Casualties of War: The Destruction of Iraq's Cultural Heritage as a Result of U.S. Action During and After the 1991 Gulf War

Marion Forsyth

Follow this and additional works at: https://via.library.depaul.edu/jatip

Recommended Citation
Available at: https://via.library.depaul.edu/jatip/vol14/iss1/4

This Lead Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact wssulliv6@depaul.edu, c.mcclure@depaul.edu.

Marion Forsyth*

I. INTRODUCTION AND OVERVIEW

The territory that is currently Iraq initially was settled in approximately 6000 B.C. along the Tigris and Euphrates rivers. In this land of ancient Mesopotamia, man first created a cooperative society with divisions of labor. In fact, the Sumerians who inhabited southern Mesopotamia created many of the innovations that made civilization possible. They invented written language, which they imprinted on clay tablets; this cuneiform writing has revealed much of what we know about how Sumerian society worked and the history of the time period. Cuneiform tablets have also preserved the earliest literature, including the Epic of Gilgamesh—a flood story that closely parallels the Great Flood of the Old Testament.¹

The Sumerians were responsible for the development of the wheel and sophisticated irrigation techniques to assist with farming in the fertile river valley. They also created a complex mathematical system, used for everything from basic counting to predictions of astronomical occurrences. Their base-60 system of numerical calculation still serves as the basis of our system of telling time—because of their influence, we count sixty seconds in

---

* The author earned her J.D. from Harvard Law School in 2003. She is an associate with Baker & Daniels, an international law firm, and is resident in the D.C. office. The author wishes to thank Professor Terry Martin, who supervised the writing of this article, and whose advice and encouragement have been invaluable. The author also thanks Professor Patty Gerstenblith for her insightful comments and generous guidance. All errors should be attributed only to the author.

a minute, and sixty minutes in an hour.  

As Sumerian culture advanced, it expanded to a larger region and evolved through successive rules of Akkadians, Amorites, and Hittites. The Akkadians were characterized by their war-like nature, and they used their technological advantage in military weapons—including the composite bow—to defeat many of their neighbors. The Amorites ruled from Babylon, and they created the most complete collection of ancient law, the Code of Hammurabi.  

The code included laws on "land tenure, rent, the position of women, marriage, divorce, inheritance, contracts, control of public order, administration of justice, wages, and labor conditions." The promulgation of this code marks the earliest known time in human history when a ruler distributed written terms of the laws and provided notice to the populace of what was expected of them.  

The Hittites, characterized by a war-like nature and adept use of the chariot, ruled through the twelfth-century B.C. After the Hittites were overthrown, the indigenous population, called Assyrians, gained power. The Assyrians were Semitic peoples who dominated the area for a brief time after the Hittites. In addition to being a military power, the Assyrians were patrons of the arts, and sculptural reliefs were the most popular form of visual art. The Assyrians decorated their major centers at Nineveh, Nimrud, Babylon, and Khorsabad with, among other things, intricately carved lions, military scenes, and agricultural motifs.

Organized archaeological excavations of ancient Mesopotamia utilizing modern scientific methods have been ongoing since the
late 19th century. While extensive excavations have been conducted at Babylon, Nimrud, and other major sites, most of the estimated 10,000 archaeological sites from the ancient period remain unexcavated. It has been remarked that in Iraq there "may be as rich and concentrated a cultural heritage of humankind as can be found anywhere."

This paper describes the destruction of this heritage as a consequence of the 1991 Gulf War and its aftermath. Part II discusses the situation in Iraq prior to the Gulf War and Iraq's exemplary record on cultural property protection. Part II also explains how this tradition of protecting archaeological sites was shattered by the events of the Gulf War, first by Coalition bombings, and then by the ensuing economic devastation caused by United Nations sanctions. The strict sanctions policy frustrated Iraqi efforts to protect archaeological sites, and the U.S. did not make cultural property protection a priority in its interactions with Iraq. This paper argues that the United States has not done enough to ensure that the cultural patrimony of Iraq is protected, both from the events during the Gulf War and its aftermath.

Part III examines whether American actions, while certainly irresponsible, were per se illegal under the terms of international treaties and customary law on the subject. Particular emphasis is given to the 1954 Hague Cultural Property Convention. Part III concludes that while contrary to the spirit of these agreements, the U.S. actions with respect to Iraqi cultural property are not per se illegal under current law.

I then suggest avenues that could be open to Iraq for recovery and/or mitigation of the damage still occurring in the country. I discuss potential use of the U.S. Customs service, the 1970 UNESCO Convention on Cultural Property, and the National Stolen Property Act. An explanation that none of these tools are practical in this situation follows, and I conclude that Iraq does not
have any established or sensible legal recourse in international or American courts.

Part IV begins by asking why international law does not offer a remedy for this situation. I then suggest the possible emergence of a *jus cogens* norm against destruction of cultural property in times of war to remedy this gap in international law. Part V calls for widespread ratification of the 1954 Hague Cultural Property Convention and its Second Protocol. I address the recent looting of Iraqi antiquities after the U.S. invasion and urge more responsible policy making in addition to legal development to ensure the protection of our shared cultural heritage.

**II. THE GULF WAR'S EFFECT ON IRAQ'S CULTURAL HERITAGE**

Prior to 1991, Iraq had one of the most successful cultural property protection schemes in the Middle East. Iraqi national law has considered all immovable and movable antiquities to be owned by the state. The trade in antiquities has been illegal, and it has also been illegal to “break, mutilate, destroy or damage antiquities whether movable or immovable.” The Iraqi government outlawed the export of antiquities and established severe criminal penalties for the looting of archaeological sites. The government

10. Some private ownership is allowed, if the object was in private hands when the legislation was enacted and the property is registered with the state. The vesting of ownership was accomplished by Antiquities Law of 1936, as amended in 1974 and 1975 (Article 3). *UNESCO, THE PROTECTION OF MOBILE CULTURAL PROPERTY II: COMPENDIUM OF LEGISLATIVE TEXTS 100* (1984) [hereinafter UNESCO].


12. Export of “movable and immovable possessions which were erected, made, produced, sculptured, written, drawn or photographed by man, if they are 200 years old or more” is prohibited. “Export, attempted export or help therein is punishable by imprisonment for a period not exceeding five years, confiscation of the antiquities as well as all other antiquities in the person’s possession even if they are registered.” *LYNDEL V. PROTT & PATRICK J. O’KEEFE, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT*
required that antiquities be reported within one week of discovery, and no excavations were allowed without permits from the national government.\textsuperscript{13}

Before the invasion of Kuwait in 1990, Saddam Hussein’s regime directed healthy sums to the Iraqi Antiquities Department, guarded archaeological sites closely, and encouraged scientific excavation by local and international teams of archaeologists.\textsuperscript{14} It is likely that Saddam’s interest in the cultural heritage of Iraq was motivated by nationalist intentions and a desire for self-promotion. For example, Saddam had a special interest in the site of Babylon, where he sponsored restoration projects and had every new brick stamped with his name.\textsuperscript{15} Not all of his programs were characterized by such overt self-promotion, however. The regime established a regional museum system that showcased local finds and treasures so that they would be more accessible to Iraqis living throughout the country.\textsuperscript{16} Saddam also established as part of this

\begin{itemize}
\item \textsuperscript{13} UNESCO, \textit{supra} note 10, at 104-5.
\item \textsuperscript{14} Andrew Lawler, \textit{Invisible Crisis: Destruction in Mesopotamia}, \textit{SCIENCE}, July 6, 2001, at 32-35.
\item \textsuperscript{15} Saddam had inscribed at the Palace of Nebuchadnezzar, “In the era of the victorious Saddam Hussein, the protector of greater Iraq and the restorer of its civilization, this city was rebuilt once again.” Barbara Demick, \textit{Iraq’s Antiquities Being Robbed from the Cradle of Civilization}, KNIGHT RIDDER NEWSPAPERS, available at http://seattletimes.nwsource.com/news/nation-world/html198/altbabl_040398.html (last visited Jan. 11, 2002).
\end{itemize}
museum system educational programs that taught Iraqi citizens to value their rich archaeological heritage both above and below ground, and to safeguard these vestiges of the past. 17 As a result of these policies, there was virtually no illicit trade in Iraqi antiquities before 1991. 18

The Gulf War and its aftermath shattered this cultural heritage protection scheme. Funds that had previously gone to the Antiquities Department were diverted to the war effort, and the preservation of archaeological sites took on a low priority in comparison to national defense. 19 Foreign excavation teams were forced to leave the country, and they took with them the funds required to protect many of the sites. 20

The Antiquities at places close to certain archaeological sites.” UNESCO, supra note 10, at 103 (Article 23 of Antiquities Law 1936 as amended 1974, 1975 specifically addresses this situation).


18. “To protect and promote its irreplaceable patrimony in the face of such powerful market forces, modern Iraq has an excellent antiquities department, and its people have a very high level of pride in their national heritage. In the recent past, very few antiquities left the country, because every Iraqi carefully guarded that inheritance. This attitude is essential for a country that possesses hundreds of major archaeological sites and tens of thousands of smaller ones. Even in the best of times, it would be impossible to guard all these sites without the cooperation of the Iraqi people.” JOHN MALCOLM RUSSELL, THE FINAL SACK OF NINEVEH 18 (Yale U. P. 1998).

19. The Antiquities Department had just started to recover from the fallout of the Iran-Iraq war of the 1980’s when the invasion of Kuwait took place in 1990. See John Malcolm Russell, Robbing the Archaeological Cradle, NATURAL HISTORY (The magazine of the American Museum of Natural History), Feb. 2001, at 44.

20. John Russell states,

[a]t the time of the Gulf War, archaeology was experiencing an extraordinary revival in Iraq, after a dry spell during the nation’s 1980-88 war with Iran. Dozens of foreign and Iraqi teams were working at an unprecedented rate, often in response to threats posed by modern urban and agricultural development. At the ancient site of Sippar, just
Department was left to disperse its scarce resources to safeguard the thousands of archaeological sites in the country. The harsh United Nations sanctions that kept out military supplies also excluded academic works, and the Antiquities Department found itself unable to sponsor educational programs. In fact, Iraqis studying to be archaeologists have been particularly hurt by the sanctions—they are unable to receive academic books and new information on excavations. When they can work, Iraqi archaeologists must do so without any of the benefits of the last decade of improvements in the science of archaeology.

During the first Gulf War, Allied bombings and ground forces directly damaged several sites. Particularly, damage was done at Ur of the Chaldees, where cannon holes and bomb craters riddle southwest of Baghdad, Iraqi archaeologists had discovered an extensive library from the late Babylonian empire. A wide variety of clay tablets (literary works, omens, incantations, astronomical records, mathematical exercises) were found, still arranged on the shelves. Knowledge of Iraq’s past was increasing exponentially. When Iraq invaded Kuwait in the summer of 1990, virtually all archaeological activity ceased, and the war and subsequent imposition of UN sanctions have left Iraq’s patrimony in peril.

Iraq’s national legislation requires that archaeologists, as a condition of receiving a permit, pay for a number of guards to be determined with the Directorate of Antiquities to guard the site during the excavation and afterwards. (Article 44, Section h, of Antiquities Law of 1936 as amended 1974, 1975.)

21. Donison, supra note 16.


24. Sue Williams notes that:

[T]he archaeological site of Ur of the Chaldees, reputed birthplace of Abraham, was bombed and strafed by Allied aircraft, with over 400 cannon holes reported in the temple tower and at least 4 bomb craters in the site. The unexcavated major site of Tell el-Lahm was trenched and bulldozed by American forces. Sue Williams, Iraq: Robbers of the Cradle, UNESCO SOURCES, May 2000, at 11.
the site. In addition to this collateral damage, looting archaeological sites has become an attractive way of earning cash in a society where 70% of household income is spent on food, and the average salary is $2 per month. The reduced security caused by lack of funds to pay guards at archaeological sites invited looters fueled by the strong demand of a western market that had not had easy access to Mesopotamian artifacts in a number of years. One truly devastating consequence of the looting of archaeological sites has been the loss of untranslated cuneiform writing engraved on these artifacts. Such writing in the past has yielded invaluable information about Mesopotamian societies—everything from agricultural logs to great literature—but tablets on the private market are not available for translation and study, and without scientific excavation they cannot be put into context with the other tablets found nearby.

Lax security and special orders for certain pieces from western collectors have encouraged looters. Organized and armed groups often conduct illicit excavations, sometimes using bulldozers. Some even attacked established museums as early as April 1991, when the museum at Babylon was robbed of its treasures. Those

25. Id. at 11.
26. See Adams, supra note 9.
29. McGuire Gibson has noted that Mesopotamian objects are available on Portobello Road in London that were not available before the Gulf War. Gibson, supra note 17, at
http://www.mcdonald.cam.ac.uk/IARC/cwoc/issue1/LossContext.htm (last visited Jan. 11, 2004). It is widely known that of particular interest to antiquities buyers are cylinder seals, cuneiform tablets, sculptural reliefs, and jewelry of any kind.
30. Donny George asserts that looters often arrive in pickup trucks with armed groups of guards with machine guns to protect them. See Lawler, Invisible Crisis: Destruction in Mesopotamia, supra note 14, at 32-35.
31. Muayed Said Damerji, Iraq’s director general of antiquities, says the Babylon case remains unsolved: “We can only guess. These cases usually start with a poor, simple peasant or Bedouin, but they are organized by people who
who attempted to challenge the looters were met with violence and machine guns. Donny George, the director of the Iraqi Antiquities Department, has stated that about a dozen archaeological guards had been injured and killed in standoffs with looters from 1991-2002. George himself has been the victim of violent attack.32

Despite difficulties, Iraq tried to stop the looting during the sanctions period. One widely publicized victory of Iraqi law enforcement was the apprehension of looters who had stolen a sculpture of a winged bull from the palace of Sargon at Khorsabad in 1997. The looters were summarily executed and the bull was returned, although it was permanently damaged—the looters had cut it into a dozen pieces to more easily smuggle it out of the country.33 The government also attempted to stop looting through border patrols. Donny George estimated that 10,000 looted antiquities had been seized at the Iraqi borders, but he conceded, "We believe even double that, or more, has got out."34 Throughout the 1990’s, objects recorded as being in Iraq before the Gulf War came onto the Western antiquities market, and many promptly disappeared into private collections.35

Iraq’s cultural patrimony also suffered from the repercussions of anti-Saddam riots at the end of the first Gulf War. When Iraq

---

32. See Andrew Lawler, Digging In: Rifle-Toting Researcher Fights to Protect Ancient Sites, SCIENCE, July 6, 2001, at 39.
34. Donison, supra note 16.
invaded Kuwait, it quickly moved the collections of the Kuwait Museum to Baghdad, ostensibly for safekeeping.\textsuperscript{36} To make room for these pieces in the Baghdad museum, the Baghdad collections (over 150,000 pieces) were moved to the regional museums.\textsuperscript{37} In the anti-Saddam rebellions that took place after the 1991 Iraqi defeat, however, these regional museums were attacked and looted by mobs of angry civilians.\textsuperscript{38} It has been estimated that 4800 objects were lost in these incidents, which sadly served as a precursor to the widespread devastation in national museums in April 2003.\textsuperscript{39} While some objects were completely destroyed in the riots, many of the objects were stolen and have found their way to the art market in Europe and the United States.\textsuperscript{40} The loss of the museum collections is distressing not just for the objects lost, but for the educational opportunities they afforded. Archaeologist McGuire Gibson commented, "[i]t is unlikely that there will ever again be an effort at public education about archaeology on the scale that was represented by those regional museums."\textsuperscript{41}

In an attempt to understand the variety and degree of damage done to cultural property in Iraq during the war and its aftermath, the United Nations Educational, Scientific and Cultural

36. Some scholars have claimed this action was actually required under Iraq's obligations as a party to the 1954 Hague Convention. Under the terms of the 1954 Hague Convention, Iraq notified UNESCO that the collections of the Kuwait Museum were in danger and that they would be moving the collections to Baghdad for safekeeping. See McGuire Gibson & Augusta McMahon, American Association for Research in Baghdad, Fascicle No. 1, Lost Heritage: Antiquities Stolen from Iraq's Regional Museums vi (1992) [hereinafter Gibson & McMahon].


38. Museums in Amara, Basra, Kufa, Diwaniya, Suleimaniya, Dohuk, and Kirkuk were vandalized. See McGuire Gibson & Augusta McMahon, supra note 36, at v.


40. See Gibson & McMahon, supra note 36, at v. Some objects have even appeared on the E-Bay auction website, Adams, supra note 9.

Organization (UNESCO) requested permission from the United Nations Security Council to send a mission of scientists to the country. This request was vetoed by the United States and Great Britain.\textsuperscript{42} The Antiquities Department in Iraq moved quickly to get information out about the stolen objects from its regional museums, for fear that the objects would be offered for sale in Europe and the U.S. Their fears were well founded, and many Mesopotamian antiquities surfaced on the art market, particularly in London, after the war.\textsuperscript{43}

The Antiquities Department possessed photographic negatives of many of the pieces in their collection, and in 1995 requested that the sanctions committee allow them to import photographic paper in order to make prints from the negatives. Such photographs would be pivotal to the recovery effort and would help antiquities dealers and auction houses, as well as INTERPOL and other law enforcement agencies, to identify the stolen objects. These requests were also denied by the sanctions committee.\textsuperscript{44} Thus the international community prevented Iraq from alerting the art market in the most effective way of the questionable provenance of objects for sale. This lack of information was mitigated to some extent by the work of concerned archaeologists and academics to document the stolen antiquities through their own records and observations from their work in Iraq.\textsuperscript{45}

\begin{flushright}

43. Russell recounts being presented with photographs of Assyrian reliefs offered for sale that he had documented as an archaeologist at Nineveh before the Gulf War. \textit{See} RUSSELL, \textit{supra} note 18, at 15-16. \textit{See also} GIBSON \& MCMAHON, \textit{supra} note 36, at v (referencing works that have appeared on the London market).

44. Williams, \textit{supra} note 42, at 12.

45. Archaeologists John Russell, McGuire Gibson, and Augusta McMahon, among others, have produced catalogs of artifacts for use by the art market in identifying stolen works. \textit{See}, \textit{e.g.}, GIBSON \& MCMAHON, \textit{supra} note 36. \textit{See
Antiquities Department was unable to make photographic prints, they were able to provide "four volumes listing 4,000 cultural objects missing from their provincial museums to UNESCO, which made copies and distributed the volumes worldwide."\(^{46}\) The United Nations sanctions were supposed to stop all trade out of and into Iraq, and yet a large number of antiquities were able to pierce the embargo and are finding their way into European and American collections.\(^{47}\)

III. THE LEGALITY OF U.S. ACTIONS DURING AND AFTER THE GULF WAR

According to the Department of Defense final report on the conduct of the Gulf War to Congress, the United States Armed Forces acted in accordance with the international laws of war throughout the conflict.\(^{48}\) Then Chairman of the Joint Chiefs of Staff General Colin Powell stated, "Decisions were impacted by legal considerations at every level, [the law of war] proved invaluable in the decision-making process."\(^{49}\) Under the various legal obligations of the United States, this consideration should have extended to the protection of cultural sites in Iraq. While simultaneously creating the conditions for massive looting of the cultural property of Iraq (through crippling sanctions policy that drove citizens to rob sites and handicapped the Iraqi government's efforts to prevent it) and encouraging the art market in New York

\(^{46}\) Williams, supra note 42, at 12.

\(^{47}\) See note 43.

\(^{48}\) The Report states that:

DOD-mandated instruction and training in the law of war were reflected in US operations, which were in keeping with historic U.S. adherence to the precepts of the law of war. Adherence to the law of war impeded neither Coalition planning nor execution; Iraqi violations of the law provided Iraq no advantage.


\(^{49}\) Id. at 605.
through lax Customs procedures, the United States ensured that a steady supply of antiquities met a strong demand in the western art market.

A. The 1954 Hague Convention

The Defense Department recognized that the 1954 Hague Cultural Property Convention was applicable in the 1991 Gulf War, by virtue of the fact that both Iraq and Kuwait are parties, as well as several Coalition members including France, Egypt, and Saudi Arabia. Even though Canada, Great Britain, and the United States had not ratified the treaty, “the armed forces of each receive training on its provisions, and the treaty was followed by all Coalition forces in the Persian Gulf War.”

The 1954 Hague Convention for the Protection of Cultural Property In the Event of Armed Conflict is the most well-known and commonly supported international agreement on cultural property protection. According to one scholar, “The significance of the Hague Cultural Property Convention was that for the first time, there was a wide recognition among nations that each holds and administers its cultural treasures at least in part for the common good of the entire world.” This Convention affirms general principles that cultural property should be above the fray of war and special efforts should be made to safeguard these

51. DOD Report at 605.
52. Id. at 605-606.
53. The 1954 Hague Convention is supported by a broad spectrum of governments and world regions. The 1954 meeting to negotiate the Convention was the first meeting attended by representatives of Western and Soviet bloc countries after the start of the Cold War. See Stanislaw E. Nahlik, International Law and the Protection of Cultural Property in Armed Conflicts, 27 HASTINGS L. J. 1069, 1077 (1976).
treasures during hostilities.\textsuperscript{55}

Parties to the Convention agree to offer protection, including both not using cultural property for military purposes and also safeguarding cultural property by stopping theft and vandalism during times of war.\textsuperscript{56} Such protection may also encompass designating sites with the Hague emblem during hostilities so that other belligerents may more easily recognize the site as protected.\textsuperscript{57} The Convention allows a party to waive its duty to protect in the case of military necessity, such as if an enemy uses the property as a shield or a military planning facility.\textsuperscript{58} In times of occupation, the Convention imposes upon an occupying party an obligation to assist the occupied country in protecting its own

\textsuperscript{55} The 1954 Hague Convention defines cultural property in Article 1 as-
- movable or immovable property of great importance to the cultural heritage of every people, such as 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 or 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;
- buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in subparagraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);
- centers containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as "centers containing monuments." The 1954 Hague, \textit{supra} note 50.

\textsuperscript{56} See \textit{Id., supra} note 50, at Article 4, Sections 1 and 3.

\textsuperscript{57} See Article 6 of the 1954 Hague Convention, "Distinctive Marking of Cultural Property" and Article 16, "Emblem of the Convention," which states, The distinctive emblem of the Convention shall take the form of a shield. . .consisting of a royal blue square, one of the angles of which forms the point of the shield, and of a royal blue triangle above the square, the space on either side being taken up by a white triangle. The emblem shall be used alone, or repeated three times in a triangular formation (one shield below), under the conditions provided for in Article 17.

\textsuperscript{58} See \textit{Id., supra} note 50, at Article 4, Section 2.
cultural property by providing the most necessary aid.\textsuperscript{59} The Convention also prohibits reprisals directed at cultural property.\textsuperscript{60}

The Convention is waived if countries do not make efforts to protect their own cultural property.\textsuperscript{61} To this end, the Convention establishes a registry where each country deposits a list of its most important cultural sites.\textsuperscript{62} Listed sites are granted special protection from damage, meaning that they enjoy immunity from the hostilities. They cannot be seized as war booty,\textsuperscript{63} and cannot be destroyed except in cases of military necessity. These specially protected sites only retain their status if they are not used for military purposes.\textsuperscript{64} If one party attacks the specially protected sites of another party, the attacked party is released from its obligations under the Hague Convention.\textsuperscript{65} The main purpose of designating property as specially protected is that other nations will be aware of its status in advance and can plan accordingly. In addition to these substantive provisions, the Convention directs UNESCO to provide technical support and to help implement the terms of the Convention.\textsuperscript{66}

Both Iraq and Kuwait are parties of the Hague Convention.\textsuperscript{67} Both the United States and Great Britain have signed the

\textsuperscript{59} Id. at Article 5, Section 1.
\textsuperscript{60} Id. at Article 4, Section 4.
\textsuperscript{61} Id. at Article 4, Section 5.
\textsuperscript{62} Article 8, Section 6 of the 1954 Hague Convention establishes the register. The International Register of Cultural Property Under Special Protection is maintained by UNESCO. However, UNESCO has had difficulty persuading countries to respond to their requests. "Only seven out of 80 countries solicited in 1979 for reports on their implementation of the Convention responded." David A. Meyer, The 1954 Hague Cultural Property Convention and Its Emergence Into Customary International Law, 11 B.U. INT'L L.J. 349, 369 (1993).
\textsuperscript{63} See 1954 Hague Convention, supra note 50, at Article 4, Section 2.
\textsuperscript{64} See Id., supra note 50, at Article 8, Section 6 and Article 9.
\textsuperscript{65} Id., supra note 50, at Article 11.
\textsuperscript{66} Id., supra note 50, at Article 23.
Convention, but neither country has ratified it. The Hague Convention's provisions apply in any armed conflict where two or more of the hostile countries are members of the Convention. Thus, as a technical matter, the Hague Convention did not govern the March 2003 U.S. and British invasion of Iraq.

Although the United States has not formally ratified the treaty, in practice the U.S. follows its tenets. U.S. service personnel are trained in the law of war and the Hague Convention, and they are instructed to respect the Hague emblem. In fact, the American armed forces have received training on the tenets of the Hague Convention for many years. During their initial training, U.S. soldiers and reservists are taught "The Soldier's Rules," which are comprised of the most basic laws of war. These rules include, "Soldiers destroy no more than the mission requires," and Air Force servicemen are taught to recognize the Hague emblem for protection of cultural sites. While the United States is not a party to the Hague Convention, it does make efforts to follow the strictures of the Convention through the training of its armed forces and has taught the principles of the 1954 Hague Convention on the level of customary international law. Therefore, whereas

68. For a list of parties see http://www.unesco.org/culture/legalprotection/war/html_eng/100.shtml (last visited Jan. 12, 2004).


71. JAG GUIDEBOOK TO LAW OF WAR: METHODS OF INSTRUCTION at 23, at http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/TJAGSAWeb.nsf/8f7edfd448e0ec6c8525694b0064ba51/9dc02ec45aba401d852569ad007c79df/$FILE/Chapter%2010.pdf (last visited Apr. 28, 2003).

72. Goldman, supra note 70, at 390.

73. Meyer, supra note 62, at 372.
the Senate has not ratified the 1954 Hague Convention, it appears that for all intents and purposes, the United States respects the authority of the Convention and seeks to abide by its proscriptions.

This respect and consideration for the treaty supports many international scholars' pronouncements that much of the Hague Convention has acquired the status of international customary law.\textsuperscript{74} One hundred five states have become party to the convention, and the sections accepted as international customary law bind all other states in the international community.\textsuperscript{75} The principle that cultural and religious objects should not be attacked in times of war, except in times of military necessity, seems to have acquired such binding status.\textsuperscript{76} While this general principle has moral persuasive authority, the only enforcement provisions in the Hague Convention call for Parties to the Convention to impose sanctions upon other Parties that violate it, including criminal penalties for individuals who violate the Convention.\textsuperscript{77} No sections provide for recovery of objects or monetary compensation if the Convention is violated. Because of the lack of enforcement

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{74} "The U.S. has trained forces in the principles of the Hague Convention on the level of international customary law for many years." \textit{Id.} Meyer argues that "under the three requirements laid down by the International Court of Justice, the 1954 Convention has certainly reached a binding status as a part of the general law." Meyer at 387-88. Marion Haunton also states, "There are now 82 states party to the '54 Convention, thus the obligation to respect the cultural property of other states may be so well entrenched as to have become customary international law." Marion Haunton, \textit{Peacekeeping, Occupation and Cultural Property}, 12 U.B.C. L. REV. 217, 225 (1995).
\item \textsuperscript{75} See supra text accompanying note 68.
\item \textsuperscript{76} See Goldman, supra note 70, at 390 and Meyer, supra note 62 at 357.
\item \textsuperscript{77} See 1954 Hague Convention, supra note 50, at Article 28. However, as David Meyer states, This article lacks teeth because no international body exists to impose sanctions. Instead, the creation and scope of sanctions are left to the Parties actually affected by the crime to impose as they see fit. The language leaves much room for discretion, and from this vagueness stems the problems with enforcement. . . . Although less effective than sanctions, much of the pressure for cultural property protection stems from the moral realm, international indignation, and diplomatic missives, not the concrete realm of sanctions. Meyer, supra note 62, at 357.
\end{enumerate}
\end{footnotesize}
mechanism, the Convention has not reached its full potential.

In practice, the Convention has also failed to accomplish many of its aims because the International Register has not been widely used.\footnote{See Nahlik, supra note 53, at 1080.} Politics dominate the process of putting sites on this list, and adding to the list has not been a priority for many countries. Some of this reluctance is due to the lack of resources at UNESCO for assisting in the development of the registry, but more significantly, some countries view creating a list of their most precious sites as authoring their destruction—they view it as assisting their enemies in attacking the sites that are most important to their culture. Such fears have been justified in ethnic conflicts such as the one in Yugoslavia, and UNESCO needs to do a better job of convincing countries that it is in their best interest to secure special protection for their sites.\footnote{W. Hays Parks, The 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, Speech to the Carnegie Endowment for International Peace (May 2, 1994), available at http://www.kakarigi.net/manu/ceip4.htm (last visited Jan. 11, 2004).} Thus the lack of enforcement mechanism in the 1954 Hague Convention, combined with the inefficacy of the International Register, render the 1954 Hague Convention an important statement of international values, but with little power to translate those values into action in real world conflicts.

During the Gulf War bombing campaign, the U.S. Defense Department maintained that it was doing all it could to ensure that bombs were not targeting important cultural sites. In its final report to Congress, the Defense Department stated, “Some targets were specifically avoided because the value of destruction of each target was outweighed by the potential risk to nearby civilians or, as in the case of certain archaeological and religious sites, to civilian objects.”\footnote{DOD Report at 611-12.} The Defense Department also asserted, “Coalition operations in Iraq were carefully attuned to the fact that those operations were being conducted in an area encompassing ‘the cradle of civilization,’ near many archaeological sites of great cultural significance. Coalition operations were conducted in a
way that balanced maximum possible protection for those cultural sites against protection of Coalition lives and accomplishment of the assigned mission.\textsuperscript{81}

A specific example was the Defense Department's decision not to bomb fighter aircraft parked near the temple at Ur.\textsuperscript{82} Since the aircraft could not easily be pressed into action from that location (there was no runway nearby or support services), the Coalition viewed their placement at Ur as an attempt by Saddam to induce the Coalition into destroying the temple. While the Coalition felt it would be justified under the laws of war in bombing the aircraft because of military objectives,\textsuperscript{83} the concern about proportional military gains as opposed to the loss of the temple at Ur won out in a decision not to bomb the area.\textsuperscript{84}

The Allies' position that Ur was not bombed by the Coalition is contradicted by information from archaeologists that the site was damaged by bomb craters and other damage from the campaign.\textsuperscript{85} There are many such disparities in information about the actual damage to sites during the Gulf War, and some archaeologists allege that the Defense Department did not act in good faith to avoid targeting archaeological sites. John Russell, the archaeologist who has excavated at Nineveh, has contended,

Specialists in the archaeology and heritage of Iraq were not consulted by American military planners until late February 1991, five weeks after the bombing of Iraq began, and then only after a letter to the U.S. ambassador to Iraq expressed the concern of American and European scholars.\textsuperscript{86}

The U.S. bombing, while not \textit{per se} illegal, was contrary to the American practice of honoring the Hague Convention. The Hague Convention's inefficacy in moderating U.S. and U.N. behavior

\begin{thebibliography}{9}
\bibitem{81} Id. at 610.
\bibitem{82} Id. at 615.
\bibitem{83} Roberts, \textit{supra} note 67, at 155.
\bibitem{84} DOD Report at 615.
\bibitem{85} See \textit{supra} text accompanying note 24.
\bibitem{86} See Russell, \textit{supra} note 42.
\end{thebibliography}
during the war mandates other legal options be considered for recovery and mitigation.

B. U.S. Customs Service and the UNESCO Convention

With direct avenues of assistance effectively closed by the imposition of United Nations sanctions, one must look to the United States' other legal obligations to halt market demand for looted objects. One such tool is the Customs Service, which was charged with blocking all imports from Iraq as a condition of the Security Council sanctions. While the vast majority of sanctions against Iraq have been lifted, those barring import of antiquities taken illegally from Iraq are still in effect.87 Many antiquities imports, however, are disguised as coming from other countries in the Middle East, and the Customs agents do not possess the expertise to distinguish Syrian antiquities from Iraqi antiquities, or, for that matter, reproductions from authentic artifacts. Falsely stating the country of origin of an imported antiquity can subject the object to immediate forfeiture under the civil asset forfeiture provision of the National Stolen Property Act, but prosecutions in the cultural property context are notoriously difficult.88 It is also noteworthy that only objects valued at $5,000 or more can be brought to trial under the National Stolen Property Act, and the flood of antiquities from Iraq has depressed many prices below this level.89 This is not to say that some objects cannot command astonishing sums on the open market. In 1994 a Mesopotamian sculpture owned by an English estate was sold at Christies in London for $11.9 million, the highest price ever paid for an antiquity.90

88. See U.S. v. An Antique Platter of Gold, 184 F.3d 131 (2nd Cir. 1999). The U.S. successfully prosecuted Michael Steinhardt for misstating the country of origin of a gold phiale on customs forms as Switzerland, rather than Italy. Id.
90. See Andrew Lawler, Timeline: 10,000 Years of Mesopotamian History,
In addition to the sanctions bar on imports from Iraq, the 1970 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property is one tool which requires Customs to seize cultural property illegally exported from Iraq. The United States and Iraq have both ratified the UNESCO Convention, although the U.S. implementing legislation effectively only ratified Article 7B and Article 9 of the Convention. Article 7B is implemented in Section 308 of the Convention on Cultural Property Implementation Act, and it protects cultural property "documented within an inventory of a museum or religious or secular public monument or similar institution in any State Party and which are stolen from such institutions." No bilateral treaty is required for enforcement of Article 7B, and cultural property items that are stolen from documented collections may not be imported legally into the United States.

Article 9 concerns cultural property items that were not part of a documented collection. The U.S. implementation allows another Party to the Convention to request that the United States enforce that Party's export regulations when cultural property from the country is imported to the United States. The decision to issue such an order is made by the President through consultation with
the Cultural Property Advisory Committee, which is administered by the State Department.\textsuperscript{94} If an order is put in place, it would make the import of the covered cultural property subject to forfeiture in the United States. Currently the United States has this type of agreement with Bolivia, Canada, Peru, Mali, and Italy, among others.\textsuperscript{95}

As Iraq is also a party to the Convention, it could formally request protection from the United States under the provisions of the Convention.\textsuperscript{96} Such a request might be formulated to ask for customs bans on import of all Mesopotamian sculptures, cylinder seals, cuneiform tablets, reliefs, jewelry, and other objects from a certain historical era. However, in order for such a request to be made, the United States and Iraq must share diplomatic relations. Until an independent government is established in Iraq to make such a request, enforcement of Article 7B could be used to reclaim documented Iraqi antiquities now in the United States. Undocumented Mesopotamian pieces in the United States are not protected by the Convention until a bilateral treaty is in force.

\textbf{C. The National Stolen Property Act}

Even with the absence of an established government in Iraq, however, the United States could bring criminal suits against dealers and collectors in possession of illegally exported

\textsuperscript{94} An explanation of this process is provided by the U.S. State Department at http://exchanges.state.gov/education/culprop/overview.html (last visited Jan. 12, 2004).

\textsuperscript{95} For a complete list of bilateral agreements see http://exchanges.state.gov/education/culprop/overview.html (last visited Jan. 12, 2004).

\textsuperscript{96} In addition to the ratification of the UNESCO Convention, Iraq had a law on the books as early as 1926 that accomplished many of the mandates of the UNESCO Convention. Article 2 of Law No. 40 of 1926 states, "The Government may confiscate any archaeological object brought into Iraq without the authorization of the government of the country from which it comes and return it in those cases where an agreement for reciprocal action in this field has been concluded between the governments of the two countries." UNESCO, supra note 10, at 104.
antiquities. Such a claim could be based on the National Stolen Property Act (NSPA). 97 Because Iraq has established legal ownership of its antiquities, giving title to all movable and immovable antiquities to the State, the Iraqi government could claim that antiquities found in the United States are actually stolen from the government of Iraq. U.S. courts are becoming more sympathetic to this type of claim, which first succeeded in the landmark case U.S. v. McClain, 593 F.2d 658 (5th Cir. 1979). In McClain, U.S. art dealers were convicted of dealing in stolen goods based on the fact that the antiquities had been smuggled from Mexico, and Mexican law nationalizes these types of objects. The judge in that case remarked, “[The National Stolen Property Act] protects ownership derived from foreign legislative pronouncements, even though the owned objects have never been reduced to possession by the foreign government.” 98

More recently, New York art dealer Frederick Schultz was convicted of violating the National Stolen Property Act by selling stolen antiquities smuggled out of Egypt. 99 The court relied on the prosecution’s theory that the antiquities, including a statue of a Pharaoh’s head, were the property of Egypt because of an Egyptian law vesting ownership in all antiquities discovered after 1983. That law makes private ownership or possession of antiquities found after 1983 illegal. 100 Because the Pharaoh’s head was owned by the Egyptian government under this law, its possession by Mr. Schultz was illegal and the object “stolen” under the meaning of the National Stolen Property Act. A jury convicted Mr. Schultz of one count of conspiracy to receive stolen property that had been transported in interstate and foreign commerce and he was sentenced to 33 months in prison. 101 Mr.

101. For further discussion of the Schultz case, see Patty Gerstenblith, From Steinhardt to Schultz: The McClain Doctrine and the Protection of Archaeological Sites, LEGAL PERSPECTIVES ON CULTURAL RESOURCES 100.
Schultz appealed to the Second Circuit, which found that the Egyptian law is unambiguous, and that the NSPA applies to property that is stolen from a foreign government, where that government asserts actual ownership of the property pursuant to a valid ownership law. The McClain doctrine was extended to the Second Circuit, and Mr. Schultz's conviction upheld.

This precedent could be used to prosecute those in possession of Iraqi antiquities in the United States if the elements laid out in Schultz are satisfied. In addition to the elements required for prosecution under the NSPA, the prosecution must prove the validity of the Iraqi ownership law. In considering whether the Egyptian law truly vested ownership rights in the state, the Schultz court held an evidentiary hearing with testimony from two Egyptian officials. The court seemed to find it persuasive that no private ownership of antiquities is allowed in Egypt, and that the government actively enforces this law. It also relied on the plain language of the statute to find that the Egyptian law is a true ownership law. It remains to be seen whether the Iraqi ownership law would withstand this level of scrutiny.

Another option would be for Iraq to bring a civil case based on a similar theory of national ownership. The Republic of Turkey has been quite successful in bringing these kinds of claims because the prospect of defending in court and the negative publicity generated by trials persuades possessors to relinquish their antiquities. For example, the Metropolitan Museum in 1993 was convinced by the prospect of litigation to return the Lydian Hoard, an extensive collection of Anatolian antiquities illegally smuggled out of Turkey in the late 1960's and purchased by the Met. Similar

---

102. Schultz, 333 F.3d at 416.
103. Id. at 400.
104. Id.
105. Id. at 401.
pressures led millionaire businessman William Koch to return the Elmali hoard, a collection of 1,661 ancient Greek and Lycian coins, to Turkey in 1999. Mr. Koch agreed to return the coins just before a trial was to commence after approximately ten years of pre-trial litigation with the state of Turkey. This kind of litigation would be possible only far in the future, when the Iraqi government is re-established and sufficiently stable to undertake protracted actions in U.S. courts.

IV. THE FAILURE OF INTERNATIONAL LAW TO PROTECT THE CULTURAL PATRIMONY OF IRAQ

The current established customary and codified international laws of war are not sufficient to protect cultural property in times of armed conflict. While a norm has emerged that cultural property should not be targeted during war, this norm is subject to an exception for military necessity. If an enemy uses an important site for a military purpose, or if the destruction of a site would advance a belligerent’s cause to the degree that destruction outweighs the preservation of the site, then the cultural property is not protected. While a rule of immunity for all cultural property in all situations involving armed conflict seems unrealistic, the international community should work to provide more protection than it gave Iraq.


108. Iraq would have a plausible argument for the court tolling the statute of limitations in these cases, relying on Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150 (2nd Cir. 1982), in which the Second Circuit tolled the statute of limitations in a stolen art case brought by the Federal Republic of Germany to recover paintings until the United States diplomatically recognized the German Democratic Republic, an intervenor in the case.
A. Jus Cogens Argument for Global Responsibility for Cultural Property Protection in Times of War

Perhaps international law fails to provide a remedy for the pillage of the cultural heritage of Iraq because treaties are not the proper instruments to protect cultural property. As discussed above, customary international law can be a powerful tool of persuasion in the international community. The United States has accepted the customary law status of several conventions and of rules of international conduct that have never been codified (e.g., diplomatic courtesy). Scholars disagree about whether the 1954 Hague Convention constitutes \textit{per se} customary international law, although the consensus is that the central thrust of the Convention—that cultural property should be protected in times of war—has become an accepted norm that is binding on all members of the international community.\footnote{109}

In addition to customary international law, the doctrine of \textit{jus cogens} may be helpful in future legal actions against those who would use the destruction of cultural property as a weapon in times of war. \textit{Jus cogens} norms do not arise from treaties; rather, they are derived from the nature of the international system and the cooperation inherent in the working of the international order. One scholar has attempted to define \textit{jus cogens} in this way: "The rules of \textit{jus cogens} [are] those rules which derive from principles that the legal conscience of mankind deem[s] absolutely essential to coexistence in the international community."\footnote{110} \textit{Jus cogens} rules encompass such norms as prohibitions on genocide, slavery, and torture, and have a higher status than customary law. \textit{Jus cogens} has been expanded as international law has become more concerned with human rights, and some scholars have argued that

all of human rights are part of *jus cogens*.

Many have argued that the Universal Declaration on Human Rights is also part of this body of law. Article 27 of the Universal Declaration states, "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." While the Declaration gives everyone the right to engage in the exercise of his or her culture, it does not explicitly give one the right to preservation of that culture's heritage.

However, a look beyond the Universal Declaration elicits a view of cultural property protection as a *jus cogens* norm. Both the 1954 Hague Convention and the 1907 Geneva Convention prohibit belligerent reprisals against cultural property. Additionally, laws and custom against attacking civilian objects in times of war—the embodiment of the Basic Rule about distinguishing between military and civilian targets—support a general consensus that cultural property is not a legitimate target in times of war. The history of state custom and legal protection for cultural objects dates back to the 16th century when Grotius suggested that such things be protected. By the time of Napoleon, a general norm had emerged that looting of captured countries was not appropriate—many expressed shock and dismay when Napoleon robbed countries of their patrimony to fill the halls of the Louvre. By the time of the Civil War, the rules for protection of cultural property were codified in the United States by Francis Lieber, who developed the first law of war code for the United States. The first modern international agreements were drafted

---

111. For a discussion of scholars who have made this argument, see Parker & Neylon, supra note 110, at 441.

112. Id.


115. See Kastenberg, supra note 70, at 282-83.


117. See id. at 1072. The full text of the Lieber Code is available at
at the end of the 19th century and the beginning of the 20th at the Hague.\textsuperscript{118} The United States and other countries in the Americas also signed the Roerich Pact in 1933, which established a flag that could be flown on cultural property during times of war to alert combatants of the importance of the site.\textsuperscript{119} This flag was replaced by the Hague Emblem as the international symbol of cultural property in 1954.

While the Hague Convention of 1954 is the most frequently cited authority on protection of cultural property during times of war, several other international conventions echo its sentiments. The 1977 Geneva Protocol I, Article 48, requires parties to a conflict to distinguish between military and civilian targets, and to avoid harming the civilian population and civilian objects.\textsuperscript{120} The United States "views this basic rule as a 'codification of the customary practice of all nations, and therefore binding on all.'"\textsuperscript{121} The 1949 Geneva Convention IV, Article 33 simply states, "Pillage is prohibited."\textsuperscript{122} Articles 53 and 147 of the same Convention "have rules prohibiting excessive and wanton destruction of property."\textsuperscript{123} Finally, the 1907 Geneva Convention Regulations Article 23(g) "especially forbid to destroy or seize the

\textsuperscript{118} The Convention with Certain Powers, with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (1903) and the Convention with Other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (1911). Nahlik, \textit{supra} note 53, at 1072.

\textsuperscript{119} The Roerich Pact is officially titled the Treaty with Other American Republics for the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1035, 49 Stat. 3267 (1935). It was initiated by the Roerich Museum in the United States, and had twenty-one countries from North, Central, and South America as signatories. \textit{Available at} http://www.roerich.org/nr.html?mid=pact (last visited Jan. 12, 2004).


\textsuperscript{121} Roberts, \textit{supra} note 67, at 151.

\textsuperscript{122} \textit{Id.} at 152.

\textsuperscript{123} \textit{Id.} at 165.
enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.” 124

Following World War II, the 1954 Hague Convention made the broadest statement about cultural property protection, and it was the first meeting between the West and the Soviet Bloc after the start of the Cold War. 125 The support for protection of cultural property has continued to spread, and the public outcry after widespread destruction of cultural property in Yugoslavia and more recently under the Taliban in Afghanistan is a testament to the fundamental moral nature of the impropriety of making cultural property a target for destruction in armed conflicts.

The widespread acceptance of these principles and the increasing importance of humanitarian law in the international community support the argument that there is a growing movement towards a jus cogens norm against the destruction of cultural property in times of war. While it cannot be plausibly said that there is such a norm at this time, perhaps in the future claims based on a violation of jus cogens will provide recourse for countries that are victims of destruction of their cultural patrimony. The advantages of a jus cogens claim are many. It avoids the requirement that a country must be a signatory of a treaty in order for the norm to be binding; inherent in the nature of jus cogens is its binding authority on all nations. Any member of the international community can bring a jus cogens claim, and so problems of standing and jurisdiction do not exist with a jus cogens claim. Jus cogens claims are above politics, largely eliminating the practical problems that hinder suits under treaty law. This area of law offers great promise for future prosecutions of war crimes against cultural property.

V. THE FAILURE OF INTERNATIONAL LAW TO PROTECT THE CULTURAL PATRIMONY OF IRAQ

The current established customary and codified international

---

124. Id.
125. 1954 Hague Convention, Article 6 and Article 16, supra note 50.
laws of war are not sufficient to protect cultural property in times of armed conflict. While a norm has emerged that cultural property should not be targeted during war, this norm is subject to an exception for military necessity. If an opponent uses an important site for a military purpose, or if the destruction of a site would advance a belligerent’s cause to the degree that destruction outweighs the preservation of the site, then the cultural property is not protected. While a rule of immunity for all cultural property in all situations involving armed conflict seems unrealistic, the international community should work to provide more protection than has been afforded to Iraq.

A. Working With What We Have: The Hague Convention and its Second Protocol

One step in the right direction to increase protection of cultural property would be widespread ratification of the 1954 Hague Conventions and its protocols, including the Second Protocol adopted in March 1999. The Second Protocol significantly strengthens the protection of cultural property in times of war. Article 6 limits the availability of the military necessity exception, requiring that two conditions be met in order for a Party to invoke the exception: first, “That cultural property has, by its function, been made into a military objective,” and second, “There is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.” The language of the Hague Convention relating to


general objects of cultural property had only stated that “the obligations... may be waived only in cases where military necessity imperatively requires such a waiver.”128 This heightened requirement that “no feasible alternative” be available would ensure that the cultural property is given the utmost respect and is not destroyed merely because such destruction is an expeditious way to achieve a strategic advantage.

The Second Protocol also requires each Party to “do everything feasible to verify that the objectives to be attacked are not cultural property,” and to take into account the possible incidental damage that would occur to cultural property if certain targets were struck.129 The principle of proportionality also governs these decisions, as in the original Convention, but requires weighing of the cultural property damage against the “concrete and direct military advantage anticipated.”130 This standard is stricter than the vague balancing test of the damage versus overall military objectives, and provides a more precise definition of what constitutes a military necessity.131

The Second Protocol also creates a new level of protection for cultural property—enhanced protection. Enhanced protection is available to cultural property that is “cultural heritage of the utmost importance for humanity,” and is protected by domestic law and a pledge by the local government not to use the property for military purposes.132 Property under enhanced protection is immune from attack in times of war, and the Second Protocol urges countries to establish harsh criminal sanctions for

128. See 1954 Hague Convention, supra note 50, at Article 4, Section 2. The language relating to objects under special protection is more forceful in the Second Protocol. It states, “Immunity shall be withdrawn from cultural property under special protection only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues.” See Id. at Article 11, Section 2. The advance of the Second Protocol is applying a strict military necessity exemption to all classes of cultural property.

129. See Second Protocol, supra note 127, at Article 7(c).

130. Id.


destruction of property under enhanced protection.133

The Second Protocol’s greatest advancements in cultural property protection derive from the affirmative obligations it places on occupying powers. Article 9 places the onus on an occupying party to secure the cultural property in the area and to prevent “any illicit export, other removal or transfer of ownership of cultural property.”134 This language supplants the vague pronouncements in Article 5, Section 2 of the Convention which require occupying powers to “take the most necessary measures of preservation.”135 If the Second Protocol were ratified by the United States and Iraq, it would impose additional duties on the United States in its role as occupier of Iraq; for example, application of Article 9 of the Protocol to the conflict would require the United States to stop looting of cultural property and to enforce the export ban.136 Responsibility for the security of the cultural property would rest with the United States. Placing the onus on the occupying power is appropriate because the cultural heritage of Iraq is important to all of mankind, and the Party under attack may not have the resources to provide for adequate protection.

Unfortunately, the Second Protocol does not provide stronger enforcement mechanisms than are included in the 1954 Convention. The Second Protocol relies on individual Parties to formulate criminal penalties for violations of the agreement.137 It does establish, however, the Fund for the Protection of Cultural Property in the Event of Armed Conflict to assist with compliance with the Convention.138 This fund would defray the cost of preparation in times of war (including listing cultural property in the register) and provide emergency aid during conflicts or afterwards to mitigate the damage to cultural property.139

133. Id., supra note 127, at Article 15.
134. Id., supra note 127, at Article 9(1).
135. Id., supra note 127, at Article 5(2).
136. See Haunton, supra note 74, at 227.
137. See Second Protocol, supra note 127, at Article 15(2).
139. Id., supra note 127, at Article 29(a), (b).
The Fund will raise money through contributions by Party states and from private foundations and individuals.\textsuperscript{140} The Fund will be administered by the Committee for the Protection of Cultural Property in the Event of Armed Conflict.\textsuperscript{141} This Committee is comprised of members from twelve party states that meet annually to administer the Protocol.\textsuperscript{142} As part of its duties, the Committee is also responsible for maintaining the List of Cultural Property Under Enhanced Protection.\textsuperscript{143} The establishment of a separate committee to administer the Protocols is an advance that should be extended to the administration of the entire Hague Convention. Currently UNESCO is responsible for maintaining the Convention, but it is incapable of devoting the necessary resources to maintaining the International Register and to promoting use of the Hague Emblem. UNESCO is still called upon in the Second Protocol to provide technical assistance when requested, but the day-to-day operations of the Protocol (including the maintenance of the List and decisions about Fund dispersals) would be handled by the Committee.\textsuperscript{144}

The Second Protocol was adopted on March 26, 1999, and entered into force on March 9, 2004.\textsuperscript{145} Twenty states have deposited their instruments of accession with UNESCO.\textsuperscript{146}

\textbf{B. Current Status of Iraqi Cultural Heritage Protection}

Just as President Bush coupled his bombing campaign of Afghanistan with a humanitarian initiative to provide food and

\begin{itemize}
\item \textsuperscript{140} \textit{Id.}, supra note 127, at Article 29(4).
\item \textsuperscript{141} \textit{Id.}, supra note 127, at Article 24.
\item \textsuperscript{142} \textit{Id.}, supra note 127, at Articles 24 and 27.
\item \textsuperscript{143} Second Protocol, \textit{supra} note 127, at Article 27(1)(b).
\item \textsuperscript{144} \textit{Id.}, supra note 127, at Article 33.
\item \textsuperscript{146} \textit{Id.} For another view of the merits of the Second Protocol, see Kastenberg, \textit{supra} note 70, at 299.
\end{itemize}
clothing for Afghan citizens, the deliberate protection of a civilian population’s most prized sites can have a powerful persuasive effect in garnering support for the war effort. Respect for cultural heritage can go a long way in establishing trust in the international sphere. When asked why UNESCO focuses on protecting cultural objects when often humanitarian concerns are urgent, former Director for Legal Protection of Cultural Heritage Lyndel Prott stated,

We are often asked the question, “Why protect monuments when people are dying?” The reason is, the people who are dying ring us up and say, “Please protect our monuments.” If people feel that strongly about their heritage, we don’t feel the international community can simply stand back and say, “It’s not important. As long as you’re not dying, that’s all that counts.”

Ironically, protecting cultural property could have served as a powerful weapon in the 2003 war against Iraq as a way to garner support from civilians in Iraq and to create better relationships with Arab allies. Lessons about the importance of cultural property protection in an overall propaganda scheme related to the war on terrorism can be learned from the recent conflict in Afghanistan. While the deplorable actions of the Taliban against women and other human rights abuses did not command the world’s attention in the late 1990’s, the destruction of the Bamiyan Buddhas in March 2001 was met by international outcry. The ability of cultural monuments to arouse passion across the world is a political tool that was overlooked by the Bush Administration in its handling of the 2003 invasion. Allowing museums to be ransacked broadcast to the world the United States’ casual indifference towards the cultural heritage of Iraq. The U.S. neglect of Iraqi museums and cultural treasures not only represents

147. Donison, supra note 16.
a missed opportunity, but caused a staggering loss whose repercussions likely will be felt for centuries to come.\textsuperscript{149}

It is the hope of the author that future belligerents will recognize that the preservation of cultural property does not solely benefit the culture directly affected, but the entire spectrum of mankind, and respect of our shared heritage can lead to increased cooperation throughout the world.

\textsuperscript{149} See Id.