

The Case for Changes in International Law in the Aftermath  
of the 2003 Gulf War\*  
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Protecting Cultural Heritage: International Law After the War in Iraq  
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The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict was written in response to the large-scale intentional looting and destruction of cultural property perpetrated by Nazi Germany during World War II. The Convention lays out the basic principles for protecting cultural property by requiring that States Parties safeguard their own cultural sites, monuments and movable objects in advance of war (Article 3), avoid the targeting of such sites during conflict (Article 4), and refrain from interfering with the cultural heritage of occupied territory (Article 5). The First Protocol, written at the same time, prohibits the removal of cultural objects from occupied territory and requires the restitution of any objects that have been removed at the close of hostilities. Following the Balkan Wars of the 1990s, the Convention was updated in its Second Protocol of 1999. Despite this updating, the 2003 Gulf War and subsequent occupation of Iraq have demonstrated additional shortcomings of international law that need to be addressed if the damage caused to the cultural heritage of Iraq is not to be repeated in future international conflicts.<sup>1</sup>

The cultural heritage of Iraq has suffered in different ways since the beginning of hostilities in March of 2003.<sup>2</sup> The looting of the Iraq Museum in Baghdad and the

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<sup>1</sup> This subject is treated in greater detail in my forthcoming article, *From Bamiyan to Baghdad: The Conduct of Warfare and the Preservation of Cultural Heritage at the Beginning of the Twenty-First Century*, GEORGETOWN JOURNAL OF INTERNATIONAL LAW (2006) (forthcoming).

<sup>2</sup> For an overview of the history of Iraq and of the cultural significance of Mesopotamia, see BENJAMIN A. FOSTER, KAREN POLINGER FOSTER & PATTY GERSTENBLITH, *IRAQ BEYOND THE HEADLINES: HISTORY,*

destruction and looting of cultural repositories, such as libraries and archives, received widespread media attention. Other examples of cultural loss have received less attention. These include the looting of archaeological sites, particularly in southern Iraq, which destroys archaeological context and our ability to reconstruct and understand the past. The construction of military installations at historical sites, including a military base at the site of Babylon<sup>3</sup> and a berm encircling Samarra,<sup>4</sup> have caused damage but need more complete assessment to determine the extent. The use of the spiral minaret (or Malwiya) at the ninth century al-Mutawakkil mosque in Samarra as a sniper position<sup>5</sup> exposes a religious and historic monument to danger, but, so far as we know, it has not been damaged to any significant degree (and the use may be excused under the military necessity waiver). Finally, reconstruction projects, to be carried out largely with United States funding, have the potential for causing damage to historic and cultural sites throughout Iraq.

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ARCHAEOLOGY, AND WAR (2005), and THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD: THE LOST LEGACY OF ANCIENT MESOPOTAMIA (Milbry Polk and Angela M.H. Schuster, eds. 2005).

<sup>3</sup> Presentation of John Russell, Former Senior Advisor to the Iraqi Ministry of Culture, Annual Meeting of the Archaeological Institute of America, January 8, 2005; John E. Curtis, Report on Meeting at Babylon, 11<sup>th</sup> – 13<sup>th</sup> December 2004, available on-line at:

[http://www.thebritishmuseum.ac.uk/newsroom/current2005/Babylon\\_Report04.doc](http://www.thebritishmuseum.ac.uk/newsroom/current2005/Babylon_Report04.doc); Zainab Bahrani, *The Fall of Babylon*, in THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD: THE LOST LEGACY OF ANCIENT MESOPOTAMIA 214, 214-16 (Milbry Polk and Angela M.H. Schuster, eds. 2005).

<sup>4</sup> Lucian Harris, *US Security Measures Threaten Samarra's Heritage*, THE ART NEWSPAPER, Nov. 10, 2005, available at: <http://www.theartnewspaper.com/article01.asp?id=69>.

<sup>5</sup> Lucian Harris, *US snipers on Samarra's spiral minaret*, THE ART NEWSPAPER, February 25, 2005, available at: [www.theartnewspaper.com/news/article.asp?idart=11727](http://www.theartnewspaper.com/news/article.asp?idart=11727); Josh White, *For U.S. Troops a Frustrating and Fulfilling Mission*, WASH. POST, Jan. 2, 2005, at A12. It was recently reported U.S. forces have returned to the minaret, Aqeel Hussein and Colin Freeman, *U.S. snipers make minaret a rebel target*, TELEGRAPH, Jan. 22, 2006, available at: <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/01/22/wirq22.xml&sSheet=/news/2006/01/22/ixworld.html>.

Some of these incidents violate provisions of the 1954 Hague Convention.<sup>6</sup> In some cases, it is not possible to determine whether there has been a violation because sufficient information is not available. In still other cases, to the extent that an activity was carried out either by U.S. forces or with U.S. funding, the activity likely constitutes a violation of U.S. law.<sup>7</sup> However, the goal of this paper is not to enumerate those activities or omissions that violated the Hague Convention or customary international law. Rather, the goal of this paper is to address those actions that did not violate the Hague Convention or customary international law and to propose changes that are necessary to close the lacunae in existing international law.

The most critical change that needs to occur is the United States' ratification of the Hague Convention and at least the First Protocol. The United States signed the Convention soon after its writing and, after the U.S. military withdrew its objections, President Clinton transmitted the Convention and First Protocol to the Senate for ratification in 1999. No further steps toward ratification have been taken. The United States military already follows numerous of the principles of the 1954 Hague Convention under the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex (of which the United States is a party) and as a matter of customary

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<sup>6</sup> While the United States is not a party to the 1954 Hague Convention, it claims to follow the Convention's principles as a matter of customary international law, discussed below, and is a party to the 1907 Hague Convention. Many of the Coalition allies are parties to the 1954 Hague Convention, including Italy, Spain and Poland (as is Iraq), and so are bound to its full terms.

<sup>7</sup> The National Historic Preservation Act, 16 U.S.C. §§ 470-470w-6, requires the avoidance or mitigation of any harmful effects caused by a federal undertaking to a World Heritage site or to a historic site that is listed on another country's equivalent of the National Register, 16 U.S.C. § 470a-2. A federal undertaking includes any project "funded in whole or in part under the direct or indirect jurisdiction of a Federal agency," 16 U.S.C. § 470w(7).

international law.<sup>8</sup> Nonetheless, ratification of the Convention would clarify the obligations of the United States military, would encourage marking of cultural sites, and would give added impetus to the training of U.S. military personnel in their obligations to protect cultural heritage. In particular, it would encourage better preparation during war planning and gathering of information as to the locations of cultural sites in a war zone. Ratification of the Convention would allow these concerns to be incorporated at an earlier stage of war planning with the greater awareness that the Convention would bring to war planners. This would avoid the last-minute efforts to obtain the necessary information and minimize the risk that cultural sites might be accidentally targeted. With the announcement in May 2004 that the United Kingdom will ratify the Convention and both Protocols and with its progress toward that goal,<sup>9</sup> the United States will soon be the only major military power not to be a party to the Convention.

The experiences of the 2003 Gulf War demonstrate the urgency for ratification of the First Protocol, which requires States Parties to prevent the export of cultural objects from occupied territory, take into custody any cultural objects imported either directly or indirectly from occupied territory, and return at the end of hostilities any cultural objects illegally removed from occupied territory. There may be a perception that because the United States is a party to the 1970 UNESCO Convention on the Means of Prohibiting

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<sup>8</sup> See, e.g., Department of Defense, January 1993 Report of Department of Defense, United States of America, to Congress on International Policies and procedures regarding the Protection of Natural and Cultural Resources during Times of War.

<sup>9</sup> See

[http://www.culture.gov.uk/global/consultations/2005+current+consultations/hague\\_convention.htm?properties=2005+current+consultations%2C%2Fglobal%2Fconsultations%2Fdefault%2C&month=](http://www.culture.gov.uk/global/consultations/2005+current+consultations/hague_convention.htm?properties=2005+current+consultations%2C%2Fglobal%2Fconsultations%2Fdefault%2C&month=). For the Consultation Paper released in September 2005, see Department of Culture, Media, and Sport, Consultation Paper on: The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols of 1954 and 1999 (September 2005) (“Consultation Paper”), *available at*: <http://www.culture.gov.uk/NR/rdonlyres/C234A6B1-3178-4350-8C72-C354F24D1CF9/0/HagueConvention.pdf>.

and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property that there is no need for the United States to ratify the First Protocol. This perception is not, however, correct in large part because of the United States' minimalist implementation of the 1970 Convention, which is limited to Articles 7(b)(i) and 9.<sup>10</sup>

Our recent and current experiences in Iraq demonstrate that these provisions are entirely inadequate to prevent the import of looted archaeological materials into the United States during time of war or occupation. While the looting of the Iraq Museum in Baghdad received extensive media coverage, the larger issue is the extensive looting and destruction of archaeological sites. This has far more detrimental consequences for our knowledge and understanding of the past because the sites, the objects and their associated contexts have never been documented. While it is difficult to quantify the extent of this looting, the World Monuments Fund took the unprecedented step of placing the entire country of Iraq on its 2006 list of 100 Most Endangered Sites.

Under normal circumstances, there would have been no legal mechanism to prohibit the import of such looted objects into the United States. The sanctions that had been in place since August 1990 prohibiting the import of goods into the United States from Iraq provided a unique circumstance by which the import of illegally removed cultural materials happened to have been prohibited before the war began.<sup>11</sup> Congress recognized the emergency nature of the situation and the need for longer-term import

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<sup>10</sup> The implementing legislation is the Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C. §§ 2601-13. Article 7(b) of the Convention is implemented in 19 U.S.C. § 2607 and Article 9 is implemented through 19 U.S.C. §§ 2602-03.

<sup>11</sup> The President imposed sanctions under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-07, pursuant to Executive Orders 12722 and 12744. These sanctions were continued following the 2003 War as applied to certain goods, including illegally removed cultural materials, 31 CFR 575.533 (b)(4), and were renewed most recently on May 20, 2005, when President Bush issued Executive Order 13350, 70 Fed. Reg. 29435, 2005 WL 1243182. Unlike import restrictions imposed under the CPIA, the sanctions carry the potential for criminal punishment.

prohibition by enacting special legislation that allows the President to impose import restrictions under the CPIA in the case of Iraq under a significantly simplified process.<sup>12</sup> In case of any future war, it is extremely unlikely that the unique circumstances of the pre-existing sanctions against Iraq will be in place. Ratification of the First Protocol would prevent the United States, the largest market for antiquities in the world, from becoming a haven for antiquities looted during time of war and occupation.

The ongoing conflict in Iraq illustrates shortcomings of existing international law. Although there may be several aspects of the Hague Convention that need updating, I will focus on two: the need to impose an obligation to protect cultural sites, monuments and repositories from the actions of local populations and the need for the adoption of cultural resource management principles into international law.

The episode that received the most media attention was the looting in April 2003 of the Iraq Museum and other cultural institutions, particularly the libraries and archives in Baghdad and other cities. While Article 4 of the Hague Convention clearly imposes an obligation on States to prevent looting and vandalism of cultural sites, monuments and repositories, this obligation is most likely to be interpreted as a constraint on the actions of that State's own military. In light of the nature of World War II and earlier conflicts, the drafters of the Hague Convention probably did not anticipate a situation in which the threat to cultural heritage would come from the local population, rather than from the attacking force.

The current situation demonstrates that international law should impose an obligation on States to restrain the local population from acts of vandalism, looting and

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<sup>12</sup> Miscellaneous Trade and Technical Corrections Act of 2004, 108 P.L. 429 (2004), §§ 3001-3003. This legislation fulfills, at least in part, the United States' obligations under U.N. Security Council Resolution 1483.

misappropriation of cultural property. Three provisions should be added to accomplish this goal. The first would clarify that a State Party should undertake efforts to the extent feasible under the conditions of active conflict to protect cultural sites and monuments from threats of pillage, vandalism and looting, regardless of who the actors are. The second provision would apply to situations that are neither active hostilities nor formal occupations. In the time period after the United States and Coalition authorities gained control of Baghdad but before the occupation was formally recognized by the United Nations on May 22, 2003, this obligation should have been imposed on Coalition forces under Article 4 of the Convention. Finally, this obligation should be explicitly extended to occupations and incorporated in Article 5. As with Article 4, Article 5 of the Convention needs to clarify that the occupying power has an obligation to prevent looting and vandalism of cultural sites and institutions not just by its own forces but also by the local population.

One question that arises is whether this obligation should be qualified. Where a nation is attempting to maintain control and provide security but is unable to do so, it is difficult to conclude that it has an absolute obligation. The obligation should therefore be qualified by a requirement to do so “so far as is practicable”. Even if the obligation is qualified, an explicit provision in the Hague Convention imposing this responsibility would still establish the international standard of expected conduct, and this should encourage nations in future conflicts to prepare adequately for this larger responsibility.

One of the most effective methods to accomplish this is to encourage the major military powers to maintain within their active military a corps that is dedicated to preservation of cultural heritage. Such a group was established by the United States and

Britain during World War II, known as the Monuments, Fine Arts and Archives officer corps. Composed of art historians, archaeologists and museum professionals, this group was responsible for protecting major heritage sites and securing movable cultural objects as soon as the Allied forces had advanced into a particular area. While during the Iraq war the reserves and civil affairs had individuals with comparable skills who were equally dedicated to cultural heritage preservation, they were often not situated in the regions where they could be effective, did not form cohesive units and did not have the proper lines of authority and commands to permit them to carry out activities aimed toward preservation. It would be feasible for nations to fulfill their new responsibilities to preserve cultural heritage through maintenance of such groups within their military and they would complement the work of UNESCO and other inter-governmental and non-governmental international organizations. However, a unit within the military of the combatant nations will have greater access to war zones and occupied territory than will international organizations and will therefore likely be in the position of first responder.

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

of an occupying power.

The provisions of the Convention and even the Second Protocol that deal with this situation are frustratingly meager. The Convention seems premised on the notion that the occupying power should do nothing to interfere with the cultural heritage of the occupied territory. Article 5, paragraph 2, requires that the Occupying Power take “the most necessary measures of preservation” to protect cultural property damaged by military operations and does not seem to envision the need to protect cultural property from other types of damage. Article 9 of the Second Protocol permits an Occupying Power to undertake archaeological excavation only “where this is strictly required to safeguard, record or preserve cultural property”. This provision arguably permits the carrying out of survey and salvage work by an occupying power, but it does not require it. Similarly, international norms and customary international law establish general principles for the protection of cultural property during occupation and require cooperation to the fullest extent feasible with the local national authorities in doing so. However, none of these instruments imposes a direct obligation on an occupying power to undertake survey and salvage work or other actions in an attempt to prevent or mitigate damage to cultural resources during construction projects.

The first step is that the Convention should require that a cultural heritage damage assessment be facilitated and carried out under the auspices of either the national authorities or an international organization, such as UNESCO, as soon as feasible following the cessation of hostilities. The most needed change in Article 5 is paragraph 2, which permits an occupying power to preserve cultural property only if it was damaged during military operations. First, the occupying power should be permitted to preserve

cultural property without regard to how or why it was damaged. Second, not only should the occupying power be permitted to take steps to preserve and stabilize cultural sites and monuments, but the occupying power should be required to do so when this is necessary for the purpose of preservation. The caveat that the competent national authorities should carry out this preservation work or the occupying power should do this in consultation with the competent national authority is important to maintain.

UNESCO has recognized the importance of these principles in its Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works of 1968. In many countries, including both Iraq and the United States, cultural resource management provisions of domestic law require that construction projects not damage or destroy archaeological sites and historic properties. These principles are routinely incorporated as part of federal construction projects within the United States (including military construction) and apply to U.S. undertakings in other countries under certain circumstances through the National Historic Preservation Act. Cultural resource management principles require that any area to be affected by a project be surveyed and then efforts taken to mitigate damage to cultural resources located in the affected area. Depending on the type of cultural heritage resource at risk, mitigation may include relocating a project or carrying out salvage excavation before the project can proceed.

Specific standards of cultural heritage resource management could be embodied in an Annex to the Convention. The Annex would establish international norms and would likely be widely recognized as with the Annex to the 2001 UNESCO Convention on the Underwater Cultural Heritage. These should be relatively uncontroversial

provisions. The Annex would attract many ratifying nations and would quickly be recognized as part of customary international law. Such an accepted norm of international law would avert difficulties when an occupying power is undertaking large-scale construction projects and when the relevant domestic law is uncertain. Widespread acceptance would do much to assure protection for the world's cultural heritage if comparable situations were to arise in the future.

The 1954 Hague Convention has done much to establish international norms for the protection of the tangible cultural heritage in times of armed conflict. However, with its status approaching universal acceptance and changes in the nature of warfare and occupation, it needs significant updating to incorporate cultural heritage resource management principles, unknown at the time the Convention was originally written, and to plan for longer-term occupations of territory, another situation that was likely unanticipated in the wake of World War II. Expansions of the obligations of occupying powers in this respect and in the duty to provide affirmative protection for cultural sites, monuments and repositories are a new reality that needs to be explicitly incorporated into international law.