note 202, at 521 n.171. If such training programs become



successful, will provide cultural resource management and preservation expertise in case of future conflicts.<sup>407</sup>

The single most significant issue that has not been resolved is the failure of many of the major military powers to ratify the 1954 Hague Convention. The two leading members of the Coalition in the Second Gulf War, the United States and the United Kingdom, have still not ratified the Convention.<sup>408</sup> Even if the United States regards the Convention as embodying customary international law, its failure to ratify the Convention and its Protocols creates considerable confusion. While it seems clear that the United States accepts the notion that cultural sites and monuments should not be targeted during active warfare, unless the military necessity waiver should apply, it is not clear what other provisions of the Convention the United States accepts as part of customary international law, particularly those portions that deal with the conduct of an occupation. Because it is unlikely that United States leaders or members of its military would be subjected to an international war crimes tribunal, in order to avert future adverse consequences for cultural heritage, it is more important to discern what strictures the United States perceives to be binding and therefore voluntarily incorporates into its war planning and teaches to the members of its military. Ratification would assure uniformity and more detailed treatment of obligations to protect cultural property in U.S. military training and manuals. Ratification would also provide a needed impetus to incorporate the locations of cultural heritage sites and

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prevalent, then this responds to Boylan's recommendation addressed to State Parties to the Convention to improve training of military personnel.

407. See American Committee of the Blue Shield, <http://www.americanblueshield.org/>. Corine Wegener is an assistant curator at the Minneapolis Institute of Arts and, as a member of Civil Affairs, worked in the Iraq Museum in Baghdad for about nine months.

408. See *supra* notes 267-273 & accompanying text. Perhaps the easiest reason to understand for the United States's failure to ratify is the general reluctance on the part of the United States to join international conventions. While this reluctance may be traced to the time during which Senator Jesse Helms was chairman and later member of the Senate Foreign Relations Committee, Colwell-Chanthaphonh & Piper, *supra* note 265, at 239 n.98, it clearly has continued under the current Bush administration. In particular, any international convention that might impose penalties on United States military for their conduct of warfare is unlikely to receive acceptance. The irony of the situation is exacerbated by the position of the United States government that it already follows the provisions of the Hague Convention, thus making it appear unnecessary for it to ratify the Convention. This belief is also based in part on the United States' adherence to the 1970 UNESCO Convention. However, the provisions of the UNESCO Convention that the United States has implemented, as discussed *supra* notes 331-349 & accompany text, are not adequate to cover situations of massive looting as has occurred and is still occurring in Iraq and Afghanistan.

repositories into U.S. military planning at earlier stages.<sup>409</sup>

In May 2004, the United Kingdom announced that it would ratify the 1954 Convention and its two protocols.<sup>410</sup> This is an action long overdue on the part of both the United States and the United Kingdom. In September 2005, the United Kingdom issued its Consultation Paper.<sup>411</sup> As the Consultation Paper points out, the United Kingdom's failure to ratify the Convention would result, among other consequences, in the risk that the United Kingdom would be "involved in occupation of territory with significant risk of damage to/unlawful removal of cultural assets of that territory" with the consequence of "[p]otential for damage to reputation of UK if adequate training of UK troops not provided."<sup>412</sup> The Paper further notes that "[t]he process [of ratification] will codify existing procedures, making what is and is not acceptable clearer."<sup>413</sup> Ratification by the United States would be a crucial step, both to demonstrate the United States' commitment and good faith and to reassure the world community that the disastrous consequences for Iraq's cultural heritage were unintentional and would not be repeated.

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409. See, e.g., Matthew Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE H.R. & DEV. L.J. 153, 166-76, 183-85 (2005) (detailing references in American military manuals to international obligations to protect cultural property and their shortcomings; explaining development of "no-strike" lists). As the experiences with Iraq demonstrated, training, manuals and war plans must all be developed far in advance of any particular military operation if these efforts are to be successful in avoiding damage to cultural heritage during conflict.

410. Press Release, UK Department for Culture, Media, and Sport, UK to Ratify Convention Safeguarding Cultural Heritage in War-Time (May 14, 2004), available at [http://www.culture.gov.uk/global/press\\_notices/archive\\_2004/dcms053\\_04.htm](http://www.culture.gov.uk/global/press_notices/archive_2004/dcms053_04.htm). The United Kingdom explained its decision to ratify the Convention and its protocols in the following somewhat cryptic statement: "The UK, which has remained committed to the principles of the agreement, signed but did not ratify the Convention in 1954 due to issues surrounding interpretation and implementation. The adoption of the Second Protocol in 1999 remedied these deficiencies and has made it possible for the UK to ratify the treaty." Perhaps as the result of the United Kingdom's announcement, Canada acceded to the First and Second Protocols on November 29, 2005.

411. UK DEPARTMENT OF CULTURE, MEDIA, AND SPORT, CONSULTATION PAPER ON THE 1954 HAGUE CONVENTION ON THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS TWO PROTOCOLS OF 1954 AND 1999 (2005), available at <http://www.culture.gov.uk/NR/rdonlyres/C234A6B1-3178-4350-8C72-C354F24D1CF9/0/HagueConvention.pdf> [hereinafter Consultation Paper].

412. *Id.* at 63.

413. *Id.* at 64.

B. *Recommendations for a New Protocol*

Just as the experiences of the Balkan Wars during the decade of the 1990s led to a reevaluation of the efficacy of the 1954 Hague Convention and then to the writing of the Second Protocol to address these shortcomings, so the war in Iraq has demonstrated both a lack of clarity and lacunae in the provisions of the Convention that should now be addressed. These changes should be embodied in a new protocol to the Convention that would have the main goals of clarifying existing provisions of the Convention and adding new provisions that reflect a modern understanding of cultural heritage resource management. While the practical obstacles to adoption of a new protocol are significant, it is still worthwhile to point out the shortcomings in current international law.

1. *Obligations with Respect to Local Populations*

The first and most serious shortcoming of the 1954 Convention is the failure of Article 4 to impose an obligation to prevent looting by the local civilian population, as occurred at the cultural institutions in Baghdad and which is still ongoing at archaeological sites in southern Iraq. This problem is clarified by Boylan's discussion of the meaning of "protection" of cultural property in the Hague Convention.<sup>414</sup> Boylan points out that "protection" is comprised of two parts: 1) safeguarding and 2) respecting. He comments that "[s]afeguarding" is used not in the obvious sense of guarding and keeping safe that which is safeguarded [in this case cultural property] at all times, including the times of greatest danger (e.g., in this case during armed conflict). Instead, in the Convention 'safeguarding' is explicitly defined as referring only to peacetime preparations for the possible effects of war or other armed conflicts."<sup>415</sup> On the other hand, "respect" applies to actions during hostilities but is defined primarily in terms of "refraining from" certain activities. As Boylan explained:

Under customary international law the general staff and individual field commanders of invading and occupying forces have an established responsibility not merely to refrain from unlawful acts ('respect') but to ensure adequate military and/or civil police etc. control over not only their own forces, but also

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414. See BOYLAN, *supra* note 65, at 53.

415. *Id.* at 53. "Safeguarding" is defined in Article 3 of the Convention.

irregular forces and civilians within the occupied territory so as to also 'safeguard' (in the *Hague Convention* sense) both the lives and property of non-combatants. Indeed, in the current discussions about possible war crime cases in ex-Yugoslavia, the issue of field command and control over irregular forces and civilians in relation to the willful destruction of property is seen as an important issue. It therefore seems reasonable to require attacking and occupying forces not merely to 'respect' but also to positively 'safeguard' cultural property in so far as this is practicable.<sup>416</sup>

Despite Boylan's interpretation of what the Convention should say,<sup>417</sup> it is not clear that the Convention imposes this obligation. However, the earlier Hague Conventions and the 1949 Geneva Conventions impose an obligation to maintain the safety of the civilian population.<sup>418</sup>

International law needs to state explicitly that the obligation to "safeguard" extends to preservation of cultural property during hostilities and during occupation. This obligation would go beyond the current obligation in Article 5, paragraph 1, to assist the competent national authorities and would require that a nation undertake this responsibility when the national authorities are unable to do so. This obligation would apply equally to the protection of cultural institutions, historic monuments and structures, and archaeological sites. While other sources of international law, particularly the 1907 Hague Convention,<sup>419</sup> impose an obligation to maintain order and security in occupied territory, this obligation with respect to cultural property should be contained within an international convention that explicitly addresses cultural property.

Three provisions should be added to accomplish these goals. The first would clarify that a State Party should undertake efforts to the extent feasible under the conditions of active conflict to protect cultural sites and monuments from threats of pillage, vandalism, and

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416. *Id.* at 53.

417. Given that Boylan is referring to the situation in the Balkans, he is likely referring to an obligation that military commanders restrain not only the regular military under their control but also irregular forces and even civilians—but civilians who are allied with them. It is unlikely that he is referring to the situation which occurred in Iraq, in which the civilians of the opposing military power are the ones engaging in the destructive activity.

418. See Fourth Geneva Convention, *supra* note 295, art. 53; 1907 Hague Convention, *supra* note 43, arts. 43, 55.

419. See *supra* notes 319-321 & accompanying text.

looting, regardless of who the actors are. The second provision would apply to situations that are neither active hostilities nor formal occupations. In the time period after the United States and Coalition authorities gained control of Baghdad, but before the occupation was formally recognized by the United Nations on May 22, 2003, this obligation should have been imposed on Coalition forces under Article 4 of the Convention. Finally, this obligation should be explicitly extended to occupations and incorporated in Article 5. As with Article 4, Article 5 of the Convention needs to clarify that the occupying power has an obligation to prevent looting and vandalism of cultural sites and institutions not just by its own forces but also by the local population.

One question that arises is whether this obligation should be subject to a military necessity waiver. Boylan states that the obligation to positively safeguard cultural property should be imposed "so far as this is practicable."<sup>420</sup> This is a necessary component to the extension of the obligation to preserve cultural property. What a nation does within its own territory during peacetime (the "safeguard" requirement of Article 3) and what targets it selects (the "respect" requirement of Article 4) are within its control. Similarly, the discipline it exercises over its own troops to prevent them from engaging in looting and vandalism is also within its control. However, in a situation where a nation is attempting to maintain control and provide security but is unable to do so, it is difficult to conclude that a nation has an absolute obligation. The obligation should therefore be qualified by a requirement to do so as "far as is practicable." Even if the obligation is qualified, an explicit provision in the Hague Convention imposing this responsibility would establish the international standard of expected conduct and should encourage nations in future conflicts to prepare adequately for this larger responsibility, particularly by incorporating such concerns into their military strategy at early stages of planning.

Some provisions of the Second Protocol may be interpreted to impose this obligation. For example, Article 7(b) calls on Parties "to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental damage to cultural property," and Article 7(c) requires parties to "refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property."<sup>421</sup> While acknowledging that damage to cultural property may be incidental, these provisions do

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420. BOYLAN, *supra* note 65, at 53.

421. Protocol II, *supra* note 88, arts. 7(b), 7(c).

not require a party to give cultural property affirmative protection, and they still focus only on time of attack. Further, as there is no definitive interpretation of the provisions of the Convention and its Protocols, it is very unlikely that a State Party would interpret these provisions as applying to the looting of a museum or the protection of archaeological sites. Article 9, which prohibits archaeological excavation under most circumstances, also would not apply to the looting of archaeological sites because looting is not the same as excavation and so is unlikely to be applied to comparable situations.<sup>422</sup> This lack of definitive interpretation again emphasizes the need for greater clarity in the international law protecting cultural sites and monuments.

One of the most effective methods to accomplish this new obligation would be to encourage the major military powers to maintain within their active military a corps that is dedicated to the preservation of cultural heritage. Such a group was established by the United States and Britain during World War II, known as the Monuments, Fine Arts and Archives officer corps.<sup>423</sup> Composed of art historians, archaeologists, and museum professionals, this group was responsible for protecting major heritage sites and securing movable cultural objects as soon as the Allied forces had advanced into a particular area. While during the Second Gulf War individuals with comparable skills who were equally dedicated to cultural heritage preservation were present in Coalition reserve units and civil affairs, they were often not situated in the regions where they could be effective, did not form cohesive units, and did not have the proper lines of authority and commands to permit them to carry out activities aimed toward preservation.<sup>424</sup> It would be feasible for nations to fulfill their new responsibilities to preserve

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422. *Id.* art. 9.

423. See *supra* note 54 & accompanying text. Differences in the organization of the current U.S. military might require different logistical arrangements; nonetheless, the concept can be adapted to the current situation.

424. Other units could also be trained and assigned specific military duties to protect cultural monuments and sites of particularly great significance. For example, Colonel Bogdanos raises the "more pointed question . . . why no unit before the battle had been given the specific mission of protecting the museum from looting after Baghdad was secure. As with the delay in responding to the requests for assistance on 12 and 13 April, the answers are neither complicated nor entirely satisfactory." Bogdanos, *Casualties of War*, *supra* note 202, at 506. He attributes the failure to the speed of the U.S. victory, which did not leave adequate time to plan for security needs in Baghdad, and the failure of military planners to anticipate the likely looting of the museum. *Id.* at 506-07. Whether these explanations for the failure are satisfactory or logical belies the fact that if there had been a unit of the active military specifically given this and similar responsibilities, many of the losses likely could have been effectively averted.

cultural heritage through maintenance of such groups within their military, and they would complement the work of UNESCO and other inter-governmental and non-governmental international organizations.<sup>425</sup> This obligation could also be satisfied through an agreement between the military and an organization such as a national committee of the Blue Shield, which would then carry out these responsibilities.<sup>426</sup>

## 2. Cultural Resource Management Principles

Article 5, which addresses occupation, poses additional difficulties when applied to modern conflicts. The 1954 Convention envisions neither a long-term occupation of territory nor one that engages in extensive reconstruction activities. The Convention therefore fails to address issues of cultural resource management. The silence of the Hague Convention on this point is not surprising, given the context of World War II and the fact that concepts of cultural heritage resource management were unknown when the Convention was written in 1954, but today this needs to change. These modern principles, including issues of survey, salvage, damage assessment and mitigation, need to be incorporated into the obligations of an occupying power.

The provisions of the Convention and even the Second Protocol that deal with this situation are frustratingly meager. The Convention seems premised on the notion that the occupying power should do nothing to interfere with the cultural heritage of the occupied territory. Article 5, paragraph 2, requires that the occupying power take "the most necessary measures of preservation" to protect cultural property damaged by military operations and does not seem to envision the need to protect cultural property from other types of damage.<sup>427</sup> Article 9 of the Second Protocol permits an occupying power to undertake archaeological excavation only "where this is strictly required to safeguard, record or preserve cultural property."<sup>428</sup> This provision arguably permits the carrying out of survey and salvage work by an occupying power, but it does not require it. Similarly, international norms and customary international law establish general principles for the protection of cultural property during occupation and require cooperation to the

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425. See *supra* note 405 & accompanying text. However, a unit within the military of one of the combatant nations will have greater access to war zones and occupied territory than will international organizations and will therefore likely be in the position of first responder.

426. See *supra* note 407.

427. 1954 Hague Convention, *supra* note 59, art. 5, para. 2.

428. Protocol II, *supra* note 88, art. 9.

fullest extent feasible with the local national authorities in doing so. However, none of these instruments imposes a direct obligation on an occupying power to undertake survey and salvage work or other actions in order to prevent or mitigate damage to cultural resources during the types of construction projects now being planned by the United States.

The first step is that the Convention should require that a cultural heritage damage assessment be facilitated and carried out under the auspices of either the national authorities or an international organization, such as UNESCO, as soon as feasible during hostilities or following their cessation.<sup>429</sup> The most needed change in Article 5 is paragraph 2, which permits an occupying power to preserve cultural property only if it was damaged during military operations. The occupying power should be permitted to preserve cultural property without regard to how or why it was damaged. Not only should the occupying power be permitted to take steps to preserve and stabilize cultural sites and monuments, but the occupying power should be required to do so when this is necessary for the purpose of preservation. The competent national authorities should carry out this preservation work, but if the national authorities are not able to do so, then the occupying power should have the responsibility for preservation, in consultation with the competent national authority if possible.

One of the less typical threats to the cultural heritage of Iraq has arisen from the efforts that the United States may be undertaking to rebuild Iraq's infrastructure,<sup>430</sup> which suffered both during the years of sanctions and during the war itself. There is no international instrument that imposes a direct obligation on occupying powers to avoid damage to cultural sites and monuments during construction projects.<sup>431</sup> The Second Protocol goes some way toward remedying this

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429. For examples of cultural heritage damage assessments and reconstruction carried out following the Balkan wars, see Šulc, *supra* note 97, at 162-67, and Sultan Barakat et al., *Challenges and Dilemmas Facing the Reconstruction of War-Damaged Cultural Heritage: The Case Study of Poiteli, Bosnia-Herzegovina*, in *DESTRUCTION AND CONSERVATION OF CULTURAL PROPERTY* 168-181 (Robert Layton, Peter G. Stone & Julian Thomas eds., 2001).

430. The Archaeological Institute of America has attempted to bring pressure to ensure that U.S. construction contracts and projects incorporate cultural heritage resource management principles, but the success of this pressure is not certain. Letter from Jane C. Waldbaum, President, Archaeological Institute of America, to US AID and the US Army Corps of Engineers (Jan. 8, 2004), <http://www.archaeological.org/webinfo.php?page=10233>.

431. *But see* UNESCO, Nov. 19, 1968, *Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works*, [http://portal.unesco.org/en/ev.php-URL\\_ID=13085&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13085&URL_DO=DO_TOPIC&URL_SECTION=201.html).



problem by permitting an occupying power to carry out survey and salvage work to avoid or minimize harm to archaeological sites through construction projects,<sup>432</sup> but these actions are not required.

In many countries, including both Iraq and the United States, cultural resource management provisions of domestic law require that construction projects not damage or destroy archaeological sites and other historic monuments.<sup>433</sup> Cultural resource management principles require that any area to be affected by a project be surveyed and then efforts taken to mitigate damage to cultural resources located in the affected area. Depending on the type of cultural heritage resource at risk, mitigation may include relocating a project or carrying out salvage excavation before the project can proceed.

Modern principles and standards of cultural heritage resource management should be embodied in a new Protocol to the Hague Convention that would directly impose these obligations on occupying powers. More specific standards could be included in an Annex to the new Protocol, which could establish international norms and would likely be widely recognized as was the Annex to the 2001 UNESCO Convention on the Underwater Cultural Heritage.<sup>434</sup> These should be relatively uncontroversial provisions that would attract many ratifying nations or that would quickly be recognized as part of customary international law. By delineating with greater specificity actions that

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432. Protocol II, *supra* note 88, art. 9(1)(b).

433. The Iraqi law requires the reporting of the discovery of any immovable antiquities. Antiquities Law, *supra* note 156, art. 11. It also states: "No person shall, without special permission, render any immovable antiquity or dispose of any of its constructional materials or utilize such antiquity in a manner which is likely to injure or destroy it or alter its character." *Id.* art. 13. Finally, the law sets extensive requirements for permission to excavate archaeological sites. *Id.* arts. 40-54. While in the United States the National Historic Preservation Act applies only to federal undertakings, see *supra* notes 301-302, every state has similar provisions that apply to state land or funded projects while often also setting limits on what owners of private land may do. See Carol L. Carnett, *A Survey of State Statutes Protecting Archeological Resources*, 14 PRESERVATION L. REP. 1117 (1995). In addition to the NHPA, other federal laws, such as the Department of Transportation Act, 49 U.S.C. § 303, and the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347, also protect cultural resources. See also SHERRY HUTT ET AL., CULTURAL PROPERTY LAW 10-74 (2004); THOMAS F. KING, CULTURAL RESOURCE LAWS AND PRACTICE (2d ed. 2004); Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 438-75 (2002). Most federal agencies, including the military, have extensive experience complying with statutory mandates for cultural resource management both within the United States and abroad. See, e.g., James G. Van Ness, *Cultural Resources Management in the Department of Defense*, SG039 ALI-ABA 91 (2001).

434. Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40, available at <http://unesdoc.unesco.org/images/0012/001260/126065e.pdf>.

can be taken to minimize damage to cultural heritage, the Annex would assist military powers in avoiding more flagrant violations of existing Conventions, such as construction of the military camp on Babylon. An accepted norm of international law would avert difficulties when an occupying power is undertaking large-scale construction projects and has suspended many of its own domestic rules for the awarding of construction contracts, as the United States has done. Widespread acceptance would do much to assure protection for the world's cultural heritage if comparable situations were to arise in the future.

### 3. Additional Provisions

A new protocol to the Hague Convention should also establish more specific standards for the training of military personnel and the preparation of military manuals that explicitly include training in cultural heritage resource issues. For example, the military base at the site of Babylon was reportedly constructed, at least initially, in order to protect the site from looting. This objective was accomplished but in a way that caused considerable damage in other areas. This decision displays a lack of understanding of archaeological sites and what must be done to provide effective protection.

The provisions of the First Protocol concerning movable cultural objects also need clarification. The possibility of creating a traveling exhibition of Mesopotamian artifacts from the Iraq Museum has raised questions about the applicability of the First Protocol to such situations.<sup>435</sup> Exhibitions are not included in the First Protocol as a legitimate reason for removal of cultural property, but if Iraqi officials were to consent to export for this purpose, then perhaps the First Protocol would not be violated. Nonetheless, it would be useful for an international instrument to establish standards for exhibitions undertaken during occupation even with the consent of the national authorities. These standards should address safety of the objects, in terms of both physical preservation and immunity from seizure and other forms of judicial action while the objects are in another country;<sup>436</sup> proper

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435. The possibility of a traveling international exhibit of Mesopotamian artifacts recalls the "202 Exhibit" of paintings from German museums sent to the United States at the end of World War II. The exhibit was considered very controversial and members of the Monuments, Fine Art and Archives corps objected, but it was very popular in the United States and all of the paintings returned to Germany. NICHOLAS, *supra* note 51, at 384-405.

436. For seizure of cultural objects while part of a traveling international exhibit, see the extended litigation involving the Egon Schiele painting, *Portrait of Wally*. *United States v. Portrait*

conservation; adequate insurance; and proper scholarly integrity for an exhibition.

## V. CONCLUSION

The effect of war, poverty, political chaos, and instability on cultural heritage can be and often is devastating. War and violence in Iraq and Afghanistan have resulted in disastrous consequences. At the same time, however, these events also offer some lessons from which the world community may be able to learn to avoid or reduce such consequences in the future. We have seen that when sufficient publicity and media attention are given to the destruction of cultural heritage even if, as in the case of the Iraq Museum, the facts were not always correct, the world does react; in fact, the world does care about its heritage. We have also seen that when the public's attention is captured, our governments can be pressured to react.

The international and domestic national legal regimes need to be crafted as carefully and precisely as possible to give maximum protection to cultural heritage, and our governments must be committed to following and enforcing these dictates. Even more importantly, these legal regimes need to be devised in a proactive, rather than reactive, manner. Some dramatic changes took place in reaction to the events in Iraq. At the same time, slow, incremental change has also occurred, which may in the long run have a more lasting and effective impact. We have seen such incremental changes in the new ratifications of the 1970 UNESCO Convention and implementations into domestic law.<sup>437</sup> Another incremental change was the adoption by the U.S. Congress of the Cultural Heritage Resource Crime Sentencing Guideline, which provides for effective punishment of those who damage or destroy cultural heritage resources.<sup>438</sup> These changes are both permanent and universal—that is, they apply to protect cultural heritage located anywhere in

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of Wally, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. 2002). Immunity from seizure is available for international traveling exhibits in the United States under the Immunity from Seizure Act, 22 U.S.C. § 2459.

437. *Supra* notes 367-372, 374-378 & accompanying text.

438. U.S. SENTENCING GUIDELINES MANUAL § 2B1.5 (2004). For explanation of the mechanics of the new Sentencing Guideline, see Paula J. Desio, *Crimes and Punishment: Developing Sentencing Guidelines for Cultural Heritage Resource Crimes*, in LEGAL PERSPECTIVES ON CULTURAL RESOURCES 61 (Jennifer R. Richman & Marion P. Forsyth, eds. 2004). Although the exact status of the Sentencing Guidelines is uncertain in the wake of *United States v. Booker*, 125 S. Ct. 738 (2005), the presence of this Guideline will undoubtedly have the effect of ensuring meaningful and comparable punishments for those who commit cultural resource crimes.

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the world, not just in Iraq and Afghanistan.

The experiences in Afghanistan and Iraq demonstrate that the fate of cultural heritage during times of war and other armed conflict is indeed like the canary in the coal mine. Because of the sensitivity and non-renewable, irreplaceable character of cultural heritage, it is a sensor by which our actions can be judged. When cultural heritage is sacrificed, it is likely that many other aspects of life that mark us as human beings are also being sacrificed. It is our obligation to preserve cultural heritage as the inheritance of future generations and because future generations depend on us to do so.

