
Note

Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law

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I. INTRODUCTION

As American troops entered Baghdad as a liberating force on April 9, 2003, a wave of looting engulfed the city. Iraqi looters ransacked government buildings, stores, churches, and private homes stealing anything they could carry and defacing symbols of the defunct Hussein regime. American authorities had not anticipated the magnitude or the fervor of the civil disorder. But the looting over the course of two to three days at Iraq's National Museum, home to the world's greatest collection of Babylonian, Sumerian, and Assyrian antiquities, stood apart from the rest of the pillaging and vandalism in Baghdad. Months before, prominent members of the international archaeological community contacted the U.S. Department of Defense and U.S. State Department with concerns about the Museum.¹ Nonetheless, as the threat materialized, American forces largely stood idle as a rampaging mob ravaged the collection. Initial reports noted that 170,000 objects had been taken including some of the world's most priceless ancient treasures.² In the following weeks, the anger of Iraqis, archaeologists, and cultural aesthetes bubbled over in a series of accusatory and condemnatory newspaper reports and editorials.³

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1. See John Noble Wilford, *War in Iraq Would Halt All Digs in Region*, N.Y. TIMES, Feb. 25, 2003, at E1.

2. See John F. Burns, *Pillagers Strip Iraqi Museum of Its Treasure*, N.Y. TIMES, Apr. 13, 2003, at A1.

3. See generally Kenneth Baker, *At a Loss Over Theft of Artifacts: Calamity Should Have Been*

Although the Museum's losses were far less than originally feared, (amounting to the loss of only about thirty-three major pieces and an additional 8,000-18,000 artifacts),⁴ the incident focused international attention on an important issue of international law, namely the protections afforded cultural property during armed conflicts. The looting of the Museum and several other important cultural sites in Baghdad and throughout Iraq has raised important political, moral, and legal questions: Does the United States have an obligation to protect the greatest cultural assets of the Iraqi people? Does American military policy provide adequate guidance to ensure that the cultural property of the Iraqi people will be preserved? Finally, at what point is the responsibility to protect cultural property waived by countervailing principles of military necessity?

Any discussion of the protection the United States should afford cultural property must begin with a definition—an explanation of what property the international community recognizes as deserving of special protections. Although the meaning of cultural property has shifted over time,⁵ for purposes of this paper, I will adopt the broad definition of cultural property provided in the Hague Convention of 1954.⁶ The 1954 Hague Convention defines cultural property as “movable or immovable property of great importance to the cultural heritage of every people.”⁷ More specifically, it includes protections for archaeological sites, archives, museums, large libraries, historic city centers, religious or secular monuments, individual works of art, books, scientific collections, and “other objects of artistic, historical or archaeological interest.”⁸

The United States has joined numerous international treaties that provide limited protections for cultural property including: The Hague Conventions of 1899 and 1907,⁹ The Roerich Pact,¹⁰ the Fourth Geneva

Foreseen, S.F. CHRON., Apr. 17, 2003, at E1; Dexter Filkins, *As War Ebbs, History, Hope and Fury: An Art Center Left in Ashes*, N.Y. TIMES, Apr. 17, 2003, at A1; Paul Richard, *Bush Panel Members Quit Over Looting: Cultural Advisers Say U.S. Military Could Have Prevented Museum Losses*, WASH. POST, Apr. 17, 2003, at C1.

4. See COLONEL MATTHEW BOGDANOS, UNITED STATES MARINE CORPS, IRAQ MUSEUM INVESTIGATION 22APR-8SEP03, 7-12, 17 (2003), available at <http://www.defenselink.mil/news/Sep2003/d20030922fr.pdf> (last visited Feb. 16, 2002); David Johnston, *Picking Up the Stolen Pieces of Iraq's Cultural Heritage*, N.Y. TIMES, Feb. 14, 2005, at A10; Alan Riding, *Missing Antiquities: Loss Estimates are Cut on Iraqi Artifacts*, N.Y. TIMES, May 1, 2003, at A1.

5. See *infra* Part II.

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

7. *Id.* art. 1, at 242.

8. *Id.* The United States has not ratified the Hague Convention of 1954 (and is thus not bound by this conceptualization of cultural property), but the U.S. military has largely recognized the categories of property protected under the treaty. See JUDGE ADVOCATE GENERAL, UNITED STATES ARMY, OPERATIONAL LAW HANDBOOK 23 (2004), available at www.jagcnet.army.mil (last visited Mar. 1, 2005) [hereinafter OPERATIONAL LAW HANDBOOK].

9. Hague Convention II with Respect to the Laws and Customs of War on Land: Regulations Concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 2 Martens Nouveau Recueil (2d) 949 (entered into force Sept. 4, 1900); Hague Convention IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631

Convention,¹¹ the UNESCO Convention of 1970,¹² the World Heritage Convention,¹³ and the UNIDROIT Convention.¹⁴ In addition to these obligations, international customary laws of warfare also bind the United States. While customary laws of war are often ill defined, they generally include many of the principles from Geneva Protocols I and II¹⁵ and other international conventions and treaties ratified by the United States. Finally, the United States has its own policy on the rules of war and cultural property. The Department of Defense has developed a Law of War (LOW), which incorporates the treaty obligations of the United States and creates a set of binding, wartime obligations for U.S. service members.¹⁶ Each branch of the military has issued manuals outlining the responsibilities of troops and commanders under the Law of War (or Law of Armed Conflict). The manuals developed by the different military branches, however, are policy guides rather than strict military protocols.¹⁷ The actual protection afforded cultural property during a conflict may be broadened or narrowed to fit political, social, and military exigencies.

In this Note, using Operation Iraqi Freedom as a case study, I will argue that it is in the best interests of the United States to develop stronger and clearer standards of protection for cultural property. Specifically, I will contend that the United States should ratify the provisions of the 1954 Hague Convention and provide affirmative protection for cultural property during armed conflicts. The war in Iraq has shown that it is in the long-term strategic interests of the United States to cooperate with occupied countries in preventing the looting and destruction of cultural property. The response of the international community to the events in Iraq has also underlined a growing global consensus that cultural property is entitled to protection as a matter of international human rights.¹⁸ To the

(entered into force Nov. 27, 1909) [hereinafter Hague Convention of 1907].

10. Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 289 (entered into force July 13, 1935) [hereinafter Roerich Pact].

11. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 46, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention].

12. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (entered into force Apr. 24, 1972) [hereinafter Illicit Import Convention of 1970].

13. Convention Concerning the Protection of the World Cultural and Natural Heritage, Oct. 17, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 (entered into force Dec. 17, 1975) [hereinafter World Heritage Convention].

14. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322.

15. Protocols Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International and Non-international Armed Conflicts, *entered into force* Dec. 7, 1978, 1125 U.N.T.S. 3 (Protocol I) & 1125 U.N.T.S. 609 (Protocol II) [hereinafter AP I and AP II].

16. OPERATIONAL LAW HANDBOOK, *supra* note 8.

17. *See, e.g.,* OPERATIONAL LAW HANDBOOK, *supra* note 8, at ii (“The Operational Law Handbook is not a substitute for official references. Like operational law itself, the Handbook is a focused collection of diverse legal and practical information.”).

18. *See* Draft UNESCO Declaration Concerning the International Destruction of Cultural

extent that the United States is concerned with cultural rights, the United States military must shift its current understanding of cultural property as a mere special type of private property to an understanding of cultural property as belonging to the international community and the individual peoples of the world.

In Part II of this Paper I trace the development of international laws relating to the treatment of cultural property during armed conflicts. I will emphasize a shift in international law from conceptualizations of cultural property as private property or the property of a nation-state to the property of the international community and "individual peoples." In Part III, I describe current American military policy manuals with regard to the protection of cultural property during armed conflicts. In Part IV, I critique the purposes of the manuals and the military's limited vision of cultural preservation. In Part V, I return to Operation Iraqi Freedom and describe how the cultural protection standards established by American policy-makers played out following the invasion in the spring of 2003. Specifically, I highlight the extent to which American policy in Iraq has both comported with and fallen short of international property protection standards. Finally, in Part VI, I describe how international cultural property treaties can be made more effective, propose specific changes to American military policy manuals, and argue for the adoption of international norms of armed conflict as a means of averting future cultural property tragedies.

II. INTERNATIONAL CONVENTIONS AND TREATIES RELATING TO THE TREATMENT OF CULTURAL PROPERTY DURING ARMED CONFLICT

A. The Lieber Code

Long before the Hague Convention of 1954, American military leaders during the Civil War played an instrumental role in developing the first modern code to protect cultural property during armed conflicts. The Lieber Code of 1863¹⁹ became the basis for all modern international agreements safeguarding cultural property in the event of war. The Code defined cultural property as a form of "private property" subject to higher standards of protection and preservation than public or government property.²⁰ Although the Code permitted the destruction and appropriation of property in some circumstances,²¹ it provided strong protections for

Heritage, July 17, 2003, available at <http://www.international.icomos.org/draft-unescodeclaration.pdf> (last visited Feb. 16, 2005) (stating in Preamble: "Mindful that cultural heritage is a component of cultural identity and social cohesion so that its intentional destruction may have adverse consequences on human dignity and human rights").

19. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, (Apr. 24, 1863), reprinted in THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Tomas eds., 3d ed., 1988) [hereinafter Lieber Code].

20. *Id.*

21. The Code recognized the principle of military necessity and its limitations. See Hays

cultural property. The Code held that “[c]lassical works of art, libraries, scientific collections . . . as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places which are besieged or bombarded.”²² This broad obligation to protect cultural property at points or places held by the enemy goes far beyond current U.S. military obligations. Not only did the Lieber Code require Union commanders to reconsider attacks against cultural sites held by the enemy, but the Code also placed an affirmative duty on Union commanders to “acknowledge and protect” cultural objects and sites in occupied territories.²³

B. Early Cultural Property Agreements & the Hague Convention of 1907

The 1874 Brussels Conference²⁴ translated most of the Lieber Code into an international agreement.²⁵ Although the Brussels Conference failed to lead to an international treaty, laws of war developed rapidly in the next twenty-five years. The 1899 Hague Convention finally created an enforceable body of international law on the rules of land warfare. Adopted soon thereafter, the Hague Convention of 1907 became the defining source of the United States military’s cultural property policies for the next hundred years.

Unlike prior conventions, the Hague Convention of 1907 provides carefully tailored rules against the destruction of cultural property. Article 25 explicitly forbids attacks against undefended towns, buildings, or dwellings and Article 27 holds that “all necessary steps must be taken to spare, as far as possible,” religious buildings, museums, monuments, and hospitals.²⁶ Under the same article, if the enemy uses cultural sites for

Parks, *Protection of Cultural Property From the Effects of War*, in *THE LAW OF CULTURAL PROPERTY AND NATURAL HERITAGE*, 3-3 (Mary Phelan et al. eds., 1998) (“Military necessity . . . allows of all destruction of property, . . . and of the appropriation of whatever an enemy’s country affords necessary for the subsistence and safety of the army.”).

22. *Id.* at 3-4.

23. Lieber Code, *supra* note 19, art. 37 (“The United States shall acknowledge and protect, in hostile countries occupied by them, . . . strictly private property. . . .”). Union commanders had an affirmative obligation to preserve private and cultural property and punish both pillaging soldiers and thieving civilians for breaches of the Code. The Code held that martial law existed as a condition of war, and Union commanders were meant to enforce “the laws and usages of war” against the civilian population. *Id.*

24. Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, available at <http://www.icrc.org/ihl.nsf> (last visited Feb. 16, 2005) [hereinafter Brussels Agreement].

25. One change made by the drafters, however, significantly narrowed the extent of coverage. The Brussels Agreement held that the parties were *not* bound to protect cultural property “against all avoidable injury.” Rather, member states were only obligated to protect cultural property “as far as possible.” In contrast to the Lieber Code, under the Brussels Agreement if a cultural site was being used for military purposes, principles of military necessity allowed for its destruction. *Id.* art. 17.

26. Hague Convention of 1907, *supra* note 9, art. 27, 36 Stat. at 2303.

military purposes, however, immunity is waived. Importantly, the Hague Convention of 1907 also requires defenders “to indicate the presence of such buildings or places by distinctive and visible signs.”²⁷ This is a critical innovation because it provides that the protection of cultural property is a *joint responsibility* held by both defender and attacker.

The Convention not only increases the responsibilities of defenders and civilians; it also implicitly limits the responsibilities of the attacking party. Attackers are required to treat cultural property as private property and “[a]ll seizure of, destruction or wilful [sic] damage done to institutions of this character . . . is forbidden.”²⁸ Although the Convention forbids pillaging and wonton destruction, it does not create a more general obligation to prevent the destruction of cultural sites in occupied territories. While the Lieber Code endorsed the protection of cultural property from all variety of threats, the Hague Convention focuses exclusively on wrongful or intentional destruction by the occupying party and does not impose any obligation to affirmatively protect cultural property.²⁹

C. World War I & the Roerich Pact

During World War I the Hague Convention was put to its first important test. The destruction of French and Belgian churches, cathedrals, museums, and libraries revealed its patent ineffectiveness. German forces removed valuable cultural objects and both sides targeted culturally protected sites (most notably Louvain University and Chartres Cathedral). Although Germany was ultimately forced to pay reparations for the appropriation of cultural property and the destruction of cultural sites, the failure of the Hague Convention spurred further developments in international laws of warfare. Diplomats drafted a set of rules governing aerial bombardment in the 1920s, but failed to implement The Hague Rules of Air Warfare³⁰ before the next major European conflict.

Some progress, however, was made in the Western Hemisphere. In 1935, the United States and twenty other countries entered into a Pan-American agreement for the protection of cultural property commonly referred to as the Roerich Pact. Although much of the language in the Roerich Pact mirrors the language in the Hague Convention of 1907, the protections afforded cultural property are broader. The Convention provides historic, artistic, scientific, and educational sites neutral status in times of war.³¹ The Roerich Pact holds that parties have an obligation to

27. *Id.*

28. *Id.* art. 56, 36 Stat. at 2309.

29. Compare *id.* with 1954 Hague Convention, *supra* note 6, art. 4 § 3, 249 U.N.T.S. at 244.

30. Hague Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, drafted by a Commission of Jurists at The Hague, Dec. 1922-Feb. 1923, 315 reprinted in *THE LAW OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988).

31. Roerich Pact, *supra* note 10, art. 1, 167 L.N.T.S. at 290.

“respect and protect” these sites.³² Interestingly, the Roerich Pact also provides for the exchange of lists of institutions and monuments “for which [the parties] desire protection.”³³

D. World War II & the Fourth Geneva Convention

Once again, during the Second World War, the Hague Convention of 1907 went largely unobserved as the Nazis engaged in wide-scale looting and cultural plunder, and both Axis and Allied powers abandoned principles of military necessity and razed thousands of important cultural sites in Europe. Spearheaded by the efforts of Alfred Rosenberg and the Einsatzstab, the Nazis hoarded paintings, sculptures, and other antiquities.³⁴ The Russians reprised the destruction of cultural sites on the Eastern Front by reclaiming and appropriating German “trophy art.”³⁵ By contrast, despite participation in the firebombing of German cities and the destruction of Monte Cassino, the American military played a vital role in preserving Europe’s cultural heritage. The American and British armies employed cultural property officers specifically charged with the task of locating and preserving buildings and movable art threatened during the conflict.³⁶

In response to the vast losses in cultural property during World War II, in 1949 the international community adopted the Fourth Geneva Convention.³⁷ It was hoped that the Geneva Convention would clarify the responsibilities and duties of soldiers and governments during armed conflicts and prevent the widespread human rights abuses characteristic of World War II. Although the Geneva Convention became an important part of American military policy, it did not provide much guidance on the protection of cultural property during armed conflicts. The Convention forbids “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly,”³⁸ but these protections are no broader than those afforded in the 1907 Hague Convention. However, the Geneva Convention does, importantly, require contracting parties to teach soldiers its text.³⁹ Because the Geneva Convention includes rules concerning civilian property, it ensures that every American soldier and commander receives information regarding

32. *Id.* As in the Hague Convention of 1907, both defending and attacking parties share this obligation.

33. *Id.* art. 4. Although these sites do not retain neutral status if they are used for military purposes, the Pact implies a general duty to protect these listed sites during times of war. *Id.* art. 5.

34. See Parks, *supra* note 21, at 3-12, 3-14.

35. See Victoria Birov, *Prize or Plunder?: The Pillage of Works of Art and the International Law of War*, 30 N.Y.U. J. INT’L L. & POL. 201, 212 (1997); Jack Achiezer Guggenheim, *Cultural Depravity Justifies Cultural Deprivation*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 699 (1998).

36. Parks, *supra* note 21, at 3-14.

37. Geneva Convention, *supra* note 11.

38. Geneva Convention, *supra* note 11, art. 147, 75 U.N.T.S. at 388.

39. *Id.* art. 144, 75 U.N.T.S. at 386.

the disposition of cultural property in wartime.

E. The 1954 Hague Convention

Drafted shortly after the Geneva Convention, the 1954 Hague Convention or Convention for the Protection of Cultural Property in the Event of Armed Conflict became the first international treaty exclusively devoted to the protection of cultural property during war. Much of the 1954 Hague Convention builds upon the protections established in prior conventions. The Hague Convention emphasizes that the duty to protect cultural property is the joint obligation of both attackers and defenders.⁴⁰ Defending parties must mark buildings and cultural sites with an internationally recognized shield and those who fail to safeguard their cultural property may lose protection under the Convention.⁴¹ Unlike prior treaties, attackers have an obligation not only to respect and preserve cultural property, but also to take affirmative steps to prevent the theft of property in occupied territories. Member-states agree 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.”⁴² Occupiers are also required “to take measures to preserve cultural property” and even work closely with national authorities to meet this objective.⁴³

Ironically, the Hague Convention presupposes that both parties will have similar interests in protecting cultural sites and will be capable of temporarily papering over differences to ensure their survival. Perhaps this optimism is rooted in the Convention’s sense of internationalism. The Hague Convention conceptualizes cultural property as not only a part of the national heritage of the defending state, but also the property of the international community. Internationalism is apparent in the very definition of cultural property the Convention provides: “[C]ultural property’ shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people”⁴⁴

Not only does the Hague Convention seek to protect the cultural property of member-nations, it also effectively establishes a body of internationally recognized cultural property. Akin to the Roerich Pact, the 1954 Hague Convention divides cultural property into two classes. The first type of cultural property is entitled to the standard protections afforded in prior treaties. A very narrow second class of cultural property, however, is afforded greater protection. Specially protected property is designated by member states and entered into an International Register of

40. 1954 Hague Convention, *supra* note 6, art. 3, 249 U.N.T.S. at 242.

41. *Id.* art. 17, 249 U.N.T.S. at 254.

42. *Id.* art. 4, § 3, 249 U.N.T.S. at 244 (emphasis added).

43. *Id.* art. 5, § 2, 249 U.N.T.S. at 244.

44. *Id.* art. 1, 249 U.N.T.S. at 242.

Cultural Property.⁴⁵

Although the United States played an important role in negotiating the terms of the Convention and is a signatory, the United States Senate never ratified the treaty. Embroiled in the Cold War, American senators believed that the special protection afforded cultural sites in the International Registry might prevent the United States from using nuclear weapons.⁴⁶ In retrospect, this concern seems somewhat misplaced. Although the treaty might counsel against attacking "special cultural property sites" with nuclear weapons, it does not serve as an absolute bar against the use of nuclear weapons.⁴⁷ In many ways, the creation of an international register of special sites imposes no obligation greater on the United States than that imposed by a similar register of sites under the Roerich Pact. Moreover, the international community has largely ignored the special protection provisions in the Hague Convention. Currently only nine sites in five countries, including the Vatican, are protected under the Convention as "special property."⁴⁸

Although the Hague Convention has had an important impact in shifting international norms with regard to the protection of cultural property, it has had little or no success as an enforceable body of law.⁴⁹ The weakness of the Convention stems largely from its reliance on national laws and ad hoc criminal tribunals to prosecute individuals.⁵⁰ To date the Convention has only been invoked four times.⁵¹ In none of these instances did the Convention prevent the improper use or destruction of cultural property. Unfortunately, like most international agreements it appears that the lack of an effective international enforcement mechanism has rendered the Hague Convention impotent.

45. *Id.* art. 8-9, 249 U.N.T.S. at 247-48.

46. Roger M. Mastalir, *A Proposal for Protecting the 'Cultural' and 'Property' Aspects of Cultural Property under International Law*, 16 FORDHAM INT'L L.J. 1033, 1048 (1993).

47. Indeed, the Second Hague Protocol indicates that the main difference between the protections afforded special property and standard cultural property are the higher obligations placed upon defending nations to protect special property. See David Keane, *The Failure to Protect Cultural Property in Wartime*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 1, 33 ("The 1954 Hague Convention seemed to imply a lower standard of protection for cultural property under general protection than for cultural property under special protection. However, the Second Protocol makes it clear that there is no higher standard of protection for cultural property under enhanced protection.").

48. JIRI TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 141 (1996).

49. Most famously, the Hague Convention was invoked during the conflict in Yugoslavia. Serbian forces ignored the pleas of UNESCO agents in Dubrovnik and intentionally destroyed large parts of the historic city center. See Karen J. Detling, Note, *Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 MD J. INT'L L. & TRADE 41 (1993).

50. 1954 Hague Convention, *supra* note 6, art. 28, at 260.

51. The Hague Convention has been invoked in Cambodia, Israel, Yugoslavia, and Kuwait. See Detling, *supra* note 49, at 62-67.

F. The Development of Modern International Cultural Rights

Since the passage of the 1954 Hague Convention, a number of other treaties have enhanced the protections afforded cultural property and emphasized the international and human rights foundations of cultural property. In 1966, the United Nations General Assembly adopted the International Covenant on Economic, Social and Cultural Rights.⁵² Although the Covenant does not explicitly mention cultural property, it recognizes “cultural rights” as intimately tied to human rights.⁵³ Approaching cultural rights from a different angle, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property stems the flow of stolen goods onto the international art and antiquities market. The Convention requires member states not only to identify and control the export of cultural property, but also to prevent the import of illegally obtained goods.⁵⁴

The 1972 Convention for the Protection of the World Cultural and Natural Heritage created a new avenue for protection of immovable property during wartime and reaffirms the internationalist values of the 1954 Hague Convention. Article 6 holds that the member-parties have an obligation to cooperate and must “give their help in the identification, protection, conservation, and presentation” of international cultural and natural heritage.⁵⁵ Parties, including the United States, are forbidden from taking “measures which might . . . directly or indirectly” damage or destroy listed sites.⁵⁶

The World Heritage Convention provides some hope for engendering a sense of international responsibility for the protection of cultural property not only from direct military assault, but also from the destabilizing conditions created by warfare. Because members are liable for the “indirect” effects of their actions, they may be accountable to occupied nations for cultural property losses. In this sense, responsibility is rooted in the concept of proximate cause. If Country A had not invaded or destabilized Country B, then no threat to Country B’s cultural property would have emerged. Alternatively, this notion might also be analogized

52. See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter Covenant]. Although the United States has signed the Covenant, it has not ratified it.

53. *Id.* at 3. Moreover, the Covenant holds that “full realization” of cultural rights can only occur if member nations take the steps necessary to conserve “science and culture.” *Id.* art. 15 at 9.

54. Illicit Import Convention of 1970, *supra* note 12, at 231. More specifically, the Convention provides for the return of cultural goods through diplomatic channels. *Id.* art. 7, at 240. The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 14, at 1322, expands the protections within the 1970 treaty and focuses more attention on national interests in cultural property. The United States implemented the provisions of the 1995 UNIDROIT Convention in the Convention on Cultural Property, 19 U.S.C. ch. 14, §§ 2600-2614 (1995).

55. World Heritage Convention, *supra* note 13, art. 6, at 154.

56. *Id.*

to the “law of rescue,” in which the military intervener assumes an affirmative responsibility for protecting the people and property of the occupied state. If the occupier abandons the “victim” he sought to save, he becomes liable for the harm he took it upon himself to prevent.

Geneva Protocols I and II also provide substantial protection to cultural property in times of armed conflict. Article 53 of Protocol II provides protection to historic and religious sites during wartime: “[I]t is prohibited . . . to commit 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.”⁵⁷ Unlike the 1954 Hague Convention, the Geneva Protocols are largely understood to shift much of the burden for the protection of cultural property to the attacking party.⁵⁸

The Geneva Protocols re-conceptualize cultural property. Cultural property is identified not simply as the heritage of the world, or even of a nation-state, but of a particular group of “peoples.”⁵⁹ This redefinition of cultural property complicates earlier notions of cultural property and international obligations to protect it. The Geneva Protocols imply that national interests in cultural property may be divergent. A national government cannot always be trusted to protect the cultural property of disparate ethnic and religious groups.⁶⁰ Thus, the obligations of an attacking party do not cease when the defending state waives its treaty obligations and—negligently or intentionally—places a cultural site in jeopardy. Because governments are merely the caretakers of cultural property, attackers may retain residual responsibilities to protect the cultural property of the “peoples” and communities within nation-states.⁶¹

57. See AP II, *supra* note 15, art. 53, at 1414.

58. In the 2004 Operational Law Handbook, the United States military has taken the position that the Protocols should be thoughtfully considered, even if some provisions do not rise to the level of customary international law. See OPERATIONAL LAW HANDBOOK, *supra* note 8, at 23 (“The rules are not U.S. law but should be considered because of the pervasive international acceptance of AP I and AP II.” (citing AP I and AP II, *supra* note 15)); see also OPERATIONAL LAW HANDBOOK, *supra* note 8, at 15 (observing that although the U.S. has not ratified the Protocols, 155 other states have ratified AP I, thus “U.S. Commanders must be aware that many allied forces are under a legal obligation to comply with the Protocols. U.S. military forces may not be obligated to comply with AP I provisions that do not codify the customary practice of nations.” (citing AP I and AP II, *supra* note 15)). By contrast, the Operational Law Handbook from 2002 explicitly rejected Articles 55 and 56 of the Geneva Protocols because they afford protection to cultural sites even if they contain enemy forces and such a bright-line determination might actually encourage combatants to use cultural sites as shields. See JUDGE ADVOCATE GENERAL, UNITED STATES ARMY, OPERATIONAL LAW HANDBOOK 4 (2002) available at www.jagcnet.army.mil (last visited Mar. 1, 2005) [hereinafter OPERATIONAL LAW HANDBOOK 2002].

59. AP II, *supra* note 15, art. 53(a), at 1414.

60. Indeed, in some situations the defending state may intentionally place the cultural property of minority “peoples” in harm’s way.

61. See also Draft UNESCO Declaration Concerning the International Destruction of Cultural Heritage, *supra* note 18, art. 6:

UNESCO Member States that intentionally destroy or intentionally fail to take the necessary measures to prohibit, prevent, stop and punish any intentional destruction of cultural heritage of great importance for humanity, including such cultural heritage which is of special interest for

Recently, in 1999, the international community harmonized the 1954 Hague Convention with many of the customary international law principles in the Geneva Protocols.⁶² The result—the Second Protocol to the Hague Convention⁶³—dramatically expands the scope of cultural property protection during armed conflicts. Although the Convention has been ratified by only twenty-six nations thus far,⁶⁴ it may eventually become an important normative guide for the rest of the international community. The Second Protocol creates a strong presumption against the destruction of cultural property during armed conflicts by forbidding its destruction unless an attacking party establishes: 1) that the cultural property has been transformed into a military objective; and 2) there is no feasible alternative with similar military advantages.⁶⁵ Aggressor nations must take all practicable precautions to prevent the destruction, and even incidental damage to cultural sites.⁶⁶ Finally, and perhaps most relevant to the American occupation of Iraq, Article 9 of the Second Protocol provides that occupying nations “shall *prohibit and prevent*” the export, transfer of ownership or removal of cultural property, illicit archaeological excavations, and the concealment or destruction of cultural or historical evidence.⁶⁷

III. UNITED STATES MILITARY POLICY AND CULTURAL PROPERTY

A. Introduction

In the late nineteenth and early twentieth centuries, the United States was at the forefront of international efforts to protect cultural property. After two major world wars resulted in the devastation of Europe’s cultural heritage, America’s interest in cultural property waned. Perhaps, because the paroxysm of twentieth century violence had yet to engulf America’s cultural property or much less touch the American mainland, the United States did not view the 1954 Hague Convention as providing many tangible benefits. Indeed, as the United States emerged as a global

the community directly affected by such destruction, bear the responsibility for such destruction. The responsible State should provide reparation in the form of restoration when technically feasible, or compensation as a measure of last resort.

62. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 164 (2004).

63. 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 [hereinafter Second Hague Protocol].

64. See International Committee of the Red Cross, States Party to the Following International Humanitarian Law and Other Related Treaties as of 04.02.05, available at [http://www.helpicrc.org/Web/eng/siteeng0.nsf/htmlall/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.helpicrc.org/Web/eng/siteeng0.nsf/htmlall/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) (last visited Feb. 20, 2005).

65. Second Hague Protocol, *supra* note 63, art. 6, at 770.

66. *Id.* art. 7, at 771.

67. *Id.* art. 9, at 771 (emphasis added).

superpower in the second half of the twentieth century, the new convention only served the function of limiting the use of American military force. Although the United States currently adheres to many of the provisions of the 1954 Hague Convention and Geneva Protocols in practice, it still reserves the right to depart from un-ratified, international conventions when American interests collide with international, national, community, or private interests in cultural property. Because American leaders are reluctant to adopt rigid rules, the cultural property decision-making of the military remains largely ad hoc, situational, and discretionary.

B. The Laws of Armed Conflict

Military authorities address the issue of cultural looting and destruction within the framework of the more general Law of War (LOW). As recognized by the military manuals, scrupulous adherence to the LOW is necessary to legitimize American intervention and retain the support of the American and international communities. The Law of War, however, establishes few bright-line cultural property rules for U.S. forces. Historic, religious, artistic, and scientific buildings and sites are not to be intentionally targeted by commanders, but their destruction is permissible in light of the ill-defined principle of military necessity. Although America's LOW seeks to avoid the unnecessary loss and destruction of cultural property, it creates no affirmative obligations to protect cultural property during armed conflicts.

For American soldiers and commanders the LOW provides a model code of behavior similar to an American criminal code. The LOW forbids American forces from committing abuses against individuals and property, but it does not create affirmative duties to prevent these acts from occurring in the theater of war. On an individual level, the LOW makes sense: It would violate notions of fairness to convict American soldiers for their failure to prevent crimes against cultural property. At the same time, the LOW should not merely be understood as a guide shaping the behavior of individual soldiers. The LOW also describes the legal obligations and policies of the United States military.⁶⁸ If understood in this light, the LOW may more clearly engender a sense of collective accountability for the prevention of cultural property destruction rising to the highest levels in the chain of command.

In 1977, the Department of Defense issued Directive 5100.77,⁶⁹ establishing a Law of War Program for the United States military. The Directive instructed each branch of the military to develop training programs to ensure compliance with the Law of War and fulfill the

68. See OPERATIONAL LAW HANDBOOK, *supra* note 8, at 12 (noting that the LOW constitutes "national obligations").

69. Department of Defense, Directive No. 5100.77, Dec. 9, 1998, available at <http://www.dtic.mil/whs/directives/corres/pdf2/d510077p.pdf> (last visited Feb. 20, 2005).

obligations of the United States under the Geneva Convention.⁷⁰ The Department of Defense's decision to delegate the responsibility of armed conflict training to each branch of the military (including training on the treatment of cultural property during warfare), led to the creation of several service manuals and instructions on the LOW.

The decision to allocate responsibility for cultural property training among the services fits within the current structure of the American military. Each branch has its own Judge Advocate General's corps and each branch educates and trains its own members. However, it is curious that the United States chose to meet its treaties obligations through the piece-meal development of rules of warfare by each branch. Not only does this result in the absence of any single, controlling, coherent body of military rules or policies; it also may result in inconsistent policies. Army, navy, and air force manuals that describe the LOW all refer to the same basic set of principles, treaties, and military laws, but each branch interprets these principles and bodies of law slightly differently. Although the Judge Advocate General's office has developed a single pamphlet on the LOW for all branches of the military, competing understandings and interpretations of the LOW and differences in the way the LOW is taught to service-members may still lead to divergent cultural policies and practices.

C. Law of War Manuals and Pamphlets

The oldest and undoubtedly most important manual that explores the Law of War is Army Field Manual 27-10.⁷¹ Originally issued in 1956, Field Manual 27-10 has been updated frequently and is widely used by American soldiers and attorneys. Although it is an Army publication, other branches of the military service often use FM 27-10.⁷² In contrast to Army Field Manual 27-10, the United States Air Force and United States Navy developed manuals, Air Force Pamphlet 110-31 (currently outdated)⁷³ and Naval Warfare Publication 1-14M⁷⁴, more narrowly tailored to the international law of bombardment. Finally, the Judge Advocate General's Operational Law Handbook provides concrete and specific explanations of LOW principles and treaty obligations and is used by all branches of the

70. *Id.*

71. DEPARTMENT OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE, July 18, 1956 (revised July 15, 1976) available at <http://nile.ed.umuc.edu/~nstanton/FM27-10.htm> (last visited Feb. 20, 2005) [hereinafter FM 27-10].

72. Telephone Interview with Lt. Col. Wendy Stafford, JAG, United States Marines, (July 25, 2003) (noting that the Marines use Army Field Manual 27-10 as a guide).

73. DEP'T OF THE AIR FORCE, AIR FORCE PAMPHLET 110-31: INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, (1976) (outdated) [hereinafter AFP 110-31]. Telephone Interview with Major Mark Pollard, Chief of Operations Law, JAG, United States Air Force, (July 31, 2003). A replacement to 110-31 has not yet been approved.

74. DEP'T OF THE NAVY, NAVAL WARFARE PUBLICATION 1-14M: THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (1995) [hereinafter NWP 1-14M].

military.

D. Application and Purpose of Manuals and Pamphlets

The pamphlets and manuals do not purport to be authoritative law or policy, but rather, are envisioned as helpful guides. The ultimate authority for defining the law of armed conflict is the United States government and the international community.⁷⁵ Despite their apparent lack of legal weight, the pamphlets and manuals do describe the current policies and treaty obligations of the United States military. Because these manuals are evidence of the customs and practices of the United States military, they provide critical insight into current American understandings of international law.⁷⁶

Arguably, the manuals invite the flexible and broad judgment of commanders to meet two often-conflicting military objectives: defeating the enemy and garnering the support or “hearts and minds” of the civilian population. The Air Force Pamphlet notes the greater strategic purposes behind the Law of Armed Conflict:

Violations of the law of armed conflict have been recognized as counterproductive to the political goals sought to be achieved. ... Violations are likely to stiffen enemy resistance, enhance antagonisms on both sides and prevent successful negotiation of the differences which precluded peaceful relations.⁷⁷

The Law of War, therefore, is not merely about creating a set of binding regulations about what American troops can and cannot do in the field, but also concerns itself with larger policy goals. The field manuals are meant to encourage constructive behavior rather than to establish legal or quasi-criminal rules. Both Naval Warfare Publication 1-14M and Air Force Pamphlet 110-31 enshrine traditional notions of honor and chivalry: “Dishonorable (treacherous) means, dishonorable expedients, and dishonorable conduct during armed conflict are forbidden.”⁷⁸

Because these manuals suggest a concept of responsibility defined by the broader values of duty and honor, they may be understood as over-broad, creating greater individual obligations than international law demands. Conversely, an even better argument can be made that they should be regarded as under inclusive. The manuals do not want to limit the conduct of soldiers or create a body of policy that will frequently be violated. The manuals leave room for American military commanders to make important tactical and strategic choices. The desire to provide discretion and flexibility, however, undermines the very purpose of the

75. See, e.g., OPERATIONAL LAW HANDBOOK, *supra* note 8, at ii.

76. FM 27-10, *supra* note 71, ch. 1, ¶ 1.

77. AFP 110-31, *supra* note 73, at 1-11.

78. NWP 1-14M, *supra* note 74, ch. 5, § 2.

manuals: to provide direction to commanders and soldiers faced with difficult decisions. Beyond stating the very obvious (pillaging and the intentional destruction of cultural sites are forbidden), the manuals and pamphlets provide little practical cultural property guidance to battlefield commanders.⁷⁹

IV. THE FAILINGS OF U.S. MILITARY CULTURAL POLICY

A. Limited Protections for Cultural Property

Despite referring to nearly every major treaty and international convention on cultural property, American military manuals provide very limited protections for cultural property. The manuals almost exclusively cover offensive military actions against cultural property sites. For example, Army Field Manual 27-10 holds, “[i]n sieges and bombardments all necessary measures must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals . . . provided they are not being used at the time for military purposes.”⁸⁰ Interestingly, the language “as far as possible” is the same language found in the Brussels Treaty of 1874 and the Hague Convention of 1907. These antiquated standards of protection are more tepid and qualified than the standard found in the Roerich Pact,⁸¹ or the 1954 Hague Convention. The meaning of “as far as possible” is largely open to the interpretation of the local military commander. The Navy and Air Force provide for slightly more protective standards, excising the “as far as possible,” for a flat prohibition on bombardment of cultural sites not used for military purposes.⁸² However, once again, obligations to protect cultural property are limited to sites that have been marked by the enemy as cultural property.⁸³

The manuals provide that the United States has virtually no affirmative commitments (including those regarding cultural property) to civilian populations in occupied territories. Beyond duties to “restore and ensure public order and safety” and provide for the “maintenance of hospital and

79. I will discuss how the manuals can be rewritten to reflect political realities and more clearly enunciate America’s commitment to cultural property in times of war in Part VI of the paper.

80. FM 27-10, *supra* note 71, ch. 2, ¶ 45(a).

81. Field Manual 27-10 obliquely refers to the Roerich Pact as a treaty that maintains the importance of cultural property, but it limits the applicability of the principles within the Pact: “The United States and certain of the American Republics are parties to the so-called Roerich Pact, which accords a neutralized and protected status to historic monuments, museums, scientific, artistic, educational, and cultural institutions in the event of War . . .” *Id.* at ¶ 57.

82. The Air Force Pamphlet holds, “Buildings devoted to religion, art or charitable purposes as well as historical monuments may not be made the object of aerial bombardment.” Absolute immunity from attack is waived only if the objects are being used for military purposes or are located near military objectives. AFP 110-31, *supra* note 73, at 5-13.

83. *Id.*

medical establishments”⁸⁴ the manuals offer few humanitarian obligations.⁸⁵ Finally, for the most part, the manuals indicate that local authorities are responsible for enforcing criminal laws, including the policing of cultural sites.⁸⁶ If it chooses to do so, the military may “enact penal law provisions” when domestic laws are ineffective.⁸⁷

B. Cultural Property Provided No Greater Protection than Private Property

Each military manual reveals that cultural property is distinct and important, but the standards left in place to protect cultural property are only slightly more stringent than the standards applied to other forms of private property. Army Field Manual 27-10 holds that soldiers must take all necessary precautions to spare cultural sites from bombardment, but they are also forbidden from targeting undefended “cities, towns, villages, dwellings, or buildings.”⁸⁸ More explicitly, the Air Force Pamphlet notes that “protected buildings” are to be spared during bombardments “along with other civilian objects.”⁸⁹ Thus, American troops have no greater obligation to spare a national museum than to spare a privately owned car dealership. Both are forbidden targets, but if the enemy uses either site for military purposes, it can be destroyed.⁹⁰

Similarly, FM 27-10 holds that for purposes of enforcement “municipal, religious, charitable, and cultural property . . . shall be treated as private property.”⁹¹ Thus, cultural property objects, including those that are thousands of years old and culturally priceless, are essentially afforded the same status as private objects. While this is certainly better than treating these objects as government or public property (which may be requisitioned),⁹² it is clearly inconsistent with the normative importance of cultural property. It seems incomprehensible that the United States military would view the potential loss of the ancient treasures of Nimrud

84. *Id.* at 14-3, 14-4

85. OPERATIONAL LAW HANDBOOK, *supra* note 8, at 12.

86. *Id.* at 14-5. Each military manual also focuses on the responsibilities of defenders to protect their own cultural property. All the manuals note that under the Hague Convention of 1954 and the Naval Bombardment Convention of 1910, defenders have an obligation to mark cultural property with internationally recognized symbols. The only manual that mentions continuing responsibilities in the absence of efforts by an occupied nation to protect its cultural property is Naval Warfare Publication 1-14M. The Naval Pamphlet provides that, “[f]ailure to display protective signs and symbols does not render an otherwise protected person, place, or object a legitimate target . . .” However, the neutral status of cultural sites still must be “apparent.” NWP 1-14M, *supra* note 74, ch. 8, ¶ 6.2.

87. OPERATIONAL LAW HANDBOOK, *supra* 8, at 29.

88. FM 27-10, *supra* note 71, ch. 2, ¶ 40.

89. AFP 110-31, *supra* note 73, at 5-13.

90. More precautions, however, are likely to be taken to prevent the unintentional destruction of the national museum. *See infra* Part IV(f).

91. FM 27-10, *supra* note 71, ch. 2, ¶ 405(a).

92. *Id.* ¶ 59.

on the same terms as a few stolen BMW's.⁹³

C. Principles of Military Necessity and Proportionality

The manuals rely upon the principles of military necessity and proportionality to guide policies on the use of force against private and cultural property. Military necessity allows for the destruction of cultural sites provided that they have been properly identified as military objectives.⁹⁴ During World War II, General Dwight Eisenhower famously noted the danger of allowing commanders unfettered discretion to determine when destroying a cultural site is necessary: "[T]he phrase 'military necessity' is sometimes used where it would be more truthful to speak of military convenience or even personal convenience. I do not want it to cloak slackness or indifference."⁹⁵ General Eisenhower's fear remains apt: local commanders have great discretion to determine what constitutes military necessity. The more significant the cultural site, however, the more likely a high level commander must approve of any attack. Department of Defense attorney Major Todd J. Enge notes that before any military campaign, the Pentagon and White House establish a "no strike list" of cultural sites.⁹⁶ These sites are not to be bombed or intentionally attacked without permission from the Pentagon or President.⁹⁷

As noted in the 2002 edition of the JAG Operational Law Handbook, commanders are subject to a retrospective two-part test of reasonableness whenever they carry out a "necessary attack" against a cultural site.⁹⁸ The first element of the military necessity test is objective: Did the commander behave reasonably in collecting adequate information about the target before commencing the assault? The second element of the test is subjective: Were the actions taken by the commander reasonable in light of the information gathered?⁹⁹ Both Army FM 27-10 and the Operational Law Handbook emphasize the vast gulf between reasonably perceiving a threat and being certain of that threat. The Handbook notes, as an example, the

93. Again, I do not mean to suggest that this is how American military policy actually operates. However, on a strict reading of the provisions as laid out in the military manuals, this is how American military commanders are instructed to address threats against cultural property.

94. OPERATIONAL LAW HANDBOOK, *supra* note 8, at 23. Military objectives are combatants and other objects "which by their nature, location or use make an effective contribution to military action." *Id.* at 12.

95. Parks, *supra* note 21, at 3-12.

96. Telephone Interview with Major Todd J. Enge, Attorney, Department of Defense (July 2003).

97. *Id.*

98. OPERATIONAL LAW HANDBOOK 2002 *supra* note 58, at 10.

99. *Id.* The 2004 edition of the Operational Handbook appears to preserve this two part test, but does not identify either test as either "objective" or "subjective." See OPERATIONAL LAW HANDBOOK, *supra* note 8, at 13 (noting that the standard for determining military necessity asks whether the "attacker acted in good faith based upon the information reasonably available at the time the decision to attack was made").

American bombing of the Al Firdus Bunker during the Gulf War. In this instance, the destruction of this civilian bunker was not a violation of the Law of War despite the tremendous loss of life and the paucity of military gain because the commander had reason to believe that the bunker presented a valid military objective.¹⁰⁰

Notably, American military commanders are not strictly liable for destruction of cultural property.¹⁰¹ If the commander has not acted reasonably in collecting information or processing this information, however, he or she may be found liable through a negligence theory. It is unclear from the manuals, however, whether the standard of negligence applied to military commanders is one of simple negligence or one of gross negligence. It seems probable that a commander that conducts any investigation of a cultural site and has even a slight military justification for attacking the site will be shielded by the doctrine of military necessity.

At the same time, the principle of proportionality, at least theoretically, also comes into play. The responsibility to distinguish military targets¹⁰² and conduct military operations in a manner proportional to perceived threats is enshrined in Protocol 1 of the Geneva Convention. Protocol I, Article 51 provides that the anticipated loss of life and damage to property incidental to attacks must not be “excessive in relation to the concrete and direct military advantage anticipated.”¹⁰³ This firm standard is significantly watered down in American military texts. Army Field Manual 27-10 excises the “concrete and direct” language and holds that commanders can attack civilian targets as long as they reasonably believe “probable loss in lives and damage to property [are not] disproportionate to the military advantage anticipated.”¹⁰⁴ Although it includes elements of a balancing test, the definition of what constitutes a “proportionate” use of force against a military target remains extremely unclear.¹⁰⁵ Does the existence of

100. OPERATIONAL LAW HANDBOOK, *supra* note 8, at 13. The Handbook notes that armed guards were posted above the bunker, making it a cognizable target.

101. AFP 110-31, *supra* note 73, at 15-2.

102. See OPERATIONAL LAW HANDBOOK, *supra* note 8, at 14 (quoting the Geneva Protocols, *supra* note 15, art. 51). The Operational Law Handbook notes that “distinction” is a customary obligation of international law found in Article 51 of Protocol 1 of the Geneva Convention. The principle provides:

[P]arties to a conflict . . . engage only in military operations the effects of which distinguish between the civilian population (or individual civilians not taking a direct part in the hostilities), and combatant forces, directing the application of force solely against the latter. Similarly, military force may be directed only against military objects or objectives, and not against civilian objects.

103. API, *supra* note 15, art. 51, 1125 U.N.T.S. at 26.

104. FM 27-10, *supra* note 71, ¶ 51. Similarly, NWP 1-14M provides that “[i]t is not unlawful to cause incidental injury to civilians, or collateral damage to civilian objects during an attack upon a legitimate military objective.” NWP 1-14M, *supra* note 74, ch. 8, § 1.2.1.

105. The Operational Law Handbook notes that proportionality is not a “legal standard” that can be separated from the principle of “discrimination.” Collateral damage does not violate recognized international law as long as a Commander has made efforts to distinguish enemy targets. Thus, proportionality ultimately involves “[b]alancing between collateral damage to civilians objects and collateral civilian casualties . . . done on a target-by-target

one threatening tank or three soldiers permit a commander to destroy a local mosque? A national shrine? A national museum?

D. Focus on Intentional Actions

Although American commanders may be found liable for the grossly negligent destruction of cultural sites, the manuals and pamphlets focus largely upon intentional behavior. In Army Field Manual 27-10, commanders are explicitly forbidden from attacking sites that they *know* are undefended.¹⁰⁶ Interestingly, both examples of war crimes the Naval Warfare Handbook provides are pre-meditated offenses: The unjustified destruction of civilian buildings for the purpose of terrorizing the population and the looting of public or private property.¹⁰⁷ Army Field Manual 27-10 also focuses on the purposeful nature of cultural property crimes: "All seizure or destruction of, or *willful* damage to . . . historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."¹⁰⁸ FM 27-10's concentration on the intentional aspects of these crimes reveals a desire to create some sense of individual responsibility for violations of the Law of War. Soldiers and commanders are threatened with prosecution if they steal or attack cultural property. However, American troops are largely absolved of responsibility for the loss of cultural property that comes about as a result of their negligence. The Air Force Pamphlet provides that even if an air force pilot attacks a military target "in a negligent manner" (missing it by several miles) he will not be liable for a violation of the Law of War.¹⁰⁹

Not only are individual soldiers not held responsible for damaging, misusing, or neglecting cultural property, the United States military also absolves itself from any broader collective obligation to protect or preserve cultural property in times of war. The 1954 Hague Convention provides that occupiers of a hostile territory have an obligation to work with national authorities to protect the cultural property of the occupied state.¹¹⁰ The Lieber Code, Roerich Pact, and the National Heritage Convention all include elements requiring the United States to protect or prevent the direct or indirect destruction of cultural property. In stark contrast, none of the military manuals provide that the United States has an obligation to "protect" cultural property in an occupied state or during an armed conflict. The United States military finds that it is required only to prevent

basis, as frequently was done in the first (1991) and second (2003) Persian Gulf Wars" or by weighing the target "against campaign objectives." OPERATIONAL LAW HANDBOOK, *supra* note 8, at 14-15.

106. FM 27-10, *supra* note 71, ¶ 39(a).

107. NWP 1-14M, *supra* note 74, ch. 6, § 2.5.

108. FM 27-10, *supra* note 71, ¶ 405(a) (emphasis added). Here the Manual incorporates much of the language of article 56 of the Hague Convention of 1907. See *supra* note 28 and accompanying text.

109. AFP 110-31, *supra* note 73, at 15-6.

110. 1954 Hague Convention, *supra* note 6, art. 5, at 244.

the intentional destruction or seizure of property by its own troops and commanders. Even that responsibility is tempered in the outdated AFP 110-31: “[A]s a general rule, in the absence of some . . . fault such as inadequate supervision or training, no obligation for compensation arises on the part of a state for . . . violations of the law of armed conflict committed by individual members outside of their general area of responsibility.”¹¹¹

E. Questionable Engagement with Broader Values

While the policies found in the manuals are useful in preventing some destruction of cultural property, they fail to speak to the larger values behind these rules: the importance of cultural property to international and national communities. The JAG Operational Law Handbook conceives of the Law of War as fulfilling both humanitarian and functional purposes. The humanitarian purposes of the LOW include protecting noncombatants and soldiers from “unnecessary suffering,” safeguarding the rights of captured individuals, and “facilitating the restoration of peace.”¹¹² By contrast, the “functional purposes” of the laws of war are “ensuring good order and discipline; [] fighting in a disciplined manner consistent with national values; and [] maintaining domestic and international public support.”¹¹³

Notably absent from the LOW’s humanitarian considerations are the “peoples” that actually possess cultural property. Because the LOW defines “humanitarian” in such a niggardly way—distinct from more expansive notions of international human rights—the humanitarian purposes of the LOW dissolve into its functional elements.¹¹⁴ Thus, American soldiers are prohibited from stealing and destroying cultural property, not because cultural property has a value to the people of Iraq, but rather, because looting will result in disorder within the ranks and may undermine support for the war at home and abroad.¹¹⁵

F. Operations and the Employment of the Law of War

Unlike the military manuals, American operational policy with regard to the protection of cultural property must be decisive. When presented with the real threat of an enemy weighed against the destruction of cultural objects, American military commanders have no choice but to make a decision that may have lasting and far-reaching consequences. Frequently,

111. AFP 110-31, *supra* note 73, at 00-3.

112. OPERATIONAL LAW HANDBOOK, *supra* note 8, at 12.

113. *Id.*

114. See INGRID DETTER, THE LAW OF WAR 160-61 (2d ed. 2000) (discussing the debate surrounding the perceived differences between human rights and humanitarian law).

115. AFP 110-31, *supra* note 73, at 1-11 (“[C]onduct which violates the law of armed conflict frequently is found to be of marginal military advantage.”).

the decisions made by American soldiers are informed by policy considerations much broader in scope than the principles of military necessity and proportionality encapsulated in the military manuals. In modern warfare, a whole range of complex socio-political factors must be considered before destroying a cultural site. As United States Army Colonel John Ley observes, Central Command shapes American policy in this regard. The joint services make decisions regarding cultural property prior to the initiation of any major operation.¹¹⁶ Major Enge notes, "In a deliberate campaign Joint Intelligence (J2) develops target sets." Each target is analyzed and assigned to a different tier based on strategic value and collateral damage estimates.¹¹⁷

The presence of cultural property within a "collateral damage radius" goes into the assessment of each target. From this list, the Pentagon develops a list of no strike targets that cannot be attacked without the authorization of the Secretary of Defense or White House. These targets are technically off limits, but local commanders may still attack a second set of restricted cultural sites subject to principles of military necessity.¹¹⁸ In the last thirty years target restrictions have played an important role in protecting important cultural sites threatened by war. During the Vietnam War, rules of engagement forbade American fighter planes from attacking any target within Angkor Wat Park. Attacking objectives within 1,000 yards of an additional 100 sites in Vietnam was also prohibited.¹¹⁹ Similarly, during the Gulf War, American troops refrained from attacking an important Sumerian temple despite the presence of Iraqi aircraft at the site. American commanders made this decision in part because the airplanes were not near a usable runway and posed no threat to American troops.¹²⁰

On occasion, the United States military takes affirmative measures to secure and protect threatened cultural sites. Although the United States disbanded its "cultural property units" after the Second World War,¹²¹ military commanders still have the authority to protect cultural sites. As Major Enge notes, "Once it becomes evident that cultural sites or museums are being targeted by looters, a Ground Forces Component Commander may issue orders to protect these sites."¹²² The sites chosen for protection, however, are somewhat haphazard and Central Command has no general policy or strategy for the protection of cultural property: "These orders are generally fragmentary in nature and involve some room for interpretation in terms of what locals consider important versus what is commonly

116. Telephone Interview with Colonel John Ley, JAG, United States Army (July 30, 2003).

117. Major Todd J. Enge, *supra* note 96.

118. *Id.*

119. Parks, *supra* note 21, at n.152.

120. Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F.L. REV. 277, 301 (1997).

121. See Parks, *supra* note 21.

122. Major Todd J. Enge, *supra* note 96.

recognized as a cultural or religious site.”¹²³ Ground Forces Commanders may choose to protect large sites or may issue orders to protect smaller, more defensible satellite sites. Their decisions may be discretionary or they may be informed by the lists of cultural sites developed by Joint Intelligence (J2) prior to the campaign.¹²⁴

V. THE UNITED STATES IN IRAQ

A. Forewarning

In the months and weeks leading up to the invasion of Iraq, the Pentagon and White House consulted with numerous archaeologists and cultural property experts regarding the importance of Iraq as the birthplace of civilization and the locus of thousands of important Babylonian, Sumerian, and Assyrian sites.¹²⁵ Numerous scholars noted the potential for the loss of irreplaceable cultural property in the event of an American invasion. Experts noted that during the Gulf War looters sacked nine of eleven regional museums in the country and stole over 2,000 objects.¹²⁶ Most of these objects made their way to the international black market, and only a dozen have since been recovered.¹²⁷

Middle Eastern scholars argued that the destruction of important cultural sites would reverberate through the international community and might undermine support for the American intervention.¹²⁸ Even worse, the destruction of cultural sites might alienate the Iraqi people and delegitimize the American presence. An academic at Columbia University noted, “[i]f any of the holiest Shiite shrines at Karbala, Najaf, or Kadhumain are hit, we can only expect a very angry reaction from Muslims everywhere.”¹²⁹ In response to the concerns of scientists and scholars, the Pentagon placed Iraq’s National Museum and other important cultural sites on the military’s “no target” list.¹³⁰ The United States agreed to refrain from attacking the National Museum and other sites in compliance with its own cultural property policies and its international treaty obligations.

123. *Id.*

124. *Id.*

125. John Noble Wilford, *Treasures; Art Experts Fear Worst in the Plunder of a Museum*, N.Y. TIMES, Apr. 13, 2003, at B3 (“For weeks before the war, archaeologists and other scholars had alerted military planners to the risks of combat, particularly postwar pillage of the country’s antiquities.”).

126. Martin Gottlieb & Barry Meier, *The Plunder; Of 2,000 Treasures Stolen in Gulf War of 1991, Only 12 Have Been Recovered*, N.Y. TIMES, May 1, 2003, at A16.

127. *Id.*

128. Holland Cotter, *Oldest Human History Is at Risk*, N.Y. TIMES, Feb. 25, 2003, at E1.

129. *Id.*

130. Douglas Jehl & Elizabeth Becker, *Experts’ Pleas to Pentagon Didn’t Save Museum*, N.Y. TIMES, Apr. 16, 2003, at B5 (“At the Pentagon, defense officials said that the museum had in fact been put on the American military’s no-target list in response to the scholars’ warnings, and that the military had refrained from bombing it.”).

Some hopes remained within the international community that the American military would respond to the unique status of Iraq's cultural heritage with sensitivity and diplomacy. One cultural anthropologist, U.S. Major Christopher Varhola, envisioned American troops playing the role of cultural property guardians: "All around Iraq there are a number of museums, in particular the National Museum of Baghdad, that hold priceless material. The U.S. military is eager to coordinate with any organization dedicated to the task of preservation, which transcends military and operational necessity."¹³¹

When marines entered the city on April 9, 2003, however, cultural property became a secondary concern. The pillage of the National Museum and other cultural sites in the city was not only the result of a failure to anticipate the very strong possibility that the destabilization of the Hussein regime would lead to looting and vandalism, but was also a deliberate political and strategic choice. The United States ultimately deemed protecting the cultural heritage of the Iraqi people of lesser importance than dismantling the remnants of the Ba'athist regime, securing Saddam Hussein's palaces and the Oil Ministry, and making the city safe for American soldiers.

B. The Looting of the National Museum

After American soldiers entered Baghdad the Hussein regime quickly disintegrated. Over the next week a massive outbreak of civil disorder plagued the city. On the morning of April 10 a dozen looters reached the National Museum and began threatening the staff members left defending the collection. The dozen looters soon multiplied into scores and then hundreds of Iraqis began flooding the museum and removing antiquities from all twenty-eight galleries and several underground storage rooms.¹³² The pillagers hauled off an estimated 8,000-18,000 objects including thirty-three significant collection pieces ranging from the five thousand-year-old "Warka Vase" to the "Harp of Ur" and a life-size statute of King Entemana from 2600 BC.¹³³ Although initial reports of the number of objects taken were vastly overestimated, thousands of objects were taken or damaged, many of which had never been properly catalogued or studied.

Shortly after the looting began, the curator of the museum, Mr. Muhammed, appealed to American military forces in the area to stop the looting. Around noon, several soldiers and a tank accompanied Mr.

131. Martin Bailey, *US Officer Warned that There Was a Risk the Museum Would Be Looted*, ART NEWSPAPER, available at <http://www.theartnewspaper.com/news/article.asp?idart=10985> (last visited Feb. 16, 2005).

132. Burns, *supra* note 2, at A1.

133. Janet Rausa Fuller, *Theft of Iraq's Art Treasures Continuing*, CHI. SUN-TIMES, Sep. 30, 2003, at 22; Adam Goodheart, *Missing: A Vase, a Book, a Bird and 10,00 Years of History*, N.Y. TIMES, Apr. 20, 2003, at 4-10; Riding, *supra* note 4, at A1. See also Bogdanos, *supra* note 4, at 7-16 (noting that 3,411 pieces including the Warka Vase have been recovered as of September 2003).

Muhammed to the Museum and opened fire over the heads of looters, temporarily bringing a halt to the destruction.¹³⁴ Unfortunately, the American soldiers did not remain. According to Mr. Muhammed, the looters soon returned to the Museum where they continued picking over the collection for the next day and a half.¹³⁵ The National Museum was not the only victim of rampaging Iraqi mobs in the days following the destabilization of the Hussein regime. The regional museum at Mosul was ransacked, the National Library in Baghdad burned to the ground (and nearly all of its rare books, historical maps, and photos were lost) and an archive of ancient Korans also fell victim to looters.¹³⁶

The reaction from military authorities and the Bush Administration in the immediate aftermath was slow and defensive. On April 16, 2003, almost a full week after the looting began, an American tank platoon was finally assigned to protect the National Museum.¹³⁷ The Pentagon responded to international outrage over the preventable loss of Iraqi antiquities dismissively.¹³⁸ Dr. Joseph Collins, a deputy assistant secretary of defense, noted that the Pentagon did not instruct local commanders to provide protection for the National Museum or National Library: "We leave such decisions to commanders on the scene."¹³⁹ General Richard Myers framed the discussion in terms of the military conditions on the ground and admitted that the failure to protect Iraq's cultural property reflected American policy: "It's as much as anything else a matter of priorities."¹⁴⁰

Members of the Bush Administration downplayed the destruction of cultural property as either unforeseeable or unpreventable. On April 11, White House Press Secretary Ari Fleischer called the widespread civil disorder and attendant looting of the Museum "a reaction to oppression."¹⁴¹ Joseph Collins argued that the Pentagon "could never guarantee ahead of time the safety of a single building" in Iraq and claimed that the military never promised to *protect* the Museum.¹⁴² Defense Secretary Donald Rumsfeld was particularly nonchalant about the Pentagon's operational planning: "To try to pass off the fact of that unfortunate activity to a deficit in the war plan strikes me as a stretch."¹⁴³

134. Burns, *supra* note 2, at A1.

135. *Id.*

136. Douglas Birch, *In North Iraq, an Ancient Past Falls Victim to a Modern War*, BALTIMORE SUN., Apr. 18, 2003, at A1; Ian Fisher, *Museum Pillage Described as Devastating but Not Total*, N.Y. TIMES, Apr. 17, 2003, at B5; see also Howard LaFranchi, *Iraq's Looted Heritage Makes a Steady—if Slow—Comeback*, CHRISTIAN SCI. MONITOR, Oct. 14, 2004, at W1.

137. See BOGDANOS, *supra* note 4, at 1.

138. Jehl, *supra* note 130, at B5.

139. *Id.*

140. *Id.*

141. Frank Rich, *And Now, 'Operation Iraqi Looting'*, N.Y. TIMES, Apr. 27, 2003, § 2, at 1.

142. Jehl, *supra* note 130, at B5.

143. *Id.*

C. Reaction and Reform

The devastation of Iraqi cultural property elicited a strong reaction from the international community. UNESCO held emergency meetings in Paris on April 17 and in London on April 29.¹⁴⁴ A team of restoration experts from the British Museum left for Iraq immediately and UNESCO raised millions of dollars from private donors and member-states to fund conservation efforts.¹⁴⁵ In the face of an angry international community, the United States military and government began to take action. The American military appointed guards to keep watch over the remnants of the National Museum and the American government sent a team of cultural experts to Iraq.¹⁴⁶ Concurrently, the FBI and United States customs office worked to stem the flow of stolen Iraqi antiquities from Baghdad and Iraq.¹⁴⁷ American political leaders also spoke out strongly on behalf of Iraq's cultural property. In a speech on April 13, 2003, Colin Powell announced, "[t]he United States understands its obligations and will be taking a leading role with respect to antiquities in general but this museum in particular."¹⁴⁸ On May 6, John Ashcroft also pledged vigorous U.S. support for the recovery of Iraq's archaeological treasures.¹⁴⁹

Congress acted on the threat to Iraqi cultural property by putting forward House Resolution 2497¹⁵⁰ and Senate Bill 1291.¹⁵¹ The House Resolution, "[t]o provide for the recovery, restitution, and protection of the cultural heritage of Iraq," explicitly identified the international significance of Iraq's cultural property.¹⁵² The resolution not only recognized twenty-three important sites in Iraq, it also placed import restrictions on all undocumented Iraqi cultural property over 100 years old. In enacting the Emergency Protection for Iraqi Antiquities Act of 2004,¹⁵³ however, Congress chose to adopt the more limited Senate proposal.

D. Exceeding Treaty Obligations

The military's long-term commitment to help Iraq recover the most

144. Martin Gottlieb, *Campaign Starts to Help Iraq Rebuild Cultural Institutions*, N.Y. TIMES, Apr. 30, 2003, at A15.

145. Alan Riding, *Artworks; Art Experts Mobilize Team to Recover Stolen Treasure and Salvage Iraqi Museums*, N.Y. TIMES, Apr. 18, 2003, at B2.

146. *Id.*

147. *Id.*

148. John Noble Wilford, *Curators Appeal for a Ban on Purchase of Iraqi Artifacts*, N.Y. TIMES, Apr. 16, 2003, at B5.

149. Martin Gottlieb, *Ashcroft Says U.S. Will Aid Effort to Save Iraq Treasures*, N.Y. TIMES, May 7, 2003, at A14.

150. H.R. Res. 3497, 108th Cong. (2003).

151. S. 1291, 108th Cong. (2003).

152. H.R. Res. 3497.

153. Emergency Protection for Iraqi Antiquities Act of 2001, H.R. Res. 1047, 108th Cong. §§ 4001-4002 (2004). This Act grants the President the authority to prevent the illicit import of cultural property from Iraq through September 2009.

valuable and most well known objects taken from the National Museum exceeded the obligations of the United States under the Geneva Convention and Hague Convention of 1907. Indeed, the joint cooperative effort to defend the National Museum and recover stolen antiquities reached the highest ideals espoused within the 1954 Hague Convention.¹⁵⁴ With regard to the National Museum, the United States began *affirmatively protecting* the cultural property of the Iraqi people.

As this Note has attempted to establish, American military policy draws a sharp distinction between intentionally targeting and looting cultural sites and the far broader duty to protect cultural property. Thus, the initial decision to refrain from intervening in the looting at the National Museum, and at numerous cultural sites across Iraq, comported with American policy standards. In Iraq, however, the United States learned that intentionally destroying cultural sites is often conflated with negligently failing to prevent their destruction. In real terms, it does not matter who destroys cultural property, it only matters that it is lost. In the minds of Iraqis and in the eyes of the international community the loss of cultural property in either case was attributable to American callousness. It became apparent to American politicians and military leaders that to fulfill the underlying policy objectives behind the campaign, and to counter fierce criticism from within and without Iraq, it was necessary for the United States to move beyond its traditional obligations and take active measures to stem the tide of cultural plunder.

Not only did the United States take on the responsibilities of an occupying power under Article 5 of the 1954 Hague Convention, but the Iraqi Museum directors also fulfilled the obligations of a defending party.¹⁵⁵ The Museum directors successfully prevented the wholesale destruction of the Museum's collection by transporting many of the objects to hidden locations within the community.¹⁵⁶ Some of the most valuable artifacts in the Museum's collection, including the golden treasures of Nimrud, were placed in a vault in Baghdad's Central Bank several months prior to the invasion.¹⁵⁷ Almost all of these objects have since been recovered.

It appears likely, however, that these actions would have been taken even in the absence of the 1954 Hague Convention.¹⁵⁸ Indeed, the ultimate preservation of this important collection might reinforce the American perspective: Nations should be responsible for their own cultural property

154. United States Central Command deployed a team of thirteen experts to aid in the identification and recovery of Iraqi antiquities. See BOGDANOS, *supra* note 4, at 1. The United States was largely successful in their efforts to recover stolen and missing objects. Combining a "don't ask, don't tell" policy with an aggressive searches and seizure program, the U.S. helped effect the return of some 3,411 objects by September 2003. *Id.* at 3-4, 16.

155. 1954 Hague Convention, *supra* note 6, art. 5, at 244.

156. See BOGDANOS, *supra* note 4, at 5 ("Months before the war, the staff moved 337 boxes containing the museum's 39,453 ancient books, Islamic manuscripts, and scrolls to a bomb shelter in Western Baghdad.").

157. Shaila K. Dewan, *Iraq Museum Reopens with Assyrian Treasures*, N.Y. TIMES, July 4, 2003, at A10.

158. Iraq is a party to the 1954 Hague Convention.

during armed conflicts. In the case of the National Museum, removing the collection to safety appears a far more effective solution to the looting threat than potentially putting the lives of American soldiers at risk.

Before arriving at the conclusion that Iraqis should be entirely responsible for their own cultural property, however, it is important to note that the Iraqi curators were able to save only a portion of the collection. Hundreds of cultural sites in the city and in Iraq have been destroyed or damaged absent a similar herculean effort. To protect these cultural sites, the Iraqis are in dire need of the type of cooperative assistance that is a hallmark of the 1954 Hague Convention.¹⁵⁹ Unfortunately, beyond its tremendous commitment to the National Museum, American military authorities have made few efforts to aid Iraqis in the protection of other important cultural sites.¹⁶⁰

E. Destruction Continues

Despite recognition of the importance of protecting cultural property in Iraq as a vital component of the strategy to restore order and renew faith in the legitimacy of the American occupation, protections for cultural sites outside Baghdad remain lax. Thousands of archaeological sites across Iraq, some as rich as the ravaged collections of the National Museum, have been attacked by armed mobs of looters.¹⁶¹ Military intervention has been sporadic and ineffective. The very same excuses that were made during the initial days of the American occupation of Baghdad have been put forward to explain American idleness: Cultural property is simply not a priority. As Lt. Col. Daniel O' Donohue noted in May 2003, "[w]e don't have anywhere near enough marines to police every fixed site in the country Our view is that if it's a fixed site, it's primarily an Iraqi responsibility."¹⁶²

American forces *do* have many important responsibilities in Iraq, including the training of Iraqi soldiers, rebuilding and protecting vital infrastructure, and rooting-out insurgents. However, as FBI Director Robert S. Muller III acknowledged in a speech in November 2004, British experts have recognized that "there is a link between the removal and transport of cultural objects and the funding of terrorism."¹⁶³ The artifacts that are being smuggled out of Iraq every day may be feeding tens of millions of dollars into Iraq's underground economy and providing

159. 1954 Hague Convention, *supra* note 6, art. 5.

160. See BOGDANOS, *supra* note 4, at 3 (noting a world-wide cooperative investigation to recover museum antiquities).

161. See Martin Gottlieb, *Looters Swarm Over Remote Sites, Study Finds* N.Y. TIMES, June 12, 2003, at A18; Roger Atwood, *Stop, Thieves! Recovering Iraq's Looted Treasures*, WASH. POST, Oct. 3, 2004, at B2.

162. Edmund L. Andrews, *Iraqi Officials Say Looting of Ancient Sites Continues Despite Pleas to U.S. Troops for Help*, N.Y. TIMES, May 27, 2003, at A14.

163. Johnston, *supra* note 4, at A10.

weapons and funding to insurgents.¹⁶⁴ Protecting cultural property thus may not only be an important diplomatic strategy, but may also be an important, near-term tactic in the fight against the insurgency.

Unfortunately, at one of the few sites where the United States has taken an interest in cultural property—the historic city of Babylon—American troops may have caused significant damage.¹⁶⁵ A report sponsored by the British Museum noted that American military vehicles crushed 2600-year-old brick paving in the area, and artifacts from the reign of King Nebuchadnezzar II lay scattered about the U.S. base.¹⁶⁶ The extent of damage caused by paving for parking-lots and a helipad is unknown even to Iraq's Minister of Culture.¹⁶⁷ U.S. authorities have responded to the charges of negligent destruction of cultural property with assurances that Babylon will soon be returned to Iraqi control.¹⁶⁸ If returning the site to Iraqis involves the wholesale removal of American forces from the area, however, the ancient city may simply fall into the hands of looters. In Babylon and elsewhere in Iraq, Iraqis want to protect their cultural property, but they often do not have the resources or manpower to do the job.¹⁶⁹

Under the 1954 Hague Convention, occupying powers have an obligation to assist national authorities in preventing the looting of cultural sites. Although the United State is not a party to the Convention, it does recognize this principle in Baghdad. Because the United States defines the concept of "military occupation" narrowly, however, a distinction may be drawn between Baghdad and the rest of Iraq. Before it adheres to the obligations of an occupying authority, the United States contends that "occupation" must be both actual and effective.¹⁷⁰ Thus, in remote regions not immediately under the direct control of American troops, the military can simply claim lack of jurisdiction. Indeed, in the absence of a stable, national governing authority, areas not occupied by American or British troops have been left with little or no law enforcement.¹⁷¹ Armed looters

164. *Id.*

165. See Jonathan Steele, *Damage Inquiry at Ancient Babylon*, GUARDIAN (London), June 12, 2004, at 17; *U.S.-Led Troops Have Damaged Babylon, British Museum Says*, N.Y. TIMES, Jan. 16, 2005, at A11.

166. *U.S.-Led Troops*, *supra* note 165, at A11.

167. *Id.* at A11 ("In an interview on Saturday with Associated Press Television News, Iraq's Minister of Culture, Mufeed al Jalzairi, said 'I expect that the archaeological city of Babylon has sustained damage but I don't know exactly the size of such damage.'").

168. Steele, *supra* note 165, at 17 ("[T]he US administrator in Iraq, and . . . the commander of the US-led multinational force, have also initiated moves to hand the site back to the Iraqis. . . . [T]hey said yesterday they had stopped further operations at Babylon 'that are or may be likely to cause archaeological damage.' The US would pay to repair any damage.").

169. To make matters worse, all 40 of the antiquities department vehicles were stolen during the outbreak of civil unrest in 2003, Andrews, *supra* note 162, at A14, and the U.S. has imposed severe restrictions on the arming of Iraqi security guards. Gottlieb, *supra* note 157, at A18. *But see* Johnson, *supra* note 4, at A10 (noting that Iraq deployed 1750 armed guards and 20 new trucks to protect cultural sites in Southern Iraq in late 2004 and early 2005).

170. This principle derives from section 42 of the Hague Convention of 1907, *supra* note 9 at 2306.

171. Alan Riding, *Art Experts Mobilize Team to Recover Stolen Treasure and Salvage Iraqi*

have taken advantage of the power vacuum to convert cultural sites into mines.

VI. CREATING A MORE COHERENT AND EFFECTIVE CULTURAL PROTECTION DOCTRINE

The cultural destruction that occurred in Baghdad and continues in Iraq is a problem with three distinct root causes: the vagueness and ineffectiveness of international cultural property treaties; the inconsistency between American military policy and America's long term strategic interests; and the United States's failure to adopt modern, international norms, including ratifying the 1954 Hague Convention. Solving the problem of cultural property destruction may require some difficult political and military choices for the United States and the international community. The loss of cultural property must always be weighed against important competing factors including protecting the lives of civilians and soldiers and meeting the strategic aims of military powers. However, clearer rules on cultural property may not require a Hobson's choice. As the American experience in Iraq has recently shown, compliance with internationally recognized rules of warfare may be in both the long-term and short-term interests of occupied and occupying countries.

A. Treaty Reforms

One significant problem with determining cultural property rules is unpacking the obligations that the numerous and distinct treaties provide. Current standards of cultural property protection remain vague and open to multiple and competing understandings and invite parties to re-construe treaty obligations in ways that are politically or militarily expedient.¹⁷² Clearer treaty language will eliminate such disputes and may prevent the avoidable loss of cultural property. Unfortunately, this type of clarification may also come at a political price. For instance, the notable lack of enthusiasm for the Second Protocol to the Hague Convention of 1954 may be a consequence of the substantial responsibilities it places on attacking

Museums, N.Y. TIMES, Apr. 18, 2003, at B1. Interestingly, it appears that Italian troops in Iraq may have done more to stem the tide of looting at many of these remote sites than American troops. This might be due to the fact that the Italian soldiers have fewer responsibilities in Iraq, but it may also be attributable to the Italian government's strong interest in cultural property and their ratification of the 1954 Hague Convention. Soon after the looting of the National Museum, the Italian government pledged \$1 million to preserve Iraq's national heritage. *Id.*; see also Neela Banerjee & Micah Garen, *Saving Iraq's Archaeological Past from Thieves Remains an Uphill Battle*, N.Y. TIMES, April 4, 2004, at A16 (noting that in early April 2004, Italian soldiers patrolled the Dhi Qar Province near Nasirya protecting sites and providing aid and training to Iraqi guards).

172. Although the Second Protocol to the 1954 Hague Convention, *supra* note 63, does condense and clarify cultural property law, limited international participation means that a patchwork of treaties remains in place.

parties.¹⁷³ Arguably, international treaties are written in vague and unhelpful language because member-states want different and conflicting standards. As the marked failure of prior cultural property treaties should indicate, however, rampant over-compromising on the language of a treaty often renders it little more than symbolic.¹⁷⁴ Creating a meaningful treaty requires consensus, the discipline of member-states, and strong leadership.

While a few criminal cases have been brought under the Geneva Convention for destruction of cultural property,¹⁷⁵ the absence of a more formal and consistent prosecutorial or adjudicative body has hampered prosecution of cultural property crimes. Unfortunately, like all war crimes, the line drawn between national and individual responsibility for the destruction of cultural property is tenuous. In the case of individual soldiers that commit minor property crimes, it appears better for the most part to allow member-states to prosecute offenders. However, in instances of major cultural crimes, an international court that prosecutes the soldiers or citizens of rogue nations can play two important roles. First, a court can play an important symbolic role by enunciating international norms regarding cultural property protection. Secondly, the court can develop a set of important precedents that clarify the delineation between acceptable and unacceptable war practices.

B. Reforming American Military Manuals

American military policy manuals that address the law of armed conflict are also in dire need of reform. The manuals (particularly the Army Field Manual) are divorced from the procedures and political realities that ultimately constrain American military actions. For the most part, they only describe the vague treaty obligations of the United States military. The manuals are hesitant to impinge on the battlefield decision making of American military commanders and thus provide ultimately unhelpful advice.

If the manuals were truly intended as useful reference guides they would more clearly reflect *actual* military procedures. The pamphlets might mention that the Pentagon often places cultural sites on “no target” lists and commanders should always consult these lists prior to ordering an attack. Given the sensitivity of many cultural sites during conflicts,

173. The Second Hague Protocol may be considered an auspicious development in the evolution of cultural property norms. Even if a majority of nations do not ratify it, the principles may seep into international practice and eventually become principles of customary international law.

174. Of course many countries are happy to create international treaties that have only symbolic meaning.

175. One example of a criminal case brought for destruction of cultural property is the prosecution of Croatian General Timohir Blaski by the International Criminal Tribunal for the former Yugoslavia. See Hiram Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1 (2001).

including many of the mosques in Iraq, the policy manuals might also instruct commanders to contact higher-level commanders or the Pentagon *whenever* a cultural property site presents itself as a military target.¹⁷⁶ Finally, the manuals provide very few examples of what constitutes military necessity or a proportional response to a threat from a cultural site. While much of the decision-making made in these instances is highly situational, it would be useful to provide some practical examples of appropriate responses.

The most important revision that should be made to all of the military manuals is clarifying the distinction between cultural property and private property. While it is important that American soldiers and commanders respect private property, they should be more clearly informed that international law provides special protections to cultural property. The conflation of these two types of property is puzzling. The United States clearly recognizes that cultural property is sensitive and its loss or destruction is a matter that can have serious repercussions. It makes little sense to have military manuals that effectively equate the pillage and destruction of cultural property with stealing or defacing private property. As a partial remedy, more severe penalties should be put into place to punish soldiers and civilians that steal or vandalize cultural property. The manuals should also instruct commanders that in most instances the obligation to prevent the wanton destruction of cultural property during civil insurgencies exceeds the obligation to protect private property.¹⁷⁷ In making tactical decisions and drawing up battle plans, commanders should be forced to consider that cultural property has more than an economic value: occupied populations and the international community revere cultural objects and cultural sites for their historic, ethnic, religious, and even personal significance.

Military manuals need not reflect only the most basic level of treaty compliance. As policy guides, manuals may also seek to represent larger international and national ideals. Indeed, the manuals do implicitly recognize the 1954 Hague Convention.¹⁷⁸ However, it would be preferable if the manuals did not just recognize the Convention, but also incorporated significant elements of the Convention into American military policy. The commitment to protect cultural sites in occupied nations is the most important part of the Convention that is currently missing in the manuals and it should be adopted immediately. Although the United States Senate

176. See, e.g., Second Hague Protocol, *supra* note 63, art. 6(c), at 771 (noting that unless circumstances do not permit consultation, the decision to destroy a cultural site can only be made by a battalion-level commander).

177. The military need not create an unnuanced rule that forces commanders to provide insignificant items of cultural property more protection than extremely valuable forms of private property. However, the manuals should force commanders to recognize a fundamental difference in the forms of property.

178. See NWP 1-14M, *supra* note 74, ch. 5, § 2.3; OPERATIONAL LAW HANDBOOK, *supra* note 8, at 16, 23. Incredibly, the Operational Law Handbook claims that the 1954 Hague Convention, "elaborates . . . but does not expand, the protections accorded cultural property found in other treaties." *Id.* at 23.

has not yet ratified the 1954 Hague Convention, the military is not necessarily constrained by this political choice. The military may find that it is within its own best interests to observe all elements of the Convention. Such a move could be predicated upon intra-service notions of chivalry and honor, or may be adopted as an effective military strategy to win “hearts and minds.”¹⁷⁹

C. Aligning American Norms with International Norms

Cultural property has morphed from its relatively meager status as personal or private property and is now widely recognized as the heritage of nations, ethnic groups, and the international community. Current American military policy, however, embodies notions of cultural property that are nearly one hundred years old. Reliance upon the 1907 Hague Convention for a cultural property policy not only ignores the ineffectiveness of this treaty during World War I and World War II, but also fails to recognize evolving understandings of culture and cultural ownership. In order to prevent the recurrence of cultural property destruction in American-occupied territories, United States military policy must adapt to reflect these evolving norms.

The first step, perhaps, in showing that the United States has a renewed commitment to the cultural heritage of the world should be passage of the 1954 Hague Convention and the Geneva Protocols. Although there was some discussion about whether the United States would become a member-state of the 1954 Hague Convention in the 1990s, efforts to ratify the Convention have stalled in Congress. Even if the United States does ultimately join the 1954 Hague Convention, however, it remains a cause for concern whether the United States will actually comply with the letter and/or spirit of the treaty provisions.¹⁸⁰

Mere ratification of international treaties will not be enough to save the world’s cultural property from destruction. The United States must also

179. Again, since these manuals are merely policy, rather than legal rules or codes, deviations could be made from the manuals if American troops or American interests were at risk.

180. The current administration’s statements about the Geneva Convention have cast doubt on its commitment to international law. *See, e.g.*, Memorandum from John Yoo, Deputy Assistant Attorney General, & Robert J. Delahunty, Special Counsel, U.S. Department of Justice, to William J. Haynes III, Department of Defense, (Jan. 9, 2002), at 2, *available at* <http://msnbc.msn.com/id/5025040/site/newsweek>; Memorandum from Alberto R. Gonzales, White Housel Counsel, to the President, (Jan. 25, 2002), *available at* <http://news.findlaw.com/hdocs/docs/torture/gnzls12502mem2gwb.html> (“[I]t is clear that the President has the constitutional authority to suspend our treaties with Afghanistan pending the restoration of a legitimate government.”); *see generally* AMNESTY INT’L, UNITED STATES OF AMERICA: HUMAN DIGNITY DENIED: TORTURE AND ACCOUNTABILITY IN THE ‘WAR ON TERROR,’ 35-38 (2004) *available at* <http://web.amnesty.org/library/Index/ENGAMR511452004> (explaining that the United States’ “selective disregard for the Geneva Conventions has . . . at best sown confusion about interrogation rules among its armed forces, and at worst given a green light to torture or other cruel, inhuman or degrading treatment . . . [including] in Iraq, where the Conventions were held by the U.S. Government to apply”).

adhere to these treaties in practice and ultimately help redraft them to make these rules of war more substantive and enforceable. In its effort to create meaningful international laws of warfare for the 21st century, the United States must recognize not only the sovereign rights of nation-states, “but must take into account the cultural and human rights of individual people and the ethnic communities in which they reside.”¹⁸¹ States are ultimately only proxies—and often poor ones at that—for the peoples that truly own the world’s cultural heritage.

VII. CONCLUSION

In removing Saddam Hussein, the United States rid Iraq of a brutal regime, but it also unseated a dictator that had found a way to protect and preserve Iraq’s cultural heritage. Shortly after American forces entered Baghdad, American soldiers began attacking symbols of the Hussein dictatorship. Statues of Hussein were leveled by tank fire and American soldiers and Iraqis joined forces in removing and destroying thousands of portraits and artifacts from the Hussein era. Arguably, these artistic representations of the Hussein regime did not rise to the level of internationally protected cultural property,¹⁸² and thus their destruction was permissible, if not laudable. However, the zealous destruction of these cultural objects surely reflects the symbolic importance of cultural property.

In the past, the looting and destruction of cultural property has been the signal of conquest and the death of empires. When the Mongols invaded Iraq in the thirteenth century, the invaders created a bridge of

181. Ironically, although the Yoo memo notes that international norms regarding the application of the Geneva Convention have shifted from a state-centered viewpoint to an individual human rights approach, the memo insists upon an original intent analysis of the Convention:

Article 3 was prepared during a period in which the traditional, state-centered view of international law was still dominant . . . Giving due weight to the State practice and doctrinal understanding of the time, it seems to us overwhelmingly likely that an armed conflict between a Nation State and a transnational terrorist organization, or between a Nation State and a failed State . . . could not have been within the contemplation of the drafters.

Yoo Memorandum, *supra* note 170, at 10. This analysis flies in the face of Geneva Protocols I and II, which explicitly identify the rights of individual “peoples” during armed conflicts. *See id.*, at 121-22; *see also* DETTER, *supra* note 114, at 35-36 (noting the application of international laws of armed conflict to non-state entities); DINSTEIN, *supra* note 61, at 21-25 (comparing and contrasting the human rights and states rights aspects within the Geneva Conventions).

182. *But see* Parks, *supra* note 21, n.154

[I]n the 1991 Coalition war against Iraq, a proposal was made to employ two F-117 aircraft armed with precision-guided munitions to topple a fifty-five foot statue of Saddam Hussein . . . and to break The Monument, otherwise known as the Victory arch Questions regarding the cultural property status of each, and the wisdom of the attack, caused the issue to be referred to Washington . . . While the cultural property status remained unresolved, the issue turned on whether their destruction would make an effective contribution to the Coalition effort.

paper across the Tigris by dumping millions of Islamic texts into the river.¹⁸³ Seven hundred and fifty years later, the motives of the United States government in invading Iraq are very different. Indeed, in many ways, the United States hopes to reshape Iraqi identity around the very heritage that is now being destroyed, stolen, and exported. To avoid becoming simply another “barbarian” invader, the United States must commit itself to the people of Iraq and their cultural heritage. Until the Iraqi people have the resources and a stable administration capable of protecting historical, religious, and archaeological sites, the United States should provide Iraqi cultural authorities with funds, equipment, training, and perhaps, a few marines.

183. Kenneth Baker, *supra* note 3, at E1.