

**UNDER NEW MANAGEMENT: THE OBLIGATION TO
PROTECT CULTURAL PROPERTY DURING MILITARY
OCCUPATION**

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Works of art and sculpture, artifacts, great monuments and temples have been prized throughout history as being of significant importance. This has been so, not only because of their aesthetic worth, but also because they represent the talent and endurance of man and the history of diverse civilizations. The contributions made to this universal collection since time began have produced a store which comprises man's cultural heritage. This heritage is a compendium of the sufferings and the genius of mankind. It must be well-preserved to ensure that future generations can see and marvel at the accomplishments of their own epoch and those that came before.¹

I. Introduction

On 9 April 2003, before the eyes of the world, in the middle of Baghdad, Iraqi citizens and U.S. military personnel pulled down a statue

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¹ SHARON A. WILLIAMS, THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY 52 (1978).

of Saddam Hussein.² United States forces had begun to penetrate Baghdad days before against disintegrating opposition.³ “The regime in Baghdad effectively ceased to function” on 9 April 2003.⁴ For the U.S.-led coalition,⁵ the invasion of Iraq appeared to be reaching a successful conclusion.

Yet elsewhere in Baghdad, a tragedy was beginning to unfold. Between 9 and 12 April 2003, unknown persons stole thousands of artifacts from the Iraqi National Museum.⁶ The museum, the largest and most modern of its kind in the Middle East,⁷ contained three-quarters of the archaeological artifacts discovered in Iraq during the preceding eighty years⁸—a collection ranging into the hundreds of thousands of items.⁹ Exaggerated initial reports suggested the entire collection was lost. Investigation, however, revealed the actual loss was far less in terms of raw numbers, and the museum staff had previously hidden many of the most valuable items elsewhere.¹⁰ Nevertheless, the damage to the cultural heritage of Iraq, and the world, was severe.¹¹

² TODD S. PURDUM ET AL., A TIME OF OUR CHOOSING 212 (2003).

³ ANTHONY H. CORDESMAN, THE IRAQ WAR 94 (2003).

⁴ *Id.* at 112.

⁵ In the 2003 Iraq invasion, the United States and the United Kingdom led a multinational coalition, which presently consists of twenty-six countries. *Multi-National Force Iraq*, <http://www.mnf-iraq.com> (follow “Inside the Force” hyperlink; then follow “Organization” hyperlink) (last visited Aug. 23, 2007).

⁶ See United States Department of Defense News, *Briefing on the Investigation of Antiquity Loss from the Baghdad Museum*, Sept. 10, 2003, <http://www.defense.link.mil/transcripts/2003/tr20030910-0660.html> [hereinafter *Briefing*].

⁷ Aaron Davis & Drew Brown, *Looting Imperils Precious Artifacts*, MIAMI HERALD, Apr. 12, 2003, at 20A.

⁸ Daniel Rubin & Shannon McCaffrey, *Experts Deliver a Largely Depressing Update on Iraq’s Looted Treasures*, MIAMI HERALD, Apr. 30, 2003, at 4A.

⁹ See Andrew Lawler, *Ten Millennia of Culture Pilfered Amid Baghdad Chaos*, 300 SCIENCE 402 (Apr. 18, 2003). Modern Iraq is the site of several ancient civilizations, including Sumeria, Babylon, and Assyria; the Iraqi National Museum held “an unparalleled collection of the world’s earliest and greatest civilizations.” *Id.* (quoting University of Oxford Assyriologist Eleanor Robinson). Marine Colonel (Col) Matthew Bogdanos, who led the U.S. military’s investigation into the looting of the museum, estimates that well over 500,000 artifacts were in the museum before the war. MATTHEW BOGDANOS WITH WILLIAM PATRICK, *THIEVES OF BAGHDAD* 156 (2005). The estimate of 170,000 items, which was cited in numerous media articles at the time, may have derived from the approximately 170,000 Iraqi Museum (IM) numbers that had been given out since 1923, but one IM number could refer to up to “several dozen” items. *Id.* at 155-56.

¹⁰ See BOGDANOS WITH PATRICK, *supra* note 9, at 142-57; PURDUM, ET AL., *supra* note 2, at 218; *Briefing*, *supra* note 6; Zainab Bahrani, *Lawless in Mesopotamia*, 113 NAT. HIST. 44 (Mar. 1, 2004). An exact accounting was impossible as many of the items in the museum’s storerooms had not yet been recorded, and many of the records that did exist

The criticism leveled at the U.S. military was also severe. Certain experts complained they had previously warned U.S. government officials of the museum's vulnerability to looting in the event of war.¹² Critics noted the United States did secure certain other buildings in Baghdad, including the oil ministry.¹³ In one oft-cited incident, a Marine officer allegedly denied multiple requests to stop the looting or to deter the looting by moving troops closer to the museum.¹⁴ United States forces finally secured the museum on 16 April 2003, four days after the museum staff returned, and four days after media reports of this incident.¹⁵

Criticism of strategy or priorities aside, do critics have a colorable argument that the United States violated international law by failing to secure the Iraqi National Museum against looters prior to 16 April 2003? Specifically, did the United States violate its obligations under the laws pertaining to military occupation and the protection of cultural property?

were destroyed. *Briefing*, *supra* note 6. Final estimates of the actual loss vary. In September 2003, Col Bogdanos estimated that 13,515 items had been stolen, of which slightly over 10,000 were still missing at that point. *Id.* Professor Zainab Bahrani, a professor of ancient Middle Eastern art history and archaeology at Columbia University and a native of Baghdad who returned to Iraq in June 2003 to assist in the museum's recovery, in March 2004 estimated the initial loss at 17,000 items. Bahrani, *supra*.

¹¹ See Bahrani, *supra* note 10 (describing the looting of the Museum as an "overwhelming disaster"). Some of the thieves targeted the most valuable of the remaining items, including forty display pieces left in the museum's galleries. See *id.*; *Briefing*, *supra* note 6.

¹² See BOGDANOS WITH PATRICK, *supra* note 10, at 201; Bahrani, *supra* note 10; Davis & Brown, *supra* note 6; Lawler, *supra* note 9.

¹³ See PURDUM, ET AL., *supra* note 2, at 217 (noting U.S. forces secured the ministry of oil and other buildings); Rubin & McCaffrey, *supra* note 8 (noting Donny George, research director of the museum, "blames the American military for not protecting the museum for days while it guarded the ministry of oil"). Colonel Bogdanos takes issue with this line of argument. BOGDANOS WITH PATRICK, *supra* note 9, at 202. He finds the criticism without merit, pointing out that unlike the museum, the oil ministry was bombed first, was not occupied by Iraqi troops, and was a single building rather than an eleven-acre complex. *Id.* Nevertheless, the fact remains that the United States dedicated troops to secure the bombed-out oil ministry but not, initially, the Iraqi National Museum and its cultural treasures.

¹⁴ See PURDUM, ET AL., *supra* note 2, at 214; Lawler, *supra* note 9; Rubin & McCaffrey, *supra* note 8.

¹⁵ BOGDANOS WITH PATRICK, *supra* note 9, at 211; Bahrani, *supra* note 10; see *Briefing*, *supra* note 6. According to Col Bogdanos, on 10 April 2003 an American tank platoon near the museum had relayed reports of looting and was directed to investigate. BOGDANOS WITH PATRICK, *supra* note 9, at 205. The platoon approached the museum but halted and then withdrew after coming under fire, having fired one shell into the complex at an enemy RPG (Rocket-Propelled Grenade) position. *Id.* at 205-06.

This article addresses these questions by first examining the legal regime for the protection of cultural property during armed conflict. Next, it reviews the regime for protecting cultural property in time of peace. The article then reviews applicable international law relating to military occupation. Finally, it applies these rules to the Iraqi National Museum incident, concludes that there is cause for concern, and suggests that greater attention to this area of the law might help prevent similar instances in the future.

II. Protection of Cultural Property

The protection of cultural property can be divided into two distinct international legal regimes: one designed to avoid targeting of or damage to cultural property during armed conflict,¹⁶ and another designed to prevent illegal trafficking in cultural property in times of peace.¹⁷ Although the former is more directly applicable for present purposes, the latter is significant with respect to an occupier's responsibilities. We therefore review each in turn.

A. Protection of Cultural Property During Armed Conflict

1. *History Through the Second World War*

a. *Ancient Times Through the Renaissance*

In ancient times, the law of war presumed the victors could seize or destroy the works of art, public buildings, sacred sites, and other cultural

¹⁶ See, e.g., The Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 539, reprinted in INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 294 (2005) [hereinafter 1954 Hague Convention] (generally addressing the protection of cultural property during armed conflict).

¹⁷ See, e.g., Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, 14 Nov. 1970, 10 I.L.M. 289, available at http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Aug. 15, 2007) [hereinafter 1970 UNESCO Convention] (seeking to prevent the illicit excavation, export, import, and transfer of cultural property).

treasures of the vanquished.¹⁸ Instances from classical literature and history abound. Emperor Xerxes of Persia's destruction of artifacts during his invasion of Greece is one frequently cited example, perhaps due to Xerxes' vilification by Greek historians.¹⁹ Some credit Alexander the Great of Macedon with a relatively enlightened view, for his era, regarding treatment of cultural property,²⁰ but his army sacked and plundered cities such as Thebes, Tyre, Gaza, and Persepolis—with much slaughter—when Alexander found it politically or economically expedient to do so.²¹ Rome's total destruction of Carthage in 146 B.C. at the conclusion of the Punic Wars²² and sack of Herod's Temple in

¹⁸ KIFLE JOTE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 25 (1994). See GROTIUS, THE LAW OF WAR AND PEACE bk. III, at 658-62 (Francis W. Kelsey trans., Clarendon Press 1925) (1646) (commenting on the pervasiveness and legality of the destruction of property in ancient warfare).

¹⁹ See, e.g., HERODOTUS, THE PERSIAN WARS 497 (George Rawlinson trans., First Modern Library ed. 1947) (Xerxes pledges to his people to capture and burn Athens); Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277, 281 (1997) (noting Herodotus comments on Persian plundering of Greek and Egyptian religious and political buildings). Hugo Grotius emphasized that when "Xerxes destroyed the images belonging to the Greeks, he did nothing contrary to the law of nations, although Greek writers exaggerate this greatly in order to arouse enmity." GROTIUS, *supra* note 18, at 661.

²⁰ See, e.g., Kastenberg, *supra* note 19, at 281-82. Kastenberg asserts:

Alexander's view on the protection of historic properties was certainly more enlightened than Xerxes'. His conquest of Persia was marked by a desire to preserve ancient treasures for the enhancement of a Hellenistic empire. It is probable that Alexander's early education by such luminaries as Aristotle left a desire to create museums and other centers of education ornamented by other culture's [sic] treasures. The enlightened attitudes of Greek and Macedonian war policy makers left a tradition that prevailed though [sic] subsequent European history.

Id. (citations omitted).

²¹ See PETER GREEN, ALEXANDER OF MACEDON 145-48, 262, 267, 314-21 (1974) (describing the sack of Thebes, Tyre, Gaza, and Persepolis, respectively). Indeed, at Tyre, Alexander defaced the city's temple to the god Melkart and renamed it after himself. *Id.* at 262. At other times, Alexander did take care to respect local culture—when it was in his interest to do so. See, e.g., *id.* at 268-71 (Alexander propitiates the Egyptian gods as he is crowned Pharaoh).

²² ADRIAN GOLDSWORTHY, THE PUNIC WARS 353-57 (2000). The destruction was a very deliberate act directed by the highest levels of the Roman Republic; a "senatorial commission of ten" arrived to "supervise Scipio's systematic destruction of the city." *Id.* at 353.

Jerusalem in 70 A.D.²³ are additional renowned examples. Pleas by scholars of antiquity such as Polybius, Cicero, and Saint Augustine seeking to prevent or limit looting and destruction²⁴ were not representative of the practice or norms of early warfare.

The pervasive notion that the victor was entitled to the spoils of war and that cultural property was fair game continued through the Middle Ages and into Europe's Renaissance.²⁵ The deliberate looting and destruction of cultural treasures remained widespread during the Thirty Years War of 1618 to 1648.²⁶ In the mid-seventeenth century, when Hugo Grotius, a key figure in the development of international law, reviewed the practice of armies during millennia of warfare, he concluded: "[I]t is permitted to harm an enemy, both in his person and in his property; that is, it is permissible not merely for him who wages war for a just cause, and who injures within that limit . . . but for either side indiscriminately."²⁷ Grotius continued, "the law of nations has permitted the destruction and plunder of the property of enemies, the slaughter of whom it has permitted," and the law "does not exempt things that are sacred."²⁸

²³ See Andrea Cuning, *The Safeguarding of Cultural Property in Times of War and Peace*, 11 TULSA J. COMP. & INT'L L. 211, 212-13 (Fall 2003).

²⁴ See Harvey E. Oyer III, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict—Is it Working? A Case Study: The Persian Gulf War Experience*, 23 COLUM.-VLA J.L. & ARTS 49 (1999). Oyer relates that

Polybius wrote that "no one can deny that to abandon oneself to the pointless destruction of temples, statues and other sacred objects is the action of a madman." Though the primary objective of Roman warfare was conquest, Cicero recommended moderation and selflessness in pillaging. Saint Augustine preached that the taking of booty was sinful.

Id. (citations omitted).

²⁵ See Cuning, *supra* note 23, at 212-13.

²⁶ See JOTE, *supra* note 18, at 26. It was standard practice to plunder cities that resisted invasion; the notorious sack of Magdeburg in 1631 was one particularly well-known and bloody example of a common phenomenon. GEOFFERY PARKER, *THE THIRTY YEARS WAR* 125 (1984).

²⁷ GROTIUS, *supra* note 18, at 643-44.

²⁸ *Id.* at 658.

b. The Enlightenment and the Napoleonic Era

The intellectual stirrings of the Enlightenment coincided with a gradual change in the treatment of cultural treasures during warfare. By the end of the seventeenth century, “axioms of international law exerted an undeniable influence on the mode and manner of warfare” and contributed to making eighteenth century warfare “a relatively humane and well-regulated enterprise.”²⁹ The humanitarian tone of Swiss scholar Emmer³⁰ de Mattel’s 1758 treatise *The Law of Nations* stands in marked contrast to Grotius’s gloomy observations.³¹ Foreshadowing modern principles of the law of war, de Mattel declared that “[a]ll acts of hostility which injure the enemy without necessity, or which do not tend to procure victory and bring about the end of the war, are unjustifiable, and as such condemned by the natural law.”³² With regard to cultural property in particular, de Mattel wrote

For whatever cause a country be devastated, those buildings should be spared which are an honor to the human race and which do not add to the strength of the enemy, such as temples, tombs, public buildings, and all edifices of remarkable beauty. What is gained by destroying them? It is the act of a declared enemy of the human race thus wantonly to deprive men of these monuments of art and models of architecture We still abhor the acts of those barbarians who, in overrunning the Roman Empire, destroyed so many wonders of art.³³

However, de Mattel clarified that it was not the destruction per se but the unnecessary destruction of such works that was unlawful.³⁴ He continued, “if in order to carry on the operations of the war . . . it is

²⁹ Henry Guerlac, *Vauban: The Impact of Science on War*, in MAKERS OF MODERN STRATEGY 72 (Paret ed. 1986).

³⁰ Or “Emiric,” or “Emheric.” See David Keane, *The Failure to Protect Cultural Property in Wartime*, 14 DEPAUL-LCA J. ART & ENT. L. & POL’Y 1, 2 (2004); Cunning, *supra* note 23, at 214.

³¹ See Cunning, *supra* note 23, at 214.

³² EMER DE VATEL, *THE LAWS OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 294-95 (Charles G. Sedgwick trans., Carnegie Institution of Washington 1916) (1758).

³³ *Id.* at 294-95.

³⁴ See *id.* at 295.

necessary to destroy buildings of that character, we have an undoubted right to do so.”³⁵

During the Napoleonic era, military forces continued to plunder cultural property, including Napoleon’s own forces.³⁶ The French method of acquiring and handling captured treasures differed from that of belligerents in earlier conflicts.³⁷ France commonly made the surrender of valuable cultural properties a condition of the armistices and treaties imposed on defeated territories, thereby accumulating vast amounts of art to be kept and displayed at the Louvre and other locations in France.³⁸ The regime created a committee for the specific purpose of managing these treasures.³⁹ It is interesting that Napoleonic France should take the trouble to create a veneer of legal legitimacy and regularity when, in the past, the victors had simply taken or destroyed cultural monuments and artifacts as they saw fit.⁴⁰ That France made such a gesture to legitimize its acquisitions suggests some recognition of an international norm against the brute seizure of a nation’s cultural property. The 1815 Treaty of Paris following Napoleon’s final defeat reinforced that expectations had indeed changed since Grotius’s day.⁴¹ The treaty disregarded the coercive treaties that purported to authorize the acquisitions and required France to return the treasures it had taken.⁴² The British Foreign Minister Lord Castlereagh clarified that this was not merely victor’s justice when he declared “the removal of works of art was ‘contrary to every principle of justice and to the usages of modern warfare.’”⁴³

c. The Lieber Code and the Late Nineteenth Century

Thus, by the middle of the nineteenth century, customary international law afforded some protection to the arts and sciences during

³⁵ *Id.*

³⁶ See JOTE, *supra* note 18, at 27-28; WILLIAMS, *supra* note 1, at 7-9.

³⁷ JOTE, *supra* note 18, at 27.

³⁸ *Id.* See WILLIAMS, *supra* note 1, at 7-8.

³⁹ JOTE, *supra* note 18, at 27.

⁴⁰ *See id.*

⁴¹ See Cuning, *supra* note 23, at 213; Karen J. Detling, *Comment: Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 MD. J. INT’L L. & TRADE 54 (Spring 1993); Keane, *supra* note 30, at 3.

⁴² JOTE, *supra* note 18, at 28; WILLIAMS, *supra* note 1, at 8-9.

⁴³ Oyer, *supra* note 24, at 50 (quoting JIRI TOMAN, *THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT* 5 (1996)).

war.⁴⁴ The earliest attempt to codify protection for cultural property during armed conflict came about in 1863 when Dr. Francis Lieber developed the Instructions for the Governance of the Armies of the United States in the Field⁴⁵—better known as the Lieber Code.⁴⁶ The Lieber Code, which governed the conduct of the armies of the United States during the Civil War, authorized the army to seize, for its benefit, public property belonging to the hostile government.⁴⁷ Private property, in contrast, was generally protected, unless it was somehow involved in the enemy's war effort.⁴⁸ The Lieber Code provided that property belonging to, *inter alia*, churches, charitable institutions, institutions of learning, museums, and observatories should not be treated as public property subject to confiscation, but as private property to be respected and preserved.⁴⁹ The code provided additional protection to art, libraries, scientific equipment and facilities, and hospitals, which were to be protected from damage to the extent possible.⁵⁰ However, the code did authorize the removal of such property from the war zone if removal was possible without damaging the property, with the ultimate status of such property to be determined at the conclusion of the war.⁵¹

The Lieber Code, with its distinction between public and private property and its exception for cultural property, proved highly influential among international lawyers in the remaining years of the nineteenth century.⁵² The ensuing decades saw a number of initiatives aimed at extending and refining the protection of cultural property. The 1874 Declaration of Brussels, the product of a conference of fifteen European countries, borrowed the concept of treating cultural property as private property and added that those who seize, destroy, or willfully damage

⁴⁴ *Id.*; Detling, *supra* note 41, at 54.

⁴⁵ See Kastenberg, *supra* note 19, at 279 n.8 (citing General Order No. 100 Apr. 14, 1863, in 3 U.S. DEPT. OF WAR, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (SER. III), at 148, 151 (1902)).

⁴⁶ JOTE, *supra* note 18, at 47; WILLIAMS, *supra* note 1, at 15; John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT'L L. 831, 833-34 (Oct. 1986) [hereinafter Merryman, *Two Ways*].

⁴⁷ WILLIAMS, *supra* note 1, at 15-16.

⁴⁸ See *id.* at 16; Keane, *supra* note 30, at 3-4.

⁴⁹ Keane, *supra* note 30, at 3-4; see WILLIAMS, *supra* note 1, at 16; Merryman, *Two Ways*, *supra* note 46, at 833; Detling, *supra* note 41, at 55.

⁵⁰ WILLIAMS, *supra* note 1, at 16.

⁵¹ *Id.*

⁵² JOTE, *supra* note 18, at 47. The Lieber Code impressed European military authorities as well; between 1871 and 1896 the Netherlands, France, Serbia, Britain, Spain, Portugal, and Italy followed the American example by enacting similar military regulations. *Id.* at 47 n.3.

such property should be prosecuted.⁵³ In 1880, the Institute of International Law drew upon the Declaration of Brussels in drafting the Laws of War on Land—also known as the Oxford Manual—which purported to codify existing customary practice.⁵⁴ The Oxford Manual required “that parties spare, if possible, buildings dedicated to religion, art, and science.”⁵⁵ The manual further called upon the defender to visibly mark such buildings and inform adversaries of their location before the outbreak of hostilities.⁵⁶

d. The Hague Conventions of 1899 and 1907

The Hague Conventions of 1899⁵⁷ and 1907⁵⁸ were “the first major global documents adopted to regulate the conduct of belligerents.”⁵⁹ The conventions borrowed heavily from the Declaration of Brussels and, by extension, the Lieber Code.⁶⁰ Articles 28 and 47 of the Annex to the 1907 Convention generally prohibit pillage.⁶¹ Article 46 generally prohibits the confiscation of private property.⁶² Echoing the Lieber Code and Brussels Declaration, the 1907 Convention then calls for religious, charitable, educational, artistic, and scientific property to be treated as

⁵³ See *id.* at 48; WILLIAMS, *supra* note 1, at 16-17; Merryman, *Two Ways*, *supra* note 46, at 834. The conference promulgated the Declaration of Brussels, but the Declaration never took effect as an international agreement. JOTE, *supra* note 18, at 48; WILLIAMS, *supra* note 1, at 16-17; Merryman, *Two Ways*, *supra* note 46, at 834.

⁵⁴ Detling, *supra* note 41, at 56.

⁵⁵ *Id.*

⁵⁶ JOTE, *supra* note 18, at 49.

⁵⁷ Convention with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1779, T.S. No. 392, available at <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument> [hereinafter 1899 Hague Convention].

⁵⁸ Convention Respecting the Laws and Customs of War on Land and its Annex, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, reprinted in INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 148 (2005) [hereinafter 1907 Hague Convention].

⁵⁹ JOTE, *supra* note 18, at 49. Twenty-six nations attended the 1899 conference, although none of them were from Africa or South America. *Id.* The 1907 conference included forty-four states from every continent except Africa. *Id.* The differences in the content of the two conventions are “insignificant.” *Id.* at 49-50.

⁶⁰ See *id.*; WILLIAMS, *supra* note 1, at 17.

⁶¹ 1907 Hague Convention, *supra* note 58, arts. 28, 47.

⁶² *Id.* art. 46. However, Article 53 authorizes the seizure of news and transportation assets, even if privately owned, for the duration of the conflict. *Id.* art. 53.

“private” property, even if it belongs to the enemy state.⁶³ Article 56 continues, “[a]ll seizure of, willful destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.”⁶⁴ As before, an exception existed where the property contributed to the enemy’s war effort in some way.⁶⁵

Thus, by 1907, the ancient presumption of a victor’s right to plunder and destroy had been supplanted by a widely agreed-upon commitment to preserve cultural property. Indeed, following the Second World War, the International Military Tribunals at Nuremberg deemed the Hague provisions protecting cultural property to be customary international law and therefore binding even on non-signatories to the conventions.⁶⁶ Nonetheless, the Hague Conventions failed to prevent egregious offenses against cultural property in the first half of the twentieth century.

e. The First World War and the Inter-War Years

At the outset of the First World War in 1914, Kaiser Wilhelm II of Germany, perhaps carried away by the martial emotions of the day, reportedly directed that “every thing must be drowned in fire and blood . . . not a house is to be left, not a tree.”⁶⁷ Although this declaration was surely rhetorical exuberance rather than a literal command, the German armies engaged in a series of highly-publicized and devastating attacks against cultural properties in Belgium, France, and elsewhere in their prosecution of the war.⁶⁸ The 1914 burning of the renowned library at Louvain, Belgium, containing “about 300,000 books manuscripts, scientific collections and works of art, many rare and ancient,” provoked international outrage.⁶⁹ The 1914 German bombardment and destruction

⁶³ *Id.* art. 56.

⁶⁴ *Id.*

⁶⁵ See Keane, *supra* note 30, at 5.

⁶⁶ *Id.*

⁶⁷ JOTE, *supra* note 18, at 37 (quoting I. ARTSIBANOV, IN DISREGARD OF THE LAW 33 (1982)).

⁶⁸ JOTE, *supra* note 18, at 37-38; WILLIAMS, *supra* note 1, at 17; Kastenber, *supra* note 19, at 286-87; Keane, *supra* note 30, at 6-7.

⁶⁹ JOTE, *supra* note 18, at 37-38. This act was denounced in a contemporary American law journal as “the greatest crime committed against civilization and culture since the Thirty Years War—a shameless holocaust of irreparable treasures lit up by blind barbarian vengeance.” J.W. Garner, *Some Questions of International Law in the European War*, 9 AM. J. INT’L L. 72, 101 (1915).

of the Rheims Cathedral in France also drew widespread condemnation.⁷⁰ Yet, Germany at least superficially acknowledged applicable international law protecting cultural property in the wake of the Rheims debacle. The Germans invoked the principle of military necessity by accusing the French of deploying forces around the cathedral and using its tower as an observation post.⁷¹ Following these public-relations disasters, the German army attached art officers to its units “to protect cultural property under their control.”⁷² Nevertheless, many churches, museums, and other protected sites were looted in German-occupied territory in the course of the war.⁷³

These violations did not pass unnoticed during the Paris Peace Conference and the resulting Treaty of Versailles.⁷⁴ Articles 245 and 247 of the Treaty required Germany to return cultural treasures it had acquired from France, Belgium, and other nations during the war, as well as French property seized during the Franco-Prussian War of 1870 and 1871.⁷⁵ In addition, Article 247 called for the Louvain collection to be rebuilt.⁷⁶ Although no German authorities were tried for offenses against cultural property during the war, the Treaty of Versailles was a strong international statement on the illegitimacy of targeting, destroying, or looting cultural property during war.⁷⁷

Additional international agreements regarding cultural property followed in the years after the First World War. The advent of the warplane and the perception that air warfare might pose unique challenges to existing law governing land warfare led to the Washington Conference, held from December 1922 to February 1923.⁷⁸ Although never adopted, Articles 25 and 26 of the resulting draft convention on air warfare sought to protect cultural property by requiring the erection of visible signs on cultural buildings and monuments and the creation of military-free cultural safety zones.⁷⁹ In 1935, a number of nations in the Americas signed the Treaty for the Protection of Artistic and Scientific

⁷⁰ JOTE, *supra* note 18, at 38; WILLIAMS, *supra* note 1, at 18.

⁷¹ JOTE, *supra* note 18, at 38. The French denied these allegations and, moreover, asserted the cathedral had been marked by a Red Cross flag in order to protect it. *Id.*

⁷² WILLIAMS, *supra* note 1, at 18.

⁷³ *Id.*; Keane, *supra* note 30, at 6-7.

⁷⁴ See WILLIAMS, *supra* note 1, at 19; Keane, *supra* note 30, at 7-8.

⁷⁵ *Id.*

⁷⁶ Keane, *supra* note 30, at 8.

⁷⁷ See JOTE, *supra* note 18, at 54-55; Keane, *supra* note 30, at 8.

⁷⁸ JOTE, *supra* note 18, at 51.

⁷⁹ *Id.* at 52.

Institutions and Historic Monuments, a regional agreement better known as the Roerich Pact.⁸⁰ The Pact includes the following requirements: “1) to respect cultural property and the persons engaged in its protection; 2) to adopt national legislation that guarantees protection; 3) to adopt a special emblem to identify cultural institutions, and the application of such emblems; 4) to register or prepare a list of protected cultural institutions.”⁸¹ The parties further agreed upon the design of a flag to designate protected cultural property.⁸² As under pre-existing law, however, military use of cultural property forfeits its protection.⁸³

f. The Second World War

The Second World War was a bleak period in the effort to protect cultural property during armed conflict. Cultural artifacts, sites and institutions were looted and destroyed “to an extreme degree,” particularly by the German regime.⁸⁴ “Germany engaged in a policy of systematic plunder, confiscation and exploitation in complete disregard of Article 56 of the Hague Convention. International law had no effect whatsoever in preventing the wholesale looting of art galleries, churches and museums throughout Europe.”⁸⁵ Hitler directed the creation of a special organization headed by Alfred Rosenberg—“*Einsatzstab*⁸⁶ Rosenberg”—to systematically seize cultural treasures from across Europe and bring them to Germany for the benefit of the regime.⁸⁷ The *Einsatzstab* photographed and carefully documented the seized items.⁸⁸ The quantities were enormous; records indicate the Germans seized at least 21,903 works of art from Western Europe alone.⁸⁹ German conduct on the Eastern Front was even more egregious:

During the war Nazi Germany, mainly for ideological reasons, treated with exceptional hatred the cultural items most dear to the Soviet people. This resulted in

⁸⁰ *Id.*; Detling, *supra* note 41, at 58.

⁸¹ JOTE, *supra* note 18, at 52.

⁸² *Id.* at 53.

⁸³ *Id.*; Detling, *supra* note 41, at 58.

⁸⁴ HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 180 (2d ed. 1998).

⁸⁵ WILLIAMS, *supra* note 1, at 19.

⁸⁶ “Special Purpose Staff.” Keane, *supra* note 30, at 8.

⁸⁷ WILLIAMS, *supra* note 1, at 26; Keane, *supra* note 30, at 8-9.

⁸⁸ WILLIAMS, *supra* note 1, at 25-28.

⁸⁹ *Id.* at 26, 28; see JOTE, *supra* note 18, at 42.

the destruction of 427 museums, 1670 Greek Orthodox churches, 237 Roman Catholic churches, 67 chapels and 532 synagogues From the Ukrainian Socialist Republic alone, 4,000,000 artifacts disappeared while the cultural treasures transferred to Germany filled 40 railway cars.⁹⁰

Selected works were sent to Hitler and Reich-Marshal Goring for their personal collections; others were to be sent to German museums, or held as potential sources of revenue or bargaining chips in future negotiations.⁹¹

The vast abuses of the German regime were undoubtedly a serious blow to the effort to protect cultural property during armed conflict. However, these abuses led to an important evolution in the enforcement of the protection of cultural property.⁹² Prior to the war, the general presumption was that individuals, as opposed to states, were not criminally liable under international law.⁹³ Yet at Nuremberg, Alfred Rosenberg and other Nazi officials were prosecuted and sentenced to death for, among other offenses, crimes against cultural property.⁹⁴

2. Post-War Developments

Thus, at the conclusion of the Second World War, there existed a generally accepted customary international law outlawing the theft or destruction of cultural property during armed conflict.⁹⁵ However, despite the successful prosecution of Rosenberg and others, the failure of existing Hague regulations to prevent the extensive abuses in both World Wars stimulated international efforts to make cultural property protections more specific, relevant, and effective.⁹⁶ Several

⁹⁰ JOTE, *supra* note 18, at 41-42.

⁹¹ WILLIAMS, *supra* note 1, at 26-28.

⁹² JOTE, *supra* note 18, at 56.

⁹³ *Id.* (citing H.J. MERRYMAN & A.E. ELSER, LAW, ETHICS AND THE VISUAL ARTS 27 (1979); Merryman, *Two Ways*, *supra* note 46, at 836.

⁹⁴ JOTE, *supra* note 18, at 56; WILLIAMS, *supra* note 1, at 28-29; Merryman, *Two Ways*, *supra* note 46, at 35-36. For a summary of the prosecution of Rosenberg, including arguments offered by the defense, see Keane, *supra* note 30, at 9-12.

⁹⁵ Kastenberg, *supra* note 19, at 288.

⁹⁶ JOTE, *supra* note 18, at 57. Through the Second World War, the 1899 and 1907 Hague Conventions were “the only relevant legal instruments” regarding the protection of

developments in the succeeding decades significantly refined international law in this area.

a. The 1954 Hague Convention on the Protection of Cultural Property

On 14 May 1954, under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO), an international conference at the Hague adopted the Convention for the Protection of Cultural Property in the Event of Armed Conflict⁹⁷ (1954 Hague Convention).⁹⁸ The 1954 Hague Convention was the first comprehensive international agreement for the protection of cultural property.⁹⁹ Indeed, the convention brought the term “cultural property” into international legal parlance.¹⁰⁰ Although several major states—including the United States, the United Kingdom, and Japan—have shown relatively little interest in formally adopting it¹⁰¹ and some of its provisions are impractical,¹⁰² the convention is nevertheless essential to any discussion of contemporary rules governing the protection of cultural property. Therefore, pertinent portions of the convention merit our attention.

The 1954 Hague Convention defines “cultural property” as follows:

- (a) 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 and other objects of artistic, historical or archaeological interest, as well as scientific collections and important collections of

cultural property. *Id.* at 58. Many felt the existing Hague rules were too bound to archaic distinctions between defended and undefended areas. *See id.* at 57.

⁹⁷ 1954 Hague Convention, *supra* note 16.

⁹⁸ JOTE, *supra* note 18, at 57-63.

⁹⁹ WILLIAMS, *supra* note 1, at 34.

¹⁰⁰ JOTE, *supra* note 18, at 64.

¹⁰¹ *Id.* at 63. Nevertheless, the majority of its provisions likely constitute customary international law binding on all states. *See infra* notes 129-32 and accompanying text.

¹⁰² *See, e.g.*, FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 50-51 (2001).

books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (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);

(c) centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as “centres containing monuments.”¹⁰³

Thus the convention’s concept of protected property includes not only movable and immovable cultural property, but buildings housing cultural property and designated areas of land (“centres”) where large amounts of property, museums, and storage facilities are located.¹⁰⁴

Article 4.1 of the convention enjoins a party from using cultural property, whether on its own territory or that of another party, in a manner likely to expose it to damage or destruction in armed conflict.¹⁰⁵ Article 4.1 further prohibits “any act of hostility directed against such property.”¹⁰⁶ However, under Article 4.2, these prohibitions are waived “where military necessity imperatively requires such a waiver.”¹⁰⁷ Article 4.3 of the convention requires parties to “prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”¹⁰⁸ Article 4.5 clarifies that a party is not excused from these requirements should another party fail to take measures to safeguard the property prior to the armed conflict.¹⁰⁹

¹⁰³ 1954 Hague Convention, *supra* note 16, art. 1.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* art. 4.1.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* art. 4.2.

¹⁰⁸ *Id.* art. 4.3.

¹⁰⁹ *Id.* art. 4.5.

Article 5 of the convention specifically addresses military occupation.¹¹⁰ Article 5.1 states a party occupying the territory of another party “shall as far as possible support the competent national authorities . . . in safeguarding and preserving its cultural property.”¹¹¹ Personnel engaged in protecting cultural property are, “[a]s far as is consistent with the interests of security,” to be respected and permitted to continue their duties should they fall into the hands of an opposing party.¹¹² In the event such authorities do not exist or are unable to take such measures, Article 5.2 puts the responsibility on the occupier to, “as far as possible . . . take the necessary measures of preservation” for property that has been “damaged by military operations.”¹¹³

Except for those provisions designed to take effect in times of peace, the trigger for the convention’s protections is armed conflict between two or more parties, total or partial occupation of a party’s territory, or armed conflict between a party and a non-party to the convention which nevertheless declares it will adhere to the convention’s provisions and in fact abides by them.¹¹⁴ In non-international armed conflicts within a party’s territory, “each party to the conflict shall be bound to apply, as a minimum, the provisions . . . which relate to respect for cultural property.”¹¹⁵ Pursuant to Article 28, parties agree to take, “within the framework of their ordinary jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit . . . a breach.”¹¹⁶ Article 36 clarifies that the 1954 Hague Convention is supplementary to the 1899 and 1907 Hague Conventions, as well as—where applicable—the Roerich Pact.¹¹⁷

The convention includes other provisions—of less significance for present purposes—addressing peacetime measures to safeguard cultural property,¹¹⁸ training military personnel to respect cultural property,¹¹⁹ designating special military personnel to work with civilian authorities to protect cultural property,¹²⁰ marking protected property with a distinctive

¹¹⁰ *Id.* art. 5.

¹¹¹ *Id.* art. 5.1.

¹¹² *Id.* art. 15.

¹¹³ *Id.* art. 5.2.

¹¹⁴ *Id.* art. 18.

¹¹⁵ *Id.* art. 19.1.

¹¹⁶ *Id.* art. 28.

¹¹⁷ *Id.* art. 36; see WILLIAMS, *supra* note 1, at 34.

¹¹⁸ 1954 Hague Convention, *supra* note 16, art. 3.

¹¹⁹ *Id.* art. 7.1.

¹²⁰ *Id.* art. 7.2.

emblem,¹²¹ detailing the role of UNESCO in assisting parties in implementing the convention,¹²² and other matters. In addition to these “general” protections, the convention includes extensive provisions for creating “refuges” for movable cultural property and “centres” containing monuments and other immovable cultural property to be placed under a regime of “special protection.”¹²³ Attaining special protection status requires meeting specific criteria as to location, marking, registration, and refraining from military use.¹²⁴ Cultural property that has achieved special protection is “immun[e] . . . from any act of hostility” absent a violation involving that property or “exceptional cases of unavoidable military necessity.”¹²⁵ In practice, very few sites have been registered for special protection, and the special protection provisions have not been a significant factor in any armed conflict to date.¹²⁶

¹²¹ *Id.* arts. 6, 16, 17.

¹²² *Id.* art. 23.

¹²³ *Id.* arts. 8, 9, 10, 11; Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, arts. 11, 12, 13, 14, 15, 16, 249 U.N.T.S. 539, *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 301 (2005) [hereinafter 1954 Hague Regulations].

¹²⁴ 1954 Hague Convention, *supra* note 16, arts. 8, 10, 11, 12, 13, 14, 15, 16.

¹²⁵ *Id.* arts. 9, 11. By implication, the “exceptional cases of unavoidable military necessity” standard applicable to special protection is more restrictive than the “imperative military necessity” standard applicable to general protection. *See id.* arts. 4.2, 9, 11. Although the distinction is far from clear, special protection does at a minimum impose additional procedural requirements. *See* KALSHOVEN & ZEGVELD, *supra* note 102, at 50.

¹²⁶ *See* WILLIAMS, *supra* note 1, at 39; Detling, *supra* note 41, at 49; Keane, *supra* note 30, at 16. Worldwide, just one centre and eight refuges—including one refuge in Austria, six sites in the Netherlands, and the entire Vatican City—have been registered as provided by Article 8 of the 1954 Hague Convention. WILLIAMS, *supra* note 1, at 36; Keane, *supra* note 30, at 16. Three of those refuges were subsequently withdrawn in 1994. MARIA TERESA DUTLI, PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: REPORT ON THE MEETING OF EXPERTS (GENEVA, 5-6 OCTOBER 2000), at 41 (2002). One apparent reason for this is the requirement that centres and refuges be located an “adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication.” 1954 Hague Convention, *supra* note 16, art. 8.1; *see* DUTLI, *supra* note 41, at 41-42; Keane, *supra* note 30, at 16. The term “adequate distance” is not defined. 1954 Hague Convention, *supra* note 16, art. 8.1; *see* Keane, *supra* note 30, at 16. Another contributing factor is that parties may object to a proposal to register a refuge or center. 1954 Hague Regulations, *supra* note 123, art. 14; Keane, *supra* note 30, at 16-17. When Cambodia

The military necessity exception stated in Article 4.2 is perhaps the convention's most controversial provision, and the most vexing to advocates of protecting cultural property.¹²⁷ To be sure, the exception creates a gray area that an absolute prohibition would avoid, and it may limit the effectiveness of the convention.¹²⁸ However, protecting cultural property is just one of several competing interests during an armed conflict. Refusing to recognize military necessity, fluid as that concept may be, could render the convention impractical and irrelevant.¹²⁹

To date, 114 states have become parties to the 1954 Hague Convention.¹³⁰ The United States is not among them.¹³¹ Disagreement exists as to the degree to which the convention's provisions reflect customary international law; however, the prevailing view is that at least the majority of its substantive provisions qualify.¹³² In line with this

attempted to register the Angkor Wat complex in 1992, its application was opposed by several countries on the grounds that the Cambodian government was illegitimate. Keane, *supra* note 30, at 16-17. The site was not registered, and no state has attempted to register a refuge or center since. JOTE, *supra* note 18, at 69; Keane, *supra* note 30, at 17.

¹²⁷ See, e.g., JOTE, *supra* note 18, at 66-67 ("In effect, inserting the clause on military necessity causes the warring parties to take the law into their own hands in such a way as to enable them to justify whatever crime they commit by adducing it."); Merryman, *Two Ways*, *supra* note 46, at 838 ("[C]ommanders can be expected to place other values higher than cultural preservation and to translate them into 'military necessity.'").

¹²⁸ See WILLIAMS, *supra* note 1, at 37.

¹²⁹ Claims that the precision of modern weapons renders the military necessity exception unnecessary are ill-founded. See Keane, *supra* note 30, at 20. Collateral damage remains a reality of armed conflict, even for forces equipped with the most modern weapons. However, improvements in weapon precision could affect the imperative military necessity analysis. For example, if the means exist to accomplish the objective without damaging cultural property, an imperative military necessity to target or damage the cultural property may not exist.

¹³⁰ *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO.ORG, <http://portal.unesco.org/la/convention.asp?KO=13637&language=E> (last visited Aug. 23, 2007).

¹³¹ See *id.*

¹³² See, e.g., DUTLI, *supra* note 126, at 27 ("[T]he basic principles concerning respect for cultural property enshrined in [the 1954 Hague Convention] have become part of customary international law."); KALSHOVEN & ZEGFELD, *supra* note 102, at 48 ("[I]t cannot be said that all of [the 1954 Hague Convention's] substantive provisions are customary."); Geoffrey S. Corn, "Snipers in the Minaret—What Is the Rule?" *The Law of War and the Protection of Cultural Property: A Complex Equation*, ARMY LAW, JULY, 2005, at 28, 40 (finding "ample implied support" for the conclusion that the 1954 Hague Convention provisions are customary international law); Kastenber, *supra* note 19, at 301 ("The 1954 Hague Convention is a reflection of the development of customary international law, and . . . binding law in most of its provisions.").

view, U.S. armed forces have consistently adhered to the convention as a matter of policy.¹³³

b. The Additional Protocols to the Geneva Conventions

The Geneva Conventions of 1949, relating to protected classes of persons during armed conflict, did not directly address the protection of cultural property.¹³⁴ But the 1977 Additional Protocols to the Geneva Conventions do address cultural property.¹³⁵ Article 52 of Additional Protocol I generally prohibits targeting “civilian objects” for attack or reprisal.¹³⁶ More specifically, Article 53 prohibits “any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples,” as

¹³³ See Kastenber, *supra* note 19, at 299-301; Major Larry D. Youngner, TJAGSA Practice Note: *Protection of Cultural Property During Expeditionary Operations Other than War*, ARMY LAW., MAR. 1999, at 25, 26.

¹³⁴ See Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362 (1949), *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 175 (2005) [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363 (1949), *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 188 (2005) [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364 (1949), *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 199 (2005) [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 6 U.S.T. 3516, T.I.A.S. 3365 (1949), *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 235 (2005) [hereinafter Geneva Convention IV].

¹³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 (1977), *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 348 (2005) [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 (1977), *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 391 (2005) [hereinafter Additional Protocol II].

¹³⁶ Additional Protocol I, *supra* note 135, art. 52.

well as using such objects “in support of the military effort” or taking reprisals against such objects.¹³⁷ On its face, these prohibitions appear categorical, in which case they would constitute a dramatic tightening of restrictions imposed by the 1954 Hague Convention, which provided an exception for imperative military necessity.¹³⁸ Some commentators have read Additional Protocol I to attempt such a restriction.¹³⁹ However, Article 53 states its provisions are “without prejudice” to the provisions of the 1954 Hague Convention,¹⁴⁰ which expressly provides for the imperative military necessity exception.¹⁴¹ Thus, the best reading appears to be that Article 53 of Additional Protocol I is merely a restatement of law already provided for in the 1954 Hague Convention and, in all likelihood, customary international law.¹⁴²

c. The Additional Protocol to the 1954 Hague Convention

On 26 March 1999, again under the auspices of UNESCO, an international conference at the Hague produced the Second Protocol to the 1954 Hague Convention.¹⁴³ The Second Protocol is expressly supplementary to the 1954 Hague Convention,¹⁴⁴ but it substantially modifies the Convention, notably regarding the oft-criticized imperative military necessity exception and the “special” protection regime.¹⁴⁵ The

¹³⁷ *Id.* art. 53. Article 16 of Additional Protocol II, addressed to non-international armed conflict, essentially mirrors Article 53 of Additional Protocol I in slightly truncated form, omitting the provision prohibiting reprisals. Additional Protocol II, *supra* note 135, art. 16. Article 16 also states that its terms are “without prejudice” to the 1954 Hague Convention. *Id.*

¹³⁸ See 1954 Hague Convention, *supra* note 16, art. 4.2.

¹³⁹ See, e.g., Kastenbergh, *supra* note 19, at 298-99 (“[Additional Protocol I] ignores both the exigencies of war, and the principles of necessity and proportionality to an unacceptable degree, and in [sic] contrary to customary international law.”).

¹⁴⁰ Additional Protocol I, *supra* note 135, art. 53.

¹⁴¹ 1954 Hague Convention, *supra* note 16, art. 4.2; see MCCOUBREY, *supra* note 84, at 181.

¹⁴² See, e.g., Corn, *supra* note 132, at 38 (Additional Protocols I and II are explicitly supplemental and must be read in harmony with the 1954 Hague Convention); Youngner, *supra* note 133, at 27 (Additional Protocols I and II restate existing principles regarding the protection of cultural property).

¹⁴³ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, March 26, 1999, 38 I.L.M. 769 (1999), available at <http://www.icrc.org/ihl.nsf/FULL/590?OpenDocument> [hereinafter Second Protocol].

¹⁴⁴ Second Protocol, *supra* note 143, art. 2.

¹⁴⁵ See *id.* arts. 6, 10, 11, 12, 13, 14. The Second Protocol restricts the invocation of “imperative military necessity” to direct an act of hostility against cultural property to

Second Protocol also adds to a party's responsibilities during military occupation, requiring the occupier to prevent the illicit export, removal, transfer, excavation, or alteration of cultural property.¹⁴⁶ The Second Protocol has been generally applauded by cultural property protection advocates as an improvement on the 1954 Hague Convention.¹⁴⁷ States have adopted the Protocol at a steady rate; however, the total number of parties is still small at this writing, and the Protocol's impact limited.¹⁴⁸ Time will tell how influential the Second Protocol will prove to be.

B. Protection of Cultural Property in Times of Peace

The primary concern at issue in protecting cultural property in times of peace differs from the primary concerns at issue in times of armed conflict.¹⁴⁹ As we have seen, the law of armed conflict is largely concerned with avoiding damage or destruction of cultural property during combat.¹⁵⁰ The peacetime regime, in contrast, largely seeks to protect the common cultural heritage of mankind by restricting the unauthorized excavation, export, import, or other transfer of cultural

situations where "the cultural property has, by its function, been made into a military objective" and "there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective." *Id.* art. 6. The Second Protocol also requires that such a decision must be made "by an officer commanding a force the equivalent of a battalion in size or larger," if circumstances permit, and "an effective advance warning shall be given whenever circumstances permit." *Id.* The Second Protocol would also replace the system of "special" protection with a system of "enhanced" protection for property "of the greatest importance to humanity," provided domestic laws recognized and protected its "exceptional" status and the state controlling it declares it shall not be used for military purposes. *Id.* art. 10.

¹⁴⁶ *Id.* art. 9.

¹⁴⁷ See, e.g., DUTLI, *supra* note 126, at 29-55 (noting improvements to perceived problem areas in the 1954 Hague Convention); KALSHOVEN & ZEGVELD, *supra* note 102, at 178 (finding the Second Protocol's new system "looks promising"); Keane, *supra* note 30, at 31-32 (finding the changes to the military necessity exception a "clear improvement").

¹⁴⁸ *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO.ORG, <http://portal.unesco.org/la/convention.asp?KO=15207&language=E> (last visited Aug. 23, 2007). Eleven states became parties in 2005, bringing the total to 37. *Id.*

¹⁴⁹ WILLIAMS, *supra* note 1, at 52.

¹⁵⁰ As previously discussed, international law also seeks to prevent plunder and looting during armed conflict. See, e.g., 1954 Hague Convention, *supra* note 16, arts. 4.3, 5 (requiring parties to prevent theft, pillage, and misappropriation of cultural property, and enjoining occupiers to safeguard cultural property in occupied territory); 1907 Hague Convention, *supra* note 58, arts. 28, 46, 47, 56 (prohibiting pillage and confiscation of cultural property).

property.¹⁵¹ Contemporary commentators tend to view peacetime cultural property regulation as a contest between, among other things, “source” nations seeking to retain cultural property in their territory on one side and “market” nations and “acquisitors” interested in obtaining such artifacts on the other.¹⁵²

The law of armed conflict generally continues to apply during military occupation, even if active hostilities have subsided. Therefore, the peacetime regime regulating the transfer and transport of cultural property is of less immediate concern to an occupying force than the cultural property provisions of the law of armed conflict. However, as we shall see, an occupying force is responsible for restoring order and, in general, respecting the existing laws of the occupied territory.¹⁵³ Therefore, some review of the peacetime regime for protecting cultural property is appropriate.

This regime incorporates a number of elements.¹⁵⁴ International conventions and customary law, regional agreements, bilateral treaties, domestic laws, international law enforcement, and ethical standards for museums and other acquisitors all play a role.¹⁵⁵ This article concentrates on the most prominent international conventions in this area, the 1970 UNESCO Convention¹⁵⁶ and the 1972 World Heritage Convention.¹⁵⁷

¹⁵¹ WILLIAMS, *supra* note 1, at 52.

¹⁵² See, e.g., John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT'L L. & POL. 1 (Fall 1998) (describing the competing interests involved in the regulation of international transfers of cultural property); Merryman, *Two Ways*, *supra* note 46, at 831-33 (describing the world as divided between “source” nations and “market” nations).

¹⁵³ See 1907 Hague Convention, *supra* note 58, art. 43.

¹⁵⁴ WILLIAMS, *supra* note 1, at 52.

¹⁵⁵ *Id.*

¹⁵⁶ 1970 UNESCO Convention, *supra* note 17.

¹⁵⁷ Convention Concerning the Protection of the World Cultural and Natural Heritage 1972, 16 November 1972, 27 U.S.T. 37, T.I.A.S. 8226 (1972), available at UNESCO.ORG, http://portal.unesco.org/en/ev.php-URL_ID=13055&URL_DO=DO-TOPIC&URL_SECTION=201.html (last visited Jan. 27, 2006) [hereinafter 1972 World Heritage Convention].

1. 1970 UNESCO Convention

The removal of artifacts and other cultural property from developing “source” nations to individuals and institutions in more developed “market” nations had long been a feature of the colonial era.¹⁵⁸ As the colonial era drew to a close in the 1960s, trafficking in the cultural property of the former colonies actually increased, heightening the perception that international action was needed.¹⁵⁹ After a decade of proposals and studies, the 16th General Conference of UNESCO adopted the final version of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention).¹⁶⁰ The more pertinent of the Convention’s twenty-six articles are described below.

Article 1 defines cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science” and which fits into one of eleven broad categories.¹⁶¹ This definition is more restrictive than the 1954 Hague Convention’s definition in three significant respects.¹⁶² First, being concerned primarily with

¹⁵⁸ JOTE, *supra* note 18, at 196.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 196-200.

¹⁶¹ 1970 UNESCO Convention, *supra* note 17, art. 1. The eleven categories are:

- (a) [r]are collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history . . .;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old . . .;
- (f) objects of ethnological interest;
- (g) property of artistic interest . . .;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest . . .;
- (i) postage, revenue and similar stamps . . .;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

Id.

¹⁶² *See id.*; 1954 Hague Convention, *supra* note 16, art. 1.

trafficable—that is, movable—cultural property, the 1970 UNESCO Convention excludes centres, refuges, and other real property intended to shelter cultural property.¹⁶³ Second, the 1970 UNESCO Convention requires the property to fit one of eleven categories.¹⁶⁴ Although these categories are quite broad,¹⁶⁵ the 1954 Hague Convention imposed no such limitation, so long as the property was “of great importance to the cultural heritage of every people.”¹⁶⁶ Third, and most important, the 1970 UNESCO Convention requires the property be “specifically designated by the State” in order to enjoy protection.¹⁶⁷ This requirement seriously limits the effectiveness of the Convention because “most of the cultural objects in developing countries are located not in museums but on sites and [are] still unexcavated.”¹⁶⁸

Article 2 of the 1970 UNESCO Convention states that “the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin.”¹⁶⁹ Therefore, parties to the convention “undertake to oppose such practices with the means at their disposal.”¹⁷⁰ Article 3 clarifies that the “import, export or transfer of ownership of cultural property” is “illicit” when “contrary to the provisions adopted under this Convention.”¹⁷¹ For example, Article 6 of the convention requires parties to develop an export certificate that must accompany any article of cultural property to be legitimately exported from the country.¹⁷²

¹⁶³ See 1970 UNESCO Convention, *supra* note 17, art. 1; 1954 Hague Convention, *supra* note 16, art. 1; see also JOTE, *supra* note 18, at 204 (“[I]t is obvious the scope of the [1970 UNESCO] Convention is limited to movable cultural property.”).

¹⁶⁴ See 1970 UNESCO Convention, *supra* note 17, art. 1.

¹⁶⁵ *Id.*

¹⁶⁶ 1954 Hague Convention, *supra* note 16, art. 1.

¹⁶⁷ 1970 UNESCO Convention, *supra* note 17, art. 1.

¹⁶⁸ JOTE, *supra* note 18, at 202. In addition, developing countries frequently lack the funds and skilled personnel to seriously undertake the registration of their cultural property. *Id.* at 203.

¹⁶⁹ 1970 UNESCO Convention, *supra* note 17, art. 2.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* art. 3.

¹⁷² *Id.* art. 6.

Article 11 touches on the military occupation of one country by another.¹⁷³ It provides that “[t]he export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit.”¹⁷⁴ More generally, Article 13 requires parties, consistent with their own laws, to “prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property.”¹⁷⁵

A total of 109 nations are parties to the 1970 UNESCO Convention, including both Iraq and the United States.¹⁷⁶ At the time it ratified the convention, the United States issued a reservation, a declaration, and a number of understandings regarding certain provisions.¹⁷⁷ These statements have little impact on the particular provisions described above.¹⁷⁸ However, the convention is generally short on specific measures, and some commentators find most of its provisions more aspirational than operational.¹⁷⁹

2. 1972 World Heritage Convention

On 16 November 1972, the 17th session of the UNESCO General Conference adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention).¹⁸⁰ The purpose of the convention is to identify and protect sites of mankind’s cultural and natural heritage around the world that possess “outstanding universal value” from a standpoint of history, art, science, aesthetic value, ethnology, anthropology, science, conservation, or

¹⁷³ *Id.* art. 11.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* art. 13.

¹⁷⁶ *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO.ORG, <http://portal.unesco.org/la/convention.asp?KO=13039&language=E> (last visited May 23, 2006). Iraq became a party in 1973, the United States in 1983. *Id.*

¹⁷⁷ *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO.ORG, http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES (last visited May 23, 2006).

¹⁷⁸ *Id.*

¹⁷⁹ JOTE, *supra* note 18, at 227 (citing P.M. Bator, *An Essay on International Trade in Art*, 34 STAN. L. REV. 371 (1982)).

¹⁸⁰ See 1972 World Heritage Convention, *supra* note 157; JOTE, *supra* note 18, at 245.

natural beauty.¹⁸¹ To this end, the Convention establishes a World Heritage List, a committee to administer the list, procedures to nominate sites for inclusion on the list, other procedures for international cooperation in protecting world heritage, and a World Heritage Fund to support these efforts.¹⁸²

The convention has proven very popular, with 181 nations now party to it.¹⁸³ However, it is of limited relevance to the treatment of cultural property during military occupation. Unlike the 1954 and 1970 Conventions, it is not intended to protect cultural *property* per se, but “cultural and natural *heritage*.”¹⁸⁴ Moreover, the convention does not

¹⁸¹ 1972 World Heritage Convention, *supra* note 157, arts. 1, 2.

¹⁸² *Id.* arts. 5, 7-18, 20-28.

¹⁸³ *Convention Concerning the Protection of the World Cultural and Natural Heritage*, UNESCO.ORG, <http://portal.unesco.org/la/convention.asp?KO=13055&language=E> (last visited Jan. 27, 2006). The United States was the first country to become a party, in 1973. *Id.* The United States, like a small number of other parties, declared it would not be bound by Article 16, paragraph 1, calling for parties to make biannual contributions to the World Heritage Fund. 1972 World Heritage Convention, *supra* note 157, Declarations and Reservations. Iraq became a party in 1974, with the clarification that in doing so it did not recognize Israel in any way. *Id.*; *Convention Concerning the Protection of the World Cultural and Natural Heritage*, UNESCO.ORG, <http://portal.unesco.org/la/convention.asp?KO=13055&language=E> (last visited Jan. 27, 2006).

¹⁸⁴ *See* 1972 World Heritage Convention, *supra* note 157, arts. 1, 2 (emphasis added). The convention defines “cultural heritage” as

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding value from the point of view of history, art, or science;
 groups of buildings: groups of separate buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
 sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

Id. art. 1. “Natural heritage” is defined as

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
 geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals

establish any sanctions for states that fail to fulfill their responsibilities.¹⁸⁵ In addition, it does not apply during armed conflict.¹⁸⁶ Nevertheless, two aspects of the convention merit discussion.

Article 4 states that the parties recognize each state's primary responsibility for safeguarding cultural and natural heritage located in its territory.¹⁸⁷ However, under paragraph 3 of Article 6, each party to the convention "undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage . . . situated on the territory of other States Parties to this Convention."¹⁸⁸ On its face, this provision could significantly impact the conduct of armed conflict in the territory of a party—and nearly the entire world is party to the convention.¹⁸⁹ As previously discussed, however, the World Heritage Convention does not apply during armed conflict.

Unlike the 1954 Hague Convention's list of sites entitled to "special" protection,¹⁹⁰ the World Heritage List, like the World Heritage Convention, has proven very popular.¹⁹¹ A total of 812 sites around the world have been included.¹⁹² To be sure, there is a distinction between cultural sites included on the World Heritage List and cultural property qualifying for protection under the 1907 and 1954 Hague Conventions. In many cases entire cities are on the World Heritage List.¹⁹³ Nevertheless, a military force occupying a location on the World

and plants of outstanding universal value from the point of view of science or conservation;
natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

Id. art. 2.

¹⁸⁵ See JOTE, *supra* note 18, at 251.

¹⁸⁶ See *id.* at 252.

¹⁸⁷ 1972 World Heritage Convention, *supra* note 157, art. 4.

¹⁸⁸ *Id.* art. 6.

¹⁸⁹ See *Convention Concerning the Protection of the World Cultural and Natural Heritage*, UNESCO.ORG, <http://portal.unesco.org/la/convention.asp?KO=13055&language=E> (last visited Aug. 23, 2007).

¹⁹⁰ See 1954 Hague Convention, *supra* note 16, arts. 8-11; 1954 Hague Regulations, *supra* note 123, arts. 11-16.

¹⁹¹ See *World Heritage List*, UNESCO.ORG, <http://whc.unesco.org/en/list/> (last visited Aug. 23, 2007).

¹⁹² *Id.*

¹⁹³ See *id.*

Heritage List should be particularly mindful of the laws of armed conflict protecting cultural property.¹⁹⁴

III. Military Occupation

A. Military Occupation Generally

International law applicable to military occupation “entails an enormously complex legal framework.”¹⁹⁵ A host of applicable regulations address taxation, use of private property, use of public property, respect for customs and religious practices, criminal procedure, legislation, labor relations, and many other subjects.¹⁹⁶ However, the bulk of these provisions have little direct impact on the preservation of cultural property in occupied territories. Below, we consider the conditions under which military occupation exists—in other words, when it begins and when it ends.¹⁹⁷ We then review several provisions of the 1907 Hague Convention, the Fourth Geneva Convention, and the *Department of the Army Field Manual 27-10 (FM 27-10)* that directly address the treatment of cultural property. These provisions can be grouped into three general categories: the occupier’s duty to restore and maintain order; the occupier’s responsibilities with respect to public and private property; and the occupier’s rights and responsibilities with respect to local laws.¹⁹⁸

¹⁹⁴ Three sites in Iraq are currently on the World Heritage List: the ruins of the ancient cities of Hatra (listed in 1985), Ashur (listed in 2003), and Samarra (listed in 2007). *Id.* The Iraqi National Museum is not listed. *Id.*

¹⁹⁵ David J. Scheffer, *Future Implication of the Iraq Conflict: Beyond Occupation Law*, 97 AM. J. INT’L L. 842, 847 (Oct. 2003).

¹⁹⁶ See 1907 Hague Convention, *supra* note 58, arts. 42-56; Geneva Convention IV, *supra* note 133, arts. 47-78; U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE paras. 351-48, 539 (18 July 1956) [hereinafter FM 27-10], *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 75-89 (2005)).

¹⁹⁷ See 1907 Hague Convention, *supra* note 58, arts. 42, 43; FM 27-10, *supra* note 196, paras. 351, 355, 356, 357, 360, 361.

¹⁹⁸ See 1907 Hague Convention, *supra* note 58, arts. 43, 55, 56; Geneva Convention IV, *supra* note 134, arts. 53, 64; FM 27-10, *supra* note 196, paras. 363, 400. In recent years, commentators have observed that the original vision of the drafters of the 1907 Hague Convention regarding occupation is at odds with the growing emphasis on the individual and collective rights of the populations of occupied territories. See, e.g., EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 209-16 (2d ed. 2004) (contending the occupation framework of the 1907 Hague Convention cannot be reconciled with the

B. When Military Occupation Exists

1. Commencement

Article 42 of the 1907 Hague Convention establishes the basic criteria for the existence of a military occupation.¹⁹⁹ It states “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army.”²⁰⁰ Article 42 further provides that “occupation extends only to the territory where such authority has been established and can be exercised.”²⁰¹ A military occupation may exist even if there was no armed resistance to the invasion.²⁰²

Field Manual 27-10 echoes this definition and elaborates upon it.²⁰³ The manual notes that the existence of military occupation “is a question of fact,”²⁰⁴ and “no proclamation of military occupation is necessary.”²⁰⁵

expected role of modern government or with the tensions between the interests of the occupier and those of the occupied population). The drafters of the 1907 Hague Convention were concerned with preserving the dormant sovereignty of the state displaced by the occupation. *See id.* at 29 (describing the convention’s occupation provisions as a pact among government elites). However, international recognition of individual and communal rights, as opposed to the displaced government’s rights, has increased over time. *Id.* at 210. “The fundamental concepts of human rights and self-determination of peoples, which had transformed international law in the latter half of the twentieth century, have not been duly reflected in the constituting documents of the law of occupation.” *Id.* at x; *see also* Scheffer, *supra* note 195, at 848-49 (contending occupation law was not designed for transformational occupations such as in post-war Iraq). While this phenomenon is undoubtedly significant to the development of occupation law as a whole, its relevance to the treatment of cultural property is only indirect. It affects primarily the political aspects of military occupation and not, for example, the occupier’s obligation to restore and maintain order or rules regarding the use of public property. *See* 1907 Hague Convention, *supra* note 58, arts. 43, 55. The major effect of such developments is likely to be on the *duration* of military occupation by providing for an early transfer of sovereignty that the 1907 Hague Convention drafters may not have anticipated.

¹⁹⁹ 1907 Hague Convention, *supra* note 58, art. 42.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Wolff Heintschel von Heinegg, *The Rule of Law in Conflict and Post-Conflict Situations: Factors in War to Peace Transitions*, 27 HARV. J.L. & PUB. POL’Y 843, 844 (Summer 2004); *see* Geneva Convention IV, *supra* note 133, art. 2.

²⁰³ *See* FM 27-10, *supra* note 196, paras. 351, 355, 356, 357.

²⁰⁴ *Id.* para. 355; *see also* Jordan J. Paust, *The U.S. as Occupying Power Over Portions of Iraq and Relevant Responsibilities Under the Laws of War 2* (May 2003), available at <http://www.nimj.com/documents/occupation.doc> (quoting *Department of the Army Pamphlet 27-161-2* and emphasizing that Articles 42 and 43 of the 1907 Hague Convention establish a factual test for military occupation).

The existence of military occupation “presupposes . . . the invader has successfully substituted his own authority for that of the legitimate government in the territory invaded.”²⁰⁶ Paragraph 356 of *FM 27-10* states the occupier “must have taken measures to establish its authority.”²⁰⁷ The number of troops necessary to establish or maintain an occupation will depend on the circumstances, but “[i]t is sufficient that the occupying force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied district.”²⁰⁸ Finally, “[t]he mere existence of a . . . defended area within the occupied district, provided the . . . defended area is under attack, does not render the occupation of the remainder of the district ineffective. Similarly, the mere existence of local resistance groups does not render the occupation ineffective.”²⁰⁹

2. Termination

Article 42 of the 1907 Hague Convention also establishes the criteria for the end of an occupation; when the territory is no longer “under the authority of the hostile army,” the occupation has ended.²¹⁰ Perhaps not surprisingly, *FM 27-10* addresses the means of terminating this authority in military terms: the occupation ends when the occupier “evacuates the district or is driven out.”²¹¹ Yet, nowadays it seems that the end of this “authority” can also be brought about by political means while the occupying forces remain in place.²¹²

The Fourth Geneva Convention somewhat muddies the waters in this area.²¹³ Article 2 states the convention will cease to apply to occupied territory “one year after the general close of military operations,” except

²⁰⁵ *Id.* para. 357. *Field Manual 27-10* indicates U.S. policy is, nevertheless, to issue such proclamations. *Id.*

²⁰⁶ *Id.* para. 355.

²⁰⁷ *Id.* para. 356.

²⁰⁸ *Id.*

²⁰⁹ *Id.*; see Heinegg, *supra* note 202, at 859.

²¹⁰ 1907 Hague Convention, *supra* note 58, art. 42.

²¹¹ *FM 27-10*, *supra* note 196, para. 360.

²¹² See BENVENISTI, *supra* note 198, at ix (observing that United Nations Security Council Resolution 1546 deemed that transfer of sovereignty to an interim Iraqi government by 30 June 2004 would end the military occupation of Iraq). *But see id.* at xv (contending that to the extent foreign forces still wield effective control, they continue to be bound by military occupation law).

²¹³ See Geneva Convention IV, *supra* note 134, art. 6.

for certain articles that apply for the duration of the occupation.²¹⁴ This provision applies only to the Fourth Geneva Convention and not, for example, to the Hague Conventions.²¹⁵

C. Obligations of the Occupier

1. Restoring and Maintaining Order

Article 43 of the 1907 Hague Convention provides, “[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”²¹⁶ The requirement to “take all measures in [its] power” sweeps broadly and seems to impose a heavy burden on the occupier to reestablish order.²¹⁷ However, the opening clause of the article underscores once again that military occupation is a question of fact, and these responsibilities are not triggered until the occupier “in fact” possesses this authority.²¹⁸ *Field Manual 27-10* echoes Article 43, repeating it verbatim at paragraph 363.²¹⁹

Once a military occupation is established, the occupier’s chain of command is responsible for deploying troops to establish law and order in areas that come under its control.²²⁰ As noted by a post-Second World War military tribunal:

A commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing

²¹⁴ *Id.* Articles 1 through 12, 27, 29 through 34, 47, 49, 51-53, 59, 61-77, and 143 continue to apply beyond one year. *Id.*

²¹⁵ See FM 27-10, *supra* note 196, para. 361.

²¹⁶ 1907 Hague Convention, *supra* note 58, art. 43. On a related note, Article 55 declares an occupier is the “administrator and usufructuary” of public buildings in the occupied territory, and it “must safeguard the capital of these properties in accordance with the rules of usufruct.” *Id.* art. 55. Although the context suggests the drafters intended to prevent the misuse or plundering of public institutions by the occupying forces, the requirement to “safeguard the capital” of public buildings would, on its face, encompass preventing civilians from looting or destroying such property as well. *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ FM 27-10, *supra* note 196, para. 363.

²²⁰ Paust, *supra* note 204, at 4.

crime, and protecting lives and property within the area of his command. His responsibility is coextensive with his area of command. He is charged with notice of occurrences taking place within that territory . . . dereliction of duty rests upon him²²¹

Thus, the law of military occupation takes the restoration of order quite seriously.²²²

2. *Respecting Private and Public Property*

As previously discussed, a number of provisions bear on an occupier's obligation to respect private and public property. At this point, a brief review of these provisions is useful to appreciate the scope of an occupier's obligations under international law. Article 23(g) of the 1907 Hague Convention forbids the destruction or seizure of enemy property unless "imperatively demanded by the necessities of war."²²³ Articles 28 and 47 prohibit pillage.²²⁴ Article 46 prohibits the confiscation of private property.²²⁵ Under Article 55, the occupier is "regarded only as administrator and usufructuary of public buildings . . . [and] must safeguard these properties, and administer them in accordance with the rules of usufruct."²²⁶ Article 56 provides that the property of

²²¹ *Id.* (quoting *United States v. List, et al.*, 11 TRIALS OF WAR CRIMINALS 757 (1948)).

²²² See also BENVENISTI, *supra* note 198, at 11 ("The restoration [of order] process includes immediate acts needed to bring daily life as far as possible back to the previous state of affairs. The occupant's discretion in this process is limited.").

²²³ 1907 Hague Convention, *supra* note 58, art. 23(g). The Fourth Geneva Convention substantially echoes this provision: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." Geneva Convention IV, *supra* note 134, art. 53.

²²⁴ 1907 Hague Convention, *supra* note 58, arts. 28, 47. The Fourth Geneva Convention also prohibits pillage. Geneva Convention IV, *supra* note 134, art. 33.

²²⁵ 1907 Hague Convention, *supra* note 58, art. 46.

²²⁶ *Id.* art. 55. "Usufruct" means "the right of enjoying all the advantages derivable from the use of something that belongs to another, as far as is compatible with the substance of the thing not being destroyed or injured." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 2098 (2d ed. 1998). Although Article 55's context suggests the drafters intended to prevent the misuse or plundering of public institutions by the occupying forces, the requirement to "safeguard the capital" of public buildings would, on its face, encompass preventing civilians from looting or destroying such property as well. 1907 Hague Convention, *supra* note 58, art. 55.

“institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property,” and “[a]ll seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.”²²⁷ *Field Manual 27-10* incorporates each of these provisions verbatim,²²⁸ with additional provisions providing further guidance on these and related matters.²²⁹

As we have seen, the 1954 Hague Convention on cultural property also contains provisions regarding military occupation.²³⁰ The convention requires parties occupying territory to cooperate with “competent national authorities” in “safeguarding and preserving” cultural property.²³¹ Where such authorities do not exist or cannot take adequate measures, the occupier should “as far as possible . . . take the most necessary measures of preservation” with respect to property damaged during “military operations.”²³² Therefore, whereas the 1907 Hague Convention generally enjoins an occupier from destroying, damaging, or seizing cultural property, the 1954 Hague Convention imposes an affirmative duty to help ensure cultural property is protected from others.

3. Respecting Existing Laws

Article 43 of the 1907 Hague Convention calls upon occupiers to restore and maintain order.²³³ However, the convention requires that when doing so, the occupier must “respect[], unless absolutely prevented, the laws in force in the country.”²³⁴ The Fourth Geneva Convention substantially echoes this provision with respect to criminal law, stating: “The penal laws of the occupied territory shall remain in force, with the

²²⁷ 1907 Hague Convention, *supra* note 58, art. 56.

²²⁸ FM 27-10, *supra* note 196, paras. 393 (generally prohibiting destruction or seizure of enemy property absent military necessity), 397 (prohibiting pillage), 400 (occupier is administrator and usufructuary of public property), 405 (preserving cultural property), and 406 (forbidding confiscation of private property).

²²⁹ See generally *id.* sec. V (comprising paragraphs 393 through 417, relating to “treatment of enemy property”).

²³⁰ 1954 Hague Convention, *supra* note 16, art. 5.

²³¹ *Id.* art. 5.1.

²³² *Id.* art. 5.2.

²³³ 1907 Hague Convention, *supra* note 58, art. 43.

²³⁴ *Id.*

exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.”²³⁵ The Fourth Geneva Convention also establishes extensive rules of criminal procedure for occupiers to comply with.²³⁶

The drafters of the 1907 Hague Convention likely intended strict military necessity to be the sole basis for changing the existing laws of occupied territories.²³⁷ However, in recent decades the trend has been to afford occupiers greater discretion to make changes.²³⁸ These changes have coincided with a lessening of concern for the prerogatives of the displaced government and increased concern for the individual and communal rights of the population of the occupied territories.²³⁹ Changes made in the interests of increasing individual rights and self-determination are likely to receive a warm welcome in much of the international law community.²⁴⁰ This trend has reached a new watermark in Iraq, where the United Nations Security Council has in effect endorsed the Coalition’s effort to create a new Iraqi government and invest sovereignty in it.²⁴¹ However, whatever political changes come about are unlikely to change the regime for protection of cultural property.

IV. Synthesis

A. Cultural Property and Military Occupation

From the foregoing, we can discern at least four possible sources of U.S. responsibility to protect cultural property during a military occupation by U.S. forces.

²³⁵ Geneva Convention IV, *supra* note 134, art. 64.

²³⁶ *Id.* arts. 64-78. These provisions are incorporated verbatim in *FM 27-10*, with additional provisions that provide additional guidance for U.S. armed forces. *FM 27-10*, *supra* note 196, paras. 432-48.

²³⁷ BENVENISTI, *supra* note 198, at 14.

²³⁸ *Id.* at 15.

²³⁹ *See id.* at 209-15.

²⁴⁰ *See, e.g.*, Heinegg, *supra* note 202, at 863-64 (stating that the United Nations Security Council recognizes occupiers can go beyond the traditional occupation law rules); Paust, *supra* note 204, at 23 (stating that United Nations Charter obligations to respect self-determination and human rights override inconsistent treaty obligations).

²⁴¹ *See* BENVENISTI, *supra* note 198, at ix n.6.

1. *1907 Hague Convention, Article 43: The Obligation to Restore Order*

An occupier “shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety.”²⁴² This requirement appears to be the most clearly applicable of those we have reviewed. Although this article is aimed at public disorder and threats to public safety rather than cultural property specifically, it certainly would apply to the looting of the Iraqi National Museum, which was also a breach of public order. Therefore, by the terms of Article 43 of the 1907 Hague Convention, the occupying forces were obligated to stop the looting unless (1) the occupation had not actually commenced, or (2) intervention was impossible or not in the occupier’s power.²⁴³

2. *1907 Hague Convention, Article 55: The Obligation to Safeguard Public Property*

As “administrator and usufructuary of public buildings” in the occupied territory, the occupier must “safeguard the capital of these properties.”²⁴⁴ Although the language of Article 55 of the 1907 Hague Convention as a whole suggests the drafters’ concern was that the occupier itself might misuse or plunder public buildings or other public resources, the phrase “safeguard the capital” is broad enough to include a duty to protect such facilities from third parties such as civilian looters.²⁴⁵ Similarly, while an occupier can logically only act as an administrator or “usufructuary” with respect to facilities it has already occupied, Article 55 does not specifically include an actual occupation requirement.²⁴⁶ Article 55 can be fairly read to require the protection of public buildings and other public resources, even if the occupier does not intend to use them.²⁴⁷ Undoubtedly, the looting and vandalism of a museum is detrimental to the museum’s capital. Assuming the museum is a public building, occupying forces arguably have a duty to prevent the looting, provided that (1) military occupation has begun, and (2) the occupying forces have the means to prevent the looting.²⁴⁸

²⁴² 1907 Hague Convention, *supra* note 58, art. 43.

²⁴³ *See id.*

²⁴⁴ *Id.* art. 55.

²⁴⁵ *See id.*

²⁴⁶ *See id.*

²⁴⁷ *See id.*

²⁴⁸ *See id.*

3. *1954 Hague Convention, Article 5: The Obligation to Take Necessary Measures to Preserve Cultural Property*

An occupying power shall “as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.”²⁴⁹ If such authorities do not exist or are unable to act, the occupier must “as far as possible . . . take the necessary measures” to preserve cultural property “damaged by military operations.”²⁵⁰ Article 5 of the 1954 Hague Convention thus imposes a duty on the occupier to affirmatively protect cultural property in two circumstances. First, if the “competent national authorities” require or request assistance, the occupying forces should “support” them “as far as possible.”²⁵¹ Second, if the national authorities cannot act, the occupier itself must take the “necessary measures of preservation,” but only as to cultural property damaged by the military.²⁵² The United States is not a party to the 1954 Hague Convention, and it is not clear that this particular provision reflects customary international law,²⁵³ although the U.S. military adheres to the convention as a matter of policy.²⁵⁴ Regardless, a non-party involved in armed conflict with one or more parties may voluntarily submit to the convention’s provisions.²⁵⁵

Therefore, Article 5 would require the occupier to act if: (1) the occupier was a party, or voluntarily submitted to, the 1954 Hague Convention, or Article 5 of the Convention reflects customary international law; (2) the competent national authorities either require or request the occupier’s support in safeguarding cultural property, or the national authorities cannot act and the cultural property in question has

²⁴⁹ 1954 Hague Convention, *supra* note 16, art. 5.1.

²⁵⁰ *Id.* art. 5.2.

²⁵¹ *Id.* art. 5.1.

²⁵² *Id.* art. 5.2.

²⁵³ See, e.g., DUTLI, *supra* note 126, at 27 (“[T]he basic principles concerning respect for cultural property enshrined in [the 1954 Hague Convention] have become part of customary international law.”); KALSHOVEN & ZEGFELD, *supra* note 102, at 48 (“[I]t cannot be said that all of [the 1954 Hague Convention’s] substantive provisions are customary.”); Corn, *supra* note 132, at 40 (finding “ample implied support” for the conclusion that the 1954 Hague Convention provisions are customary international law); Kastenberg, *supra* note 19, at 301 (“The 1954 Hague Convention is a reflection of the development of customary international law, and . . . binding law in most of its provisions.”)

²⁵⁴ See Kastenberg, *supra* note 19, at 299-301; Youngner, *supra* note 133, at 26.

²⁵⁵ 1954 Hague Convention, *supra* note 16, art. 18.3.

been damaged by military action; and (3) the occupying forces have the means to safeguard the property.²⁵⁶

4. *1907 Hague Convention, Article 43, and 1970 UNESCO Convention, Article 13: The Obligation to Respect Existing Law*

Although an occupier has a duty to restore and ensure public order, it must “respect[], unless absolutely prevented, the laws in force in the country.”²⁵⁷ The 1970 UNESCO Convention requires parties to “prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property.”²⁵⁸ Therefore, the authority of the government having shifted to the occupier during a military occupation, the occupier would arguably be responsible for enforcing the 1970 UNESCO Convention if the occupied country were a party to the convention. In fact, unlike the previous three provisions, military occupation might not be required if the occupier is also a party to the Convention because Article 13 does not expressly limit its application to a party’s own territory.²⁵⁹ The injunction to “prevent . . . transfers of ownership . . . likely to promote the illicit import or export of [cultural] property” appears broad enough to include a requirement to prevent theft committed with an eye toward selling artifacts on the international black market.²⁶⁰ The apparent triggers for the occupier’s obligation include: (1) that the occupied country, the occupier, or both are parties to the 1970 UNESCO Convention; (2) presumably, that the occupier has the “appropriate means” to prevent the looting; and (3) the cultural property in question meets the definition set forth in Article 1 of the convention.²⁶¹

B. Back to Iraq

With this understanding, we return to the scenario that opened this article—the looting of the Iraqi National Museum in Baghdad in April 2003. Was the United States remiss in its obligations under international law? As discussed, the answer hinges on two distinct, but related, issues:

²⁵⁶ *Id.* art. 5.

²⁵⁷ 1907 Hague Convention, *supra* note 58, art. 43.

²⁵⁸ 1970 UNESCO Convention, *supra* note 17, art. 13.

²⁵⁹ *Id.*

²⁶⁰ *See id.*

²⁶¹ *See id.* arts. 1, 13.

- (1) whether a military occupation was in effect during the looting; and
- (2) whether the U.S. forces had the means to prevent the looting.²⁶²

1. Occupation?

As stated before, military occupation is not a question of intent, but of fact.²⁶³ Article 42 of the 1907 Hague Convention states that “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army.”²⁶⁴ The existence of such authority will necessarily depend on the circumstances.²⁶⁵ However, *FM 27-10* indicates the occupier has sufficient authority to maintain an occupation if it can send detachments to make its authority felt at a given point, in the occupied district, within a reasonable period of time.²⁶⁶ The mere existence of pockets of resistance or local insurgents does not nullify a military occupation.²⁶⁷ However, the occupier “must have taken measures to establish its authority.”²⁶⁸

It is probably impossible to determine at what point, if any, the United States occupied Baghdad, or at least the vicinity of the Iraqi National Museum, between 9 and 16 April 2003. However, some circumstances support an argument that an occupation began prior to 16 April 2003. The Hussein regime had essentially ceased to function by 9 April 2003, although operations to eliminate resistance in Baghdad continued.²⁶⁹ However, American investigators found evidence that Iraqi combatants had prepared positions in and around the museum buildings.²⁷⁰ One source forcefully contends “intense fighting” took place around the museum from 8 April 2003 until the morning of 11 April 2003.²⁷¹ For their part, museum officials denied that combatants

²⁶² See 1907 Hague Convention, *supra* note 58, arts. 42, 43; 1954 Hague Convention, *supra* note 16, art. 5; 1970 UNESCO Convention, *supra* note 17, art. 13. The question of military occupation is likely not controlling in the case of Article 13 of the 1970 UNESCO Convention. 1970 UNESCO Convention, *supra* note 17, art. 13.

²⁶³ See 1907 Hague Convention, *supra* note 58, art. 42; *FM 27-10*, *supra* note 196, para. 355.

²⁶⁴ 1907 Hague Convention, *supra* note 58, art. 42.

²⁶⁵ *FM 27-10*, *supra* note 196, para. 355.

²⁶⁶ *Id.* para. 356.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ CORDESMAN, *supra* note 3, at 112-13.

²⁷⁰ See BOGDANOS WITH PATRICK, *supra* note 9, at 131-33; *Briefing*, *supra* note 6.

²⁷¹ BOGDANOS WITH PATRICK, *supra* note 9, at 204-06.

had occupied or fought from the museum.²⁷² American forces reportedly established a position a few hundred yards from the museum during the looting.²⁷³ “By April 10 and 11, coalition forces had effectively defeated organized resistance in Baghdad and could begin to deploy elements of their land forces toward Tikrit.”²⁷⁴ In any event, Baghdad had fallen by 12 April 2003, four days before American troops entered the museum compound. If organized resistance ended on 10 or 11 April 2003, and the Iraqi regime had effectively collapsed, was the United States in fact exercising authority over Baghdad at that point?

Paragraph 356 of *FM 27-10* indicates the occupier must have “taken measures” to exert authority, but it does not specify what “measures” are necessary.²⁷⁵ Are the presence of troops and checkpoints in the vicinity sufficient?²⁷⁶ In any event, *FM 27-10* does not constitute international law. Article 42 of the 1907 Hague Convention, which does represent international law, does not speak of a “taken measures to exert authority” requirement.²⁷⁷

2. Means to Prevent?

Assuming *arguendo* that the United States occupied at least the vicinity of the Baghdad museum at some point between 9 and 16 April 2003, did it have the means to secure the museum? Some accounts suggest the United States had insufficient forces to do so.²⁷⁸ Others contend that sending troops into the museum prior to 11 or 12 April 2003 would have done more harm than good.²⁷⁹ To be sure, the war was not over yet.²⁸⁰ However, a number of circumstances suggest the United

²⁷² See *id.* at 131-33.

²⁷³ See Lawler, *supra* note 9; Rubin & McCaffrey, *supra* note 8.

²⁷⁴ CORDESMAN, *supra* note 3, at 114.

²⁷⁵ FM 27-10, *supra* note 196, para. 356.

²⁷⁶ See Lawler, *supra* note 9 (noting reports that American forces permitted looters from the museum to pass checkpoints).

²⁷⁷ 1907 Hague Convention, *supra* note 58, art. 42.

²⁷⁸ See PURDUM, ET AL., *supra* note 2, at 214. A Marine tank officer recounted he did receive repeated requests to prevent looting, but he had neither enough troops nor orders to do so. *Id.*

²⁷⁹ BOGDANOS WITH PATRICK, *supra* note 9, at 201-11. Colonel Bogdanos contends Iraqi forces occupied the Museum until 11 April, and that an American attempt to secure the property before that point would have resulted in great damage to the Museum. *Id.*

²⁸⁰ See CORDESMAN, *supra* note 3, at 125.

States might have intervened prior to 16 April 2003 with relatively little impact on its other, ongoing operations.

First, as noted above, by 10 and 11 April organized resistance in Baghdad had effectively ceased and American forces could redeploy towards Tikrit.²⁸¹ It is not unreasonable to expect a small contingent of the forces to remain in Baghdad at or near the museum. Second, U.S. forces were reportedly in relatively close proximity to the museum while the looting was going on.²⁸² Third, the fact that the looting ended when the museum staff returned on 12 April suggests that a major show of force would not have been required.²⁸³ On 12 and 13 April, museum officials asked American officers to move forces to protect the museum.²⁸⁴ Thus, even if the museum compound had been occupied by Iraqi combatants until 11 April, American forces could have secured the compound with no opposition days before 16 April.²⁸⁵

V. Conclusion

Too much uncertainty surrounds the events in Baghdad between 9 and 16 April 2003 to definitively conclude whether U.S. forces complied with international law with respect to the Iraqi National Museum.

²⁸¹ *Id.* at 114.

²⁸² See Lawler, *supra* note 9; Rubin & McCaffrey, *supra* note 8. Afterwards, Mr. Donny George, research director for the museum, complained that a Marine officer refused to move a tank fifty or sixty yards closer to the museum to discourage looting, when asked by a museum employee. Rubin & McCaffrey, *supra* note 8; see PURDUM, ET AL., *supra* note 2, at 214.

²⁸³ See Briefing, *supra* note 6.

²⁸⁴ BOGDANOS WITH PATRICK, *supra* note 9, at 207, 210.

²⁸⁵ See *id.* at 211. Col Bogdanos argues that the occupation of the museum compound by Iraqi forces and fighting in the area until 11 April precluded any American effort to secure the compound prior to 12 April other than by a significant assault which likely would have caused much damage to the museum. See *id.* at 201-12.

[A]ny suggestion that U.S. forces could have done more than they did to secure the museum before the twelfth is based on wishful thinking rather than on any rational appreciation of military tactics, the reality of the conflict on the ground, the law of war, or the laws of physics.

Id. at 211. However, Col Bogdanos calls the post-12 April delay in securing the museum “inexcusable.” *Id.* “Although nothing was taken during this period, that does not make the indictment any less valid—because our forces had no way of knowing that looters wouldn’t come back. You can thank the museum staff for guarding the compound for those four days and not the U.S. military.” *Id.*

However, based on the foregoing discussion, it appears there is cause for concern. This is particularly true if one phrases the question as “was the United States required to secure the museum sooner than it did”—that is, before 16 April 2003—rather than “should the United States have acted in time to prevent the looting that actually occurred”—that is, sometime before 12 April 2003.²⁸⁶ The purpose here is not to suggest that strategy or tactics must be driven by the need to safeguard cultural property from looters. The “tail” of protection for cultural property does not wag the “dog” of military operations. Nor is the purpose to cast stones at any of the individuals involved from a vantage point distant in time and space from the events. Nonetheless, what happened to the Iraqi National Museum was unfortunate, and perhaps avoidable. This loss of cultural property representing the shared heritage of the world was the type of incident the drafters of the 1907 Hague Convention, the 1954 Hague Convention, and other provisions of international law hoped or even expected to prevent. Greater emphasis on this area of the law of armed conflict might prevent similar, tragic losses in future conflicts.

²⁸⁶ See *id.* at 211.