

Art Loss In Iraq

PROTECTION OF CULTURAL HERITAGE IN TIME OF WAR AND ITS AFTERMATH

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In April 2003, as the dust appeared to be settling on the **Battle** of Baghdad in the cradle of civilization, the world witnessed the horror of what appeared to be extensive looting of museums, libraries and other institutions in Iraq. At first, the decimation of the world's finest collection of ancient Mesopotamian artifacts and a wealth of later material appeared to be of an unprecedented scale. Fortunately, the extent of the looting turned out to be considerably less than originally thought. Much of the lost material had been safely hidden away before the fighting began, and some looted items were soon recovered. Even so, the occurrence of substantial plunder in the face of inadequate military safeguards and apparently organized plunder urges anyone concerned about protecting cultural heritage to review the applicable regime in time of war and in its aftermath.¹

The looting sparked controversy about the adequacy of international law to protect cultural property during and after military conflict, the extent of United States obligations, and compliance by the United States with those obligations. The media highlighted such technical legal issues as the extent to which United States obligations were limited by its status as a non-party to several pertinent treaties, particularly the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,² which has been ratified by over 100 states. These issues are properly considered in light of recent developments.

The Cold War's end introduced halcyon prospects of a new world order. Once again, as happened every twenty years or so in the last century, the global community foresaw a world ruled by right rather than might.³ International law and institutions would protect persons and property around the world.

This latest bubble of optimism soon burst in the heat of renewed warfare, ethnic cleansing, and collective terrorism. Iraq invaded Kuwait, removing some 20,000 artifacts and objets d'art, and, in the ensuing Gulf

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War, used cultural property to shield military objectives from attack. For many readers of this Journal, the destruction of Dubrovnik and the Mostar Bridge during the bloody implosion of Yugoslavia heightened skepticism about the capacity of the new world order to protect the cultural heritage.

A decade later, in a new millennium, the public has only limited confidence in the efficacy of either the *jus ad bellum* to avoid international terrorism and armed intervention or the *jus in bello*⁴ to protect persons and property.⁵ Simultaneous acts of mass terrorism and sabotage, the preventive use of force, and selective avoidance of the Security Council by its Permanent Members pose new challenges. Skepticism about the efficacy of the laws of war should not obscure two important facts, however: the unprecedented growth of international law and institutions during the Cold War, and the impressive record of compliance with the *jus in bello* by coalition forces in the thick of battle during the Iraqi campaign. Generally, the problems in protecting cultural heritage do not reflect an inadequacy of the law of war itself, but rather a lack of civic responsibility and inadequate commitment and training of military personnel, particularly in paramilitary operations and in time of civil war.⁶

Three sets of treaties⁷ form the framework for protecting cultural heritage in time of war and its aftermath.⁸ These are the Hague Conventions of 1899 and 1907; the Geneva Convention of 1949 and its two Protocols; and the Hague Convention of 1954 and its two Protocols. Together, they respond to four threats to cultural heritage: deliberate attack, incidental damage, pillage, and outright theft.

THE HAGUE CONVENTIONS OF 1899 AND 1907

The Hague Conventions of 1899⁹ and 1907¹⁰ with Respect to the Laws and Customs of War on Land, together with Annexed Regulations, generally prohibit pillage and destruction or seizure of enemy property unless imperatively demanded by the necessity of war. Private property cannot be confiscated. Attack or bombardment of undefended buildings, including cultural targets, is also prohibited. Three provisions of the two Conventions deal specifically with the protection of cultural property. Signatory states must take steps to spare buildings dedicated to art, science, and religion from attack, and, with respect to their own cultural objects, give notice to the enemy by marking such objects. An occupying power must act responsibly in administering all public institutions, including museums. All seizure or destruction with an intention to damage institutions and historic monuments of art, religion, science and charity, or works of art or science is forbidden and subject to legal proceedings. The Convention of 1907 Concerning Bombardment by Naval Forces in Time of War (Hague Convention IX) requires that all necessary precautions be taken to spare historic monuments and edifices devoted to worship, art, science, and charity.

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Although never formally adopted, the Hague Rules of Air Warfare reiterate that historic monuments and cultural institutions be spared from aerial bombing during hostilities.

Unfortunately, the Hague Conventions of 1899 and 1907 failed to prevent widespread damage and destruction to cultural property during World War I, including the bombing of the Rheims Cathedral and the burning of the library at Louvain. There were no prosecutions for destruction of cultural property. Similarly, World War II witnessed the plunder by the Nazis of cultural property throughout Europe. In the ensuing Nuremberg Trials, however, the prosecutions of major Nazi war criminals firmly established confiscation, destruction, and damage to cultural property as a war crime subject to prosecution and punishment, and provided the first true international enforcement of cultural property law. In particular, Alfred Rosenberg, Director of the notorious *Einsatzstab Rosenberg*, was found guilty of war crimes based on his responsibility for the plunder of art treasures throughout Europe.

In an attempt to control looted articles after World War II, the United States, Great Britain, and France signed a statement of policy on control of looted articles that presaged the international response to the looting in Iraq. The three nations agreed to take measures:

- to seek out looted articles and prevent their exportation;
- to encourage liberated states to provide lists of looted articles not yet recovered;
- to disseminate the lists to art dealers and museums; and
- to alert the general public to encourage the return of looted articles to their rightful owners.

THE GENEVA CONVENTION IV OF 1949 AND PROTOCOL I

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War,¹¹ one of four agreements that still define *in bello*, prohibits destruction of personal property, whether publicly or privately owned. In itself, the 1949 Convention therefore does little to strengthen the protective regime. But a 1977 protocol, that is, amendment to it (Protocol I to the Geneva Convention), prohibits acts of hostility against historic monuments, works of art, or places of worship that constitute the cultural or spiritual heritage of people and the use of such property for military efforts and prohibits direct reprisals against such property. Further, Geneva Convention IV and its Protocol I make it a "grave breach" to destroy clearly recognized and specially protected historic monuments, works of art, or places of worship. As a "grave breach" the offense constitutes a war crime, and thus an international crime subject to universal jurisdiction.

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THE 1954 HAGUE CONVENTION

Increasing international pressure for an agreement that would specifically address the protection of cultural property during armed conflict resulted in negotiations that led to the 1954 Hague Convention. It attempts to broaden the scope of the 1899 and 1907 Hague Conventions by taking into account the events of World Wars I and II, by premising the law in the "cultural heritage of mankind," and by incorporating certain provisions of Geneva Convention IV to create a truly effective and comprehensive agreement on the protection of cultural property during hostilities, whether international or non-international (civil war). The Convention covers both movable and immovable property, which may bear a distinctive emblem. Parties must undertake preparations in time of peace against the foreseeable effects of armed conflict and prohibit:

any use of the cultural property in a manner that will likely expose it to destruction or damage in the event of an armed conflict;

the commission of any acts of hostility or reprisal against cultural property except for reasons of military necessity; and

any form of theft, pillage, or misappropriation of cultural property.

To help enforce these provisions, parties agree to take steps to prosecute and impose sanctions upon offenders. The Convention also requires occupying states to help in safeguarding and preserving cultural property and provides for return of property seized during a conflict.

In addition, the 1954 Hague Convention outlines procedures for the special protection of specific items of cultural property. To qualify for special protection, cultural property must be either immovable property of "very great importance" or a refuge to shelter movable property, it must be situated at an "adequate distance" from an industrial center or important military objective, and it may not be used for a military purpose, such as stationing military personnel or storing weapons. Once cultural property is placed under special protection, state parties must ensure the immunity of the property by refraining from directing any hostilities against it. Special protection is ensured through the use of distinctive markings and the property's subsequent entry into an international registry at UNESCO. To date, however, only a handful of states have registered property for special protection, and such property is limited to just a few works.

Protocol I¹² to the 1954 Hague Convention imposes additional obligations on a state party that is occupying the territory of another state. It requires an occupying state to: (1) prevent the export of cultural property from the occupied territory; (2) seize all cultural property imported into its territory from any

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occupied territory; (3) return the seized property to the formerly occupied territory at the close of hostilities; and (4) pay an indemnity to the holders in good faith of any cultural property which has to be returned.

Perhaps the most successful implementation of the 1954 Hague Convention occurred during the Gulf War (1991) in which many members of the coalition forces were either parties to the convention or, in the instance of non-parties such as the U.S., accepted its rules, most notably by creating a "no-fire target list" of places where cultural property was known to exist.¹³ The 1954 Hague Convention was not, however, effective in Yugoslavia, as the Dubrovnik and Mostar bombings illustrate. Such wanton attacks on cultural property prompted efforts to amend the 1954 Hague Convention to prevent similar destruction and insure greater individual and state accountability.

These efforts culminated in 1999 on completion of a second protocol to the 1954 Hague Convention. Protocol II contains a greater number of penal elements than any previous cultural property instrument, with specific articles on criminal jurisdiction, a duty to prosecute and extradite, and mutual legal assistance. In addition, going beyond the idea of special protection announced in the underlying 1954 Hague Convention, Protocol II includes a provision to define property under enhanced protection. This narrowing of the scope of protection represented frustration with the failure of the registration regime under the 1954 Convention to attract much interest. To qualify for enhanced protection, cultural property must meet three conditions: (1) it is of the greatest importance to humanity, such as designated World Heritage sites; (2) it is protected by adequate domestic legal and administrative measures, including existing UNESCO protections, recognizing its exceptional cultural and historic value; and (3) it is not used for military purposes to shield military sites, and a declaration has been made by the state that has control over the property that it will not be so used.

Protocol II¹⁴ to the 1954 Hague Convention expands upon the provisions in the 1954 Hague Convention for preparatory actions in time of peace to safeguard cultural property against the "foreseeable effects" of an armed conflict. States parties must therefore (1) prepare a national inventory; (2) plan emergency measures for protection against fire and structural collapse; (3) remove all movable cultural property from areas that are likely to be damaged during military action or prepare adequate in situ protections of such property; and (4) designate competent authorities responsible for the safeguarding of cultural property. The instrument also includes precautionary measures that must be taken by states parties to prepare for and conduct military operations. All feasible measures must be taken to verify that the objects likely to be used for military purposes or likely to be attacked are not protected cultural property. Also, all feasible precautions must be made in the choice of targets and methods of attack with a view to protect and avoid

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losses and damage to cultural property. Furthermore, a state must refrain from attack when either the objective is the destruction of protected cultural property or the attack might create incidental damage to cultural property that is excessive in relation to the anticipated military advantage. The underlying principle, again, is one of military necessity. Protocol II to the 1954 Hague Convention also establishes individual criminal responsibility for violations. A state party therefore must either prosecute or extradite any person found in its territory who is deemed to have committed serious violations of the Hague/Protocol II rules. In addition, the instrument contains provisions for mutual legal assistance and the establishment of a committee to help implement the protocol and protect the specifically identified cultural property.

United States treaty obligations to protect cultural heritage during and after conflict are broad but lacking in detail. The U.S. ratified and therefore is a party to the general provisions of the Hague Conventions of 1899 and 1907 and the Geneva Convention IV of 1949, but is not bound by the two Protocols to the 1949 Geneva Convention or to the 1954 Hague Convention or either of its Protocols. The explanation for this aloofness from detailed rules for protecting cultural heritage lies in Cold War anxieties, particularly about the implications of expected nuclear conflict, and, more recently, bureaucratic delays in ratifying the instruments.¹⁵ Even though the U.S. is not yet a party to the 1954 Convention, however, it has taken steps to comply with the Convention's conduct-regulating provisions under general principles of international law and custom. These steps have included signing the Convention, educating military personnel in it, and conforming military operations to its requirements.

A concluding summary of United States obligations in the aftermath of its intervention in Iraq will illustrate the significance of both binding and nonbinding rules of warfare. The Hague Convention of 1907 requires military authorities to restore and ensure public order, including adequate measures to enforce a specific prohibition of pillage. The 1954 Hague Convention on Protection of Cultural Property in the Event of Armed Conflict and its two Protocols impose additional obligations to safeguard and preserve property under military control, to prevent exportation of looted material, and to facilitate its return to countries of origin. Although the U.S. has not ratified and is therefore not fully bound by the 1954 Convention, it is nevertheless obligated as a signatory to act responsibly so as not to defeat the treaty's object and purpose of protecting cultural material.¹⁶ It is arguable, therefore, that if the U.S. acted irresponsibly in failing to take necessary steps to avoid the looting in Iraq, as many allege, it thereby breached its essential obligation, even as just a signatory to the 1954 Convention, to protect cultural property. Moreover, the 1970 UNESCO Convention on illegal trafficking in cultural property,¹⁷ to which the United States is a party, prohibits importation and acquisition of stolen material. This treaty obligation is a reminder that the protection of cultural heritage in the event of war and its aftermath depends on implementation in time of peace, especially efforts to increase public awareness and ensure education of military personnel.¹⁸

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¹ In the end, of course, public understanding of the protective regime, and appreciation of its significance, are far more important than professional wrangling about the details. Neither a sense of common history or legal necessity is served by "the dry deadness of documents; the boring obscurity of academic vocabulary; the unaccessible abstraction of disembodied ideas removed from the rich natural and cultural landscapes that are their true homes." William Cronon, "Why the Past Matters," *Wis. Mag. Hist.*, Autumn 2000, pp. 2, 11. Public support nourishes the living law. Forgetting the law endangers civilization just as forgetting the past endangers the civic culture.

² Convention for the Protection of Cultural Property in the Event of Armed Conflict, *signed* May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

³ The first decade of the twentieth century witnessed the international codification of the modern laws of war and the establishment of the Permanent Court of International Arbitration. In the 1920s the League of Nations opened its doors as the first worldwide mechanism for peaceful settlement of disputes and the Kellogg-Briand Pact boldly outlawed all recourse to war. The 1940s introduced the United Nations and the Geneva Conventions of humanitarian law in time of armed conflict. The 1960s inaugurated major United Nations peacekeeping operations, and the late 1980s, the end of the Cold War.

⁴ *jus ad bellum* is the branch of law that defines the legitimate reasons when a state may engage in war, while *jus in bello* refers to the laws that come into effect once a war has begun.

⁵ On the general problem of looting in time of war or its aftermath, see Neil Brodie, "Spoils of War," *Archaeology*, July/August 2003, p. 16. Of course, destruction of cultural heritage is not limited to armed conflict, as the Taliban's obliteration of the Buddhist statues near Bamiyan, Afghanistan attests, but such acts ordinarily lie within the reserved domain of domestic jurisdiction and thus beyond the competence of international law.

⁶ "Adequate law of war protection for cultural property exists." Hays Parks (Special Assistant to the Judge Advocate General of the Army for Law of War Matters), "Protection of Cultural Property from the Effects of War," in *The Law of Cultural Property and Natural Heritage: Protection, Transfer and Access*, 3-1, 3-26 (Marilyn Phelan ed. 1998).

⁷ Under the United States Constitution, the Senate must give its advice and consent to treaties by a two-thirds vote before the President may give notice of ratification on behalf of the United States. U.S. Const. art II, § 2. *See generally* James A.R. Nafziger, "Treaties," in *The Oxford Companion to American Law*, pp. 809-11 (Kermit L. Hall ed. 2002). Most agreements binding on the United States, however, are executive agreements, which by constitutional practice do not require the Senate's advice and consent. *See* James A.R. Nafziger, "Executive Agreements," *id.* pp. 282-83

⁸ This summary of the international legal framework draws on more extensive discussion in M. Cherif Bassiouni & James A.R. Nafziger, "Protection of Cultural Property," *1 International Criminal Law*, pp. 949, 950-62 (with full citations of authority). *See also*, Parks, *supra* note 6.

⁹ Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403, 26 *Martens Nouveau Recueil* (ser. 2) 949, reprinted in 1 *Am. Journal Int'l Law* 129 (1907) [hereinafter 1899 Hague Convention II].

¹⁰ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (1907), T.S. No. 539, 3 *Martens Nouveau Recueil* (ser. 3) 461, reprinted in 2 *Am. Journal Int'l Law* 90 (1908) [hereinafter 1907 Hague Convention IV].

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¹¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), *signed* August 12, 1949, 6 U.S.T. 3516, T.S. No. 3365, 75 U.N.T.S. 287 (effective Feb. 2, 1956) [hereinafter Geneva Convention IV].

¹² Protocol for the Protection of Cultural Property in the Event of Armed Conflict, *signed* May 1954, 249 U.N.T.S. 358 [hereinafter Protocol I to the 1954 Hague Convention].

¹³ But see allegations of limited military damage in Richard L. Zettler, "Iraq's Beleaguered Heritage," *Archaeology*, May/June 1991, p. 38.

¹⁴ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, opened for signature Mar. 26 1999, see: www.unesco.org [hereinafter Protocol II to the 1954 Hague Convention].

¹⁵ Since 1999, when President Clinton submitted the Hague Convention and its Protocols to the Senate, the two instruments have awaited that body's Advice and Consent.

¹⁶ A rule of international custom to this effect is codified in Article 18 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, *reprinted* in 8 I.L.M. 679 (1969). Although the United States is not a party to the Vienna Convention, it has accepted the articulated burden of international custom.

¹⁷ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted Nov. 14, 1970, 823 U.N.T.S. 231, *reprinted* in 10 I.L.M. 289 (1971).

¹⁸ Parks, *supra* note 6, pp. 3-25.