Collateral Damage: The Destruction and Looting of Cultural Property in Armed Conflict

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As some predicted, when U.S. and Coalition forces seized control of Baghdad in April of 2003, many Iraqis gave the occupiers a hero’s welcome. Despite the triumphant tenor of the news broadcasts of that day, however, a new war against Iraq’s cultural property was just beginning. In fact, even before Coalition forces entered Baghdad, looters began ransacking the National Museum, robbing it and the country of its precious cultural heritage. In their haste to grab whatever they could haul in wheel barrows, bicycles, or stuff in their pockets, the looters inadvertently started several fires with homemade torches, destroying much that was not stolen.

Though most of the thieves were motivated by hopes of making a few dollars selling the artifacts and documents on the black market, it is believed some of the destruction was spurred by other motives. Saddam Hussein had made looting and destruction of cultural property one of his weapons of choice in the Kuwait war; it was also a method of suppressing Shiites in his own country. When Baghdad fell, some Iraqis used the same destructive mode of expression as a protest to a government that had oppressed them for so long. Regardless of the sundry objectives behind the chaos and

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3 Id.
4 REBECCA KNUTH, *BURNING BOOKS AND LEVELING LIBRARIES* 193 (Praeger 2006) [hereinafter BURNING BOOKS].
5 Id.
6 Id. at 192.
7 Id. at 196.
destruction, one conclusion is inarguable: the cultural identity of Iraq suffered a heavy, and to some extent, irreplaceable loss in the days surrounding the invasion of Baghdad that continues to worsen.\(^8\) Though some antiquities have been recovered, at least 10,000 pieces have not, and many of these were not classified or recorded, making their recovery difficult.\(^9\) Archaeological sites in Iraq have suffered similar fates.\(^10\)

The fate of Iraqi cultural property is hardly a modern phenomenon.\(^11\) The looting and destruction of cultural property is inseparably linked with warfare. The Romans’ calling card in warfare was to level entire cities and collect their art as fruits of victory; Napoleon made the Louvre the most impressive collection of art and sculpture in the world as a consequence of his traipse across Europe, and Hitler pilfered thousands of works of art from occupied nations.\(^12\) Many prominent figures in history understood the need to protect cultural property in times of war long before the Hague treaties of 1907 and 1954 made it international law. Herodotus, the Greek historian, criticized the Persian king Xerxes for destroying Greek and Egyptian political hubs.\(^13\) Alexander the Great sought to preserve Persian treasures for the enlightenment of his Hellenistic empire.\(^14\) The renowned philosopher Plato, however, espoused a different view: “all those goods which were the property of the vanquished become the property of the victor.”\(^15\) It is

\(^{8}\) See id. at 193.
\(^{9}\) Id.
\(^{10}\) ROGER ATWOOD, STEALING HISTORY 269 (St. Martin’s Press 2004).
\(^{11}\) Victoria A. Birov, Note, 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, 205.
\(^{13}\) Joshua E. Kastenberg, The Legal Regime For Protecting Cultural Property During Armed Conflict, 42 A.F. L. REV. 277, 277 (1997) [hereinafter The Legal Regime].
\(^{14}\) Id.
hard to imagine, then, that Plato would afford cultural property any special luxury during an armed conflict, or even give it distinction above any other type of property.\textsuperscript{16}

This paper will examine the fate of cultural property in armed conflict and conclude that all nations should cooperate to spare cultural property from the destruction of war. Section I will give a brief overview of cultural property; what it is, why it should be afforded special protection, and some of the controversies surrounding it. Section II will discuss the Napoleonic wars and the tremendous expatriation of cultural property during that conflict. It will continue by introducing the Hague treaties of 1899 and 1907, the first two World Wars, and the most important treaty to protect cultural property in wartime, the 1954 Hague Convention.

Section III will present three modern tests of the 1954 Hague Convention and its principles in the Bosnian civil war, the First Gulf War, and the current Iraq War. Section IV will focus on the United States’ efforts to protect cultural property. The United States had established a very favorable legacy concerning cultural property protection until the most recent Iraq war, during which it has received sharp criticism. Most critics strongly urge the U.S. to ratify the 1954 Hague Convention because of its stringent provisions to protect cultural heritage in wartime. Ratifying the 1954 Hague Convention would obligate the U.S. to protect cultural property far more than it is required to under current treaty obligations, but such a move seems unlikely, and another, more practical solution is needed.

I. Cultural Property and Inherent Controversies

Cultural property can be succinctly defined as, but not necessarily limited to “moveable or unmoveable property of great importance to the cultural heritage of every

\textsuperscript{16} Id.
people.” Using this definition, cultural property is hardly confined merely to the obvious choices like art or sculpture, but can be broadened to include buildings, music, clothing, ceremonies, or geographic locations, among others. The United Nations Educational, Scientific, and Cultural Organization (UNESCO), maintains a list of World Heritage sites throughout the world. UNESCO’s mission is to encourage nations to protect their cultural heritage by providing all countries technical assistance and professional training for safeguarding their important sites, and encouraging the local population to contribute to that cause as well.

In order for a place to gain status as a World Heritage site, it must have “universal value” and meet one of ten criteria: 1) represent a masterpiece of creative genius, 2) exhibit an important influence of architecture or landscape design, 3) be uniquely representative of a culture, 4) be an exceptional example of architecture, 5) be a prime representation of man’s interaction with nature and the environment, 6) be associated with artistic, literary, or traditional works of universal significance, 7) be a place of natural beauty, 8) be representative of different stages of earth’s geological history, 9) be representative of on-going biological processes, or 10) contain a natural habit of a biological nature. Currently, the World Heritage list includes 830 sites in 138 countries. Some of the more well-known examples are Australia’s Great Barrier Reef,
the Statue of Liberty in New York City, Auschwitz concentration camp in Poland, and the Acropolis in Athens.\textsuperscript{23}

UNESCO is also active in preventing the trade of illicitly-obtained works of art and antiquities, many of which changed hands during times of war.\textsuperscript{24} One of the most enduring controversies surrounding the art world is the repatriation of pieces of art looted from their countries of origin as a result of armed conflict or clandestine thievery.\textsuperscript{25} Another quandary is reconciling the inherent justness of returning looted art to its origin nation versus maintaining it in “universal museums” where it can be seen by the masses.\textsuperscript{26} Many countries demand that their art be returned, but the museums that house them are understandably defiant, as many of the pieces in dispute have been at their current location for hundreds of years in some cases.\textsuperscript{27} UNESCO tries to serve as an intermediary between countries demanding the return of their art and the museums that possess it.\textsuperscript{28}

Many justifiably ask why such items should be protected in wartime when humans are dying and being displaced.\textsuperscript{29} The answer is after the conflict is over, victims

\begin{itemize}
  \item \textsuperscript{23} Id.
  \item \textsuperscript{26} JAMES CUNO, \textit{View From The Universal Museum, in Imperialism}, \textit{supra} note 26, at 15. (The Louvre and the British Museum are examples of universal museums in that they contain many pieces of art representing many different cultures and time periods and receive millions of visitors a year).
  \item \textsuperscript{27} Id. at 35.
  \item \textsuperscript{28} \textit{Public Debate, supra}, note 27.
  \item \textsuperscript{29} Protection of Cultural Property in the Event of Armed Conflict, \url{http://www.unesco.org/culture/legalprotection/war/html_eng/index_en.shtml} (last visited February 3, 2007).
\end{itemize}
of war should have something to go home to.\textsuperscript{30} Preserving cultural heritage is a way to help rebuild communities after the conflict has ceased.\textsuperscript{31} Cultural property reifies and makes tangible something otherwise difficult to articulate – our identity.\textsuperscript{32} Every nation and culture has monuments or other items that they hold dear and value for no other reason than because those things remind them of their origin. The most representative and cherished characteristics of a culture are embodied by inanimate objects. To destroy these things is to undermine the culture.

II. History

A. \textit{Napoleonic Wars}

The Napoleonic wars produced the most prolific looting of art and cultural property since the Roman Empire.\textsuperscript{33} Napoleon felt he and the French people had a natural right to any art his vanquished foes possessed.\textsuperscript{34} As a result of his conquests from Egypt and all over Europe, Napoleon made the Louvre the largest museum in Europe.\textsuperscript{35} As part of the truce the Vatican signed with Napoleon, the Vatican agreed to surrender 500 manuscripts and 100 busts and pictures – not to be outdone by every manuscript in the Vatican’s possession dated before 900 A.D.\textsuperscript{36} Venice suffered almost as badly as the Vatican.\textsuperscript{37} In 1797, Napoleon removed the famous winged lion and bronze horses, which he later used to adorn the Arc de Triomphe.\textsuperscript{38} Other European cities suffered similar

\begin{itemize}
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Archaeological Ethics, supra note 48, at 17.}
\item \textsuperscript{34} \textit{BURNING BOOKS, supra note 4, at 184.}
\item \textsuperscript{35} \textit{Archaeological Ethics, supra note 48, at 16.}
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} Dorothy Mackay Quynn, \textit{The Art Confiscations of the Napoleonic Wars}, 50 AM. HIST. REV. 437, 441.
\item \textsuperscript{38} \textit{Id.}
\end{itemize}
Berlin and Potsdam lost 60 paintings and a collection of carved gems and medallions. Vienna lost 250 paintings from one museum alone; Munich, in neighboring Germany, was likewise ransacked.

From Egypt Napoleon confiscated the Rosetta Stone, a fragment from a large stela written in Egyptian. The Rosetta stone provided a cipher key for previously unintelligible Egyptian manuscripts. Perhaps to quell pangs of conscience produced by his appropriations, or more likely to give the appearance of propriety, Napoleon imposed treaty provisions on subjugated nations ceding their national treasures to him.

Generally, the French people were fully supportive of acquiring all the antiquities and works of art the diminutive emperor could get his hands on. Nearly all of the most accomplished French artists of the day endorsed a petition declaring: “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 our art, as they once imitated our frivolity.” This is an early, less benign manifestation of the “universal museum” philosophy that held that beautiful works of art and other noteworthy objects should be where all can enjoy them.

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39 *Id.* at 444.
40 *Id.*
41 *Id.*
42 *Archaeological Ethics, supra* note 48, at 18. (A stela is a large wooden or stone slab used to commemorate an event, such as a funeral or battle).
43 *Id.*
45 *Archaeological Ethics, supra* note 48, at 17.
46 *Id.*
47 CUNO, *supra* note 27, at 15.
In 1801, the British placed a blockade on the French fleet in Egypt, forcing the French forces to surrender in 1801.\textsuperscript{48} Instead of returning the Rosetta stone and other valuable antiquities to Alexandria, however, the British took them back to England, where they eventually ended up in the British Museum.\textsuperscript{49}

After Napoleon’s defeat at Waterloo, the vanquished French attempted to include a clause in the 1815 Treaty of Paris allowing them to keep their plundered art, which the Allies flatly refused.\textsuperscript{50} Instead of forcing the French to return the art on its own, however, countries had to go to France to retrieve their stolen art themselves.\textsuperscript{51} Over the next several weeks after the peace was formalized, delegates and entourages from many European nations came to the Louvre to retrieve their plundered national treasures.\textsuperscript{52}

By the end of the nineteenth century, owing greatly to the Napoleonic wars, the practice of honoring cultural property of vanquished nations became customary law.\textsuperscript{53} Resentment over Napoleon’s appropriations still lingers today.\textsuperscript{54} In 2003, a nearly 200 year old and previously lost statue of Napoleon was set to be restored to its original site in Venice’s St. Mark’s square.\textsuperscript{55} Many residents of Venice objected to the idea and even put on a mock trial to posthumously prosecute the Emperor for plundering the city almost two centuries before.\textsuperscript{56}

Around the time Europe was engulfed in war with Napoleon and the French, a fledgling United States was again at war with the British Empire. In 1813, the American

\textsuperscript{48} Archaeological Ethics, supra note 48, at 18.
\textsuperscript{49} Id.
\textsuperscript{50} Quynn, supra note 87, at 447.
\textsuperscript{51} Id. at 448.
\textsuperscript{52} Id. at 452.
\textsuperscript{53} Birov, supra note 11, at 206.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
ship Marquis de Somerueles was carrying works of art from Italy to Philadelphia when the vessel was detained and its precious cargo seized by the British.\textsuperscript{57} The dispute over the pilfered works of art resulted in the first reported case to address whether cultural property deserved special protection in time of war.\textsuperscript{58} Dr. Croke delivered the decision of the Vice Admiralty Court of Halifax, a British court.\textsuperscript{59} In ruling that the paintings should be returned to the United States, he reasoned:

\begin{quote}
    The arts and sciences are admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favour and protection. They 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.\textsuperscript{60}
\end{quote}

Dr. Croke did not base his decision on any legal precedent; rather his judgment seemed to arise from a humanitarian sentiment.\textsuperscript{61} Most notably, he did not want his country to sink to the same depths as the French: “I trust that every British bosom would blush with shame, if his country should be found inferior to the lawless government of France in obeying the dictates of liberality. We are at war in the just defense of our national rights, not to violate the charities of human nature.”\textsuperscript{62} The Marquis de Somerueles decision represents a formal denunciation of Napoleon’s plundering as a crime against mankind.\textsuperscript{63}

Beginning after the second half of the 19\textsuperscript{th} century, European nations began to craft rules of war. No doubt in response to Napoleon’s confiscation of art and other precious relics during his campaigns, many of the provisions addressed the treatment of

\begin{footnotes}
\item[58] Id.
\item[59] Id. at 472.
\item[60] Id.
\item[61] Id.
\item[62] Id.
\item[63] Art, Cultural Heritage, and The Law supra note 65, at 473.
\end{footnotes}
such property during conflict. The most important documents to emerge from this period were the Hague Conventions of 1899 and 1907.

**b. Hague Conventions of 1899 and 1907**

The Hague Convention of 1899 was the first serious attempt to protect cultural property of all nations. Article 23 gives a broad prohibition against destroying all enemy property unless required by military necessity. Article 27 reiterates that requirement by applying it specifically to buildings with religious, artistic, or scientific significance, among other qualifications. Article 27 is noteworthy in that it encourages the occupied nation to mark its buildings with an insignia that designates it as a structure that is outside the scope of warfare. This practice is still carried out today, as all UNESCO World Heritage sites have a UNESCO insignia to show its designation. By stating that property should be protected “as far as possible,” Article 27 also recognizes that despite a combatant’s best efforts, military necessity may overrule that provision and justify a building’s destruction. The Hague Convention of 1899 was the first time the term “military necessity” was used. A warring nation forfeits its right to have its culturally significant buildings protected if it uses those structures to further its military effort. Article 27 of the 1907 Hague convention is virtually identical to its 1899 predecessor, but “historical monuments” was added to the list of structures that should be protected.

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65 Id.
67 From Bamiyan, supra note 13, at 256.
68 BLACK’S LAW DICTIONARY 1014 (8th ed. 2004) [hereinafter BLACK’S]. Black’s defines military necessity as: “A principle of warfare allowing coercive force to achieve a desired end, as long as the force used is not more than is called for by the situation.”
69 From Bamiyan, supra note 13, at 256.
70 Laws of War: Laws and Customs of War on Land (Hague IV); October 18, 1907 [hereinafter Hague IV], available at http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm#art27
1907 version of Article 27 does more than just suggest a nation designate its buildings as historically or otherwise significant by imposing a duty to do so.\textsuperscript{71}

\textbf{C. \textit{World War I}}

During World War I, the cathedral of Reims in France was seriously damaged by aerial bombs and the library at the University of Louvain in Belgium was destroyed by fire.\textsuperscript{72} Such destruction of non military targets, in the absence of military necessity, was a clear violation of the 1907 Hague treaty, of which Germany was a party nation.\textsuperscript{73} Though World War I is not characterized by the same destruction and looting of cultural property as wars prior and subsequent, it was still an issue that had to be dealt with in the treaty of Versailles.\textsuperscript{74} Article 245 of the Treaty gave Germany six months in which to return works of art, items of historical significance, manuscripts and the like to France from where they were removed.\textsuperscript{75} This provision, however, referred to works of art that were taken during the Franco-Prussian war of 1870-1871.\textsuperscript{76} Also mentioned are French flags and political documents taken during the same conflict.\textsuperscript{77} Article 246 also gave Germany six months to return an original copy of the Koran owned by Caliph Othman dating to the seventh century A.D., to the King of Hedjaz, of Saudi Arabia.\textsuperscript{78} The Koran was allegedly presented to German Emperor Wilhelm II from his allies the Ottomans.\textsuperscript{79}

\begin{footnotesize}
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    \item\textsuperscript{71} Id.
    \item\textsuperscript{72} Id. at 474.
    \item\textsuperscript{73} See Hague IV, supra note 75.
    \item\textsuperscript{74} MERRYMAN \& ELSEN, supra note 13, at 43.
    \item\textsuperscript{75} Id.
    \item\textsuperscript{76} Id.
    \item\textsuperscript{77} Id.
    \item\textsuperscript{78} Id.
    \item\textsuperscript{79} Id.
\end{itemize}
\end{footnotesize}
Article 247 attempted to address a difficult problem: replacing cultural property that was not simply looted, but destroyed entirely.\(^{80}\) It took a novel approach, but one fraught with difficulties and complicated questions of fungibility.\(^{81}\) As previously mentioned, the library at the University of Louvain was destroyed and with it many precious objects of cultural significance to Belgium.\(^{82}\) Article 247, which appears in Section VIII of the Treaty dedicated to reparations, required Germany to endeavor to replace the countless and invaluable documents, manuscripts, books, and maps pertaining to the University of Louvain that it had burned during the war.\(^{83}\) The defeated Germans were also required to return other priceless works of art it had removed.\(^{84}\) Many incensed French and Belgian intellectuals insisted that Germany surrender its finest works of art that originated in those two countries to replace that which they had destroyed during the war.\(^{85}\) French and Belgian delegates rejected this eye-for-an-eye approach.

Perhaps the delegates recognized the inherent difficulty of what they were being asked to do – replace the irreplaceable.\(^{86}\) A unique work of art or other piece of cultural property can no more be replaced with something similar than could a human being.\(^{87}\) And it is one thing to replace a work of art with another from the same source country; but in taking a piece of another nation’s cultural property the damage is not mended but inflicted all over again.\(^{88}\) Such offenses are not easily forgotten, as evidenced by the fact

\(^{80}\) The Versailles Treaty June 28, 1919: Part VIII. \url{http://www.yale.edu/lawweb/avalon/imt/partviii.htm} (last visited February 17 2007).
\(^{81}\) See generally MERRYMAN & ELSEN supra note 13, at 45-46.
\(^{82}\) ART, CULTURAL HERITAGE, AND THE LAW supra note 59, at 473.
\(^{83}\) The Versailles Treaty, supra note 122.
\(^{84}\) Id.
\(^{85}\) Douglas Rigby, Cultural Reparations and a New Western Tradition, 273 AM. SCHOLAR 273, 278-284 (1944).
\(^{86}\) See generally id.
\(^{87}\) See generally id.
\(^{88}\) Douglas Rigby, supra note 87.
that most of the items listed in the reparations section of the Versailles treaty had been in
Germany long before World War I.\textsuperscript{89} As Douglas Rigby writes, such a practice could lay
the groundwork for future conflicts: “in a hundred years the fate of a thousand factories
will be forgotten but not the seizure of a single treasured relic.”\textsuperscript{90} Depriving a country of
its cultural heritage also impedes its ability to regain its moral symmetry.\textsuperscript{91} All of these
issues came to bear again in the next World War.\textsuperscript{92}

\textit{D. World War II}

In September 1939 when hostilities in Europe seemed inevitable, President
Franklin D. Roosevelt contacted the governments of Great Britain, France, Germany, and
Poland asking for an assurance that only military targets would be subject to aerial
bombing.\textsuperscript{93} Despite its pledge, however, Germany had no intention of sparing civilian
targets.\textsuperscript{94}

Germany’s invasion of Poland in October was less about acquiring territory than
it was about annihilating a culture the Nazis perceived as inferior.\textsuperscript{95} Unfortunately for
Poland, while Hitler admired the cultures of Western Europe, he despised the Slavic
peoples of Eastern Europe and sought to eradicate them.\textsuperscript{96} Hitler manifested his distaste
for the Polish people by going to great lengths to destroy churches, monuments, and
works of art.\textsuperscript{97} The monastery that housed the picture of Our Lady of Czestochowa,
which also served as a shrine and place of pilgrimage for Poles, was mercilessly

\textsuperscript{89} See generally MERRYMAN & ELSEN supra note 13, at 44.
\textsuperscript{90} Douglas Rigby, supra note 87.
\textsuperscript{91} Peyton Boswell, \textit{Art as Reparation}, \textit{ART DIGEST}, September 14, 1947, at 7ff.
\textsuperscript{92} See generally MERRYMAN & ELSEN supra note 13, at 44.
\textsuperscript{93} HOWARD M. HENSEL, \textit{The Protection of Cultural Property During Armed Conflicts}, in \textit{THE LAW OF
\textsuperscript{94} Id.
\textsuperscript{96} ART, CULTURAL HERITAGE, AND THE LAW supra note 59, at 480.
\textsuperscript{97} Id.
bombed. \textsuperscript{98} Local churches and synagogues were punished especially harshly. \textsuperscript{99} Synagogues were burnt or completely destroyed, their books and other precious documents thrown into fires, and headstones from Jewish cemeteries were used to pave roads. \textsuperscript{100} And in an occurrence that was reenacted again countless times all over Europe, hundreds of national treasures and works of art were taken out of the country. \textsuperscript{101} The Nazis claimed to have confiscated almost all of Poland’s artistic assets about six months after the invasion. \textsuperscript{102} Some of the confiscated art was originally taken from Vienna by Napoleon and had made its way to Poland. \textsuperscript{103} To Hitler, appropriating the art amounted to repatriating German cultural heritage. \textsuperscript{104} 

The German army soon turned its attention to the West and France. \textsuperscript{105} As early as 1939, the Louvre shut its doors to the public and began frantically packing and evacuating works of art. \textsuperscript{106} Much of the art and valuable statuary found its way to the only châteaux large enough to house them in Cheverny, Courtalain, and Brissac. \textsuperscript{107} Soon after France’s surrender, the Germans presented French officials with a very inclusive list of art works that should be turned over to the Nazis – a list that had been prepared long before the invasion. \textsuperscript{108} The register included works of German origin that had been taken from Germany during previous wars or legitimately through commercial trading, works related to any country previously attached to Germany at any point throughout its history,

\textsuperscript{98} Id.  
\textsuperscript{99} Id. at 64.  
\textsuperscript{100} Id.  
\textsuperscript{101} JAMES J. RORIMER & GILBERT RABIN, SURVIVAL, THE SALVAGE AND PROTECTION OF ART IN WAR, 226 (Abelard Press 1950).  
\textsuperscript{102} JONATHAN PETROPOULOUS, THE FAUSTIAN BARGAIN, 191 (Oxford University Press 2000).  
\textsuperscript{103} NICHOLS, supra note 101, at 69.  
\textsuperscript{104} Id.  
\textsuperscript{105} MATILA SIMON, THE BATTLE OF THE LOUVRE, THE STRUGGLE TO SAVE FRENCH ART IN WORLD WAR II, 23 (Hawthorn Books 1971).  
\textsuperscript{106} Id.  
\textsuperscript{107} Id. at 25.  
\textsuperscript{108} Id. at 33.
and any works of art pertaining to enemies of the Reich – namely the Jews. ¹⁰⁹ Hitler was unabashedly intent on erasing what he saw as the indignities of the Versailles treaty, and this meant reclaiming treasures Germany had been forced to acquiesce to the Allies less than twenty-five years before. ¹¹⁰

Louvain, the subject of the aforementioned Article 247 of the Treaty of Versailles, was particularly hard-hit by the Nazis. ¹¹¹ For three days, from May 14th through the 16th, the Germans shelled the town, exacting heavy damage on the library, the tower of which was used as an observation post by the British. ¹¹² About the time the British were retreating and the Germans were taking control of the city, a mysterious fire broke out in the library, destroying a museum and precious books and documents. ¹¹³ The Germans conducted an inquiry into the fire, concluding it was set by the British Secret Service, but this explanation did little to assuage the Belgians. ¹¹⁴

Another impetus for Hitler’s acquisition of works of art was his desire to build a “super museum” where he could display Europe’s finest works of art, much like Napoleon had envisaged nearly a century and a half earlier. ¹¹⁵ Joseph Stalin had his own designs on building a super museum that surpassed Hitler’s ambition. ¹¹⁶ The two sides

¹⁰⁹ Id.
¹¹⁰ NICHOLS, supra note 101, at 143.
¹¹¹ LORD METHUEN, NORMANDY DIARY 160 (Robert Hale Limited 1952) (Lord Methuen’s diary provides an excellent account of the myriad instances where European cultural property sustained significant damage during the war. Lord Methuen was a Monuments, Fine Arts and Archives Officer with the British Army and was stationed in France and Belgium from 1944-45. His narrative is replete with instances of observing structures and priceless relics that had been badly damaged from bombing. Multiplying his observations many times over gives an accurate estimate of the damage to cultural heritage sustained all over Europe).
¹¹² Id.
¹¹³ Id. at 160-161.
¹¹⁴ Id.
¹¹⁶ Id. at 232.
spent the duration of the war looting, plundering, and destroying each other’s cultural property from private and public collections.\textsuperscript{117}

World War II produced the greatest destruction and theft of cultural property the world has ever seen.\textsuperscript{118} It also produced a thorny issue for courts to decide when former owners of confiscated art sued buyers with legitimate title to get it back.\textsuperscript{119} In Menzel \textit{v.} List, 267 N.Y.S.2d 804 (1966), the Plaintiffs were forced to leave a Marc Chagall painting in their Brussels home in order to escape the invading Nazis.\textsuperscript{120} In 1955, List purchased the painting from an art dealer in New York City for $4,000.\textsuperscript{121} The New York art dealer had purchased it in 1955 from an art gallery in Paris.\textsuperscript{122} Among the several issues the court had to decide was whether the Menzels had abandoned the painting when they left it in their apartment to flee the Nazis.\textsuperscript{123} The court quickly disposed of this possibility, holding that the Menzels had no more abandoned the painting fleeing from the Nazis than a person relinquishing his belongings in a holdup.\textsuperscript{124}

The court also distinguished illegal plundering from the lawful principle of war booty.\textsuperscript{125} Whereas booty pertains to the seizure of cash, resources, and other materials belonging to the state necessary for war, plunder is defined as stealing private property not necessary for the war effort.\textsuperscript{126} Though the art gallery that purchased the painting in Paris and the dealer who purchased the painting from the gallery in the United States both

\begin{itemize}
  \item See generally \textit{id}.
  \item \textit{Id.} at 479.
  \item See generally \textit{Menzel v. List}, 267 N.Y.S.2d 804.
  \item \textit{Id.} at 806.
  \item \textit{Id.}
  \item \textit{Id.} at 808.
  \item \textit{Id.} at 810.
  \item \textit{Id.}
  \item \textit{Menzel}, 267 N.Y.S.2d at 810.
  \item \textit{Id.} at 810-811.
\end{itemize}
held valid title, the court held that no provision of law protecting good faith owners would be upheld if it prevented the restitution of Nazi confiscations.\textsuperscript{127}


Just as the 1899 Hague Convention was in large measure a belated response to Napoleon’s theft of cultural property, the 1954 Hague Convention was a more immediate and thorough reaction to the Nazis’ thefts and destructions. The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict was the first treaty to focus exclusively on the protection of cultural property in times of war.\textsuperscript{128} In light of the looting and destruction of cultural property during World War II, there was a serious need to create a specific protocol to protect it during war.\textsuperscript{129} Article 1 of the Hague Convention gives a broad definition of cultural property that includes a non exhaustive list of objects and depositories of cultural property, namely museums, libraries, and special asylums created for cultural property during outbreaks of armed conflict.\textsuperscript{130} Article 4, a broad reaching provision whose purpose is to instill in all nations a respect for cultural property, officially recognized for the first time that the destruction of cultural property is not only a byproduct of war, but a weapon in and of itself.\textsuperscript{131} Acts of aggression against other treaty nations’ cultural property, especially for reprisal, is forbidden.\textsuperscript{132}

\begin{footnotes}
\item[127] Id. at 819.
\item[128] Convention for the Protection of Cultural Property, supra note 18.
\item[129] John Alan Cohan \textit{An Examination of Archaeological Ethics and The Repatriation Movement Respecting Cultural Property (Part Two)} 28-FALL Environ's Envtl. L. & Pol'y J. 1, 36 (2006) [hereinafter \textit{Archaeological Ethics}].
\item[130] Id., at 261.
\item[131] Convention for the Protection of Cultural Property, supra note 18.
\item[132] Id.
\end{footnotes}
Interestingly, Article 6 of the 1954 Convention lessens the burden on occupied states by no longer requiring that they mark their cultural property with a distinctive emblem, unless there is a war, in which time property deserving special protection should be designated.\footnote{Compare Convention for the Protection of Cultural Property, \textit{supra}, note 18, \textit{with} Hague IV, \textit{supra}, note 72.} Article 7 proposes to ensure that militaries of signature parties teach their troops to respect cultural property and have a system of safeguarding cultural property of the enemy.\footnote{Convention for the Protection of Cultural Property, \textit{supra} note 18.} Article 13 first introduced the register for cultural property, which still exists today.\footnote{\textit{Id.}} As with the previous Hague conventions, the 1954 version makes an exception for military necessity and warns that immunity for cultural property will be revoked if the property is used to further military goals.\footnote{\textit{Id.}} Under Article 15, those whose charge it is to care for and transport cultural property are considered non combatants.\footnote{\textit{Id.}}

Not surprisingly, Egypt, a country rich with widely valued and admired cultural history, was the first nation to ratify the convention.\footnote{The Legal Regime, \textit{supra}, note 14, at 290.} The United States signed the convention, but to date has not ratified it because of its restrictiveness.\footnote{Harvey E. Oyer III, \textit{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. \\ 
\textit{ARTS} 49 (1999).} The U.S. fears that ratifying the convention would preclude it from using nuclear weapons if the need ever arose.\footnote{Convention for the Protection of Cultural Property, \textit{supra}, note 18.} Iraq, however, is a party to the convention.\footnote{\textit{Id.}}
III. Modern Tests of Treaty Principles

A. BOSNIAN CIVIL WAR

Ethnic cleansing again became the stimulus for war in the mid 1990s in Bosnia.\textsuperscript{142} Much like the Nazis did 50 years before, the Serbs sought to ethnically cleanse their country, this time of Muslims and their culture.\textsuperscript{143} Serbs deliberately targeted buildings with significant religious meaning to Muslims, namely mosques.\textsuperscript{144} Before 1992, there were over 1,000 mosques in the northern part of the country, many with historical significance.\textsuperscript{145} By 1995, there were probably less than 100 left.\textsuperscript{146} The most significant of these was the mosque of Banja Luka, dating from the 16\textsuperscript{th} century.\textsuperscript{147} The Serbs did not even attempt to make its destruction look accidental or consequential to normal armed conflict; it was brazenly dynamited.\textsuperscript{148}

Though Yugoslavia was one of the first signatories to the 1954 Hague convention, it was shockingly cavalier in its disregard for the treaty.\textsuperscript{149} Far from its intended purpose of protecting cultural heritage, the Hague Convention banner served as a target for Serbian forces.\textsuperscript{150} In 1991 the New York Times reported that at least 116 monuments, castles, and historical districts had been attacked and damaged.\textsuperscript{151} Of all the cities damaged in the Balkan Wars, probably none is more steeped in history than

\begin{footnotesize}
\begin{enumerate}
\item See generally BURNING BOOKS, supra note 4, at 29.
\item Id. at 88.
\item MERRYMAN \& ELSEN supra note 13, at 62.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
Dubrovnik.\textsuperscript{152} The Romans founded Dubrovnik, which is listed as a UNESCO world heritage site, in the seventh century.\textsuperscript{153} Dubrovnik was targeted for no other reason than its rich cultural significance, for it served no military purpose whatsoever, and there were no Serbs to liberate in the city.\textsuperscript{154}

Dubrovnik was just one of many historic cities damaged during the conflict in Bosnia.\textsuperscript{155} Vukovar, a city with a population of 44,000, had a continuous population dating back to the Stone Age with a historic baroque city center.\textsuperscript{156} It was completely destroyed.\textsuperscript{157} Sibenek, a city whose history dates back to 1066, had an exceptional example of Gothic architecture, the St. Vitus church, completely destroyed.\textsuperscript{158} The civil war in the former Yugoslavia marked the first time since the Nuremberg trials that indictments had been brought against state leaders for destroying cultural property.\textsuperscript{159}

\textbf{B. THE FIRST GULF WAR}

Iraq is nestled in the middle of the cradle of civilization, what was once known as Mesopotamia.\textsuperscript{160} Ten thousand years of history is buried in the ground and spread across the landscape in the form of ancient mosques, ziggurats, and minarets.\textsuperscript{161} Iraq’s rich cultural treasures called for very careful planning by the Coalition military forces.\textsuperscript{162} Though the United States, Great Britain, and Canada were not signatories to the 1954

\begin{footnotesize}
\begin{enumerate}
\item[152] See generally Id. at 120.
\item[153] Id.
\item[154] Id. at 121.
\item[155] Zaknic, supra, note 155, at 122.
\item[156] Id.
\item[157] Id.
\item[158] Id.
\item[159] Birov, supra note 11, at 221.
\item[160] See generally From Bamiyan, supra note 13, at 273 (listing the many watermarks in human civilization – namely the beginning of organized agriculture, the domestication of plants and animals, written language, and organized legal codes).
\item[161] See generally id.
\item[162] See generally The Legal Regime supra note 14, at 297.
\end{enumerate}
\end{footnotesize}
Hague Convention, they followed its provisions during the war.  

The Rules of Engagement created by Air Force commanders made attacking cultural sites permissible only if absolutely necessary. Iraqis severely tested the Coalition’s patience by deliberately positioning aircraft and other military targets near historical sites. A perfect example of this occurred when Iraqi forces stationed two fighter aircraft near the ancient temple of Ur, with no runway or servicing equipment nearby to justify its placement there. Though the law of war would permit an attack against the aircraft, Coalition forces chose not to, weighing the danger the weapons posed against the possible collateral damage to the temple.

Despite the Coalition forces’ best efforts, several historical sites were inevitably damaged. The brickwork of the ziggurat at Ur was struck by rockets or other projectiles. In constructing military bases, the United States inadvertently damaged archaeological sites at Tell al-Lahm and Tell al-Obeid in southern Iraq.

Most of the damage inflicted on Iraq’s cultural property during the Gulf War did not actually occur until after the war. At the conclusion of the Gulf War, Coalition forces encouraged Kurds and Shiites to rebel against Saddam’s government. In doing so, Iraqis looted the National Museum, destroying or stealing over 4,000 pieces of priceless cultural property. From Iraq, many pieces made their way onto the black market.

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163 Id.
164 Id.
165 HENSEL, supra note 60, at 75.
166 Id.
167 Id.
168 See generally From Bamiyan supra note 13, at 280.
169 Id.
170 Id.
171 Oyer, supra, note 146, at 25.
172 From Bamiyan, supra note 13, at 282.
173 Oyer, supra note 146, at 27.
market and ultimately to auctions in New York and London.\textsuperscript{174} One positive aspect of the Gulf War, at least concerning cultural property, was that Iraq returned practically all of Kuwait’s cultural property that it had plundered in the months and years leading up to the Gulf War.\textsuperscript{175}

\textit{C. Current Iraq Conflict}

Those in charge of the Iraqi National Museum blamed the United States for the mass looting it sustained in the days following the invasion of Baghdad.\textsuperscript{176} Workers at the museum contended that priceless antiquities could have been protected from marauding looters with only minimal security, a responsibility they placed squarely on the shoulders of the U.S. military.\textsuperscript{177}

Losses from the Iraqi National Museum were catastrophic.\textsuperscript{178} Among the prized historical objects taken were a solid gold harp dating from approximately 3360 B.C., cuneiform tablets, and 4,000 year old gold necklaces, bracelets, and earrings from the Sumerian dynasty.\textsuperscript{179} In the midst of the looting, one Museum official ran to a group of nearby American troops for help.\textsuperscript{180} The troops were able to disperse the looters – men, women and children, but half an hour after the troops moved on, the looters were back, this time threatening to kill the Museum worker if he intervened again.\textsuperscript{181}

\textsuperscript{174} Id. \\
\textsuperscript{175} Id. \\
\textsuperscript{176} Looters Ransack Baghdad Museum, \url{http://news.bbc.co.uk/1/hi/world/middle_east/2942449.stm} (last visited March 2, 2007). \\
\textsuperscript{177} Id. \\
\textsuperscript{179} Id. \\
\textsuperscript{180} Id. \\
\textsuperscript{181} Id.
In the months leading up to the war, scholars and art museum curators presaged the danger that would befall the Iraqi Museum and archaeological sites all over Iraq. Drawing on their remembrances of the First Gulf War, American scholars assumed that the biggest dangers to cultural property would come after the fighting ended. Once word of the disaster at the Iraqi Museum made news, however, panic-stricken archaeologists and academics implored the President to intervene on behalf of the museum and unprotected archaeological sites. In a letter written just days after the Iraqi Museum was plundered by looters, art scholars encouraged the President to enact means to recover stolen art and adopt plans to protect remaining cultural resources in Iraq. In late 2004, Congress passed the Iraqi Cultural Heritage Protection Act, which authorized the President to prevent the importation of select artifacts from Iraq. The United Kingdom’s Parliament passed similar legislation.

Though the Iraqi National Museum has received most of the attention and public outcry over its massive looting, undocumented artifacts bestow an even better understanding of the past. Archaeological sites are composed of layers of soil containing not only artifacts, but floral and fauna remains that act as a timeline of the civilization’s history. When a virgin archaeological site is properly and meticulously excavated, each layer of a civilization’s past can be reconstructed and connected to yield

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183 Id.
185 Id.
186 From Bamiyan, supra note 13, at 329.
187 Id.
188 From Bamiyan, supra note 13, at 291-292.
189 Id.
a more complete understanding. Conversely, when sites are ravaged recklessly, the historical context is left with nearly unbridgeable gaps. The archaeological sites that were the most victimized date from the Sumerian period, roughly 4,000 B.C. Since major hostilities in Iraq ended in 2004, looters have become more organized, traveling in bands of 40 or more in SUVs and armed with assault rifles. Since most of Iraq’s archaeological sites were previously untouched, it is impossible to accurately guess how many artifacts have been stolen.

Recovering the looted artifacts has proven difficult. Of the nearly 14,000 items stolen from the museum, only about 5,800 have been recovered from eight countries. Iraqis themselves returned many of the items at the urging of their religious leaders who issued edicts, or fatwas, calling for the return of artifacts.

Some cultural sites, such as the minaret of Samarra, sustain heavier damage because they are placed squarely in battle situations. The 162 feet tall spiral minaret was built in the 9th century by Caliph Al-Mutawakil when Samarra was part of the Abbasid Empire. Due to the vantage point atop the tower that affords a panoramic view of the city, insurgents and U.S. forces have battled for control of the minaret.

190 Id.
191 Id.
192 Id.
193 Id.
195 Id.
199 Id.
200 Aqeel Hussein & Colin Freeman, US Snipers Make Minaret a Rebel Target, THE TELEGRAPH, Jan. 22, 2005,
Insurgents use the tower to calibrate their mortar fire, while the U.S. military uses it as a watchtower to prevent placements of roadside bombs. Military snipers first used the minaret to provide extra security for the first Iraq elections, and roadside bombings declined drastically. After the election, insurgents tried to blow up the platform to prevent troops from returning. The minaret is littered with bullet holes and miniature craters from insurgent pot-shots. The Iraqi curators who oversee the minaret are concerned that a continued U.S. military presence will eventually spell doom for the impressive structure, as insurgents fire upon it almost daily. Despite unwavering criticism from Iraqi officials and academics worldwide, the U.S. insists that using the minaret is necessary. Iraqi antiquities officials have asked for compensation for the damage to the minaret and other ancient sites in and around Samarra.

D. THE PROBLEM OF CULTURAL PROPERTY DESTRUCTION IN THE IRAQI SECTARIAN VIOLENCE

Arguably the most difficult, if not widespread problem regarding the Iraq conflict is sectarian violence. Sunnis and Shiites have coexisted in the Middle East for hundreds of years and have periodically struggled for power during that time. Despite Saddam Hussein’s harsh treatment of Shiites during his regime, the two groups lived

201 Id.
202 Id.
203 Id.
205 Aqeel and Freeman, supra note 255.
206 Id.
207 Ancient Minaret, supra note 253.
208 The Pentagon, Measuring Stability and Security in Iraq, 16 (2007). There has been much debate over whether Iraq is embroiled in a full-scale civil war. The Pentagon’s recent report to Congress points out that civil war is an inaccurate term for the conflict since some attacks are Shi’a on Shi’a and a result of Al Qaeda terrorism.
together in relative peace, forging business and social relationships and even taking each other in marriage. After Saddam’s ouster, Sunnis boycotted the first open elections allowing Shiites, the formerly subservient class, to gain control. Some Shiites used their new uniforms and authority to seek redress for old resentments against Sunnis. The tensions between the two groups came to a head after the attack on the Askiriya shrine in Samarra. The Askiriya shrine is believed to date from the tenth century A.D. It is one of the most important religious destinations for Shiite Muslims and at the time of its bombing was full of worshippers. The mosque received the most damage on its famed golden dome for which the mosque is named. As expected, Shiite reprisal was swift and grave. Bombing the mosque of Askiriya was the worst heresy imaginable to Shiites, and they responded in kind, attacking around 90 Sunni mosques and killing 78 people.

Al Qaeda has also taken credit for many bombings in Iraq. Though the perpetrators of the bombing on the Golden Dome Mosque of Samarra were never discovered, many thought it bore the hallmarks of an Al Qaeda act of terrorism. The White House said it was intended to provoke a civil war between the Shiites and the Sunnis, which it arguably has. Al Qaeda in Iraq has taken responsibility for at least

210 Id.
211 Id.
212 The Significance of the Askiriya Shrine (NPR radio broadcast Feb. 22, 2006).
213 Id.
215 Id.
216 Id.
219 Id.
one mosque bombing in Iraq in 2007.\textsuperscript{220} The bombing of mosques clearly violates the 1954 Hague Convention of which Iraq is a signatory.\textsuperscript{221} What is far less clear is who should be held responsible for such violations since the Hague Conventions are agreements between states and sectarian violence in Iraq is between rival groups within a state (Sunnis and Shiites) and a terrorist organization (Al Qaeda).\textsuperscript{222} Al Qaeda presents the most difficult situation because it is a nationless organization with members all over the globe.\textsuperscript{223} The Hague Conventions’ wording clearly refers to organized governments and military conflicts between separate nations.\textsuperscript{224} No mention is made of how to deal with cultural property destruction when the warring groups are from one nation or no nation at all.\textsuperscript{225} Sanctioning a group like Al Qaeda that has no government would be both difficult and fruitless, though the United Nations established a sanctions committee against Al Qaeda that requires nations to freeze Al Qaeda assets and seize its members within their borders.\textsuperscript{226}

IV. U.S. Efforts at Cultural Property Protection During War.

\textit{A. History and Background}

The first modern attempt to codify the protection of cultural property was the Lieber code, named for the Columbia College professor under whose direction it was

\begin{footnotes}
\item[221] Convention for the Protection of Cultural Property, \textit{supra} note 18.
\item[223] Mediamatters.com, Conservatives Distorted Geneva Conventions to Defend Gonzales, \url{http://mediamatters.org/items/200501100004?offset=20&show=1}.
\item[224] \textit{See generally} Convention for the Protection of Cultural Property, \textit{supra} note 18.
\item[225] \textit{See generally id.}
\item[226] UN.org, Al Qaida and Taliban Sanctions Committee, \url{http://www.un.org/sc/committees/1267/index.shtml}.
\end{footnotes}
Approved by Abraham Lincoln in 1863 as instructions for the Union army while in the field of battle, the Lieber code protected cultural property, without calling it such. The Lieber code sought to protect cultural property, by having military leaders take an active role. The principles embodied in the Lieber code were weaved into the Hague conventions of 1899 and 1907. Lieber’s instructions also became a model for military manuals in France, Russia, and Italy. Article 34 mentions public schools, churches, hospitals, and charitable and education-related establishments as non public property that is off limits for the purposes of war. Article 35 protects works of art, scientific compilations, and other similar classes of items from foreseeable harm. Article 36 stipulated that a conquering nation may have works of art or other valuables removed from the vanquished nation for the protection of the works, but return of the works to their place of origin was to be decided after the conflict.

Though the United States has not ratified the 1954 Hague Convention, its policy towards cultural property during armed conflict is guided by the Convention’s principles. In 1999 President George W. Bush stated: “United States 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 on Article 34’s list of protected sites.”

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227 HENSEL, supra note 99, at 44.
228 Id. at 45.
230 Id.
231 GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY 8 (The University of Minnesota Press 1957).
232 Id.
233 Id.
234 Id.
upon the practices of US military forces during World War II.” President Bush most likely presented this argument as a defense against critics who disparage the United States for failing to adopt the 1954 Hague Convention and its 1999 protocol.

Despite the United States’ failure to ratify the 1954 Hague Convention, the spirit of that document permeates the military’s 2004 Operational Law Handbook (OLH), which is an instructional manual of sorts for Judge Advocates. The OLH mentions cultural property as assets that should be protected from attack inasmuch as they are not being used for military purposes, going so far as to mention the Hague Convention in the provision. The OLH also recognizes the blue and white shield emblem created by the Convention to designate cultural property. Citing Article 17 of the Hague Convention, the OLH declares that persons entrusted with the care and protection of cultural property should be treated as non combatant civilians.

The Air Force makes its own provision to protect cultural property in the Commander’s Handbook on the Law of Armed Conflict. Despite the United States’ reluctance to formally recognize the Hague Convention of 1954, The Air Force recognizes that many adversaries are signatories to the treaty. That being the case, the Air Force recognizes the blue and white emblem created by Article 16 and gives items bearing that symbol the requisite protection. Predictably, however, sites that are used

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236 Id.
239 Id. at 27.
240 Id.
241 Id.
242 The Legal Regime, supra, note 14, at 300.
243 Id.
244 Id.
to support military objectives are legitimate targets; this includes production sites vital to warfare such as petroleum or other energy-producing plants.\textsuperscript{245}

Most recently, the United States passed the Emergency Protection for Iraqi Cultural Antiquities Act of 2004.\textsuperscript{246} Senator Charles Grassley introduced the bill in an effort to help the United States conform to United Nations Security Council Resolution 1483, which urges member states to aid in the safe return of Iraqi cultural property.\textsuperscript{247} The Cultural Antiquities Act empowers the President to place import restrictions on any items of cultural significance illegally taken from Iraq.\textsuperscript{248} Perhaps more importantly, it serves as a gesture of the United States’ commitment to preserve Iraq’s cultural property.\textsuperscript{249}

\textbf{B. CRITICISMS OF U.S. CULTURAL PROPERTY PROTECTION IN WARTIME}

The United States has received stern disapproval for what critics categorize as a blatant disregard for Iraq’s cultural property.\textsuperscript{250} An Iraq man who risked his life to protect the National Museum’s stores of antiquities had this rebuke for President Bush:

\begin{quote}
A country's identity, its value and civilization resides in its history[]. If a country's civilization is looted, as ours has been here, its history ends. Please tell this to President Bush. Please remind him that he promised to liberate the Iraqi people, but that this is not a liberation, this is a humiliation.\textsuperscript{251}
\end{quote}

Unfortunately, Coalition forces are responsible for much of the destruction to Iraq’s cultural property.\textsuperscript{252} Aid workers in southern Iraq accused American soldiers of vandalizing the ancient city of Ur, which dates back to 4,000 B.C. and is believed to be

\textsuperscript{245} Id.
\textsuperscript{246} Barbara T. Hoffman, Exploring and Establishing Links for a Balanced Art and Cultural Heritage Policy, in ART AND CULTURAL HERITAGE, supra note 2, at 2.
\textsuperscript{247} Id.
\textsuperscript{248} Id.
\textsuperscript{249} Id.
\textsuperscript{250} See generally Army Base, supra note 242.
\textsuperscript{251} Id.
the birthplace of Abraham of the Old Testament and Torah. The accusations alleged that American troops spray painted ruins of the ancient city and took countless kiln-baked bricks as souvenirs. Due to concerns for the city’s safety, military leaders placed the city off limits to their own troops.

Further endangering the ancient city is nearby Tallil air base. Though Tallil is not located directly on the site of the ancient city of Ur, it is situated very near it and could conceivably contain sensitive artifacts. Construction of Tallil and air fields like it requires the removal of thousands of truckloads of earth and laying miles of pipe and wires. Besides the potential dangers of construction and recklessly moving tons of earth, bases near cultural sites invite attack from the enemy.

In January 2005 staff from the British Museum serving as stewards of Iraq’s cultural heritage accused the United States of recklessly endangering the site of the ancient city of Babylon. Tanks crushed 2,600 year old paving stones and 300,000 square meters of surface area were paved over and in some places chemically treated, damaging archaeological relics. At least 12 trenches cut through archaeological deposits. There was also evidence of fuel leaks. U.S. military spokesman Steven Boylan insisted that the Army consulted with the Babylon museum and an archaeologist

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253 Id.
254 Id.
255 Id.
257 See generally id.
258 Id.
259 See generally id.
261 Id.
262 Id.
before engaging in fortifying the area.\textsuperscript{263} He was also adamant that the base was needed to combat terrorists and insurgents.\textsuperscript{264}

In April 2006 U.S. Marines again received stern criticism for damaging Babylon.\textsuperscript{265} Marines constructed a helicopter pad near the site and the frequent and powerful vibrations from propeller blades caused the roof of a building to collapse.\textsuperscript{266} Soldiers also packed sandbags with artifacts.\textsuperscript{267} While the commanding officer offered an apology to Iraqis, he also stated that the city’s fate could have been worse if troops were not stationed there, as looters would have free reign.\textsuperscript{268} Halliburton, the private military contractor linked with so much infamy during the Iraq conflict, has also absorbed its share of criticism for endangering cultural sites.\textsuperscript{269} Halliburton or its subsidiaries built many of the military installments in Iraq and are blamed for damaging the Ishtar gate, one of the most iconic figures in antiquity.\textsuperscript{270}

One instance of cultural property destruction that has not received condemnation is the well publicized toppling of the Saddam Hussein statue in April 2003.\textsuperscript{271} Though the statue commemorated a dictator widely accepted to be ruthless, it still falls under the definition of cultural property for its political and perhaps historical significance.\textsuperscript{272} Not all Iraqis opposed the fallen dictator at the time of his death.\textsuperscript{273} For many in the Middle

\textsuperscript{263} Id.
\textsuperscript{264} Id.
\textsuperscript{266} Id.
\textsuperscript{267} Id.
\textsuperscript{268} Id.
\textsuperscript{270} See generally id.
\textsuperscript{271} Philip Kennicott, \textit{For Hate and Anger, a Statue of Limitations}, WASH. POST Apr. 10, 2003, at A31 [hereinafter \textit{For Hate and Anger}].
\textsuperscript{272} Convention for the Protection of Cultural Property, \textit{supra} note 18.
\textsuperscript{273} \textit{See Generally In Death, Saddam Fascinates Iraqi Supporters} (NPR radio broadcast Jan. 8, 2007).
East, Saddam has achieved legendary status as a martyr and symbol of resistance to the
West. Abstractly, destruction of the statue violates U.S. military policy. The statue
was not used for military purposes. Nor does military policy make exceptions for
destroying cultural property that is only significant to a small minority of the
population. President Bush likened toppling the statue to the destruction of the Berlin
Wall, calling it “one of the greatest moments in the history of liberty.” Other statues of
Saddam were destroyed in various parts of Iraq with no help from U.S. troops. This
raises an interesting and hard-to-resolve issue concerning cultural property in armed
conflict. The 1954 Hague Convention and U.S. military protocol make no distinction
for cultural property that is directly linked with tyrannical governments guilty of war
crimes like Saddam Hussein’s Baath party or Nazi Germany. And as President Bush’s
remarks concerning the toppling of Saddam’s statue illustrate, such destruction can have
a strong morale-boosting effect for troops and previously oppressed citizens.

While the idea of destroying a token of despotism strikes us as just and deserved,
it is still a violation of international law. Another point to consider is that destroying
the statue was a usurpation of authority considering the United States’ goal was to help
create a new, democratic Iraqi government. If anyone is to decide to destroy Iraqi

274 Id.
276 See generally For Hate and Anger supra note 263.
278 Press Release, The White House, President Discusses War on Terror at Fort Hood (April 12, 2005)
[hereinafter Press Release].
279 War News Roundup (PBS television broadcast Apr. 10, 2003).
280 See Generally ART, CULTURAL HERITAGE, AND THE LAW supra note 59, at 479.
282 See generally Press Release, supra note 284.
283 See generally id.
284 See generally Bush Says Formation of Iraq Government Marks Victory for Freedom, available at:
http://usinfo.state.gov/meda/Archive/2006/May/30-411404.html.
cultural property, it should be the Iraqi government, who may choose to preserve these relics as cautionary reminders of tyranny.\textsuperscript{285} 

U.S. forces have been accused of targeting mosques in their battle against insurgents.\textsuperscript{286} Shiite community leaders accused U.S. troops of storming their mosques in search of insurgents and opening fire on worshippers who tried to flee.\textsuperscript{287} American military commanders denied even entering the mosque after Iraqis complained earlier in the war that about their places of worship being dragged into the war.\textsuperscript{288} According to the U.S. military, American troops waited outside the mosque while Iraqi troops entered to conduct a search.\textsuperscript{289} Allowing Iraqi troops to enter mosques while American troops waited outside would arguably satisfy the requirements of U.S. military procedure, which incorporates principles of the 1954 Hague Convention.\textsuperscript{290} Al Jazeera reported that the U.S. was outright targeting mosques in its 2004 offensive against Fallujah, claiming that half of the city’s 120 mosques had been destroyed.\textsuperscript{291} 

Many also call for the United States to ratify the 1954 Hague Convention to more fully align itself with international norms of cultural property protection.\textsuperscript{292} However, even though the United States has not ratified the 1954 Convention, its military policy is still consistent with many of its provisions.\textsuperscript{293} The Operational Law Handbook succinctly articulates that cultural property is to be protected unless it is used for military purposes,

\begin{itemize}
\item \textsuperscript{285} Anita Ramasastry, \textit{Toppling Saddam, Not His Statues}, FINDLAW, Apr. 23, 2003, \url{http://writ.lp.findlaw.com/ramasastry/20030422.html}.
\item \textsuperscript{287} Id.
\item \textsuperscript{288} Id.
\item \textsuperscript{289} Id.
\item \textsuperscript{290} See generally \textit{Operational Law Handbook}, supra note 241.
\item \textsuperscript{291} Mosques Bombed in Fallujah Fighting, AL JAZEERA, Nov. 24, 2004, available at: \url{http://english.aljazeera.net/English/archive/archive?Archiveld=7581}.
\item \textsuperscript{292} See generally \textit{Protecting Cultural Property in Iraq}, supra note 65.
\item \textsuperscript{293} See generally \textit{Operational Law Handbook}, supra note 241.
\end{itemize}
even recognizing the blue and white shield created by the 1954 Hague Convention.\textsuperscript{294} The actions of the U.S. military in and around historical sites like Babylon and Ur suggest a failure to implement policy that already exists, that if followed, would provide adequate protection for historical sites and antiquities.\textsuperscript{295}

The recurring justification found in international agreements and U.S. policy that allows attacking otherwise protected sites is the doctrine of military necessity.\textsuperscript{296} Military necessity allows force to be used to achieve a military goal, but not more than is called for in the situation.\textsuperscript{297} While this definition by itself could be interpreted very broadly, General Dwight Eisenhower sought to temper its use in World War II by offering this oft-quoted admonishment: “The phrase ‘military necessity’ is sometimes used where it would be more truthful to speak of military convenience or even personal convenience. I do not want it to cloak slackness or indifference.”\textsuperscript{298} The Operational Law Handbook does not mention General Eisenhower’s interpretation of military necessity, so the contemporary definition employed by the military could be broad enough to include bases near ancient sites and hasty plowing asunder of earth for paving roads.\textsuperscript{299} The Operational Law Handbook, again referencing the 1954 Hague Convention, notes that certain cultural sites may be placed on an international register designating that it is protected from aggression and military use.\textsuperscript{300} Troops are forbidden

\begin{thebibliography}{300}
\bibitem{294} Id. at 27.
\bibitem{295} Id.
\bibitem{296} Id. at 12.
\bibitem{297} BLACK’S, supra note 43.
\bibitem{298} HENSEL, supra, note 237, at 100.
\bibitem{299} See generally Operational Law Handbook, supra note 241.
\bibitem{300} Id. at 26.
\end{thebibliography}
from entering mosques unless necessary to fulfill a mission or ordered to do so by their commander.\textsuperscript{301}

Besides allegedly failing to follow its own policy with respect to enemy cultural property, U.S. military commanders have been accused of being apathetic to the destruction and theft of Iraq’s cultural heritage.\textsuperscript{302} Right after the invasion of Baghdad and the subsequent looting of the Iraqi National Museum, former Secretary of Defense Donald Rumsfeld seemed incredulous and unconcerned about the amount of damage reported in the media:

\begin{quote}
The images you are seeing on television you are seeing over and over and over, and it's the same picture of some person walking out of some building with a vase, and you see it 20 times and you think, "my goodness, were there that many vases?" (Laughter) Is it possible that there were that many vases in the whole country?\textsuperscript{303}
\end{quote}

Martin Sullivan, the former chair of the President’s Advisory Committee on Cultural Property, resigned in protest over the military’s failure to stop the looting and destruction at the Iraqi National Museum.\textsuperscript{304} Sullivan said that the military had advanced warning of the danger facing the museum, and while troops quickly secured oil fields, the museum was left to the mercy of mobs.\textsuperscript{305}

\begin{center}
\textbf{C. CURING DEFICIENCIES IN U.S. POLICY}
\end{center}

The rallying cry of many people concerned about Iraq’s cultural property is that the United States needs to ratify the 1954 Hague Convention.\textsuperscript{306} To be sure, measures in the 1954 Hague Convention and its 1999 Second Protocol significantly exceed the 1907

\begin{footnotesize}
\textsuperscript{301} \textit{Id.} at 97.
\textsuperscript{302} See generally \textit{Protecting Cultural Property in Iraq}, \textit{supra} note 65.
\textsuperscript{303} \textit{War News Roundup} (PBS television broadcast Apr. 11, 2003).
\textsuperscript{305} \textit{Id.}
\textsuperscript{306} See generally \textit{Protecting Cultural Property in Iraq}, \textit{supra} note 65.
\end{footnotesize}
Hague Convention in that the former is solely dedicated to protecting cultural property.\textsuperscript{307} Article 8 prohibits state parties from positioning military targets near landmarks or other sensitive areas.\textsuperscript{308} Article 9 of the 1999 Second Protocol requires an occupying nation to prevent the illicit export of a nation’s cultural property.\textsuperscript{309} Perhaps if the U.S. felt the pressure of compliance with Art. 9, the tragedy of the Iraqi National Museum never would have occurred.\textsuperscript{310} Article 22 of the Second Protocol extends the Hague Convention to conflicts within a nation, (as opposed to just conflicts between foreign nations), which may or may not include the Iraqi insurgency, since Article 22 does not cover “internal disturbances and tensions.”\textsuperscript{311} Further, Iraq is not a party to the 1999 Second Protocol.\textsuperscript{312} Ratifying the 1954 Hague Convention would place a heavier burden on the United States to protect Iraq’s cultural property.\textsuperscript{313} The reality is, however, that the U.S. shows no signs of ratifying the convention.\textsuperscript{314} Current military policy and, if followed, the 1907 Hague Convention should provide adequate safeguards.\textsuperscript{315} Article 27 of the 1907 Hague Convention is a broad mandate that forbids a nation from destroying or placing in danger historic monuments or similar landmarks.\textsuperscript{316} Following that provision alone would preclude the military from placing bases near important sites like Ur, Babylon, and the Minaret of Samarra.\textsuperscript{317} The U.S. military also uses provisions of the

\textsuperscript{307} Compare Hague IV, supra note 45, with Convention for the Protection of Cultural Property, supra note 18.
\textsuperscript{308} Convention for the Protection of Cultural Property, supra note 18, at Art. 8.
\textsuperscript{309} Id. at Art. 9.
\textsuperscript{310} Id.
\textsuperscript{311} Id. at Art. 22
\textsuperscript{312} Id.
\textsuperscript{313} See generally id.
\textsuperscript{314} Id.
\textsuperscript{315} See generally Operational Law Handbook, supra note 68, at 27; Hague IV, supra note 45, at Art. 27.
\textsuperscript{316} Hague IV, supra note 45, at Art. 27.
\textsuperscript{317} Vulliamy, supra note 236.
1954 Hague Convention as targeting guidelines. The U.S. military went to great lengths to preserve cultural property during World War II, well before the Hague Convention of 1954 even existed. The military showed similar concern during the Gulf War. What appears to separate the current conflict from World War II or even the first Iraq War is the human sentiment that prompted General Eisenhower to define military necessity as a last resort to endangering cultural property instead of a carte blanche to achieve military goals.

Ultimately, it was not an obligation emanating from an international treaty that motivated General Eisenhower to instill in his troops the importance of protecting Europe’s treasures, but a respect for “[those] historical monuments and cultural centers which symbolize to the world all that [they were] fighting to preserve.” It is that level of respect that appears to be lacking in the current conflict. That could mean the difference between losing and saving thousands of years of shared heritage. For all the U.S. has done in the past to protect cultural property, there is a disconnect between efforts in the current conflict compared with those from the last conflict in Iraq less than 15 years ago. There are material differences between the nature of the first Iraq war, which was predominantly an air war, and the current conflict, namely the absence of a lengthy occupation. It is clear that in a long, drawn out war in a country saturated with valuable and irreplaceable cultural heritage like Iraq, extreme care must be taken – and even that will not be enough to avoid some losses. The U.S. or anyone else would presumably

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319 See generally GERSTENBLITH, supra note 108, at 480.
320 See generally The Legal Regime supra note 14, at 297.
321 HENSEL, supra note 237, at 58.
322 Id.
323 From Bamiyan, supra note 13, at 350.
have a difficult time convincing Al Qaeda, Sunnis, or Shiites to stop bombing mosques. Neither the U.S. nor Iraqi leaders have had any success to date.\textsuperscript{324} But the U.S. military can control where it builds military bases and airfields. It can also allocate troops to protect vulnerable archaeological and historical sites throughout the country to comply with the 1907 Hague Convention. Allocating troops to protect these sites may prove difficult since more personnel is needed as it is simply to restore order.\textsuperscript{325} Diverting forces from unstable areas to protect archaeological sites may not be a high priority to military leaders.

A possible solution can be found from experiences in World War II. Though the Allies destroyed their fair share of cultural property, they made considerable, laudable efforts to avoid its destruction whenever possible.\textsuperscript{326} Allied pilots went to great lengths to avoid bombing secret depots where works of art and other valuable items were placed for safekeeping.\textsuperscript{327} The Monuments, Fine Arts & Archives division, or MFA&A, was sent ahead of advancing Allied forces to prepare maps of historic sites, churches, and museums to ensure their protection.\textsuperscript{328}

General Eisenhower realized that the Allied Forces’ reputation depended in part on how they protected Europe’s treasures. Commanders all over Europe received a letter expressing General Eisenhower’s sentiments and urging caution around historic monuments. Museum curators from the United States as well as academics from Harvard, Yale, and other top universities took the lead in forming the MFA&A.

\textsuperscript{325} Joseph Lieberman, Why We Need More Troops in Iraq, WASH. POST, Dec. 29, 2006, at A27.
\textsuperscript{326} See generally ART, CULTURAL HISTORY AND THE LAW, supra note 59, at 480.
\textsuperscript{327} Id. at 481.
\textsuperscript{328} Id.
The MFA&A’s job was to protect local cultural heritage from retreating Germans, tempted American serviceman, and enterprising or desperate locals.\textsuperscript{329} If the world community is truly concerned about the fate of Iraq’s cultural property, the concerned nations should come together and form an organization similar in purpose to the MFA&A to safeguard cultural property. The United Nations could form a committee or empower UNESCO, the United Nations Educational, Scientific, and Cultural Organization to inspect cultural sites such as Babylon and Ur to recommend what measures should be taken to ensure they are protected while allowing the United States to fulfill its military objectives. If Iraq’s cultural heritage is indeed the world’s heritage, then protecting it should be every country’s responsibility.

Though most nations would probably like to stay as far away from the Iraq war as possible, if a handful of nations volunteered the services of troops to guard archaeological sites or at least to protect trained caretakers, sites could be preserved more easily. Such a plan would not be feasible for places that have not been secured by coalition forces, like the minaret of Samara. For army bases that are under coalition control that are near the ruins of ancient cities, it could encourage U.S. troops to take greater care. These same international troops could ward off the well organized looters, some of which have been rumored to be financing insurgent attacks with the profits they make from selling artifacts.

If the U.N. proposed such a plan to the General Assembly, it would very likely garner support. No doubt there are concerned museum curators and academics who would pressure their governments to participate. Of course, a modern version of the MFA&A will be impossible to realize if leaders within the Army are not converted to

\textsuperscript{329} \textit{Id.}
General Eisenhower’s sentiments concerning the importance of honoring other nation’s cultural identity. Forming such an organization would be the easiest part.

CONCLUSION

Enlisting other nations to help protect Iraq’s cultural property may be the only viable solution to protect against its loss. The United States’ efforts at preventing looting and destruction of antiquities are both regrettable and futile compared with the forces that are necessary to make a difference. To date, grousing about the United States’ failure to ratify the 1954 Hague Convention has achieved nothing. A more workable, realistic solution is needed. It is time to truly start seeing cultural property through Dr. Croke’s eyes as memorialized in his judicial opinion on the ship Marquis de Somerules – as “the property [and responsibility] of mankind at large.”