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THE LOOTING OF IRAQI ART: OCCUPIERS AND COLLECTORS TURN AWAY LEISURELY FROM THE DISASTER

Amy E. Miller[†]

In Breughel's Icarus, for instance: how everything turns away
Quite leisurely from the disaster; the ploughman may
Have heard the splash, the forsaken cry,
But for him it was not an important failure; the sun shone
As it had to on the white legs disappearing into the green
Water; and the expensive delicate ship that must have seen
Something amazing, a boy falling out of the sky,
had somewhere to get to and sailed calmly on.¹

I. Introduction

There is a plant which grows at the bottom of the ocean that, when eaten, returns man to his youth. One man, Gilgamesh, tied rocks to his feet, sank deep below the waves of the sea and plucked the plant from the ocean floor. When he returned to the surface he was afraid to eat it and decided to travel home, to the city of Uruk, to test the plant's powers on an old man living there. He crossed many mountains and oceans during his trip, and one night while he lay sleeping a snake slithered up to Gilgamesh and ate the magic plant. When the snake slipped away he left his old skin behind, and ever since that day, snakes have shed their skin reclaiming their youth.²

The foregoing is an excerpt from the *Epic of Gilgamesh*, which art historians consider the oldest written story on Earth, even pre-dating the *Iliad*. The tale unfolds on twelve stone tablets, which archeologists discovered in Nineveh, Iraq, amidst ruins of the library of an Assyrian king who ruled from 669-633 B.C.³ Where are these tablets now? Nobody knows. They are just some of the thousands of artifacts stolen or destroyed in April 2003

[†] B.A., Smith College (1999); J.D. Case Western Reserve University School of Law (2005). I would like to thank Hiram Chodosh for his guidance in developing the structure and focus of this Note. I would also like to thank Nikhil for his superb proofreading and thoughtful advice. Finally, my mother, Susan, and my sisters, Suzanne and Kate, deserve my sincere gratitude for their support and good humor through each of my endeavors.

¹ WYNSTAN HUGH AUDEN, *Musee des Beaux Arts*, in COLLECTED POEMS OF W.H. AUDEN, 146-147 (Edward Mendelson ed., 1976).

² RICHARD HOOKER, THE EPIC OF GILGAMESH: TABLET XI, summarizing the translation of Maureen Gallery Kovacs, THE EPIC OF GILGAMESH (1990).

³ *Id.*

during the widespread looting and destruction following the invasion of Iraq.

In the months following the military offensive, U.S. and Iraqi investigators began to find priceless pieces of art turning up in the most peculiar places. In one instance, a man drove his car up to the National Museum and revealed the 5,000 year old Vase of Warka, stolen during the looting, lying in fourteen broken pieces in the trunk of his car.⁴ Ancient worshipers used this four foot tall vase, made of limestone and marked by delicate carvings, in ritual ceremonies dating back to 3200 BC and it represents the oldest known depiction of ritual observance in the world.⁵ A few days after the thrilling recovery of the Warka Vase, Iraqi police and U.S. soldiers discovered the 5,500 pound marble Warka sculpture.⁶ Experts value the sculpture at thirty million dollars and it represents the most valuable possession of the Iraqi National Museum stolen during the mass looting.⁷ Police located the sculpture, which depicts a female head, under a few feet of soil in a private orchard outside of Baghdad.⁸ Later in the week, investigating authorities searched a flower shop in Baghdad and discovered two 12th century swords, allegedly used by the heroic Islamic warrior Salahadin.⁹

Many priceless antiquities that remained intact for five millennia now lay shattered and almost destroyed.¹⁰ Milestones of Iraq's artistic and scientific past trickle back to the museums and libraries under an amnesty program, by which Iraqis can return items to museum officials and American investigators without fear of prosecution.¹¹ However, most experts believe that the truly priceless relics of Iraq's lost civilizations might never return.¹²

⁴ Richard Lloyd Parry, *Looted Pounds 20m Statue is Found Buried in Garden*, THE LONDON TIMES, Sept. 18, 2003, at 18.

⁵ David Filipov, *Sumerian Mona Lisa returned to National Museum*, BOSTON GLOBE, Sept. 24, 2003, at A14.

⁶ Parry, *supra* note 4, at 18 (estimating the sculpture's worth at twenty million British pounds).

⁷ *Id.*

⁸ Ancient Iraqi Sculpture Found, BBC News World Edition, Sept. 18, 2003, at <http://news.bbc.co.uk/2/hi/entertainment/3118878.stm>.

⁹ E.A. Torriero, *5,500-year-old mask lost in Iraq looting is recovered*, CHI. TRIB., Sept. 18, 2003, at C1.

¹⁰ Rajiv Chandrasekaran, *'Our Heritage is Finished' Looters Destroyed What War Did Not*, WASH. POST, Apr. 13, 2003, at A1 (stating that the looting which occurred as Saddam Hussein's regime crumbled was largely unchecked by U.S. soldiers, and that the pillage caused more damage to "Iraq's civilian infrastructure and economy than three weeks of U.S. bombing").

¹¹ Ewen MacAskill, *Marines Accuse Baghdad Museum of Hampering Hunt for Treasures*, THE GUARDIAN, May 6, 2003, at 12 ("Col. Bogdanus [sic] has offered an amnesty to anyone returning stolen goods. 'No questions asked means no questions asked,' he said. About 200 pieces have been returned under this offer . . .").

¹² See, e.g., Layla Al-Zubaidi, *Selling-Out Iraq's Cultural Heritage*, ZNet, Apr. 29, 2003, available at <http://www.zmag.org/content/showarticle.cfm?SectionID=15&ItemID=3538>

Over 10,000 artifacts remain missing from museums, galleries, and excavation sites in Iraq and many scholars believe that these objects may remain covertly protected in private collections forever.¹³

This Note examines the responsibility of the United States government as an occupying power in Iraq during the devastating looting and cultural ruin that swept the nation in April 2003. The dominant focus of media and public attention concerning the 2003 invasion of Iraq centered on Iraq's weapons program and political leadership; however, this Note bypasses these topics and focuses instead on one discrete area of the conflict: the destruction of cultural antiquities in Iraq. Section II begins by discussing the importance of Iraqi antiquities in the international art market, both historically and economically. Part B reviews the looting activities following the 1991 Persian Gulf War. Part C discusses the relevant laws that impact the international art market and the protection of cultural property. Part D identifies the multitude of advisors and experts who warned the United States of imminent looting in Iraq following an invasion. Part E describes the U.S. military's failure to prevent the pillage. Lastly, Part F includes a description of occupation law and the pertinent obligations of an occupying State with respect to cultural property in the occupied territory. Section III argues that the United States' inability to protect Iraqi art from looting constitutes a breach of its responsibility under international occupation law. Section IV debates the merits of a managed art market and discusses the option of involving Iraq in an open international art market with managed trade. Finally, Section V concludes that the chaotic state of the international art market coupled with the United States' omission to act on its international obligation to protect Iraq's cultural property contributed to the dramatic scale of the looting in Iraq.

II. Looting Iraqi Art: Before and After

A. Iraqi Antiquities

Iraq is home to one of the richest cultural treasure troves in the world. Babylonians, Sumerians, and Assyrians lived in the fertile region called Mesopotamia, which is wedged between the Tigris and Euphrates Rivers, and the remnants of their civilizations remain a hot commodity on the art market today. In 1994, the art world watched in amazement as a six foot long wall panel, attributed to the Assyrian empire, sold at an auction for

(reporting that "antiquities are neither renewable nor repairable" and that "while certain parts of infrastructure may be rebuilt, cultural goods once removed from their context cannot be replaced"; Even if the objects are found again on the antiquity market, "it is extremely hard to put them back into context: to verify whether they are original or fake, which sites they come from and which historical periods they have belonged to").

¹³ *Id.*

U.S. \$11.8 million – the highest price ever paid for an antiquity.¹⁴ Art historians believe that the stone panel, which portrays a eunuch and a divine form with wings,¹⁵ formed part of an interior wall of one of the great Assyrian palaces of Nineveh, Iraq.¹⁶ In ancient times, large slabs of stone covered palace walls with carvings and relief images of wars and battles, celebrating the victories of kings and their armies and recording the destruction of conquered enemy cities.¹⁷ The stone panel sold in 1994 at the Christie's auction was a spectacular testament of ancient history, and because the relief survived wars and time in such remarkable condition, its value cannot be overstated.

Every year, archaeologists discover new cities and uncover secrets of ancient civilizations buried deep under the sands of Iraq. In 1989, the American archeologist Elizabeth C. Stone discovered one of the oldest lost cities in southern Iraq – Mashkan.¹⁸ Dr. Stone identified the city palace, cemetery, and manufacturing quarters, and because the city was abandoned suddenly, the fleeing residents left behind numerous pieces of daily domestic life that provide a fascinating look into ancient lifestyles.¹⁹ The ancient city of Mashkan represents a prime example of what this historically significant area means to art historians and archaeologists. The civilizations that spread across the Mesopotamian region were responsible for the world's first documented written language, legal structure (including the oldest known records of a murder trial)²⁰ and astronomical research.²¹ Undoubtedly, more discoveries are on the horizon and this promise of future unearthed treasure heightens the pressure to protect and preserve this valuable area.

It is a painstaking, and seemingly endless, task to uncover the cultural treasures of Iraq. Because ancient cities were built upon one another, they created stacks of civilizations that are difficult to separate.²² Mesopotamian art can also be hard to locate because, unlike ancient Egyptians, people in this area did not bury their dead with large quantities of art.²³ As a result of the difficulties in excavation, demand for Iraqi antiquities far outstrips sup-

¹⁴ Mike Toner, *The Past in Peril*, ATLANTA J. & CONST., Sept. 19, 1999, at H2.

¹⁵ Rita Reif, *Gleaming Antiquities From Ancient Mesopotamia*, N.Y. TIMES, Dec. 4, 1994, § 2, at 47.

¹⁶ John Malcolm Russell, *The Modern Sack of Nineveh and Nimrud*, CULTURE WITHOUT CONTEXT (Illicit Antiquities Res. Centre, Cambridge, Eng.), Autumn 1997, Issue 1 *available at* <http://www.mcdonald.cam.ac.uk/IARC/cwoc/contents.htm>.

¹⁷ *Id.*

¹⁸ John Noble Wilford, *Archeologists Discover A Lost Rival to Babylon*, N.Y. TIMES, Apr. 11, 1989, at C1.

¹⁹ *Id.*

²⁰ Bruce Lambert, *Thorkild Jacobsen, Scholar*, N.Y. TIMES, May 5, 1993, at B12.

²¹ Filipov, *supra* note 5, at A14.

²² Wilford, *supra* note 18, at C1.

²³ Reif, *supra* note 15, § 2, at 47.

ply.²⁴ Understandably, the discoveries that reach the art market, legal or otherwise, are richly rewarded by collectors who are willing to pay anywhere from tens of thousands to millions of dollars for a small piece of preserved ancient life.

B. Post-Gulf War Lessons

It was these valuable artifacts that looters swarmed to find in the weeks and months after the 1991 Persian Gulf War (the “1991 War”), often leaving excavation sites across Iraq with bulldozers filled with soil containing clay cuneiform tablets, bowls, and ancient pieces of art.²⁵ Saddam Hussein managed to protect the National Museum in Baghdad from looters; however, the Iraqi government left nine of Iraq’s thirteen regional museums unguarded and they were heavily plundered. Looters devastated these museums with what experts define as spontaneous stealing, but over time a calculated and professional ring of art thieves took over.²⁶

Several archeological dig sites, some spanning the length of 40 or 50 football fields,²⁷ suffered greatly from air attacks in addition to the looting during the 1991 war.²⁸ There are over 10,000 of these vast excavation areas in Iraq,²⁹ making these sites notoriously hard to protect during war and unrest, both because of their exposed location, increasing their susceptibility to air raids and looters, but also because of the sheer number of locations throughout the country. In the days before the United States’ 2003 invasion, museum curators and historians in Iraq recalled the devastation of the looting after the 1991 War, and they were not prepared to let it happen again.³⁰

In anticipation of the United States’ attack, Iraqi museum officials focused on protecting what they could and packed up countless pieces of art from museums across the country and hid them in underground vaults and secret locations.³¹ These museum officials knew that even local leaders

²⁴ Cf. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L. L. 831, (1986) (discussing that source nations possess a supply of cultural property that exceeds internal demand, and market nations experience a demand for antiquities that outstrips their supply).

²⁵ Hugh Dellios, *Archeologists Visit Old Digs in Baghdad*, CHI. TRIB., Mar. 25, 2001, at C3.

²⁶ Martin Gottlieb & Barry Meier, *Aftereffects: 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.

²⁷ Dellios, *supra* note 25, at C3.

²⁸ Kim Sengupta, *Treasures of Babylon Are Moved As Bombers Strike*, THE INDEP. LONDON, Sept. 30, 2002, at 10.

²⁹ Gottlieb & Meier, *supra* note 26, at A16.

³⁰ Guy Gugliotta, *Pentagon was Told of Risk to Museums*, WASH. POST, Apr. 14, 2003, at A19.

³¹ Sengupta, *supra* note 28, at 10.

could not be trusted, because many of these individuals accepted payments and allowed dealers to pillage historical sites after the 1991 War.³² Iraqi museum workers, archaeologists and art scholars remained concerned as a U.S. invasion appeared imminent because of the particularly delayed and flawed communication they experienced with the United States government during the 1991 War.³³ These scholars reminded the United States of its defective performance regarding the preservation of Iraqi antiquities, and they enlisted the Pentagon's help to prevent such a disaster from repeating itself.³⁴ In addition to these warnings from art experts, international art preservation organizations also reminded the United States of its shortcomings during the 1991 War and urged the United States government to adhere strictly to international legal principles regulating the protection of cultural property during times of war.³⁵

C. The Impact of Art Law

At the time the United States invaded Iraq in April 2003, the international art market struggled to conform to sweeping changes in the laws governing the sale and purchase of antiquities. These new laws, or new interpretations of old laws, reflect the modern commitment of nations to advocate robust rules to protect their cultural property. However, because these laws reduce the amount of art allowed for legal export, they also create a volatile environment ripe for an expanding illegal market. It was this volatility that played a major role in the widespread looting and destruction of Iraq's cultural antiquities in April 2003.

1. Domestic Antiquities Law

In the United States, the National Stolen Protection Act ("NSPA")³⁶ represents the most prominent law available to prosecute individuals guilty of transferring and receiving stolen foreign antiquities. Until recently, U.S. courts limited prosecution under the NSPA to crimes originating in the United States; recent case law however has expanded the coverage of crimes available for prosecution under the NSPA to *foreign* instances of

³² Barry Meier & Martin Gottlieb, *An Illicit Journey Out of Egypt, Only a Few Questions Asked*, N.Y. TIMES, Feb. 23, 2004, at A1.

³³ See also Eleanor Robson, *The Collection Lies in Ruins, Objects from a Long, Rich Past in Smithereens*, THE GUARDIAN, Apr. 14, 2003, at 5.

³⁴ Gugliotta, *supra* note 30, at A19 (quoting McGuire Gibson, an specialist in Iraq culture, as stating "we wanted to make sure this didn't happen again;" pentagon officials agreed and said "they would be very aware and would try to protect the artifacts.").

³⁵ Gottlieb & Meier, *supra* note 26, at A16.

³⁶ 18 U.S.C. § 2314 (2002).

theft.³⁷ This demonstrates a dramatic shift in U.S. law and it represents a source of great concern for many art dealers and collectors whose antiquities interests involve foreign sales and purchases. The United States no longer provides safe harbor to individuals who deal in foreign cultural property with a checkered past.

The expansion of the NSPA began in 1974, when courts in the United States first began to indict and convict individuals for the theft of foreign cultural property under the NSPA.³⁸ After 1979, there was a 22-year lull in the prosecution of individuals, under the NSPA, who bought or sold stolen foreign antiquities and brought them into the United States.³⁹ The legal tides changed in 2002 with the Second Circuit's decision in *United States v. Schultz*,⁴⁰ holding that the defendant violated the NSPA when he knowingly received stolen Egyptian antiquities through foreign commerce.⁴¹

The NSPA prohibits the transportation "in interstate or foreign commerce (of) any goods . . . of the value of \$5,000 or more" with knowledge that such goods were "stolen, converted or taken by fraud."⁴² The NSPA also applies to anyone who "receives, conceals, stores, barter[s], sells, or disposes of any goods . . . of the value of \$5,000 or more . . . moving as, or which are part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken"⁴³ Congress enacted the NSPA to deter and punish individuals who stole as well as those who received stolen property.⁴⁴ The language of the NSPA

³⁷ See *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003) (holding that defendant violated the NSPA when he knowingly received stolen Egyptian antiquities through foreign commerce) (emphasis added).

³⁸ *United States v. Parness*, 503 F.2d 430, 440 n.14 (2d Cir. 1974) (holding that the language of the NSPA "is broad enough to justify the federal courts in applying the statute whenever they determine that the [property was] stolen in another country."). See also *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974) (upholding the conviction of defendants under the NSPA for conspiracy to transport stolen pre-Columbian artifacts in interstate commerce). The *Hollinshead* court required the prosecution to prove that defendants knew that the artifacts transported were stolen, but defendants' lack of knowledge regarding where the artifacts were stolen and their lack of understanding of Guatemalan law was irrelevant. The Court held that defendants' conduct and admissions compelled the conclusion that they knew that it was contrary to Guatemalan law to remove the artifacts from Guatemala.

³⁹ William G. Pearlstein, *Claims For The Repatriation of Cultural Property*, 28 LAW & POL'Y INT'L BUS. 123, 132 (1996).

⁴⁰ *Schultz*, 333 F.3d at 393.

⁴¹ *Id.* at 416.

⁴² 18 U.S.C. § 2314 (2002).

⁴³ *Id.*

⁴⁴ *E.g.* *United States v. McClain*, 545 F.2d 988, 994 (5th Cir. 1977) (discussing congressional intent to enact stolen property statutes which "would discourage both the receiving of stolen goods and the initial taking"; this discouragement was intended to help states retrieve stolen property once it had crossed state lines, however "Sections 2314 and 2315 refer not only to interstate commerce, but to foreign commerce as well").

clearly includes “foreign commerce” and thus, it is entirely appropriate to apply the NSPA to thefts completed abroad and to the successive importation of the goods into the United States.⁴⁵

In 1977, *United States v. McClain*⁴⁶ became one of the first cases in United States history to apply the NSPA to the theft of foreign cultural property under the jurisdiction of universality.⁴⁷ The *McClain* court held that the NSPA applied to illegal exportation of artifacts declared by Mexican law to be the property of Mexico.⁴⁸ In this case, the defendants were indicted under the NSPA and convicted of conspiring to transport and receive pre-Columbian artifacts that they knew were stolen from archeological excavation sites in Mexico. The *McClain* court stated that so long as the foreign nation had an explicit declaration of national ownership over all antiquities found on its soil – not mere export restrictions – then any illegal exportation from that nation can be considered theft, and will invoke the NSPA.⁴⁹

Although the United States had a historical policy encouraging the importation of art objects which were over 100 years old,⁵⁰ the *McClain* court held that this traditional U.S. policy did not narrow the scope of the NSPA so as to render it “inapplicable to artifacts declared to be the property of another country and illegally imported into this country.”⁵¹ This was a groundbreaking case because the court applied a United States law to punish individuals who violated a foreign national ownership law in spite of a traditional U.S. policy of tolerance.⁵² The principle in this case reinforces the

⁴⁵ *Id.*

⁴⁶ *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979); see also Patty Gerstenblith, *Selling the Past: Criminal Intent*, ARCHAEOLOGY, at <http://www.archaeology.org/magazine.php?page=online/features/schultz/criminal> (“Ultimately a conviction was obtained only on a conspiracy charge, but it still set up the principle that national ownership laws create ownership so that when antiquities are stolen, individuals can be prosecuted under the NSPA.”).

⁴⁷ The universality doctrine states that a court has criminal jurisdiction if the nation where that reviewing court is located has the defendant in custody.

⁴⁸ *McClain*, 545 F.2d at 988.

⁴⁹ *Id.* at 1000-1001.

⁵⁰ Law on Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091-95 (2000) [hereinafter Importation Act] (allowing the importation of pre-Columbian artifacts into the United States, with the exception of certain types of artifacts which warrant a civil penalty of forfeiture).

⁵¹ *McClain*, 593 F.2d at 664.

⁵² If the *McClain* court had not applied the NSPA to the defendant’s conduct, it is unlikely that the defendant would have been convicted under the Importation Act. Any object imported in violation of the Importation Act “shall be seized and subject to forfeiture under the customs laws.” “The Importation Act prohibits the importation into the United States of “stone carvings and wall art which are pre-Columbian monumental or architectural sculpture or murals.” The latter term is defined in § 2095(3) as any stone carving or wall art (or fragment or part thereof) that (1) is the product of pre-Columbian Indian culture of Mexico,

principle that an art dealer or collector may not break antiquities laws abroad and then escape punishment by seeking refuge in the United States.

In *Schultz*,⁵³ a federal court convicted Frederick Schultz, a successful New York art dealer, of knowingly receiving stolen Egyptian antiquities through foreign commerce in violation of the NSPA. The court's opinion began with a scalding reproach of unscrupulous individuals who seek to profit at the expense of the preservation of a legendary civilization⁵⁴ and referenced the *McClain* decision by stating that the *Schultz* case was not the first time American law recognized the "special" property interest created by a foreign patrimony law.⁵⁵ The Court cited Section 2315 of the NSPA which enumerates an express provision for foreign commerce, and which has consistently "been applied to thefts in foreign countries and subsequent transportation into the United States"⁵⁶ and sentenced Frederick Schultz to serve thirty-three months in prison, in addition to paying a \$50,000 fine and returning a valuable ancient sculpture to Egypt as restitution.⁵⁷

The Second Circuit affirmed the conviction and sentence of Schultz by stating, "[w]e conclude that the NSPA applies to property that is stolen from a foreign government, where that government asserts actual ownership of the property pursuant to a valid patrimony law."⁵⁸ The valid patrimony law discussed in *Schultz* refers to Egypt's Law 117, which asserts state ownership over all antiquities discovered on Egyptian soil. Egypt actively enforces Law 117, at home and abroad, prosecuting dozens of serious violations and confiscating all newly discovered antiquities excavated from Egyptian soil.⁵⁹ The *Schultz* case marks the first reliance of a U.S. court on Egypt's Law 117 to secure a conviction under the NSPA.

Central America, South America, or the Caribbean Islands; (2) was an immobile monument or architectural structure or was a part of, or affixed to, any such monument or structure; and (3) is subject to export control by the country of origin." Therefore, since many of the artifacts stolen and transferred by the defendant in *McClain* were movable items such as "ceramic dishes, pots, or figurines that were likely not affixed to monuments or walls," many of these items may not have fallen within the meaning of the Importation Act, and thus, the defendant would not have been guilty of any violation. *McClain*, 593 F.2d at 664 nn.5-6.

⁵³ *United States v. Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393 (2d Cir. 2003).

⁵⁴ *Id.* at 446. "The marvelous artifacts of ancient Egypt, so wondrous in their beauty and in what they teach of the advent of civilization, inevitably invite the attention, not just of scholars and aesthetes, but of tomb-robbers, smugglers, black-marketeers, and assorted thieves. Every pharaoh, it seems, has a price on his head (at least if the head is cast in stone); and if the price is right, a head-hunter will be found to sever the head from its lawful owner."

⁵⁵ *Id.*

⁵⁶ *Id.* at 448 citing *McClain*, 545 F.2d at 994.

⁵⁷ Martha B. G. Lufkin, *End of the Era of Denial for Buyers of State-Owned Antiquities: United States v. Schultz*, INT'L J. OF CUL. PROP., Vol. 11, No. 2, 305, 316 (2002).

⁵⁸ *Schultz*, 333 F.3d at 416

⁵⁹ *Id.* at 401; *see also* Lufkin, *supra* note 57, at 313-314.

Many art dealers and collectors reacted with extreme emotion to the court's opinion in the *Schultz* case. They argued that U.S. courts set a dangerous precedent by permitting an NSPA indictment based on foreign patrimony laws, and they claimed that the *Schultz* decision would "have a catastrophic impact on the art world and the public interests it serves."⁶⁰ Indeed, the *Schultz* case intensified the growing apprehension that many individuals felt toward international art trade, illustrating the impact that the NSPA indictments and patrimony claims exert over the United States art market.

Patrimony claims are requests by a foreign State for the return of an antiquity which has either been stolen from the source nation or exported in violation of a national law which prohibits the exportation of art from the nation of origin.⁶¹ With patrimony claims increasing each year, dealers and collectors are subject to the increasing risks of expensive lawsuits and the possibility of losing valuable pieces of art due to these repatriation demands. In light of this developing trend, the District Court's application of the NSPA in *Schultz* cautions members of the foreign art trade to investigate their purchases thoroughly, regarding issues of foreign national patrimony rights, and to avoid sticking their heads in the proverbial sand.⁶²

2. Foreign Antiquities Law

In addition to heeding NSPA guidelines in the United States, participants in the international art market must also concern themselves with foreign antiquities laws which ban the exportation of artifacts from their nation of origin ("source nation"). Egypt's Law 117: The Law on the Protection of Antiquities ("Law 117")⁶³ illustrates a growing trend among nations, with

⁶⁰ Lufkin, *supra* note 57, at 316 ("Dealers, collectors and museums will be forced to abandon the trade and collection of any objects that any foreign government may ultimately claim . . . Existing collections also will be affected: collectors and museums that acquired objects in good faith reliance on U.S. law will be placed at risk").

⁶¹ Pearlstein, *supra* note 39, at 123-124.

⁶² Lufkin, *supra* note 57, at 318.

⁶³ Law 117: The Law on the Protection of Antiquities (1983). The following are the relevant provisions of Law 117:

Article 1

An "Antiquity" is any movable or immovable property that is a product of any of the various civilizations or any of the arts, sciences, humanities and religions of the successive historical periods extending from prehistoric times down to a point one hundred years before the present, so long as it has either a value or importance archaeologically or historically that symbolizes one of the various civilizations that have been established in the land of Egypt or that has a historical relation to it, as well as human and animal remains from any such period.

rich deposits of cultural artifacts, intent on protecting their national cultural identities by prohibiting collectors and dealers from removing antiquities from their historical origin. U.S. courts have interpreted Law 117 as protecting all antiquities found in Egypt after 1983, claiming that this property belongs to the Egyptian government, and banning the export of this property out of Egypt.⁶⁴

Many of the source nations initiating patrimony claims are typically poor countries that control vast quantities of treasured artifacts and whose citizens participate in the illegal art trade for economic survival.⁶⁵ Participants in the illegal art market profit from their nation's desire to maintain "found-in-the-ground" laws, requiring that artifacts found in the soil of a country must stay in that country.⁶⁶ Such laws are a valiant, yet seemingly vain effort, to protect and preserve the art history of a nation. In reality, nationalistic art laws catch a small percentage of offenders, and serve instead to fuel a hungry illegal art market by limiting the stream of artifacts flowing into an international art market where demand already outstrips supply.⁶⁷

Article 6

All antiquities are considered to be public property – except for charitable and religious endowments It is impermissible to own, possess or dispose of antiquities except pursuant to the conditions set forth in this law and its implementing regulations.

Article 7

As of [1983], it is prohibited to trade in antiquities.

Article 8

With the exception of antiquities whose ownership or possession was already established or is established pursuant to [this law's] provisions, the possession of antiquities shall be prohibited as from [1983]. Law 117 includes a chapter entitled "Sanctions and Penalties" detailing the criminal penalties to be imposed on persons found to have violated the law. This section provides that a person who "unlawfully smuggles an antiquity outside the Republic or participates in such an act shall be liable to a prison term with hard labor and a fine of not less than 5,000 and not more than 50,000 pounds." A person who steals or conceals a state-owned antiquity faces a prison term of three to five years and a minimum fine of 3,000 pounds. A person who removes or detaches an antiquity from its place, counterfeits an antiquity, or unlawfully disposes of an antiquity faces a prison term of one to two years and a minimum fine of 100 pounds. A person who writes on, posts notices on, or accidentally defaces an antiquity faces a prison term of three to twelve months and/or a fine of 100 to 500 pounds. Laws as referenced in *United States v. Schultz*, 333 F.3d 393, 399-400 (2d Cir. 2003).

⁶⁴ *Schultz*, 333 F.3d at 401; *see also* Lufkin, *supra* note 57, at 313-314.

⁶⁵ *Cf.* Howard Reich, *Treasures Easy Pickings*, CHI. TRIB., Apr. 28, 2003, at 1; *see also* James Nafziger, *Regulation by the International Council of Museums: An Example of the Role of Non-Governmental Organizations in the Transnational Legal Process*, 2 DENV. J. INT'L L. & POL'Y. 231, 232-233 n.6 (1972).

⁶⁶ Pearlstein, *supra* note 39, at 128.

⁶⁷ *Cf.* COLIN RENFREW, *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE*, ED. NEIL BRODIE, JENNIFER DOOLE & COLIN RENFREW, xi, McDonald Institute Monographs (2001) (discussing the importance of persuading collectors

Turkey provides another example of a country so rich in prized antiquities that many consider it the largest single source of antiquities for the United States market.⁶⁸ Turkey leads the way in patrimony claims – many of them successful – and often museums and collectors choose to settle their disagreements outside of court rather than pay for lengthy trials.⁶⁹ In *Republic of Turkey v. Metropolitan Museum of Art*,⁷⁰ Turkey brought suit against the Metropolitan Museum of Art in New York (“Met”) to regain possession of artifacts that were excavated from Turkish burial sites in 1966 and exported to the United States in violation of Turkey’s patrimony law,⁷¹ which, established in 1906, confers ownership of all antiquities found in Turkey to the Turkish government.⁷² The Met filed a motion to dismiss, but the district court denied the motion because it found genuine issues of material fact as to whether the Met purchased the artifacts in good faith.⁷³ In 1993, the Met agreed to settle the dispute with Turkey – based on compelling evidence which suggested that the Met knew that the Turkish artifacts were illegally excavated when it purchased them – and returned the entire collection of artifacts to the Republic of Turkey.⁷⁴ Many nations have followed Turkey’s example by enacting strict national ownership laws within their own countries.⁷⁵ Once these nations understand that international law provides no remedy for their claims against illegal exporters, they often exercise a self-created solution whereby possession of a piece of art, even if purchased in good faith, is nevertheless deemed illegal in light of their self-executed national ownership laws.⁷⁶ This automatic presumption of ownership by the source nations incites apprehension in collectors and dealers in the international art market who must take painstaking measures to ensure that their purchases will not become the subject of a future patrimony claim.

to stop purchasing unprovenanced antiquities with ambiguous legal lineage, because customer demand perpetuates the widespread problem of looting and cultural devastation).

⁶⁸ Pearlstein, *supra* note 39, at 137.

⁶⁹ For example the return of the Elmalı Treasure of silver coins from 4th-century B.C. Greece and the Kiyomuzi-Sannenska Museum’s return of the Paul Klee watercolor “Deserted Square of an Exotic Town” both represent art settlements in response to patrimony claims. See also Melik Kaylan, *On the Trial of Stolen Art*, Forbes.com available at <http://www.forbes.com/2001/06/27/0627hot.html>.

⁷⁰ 762 F. Supp. 44 (S.D.N.Y. 1990).

⁷¹ *Id.* at 45.

⁷² Leonard Post, *Law’s True Art*, THE NAT. LAW J., Jan. 13, 2003 available at <http://www.herrick.com/publications/default.asp?page=articles>.

⁷³ Republic of Turkey v. Metropolitan Museum of Art, 762 F. Supp. 44, 47.

⁷⁴ Post, *supra* note 72 available at <http://www.herrick.com/publications/default.asp?page=articles>.

⁷⁵ See Nathan Vardi, *The Return of the Mummy*, Forbes.com, Dec. 22, 2003 (discussing the patrimony laws of Turkey (1906), China (1982), Egypt (1983) and Italy (1902/1939)).

⁷⁶ Jonathan S. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466, 470-471 (1988).

3. International Law – The 1954 Hague Convention and UNESCO

In addition to the NSPA in the United States and foreign patrimony laws in individual sovereign states, there is an extensive body of international law intent on protecting the world's cultural property. The 1954 Hague Convention for the Protection of Cultural Property ("1954 Hague Convention")⁷⁷ and the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("UNESCO Convention")⁷⁸ represent the two principal international conventions which define cultural property and mandate its protection.⁷⁹

The NSPA and foreign patrimony laws reinforce the notion that art belongs to its nation of origin, and must remain there unless the art was exported before the patrimony laws came into existence. This nationalistic view of art represents a fundamental departure from the governing principles of international law.⁸⁰ While the individual nations lay claim to any piece of art found within their borders, the Hague Convention supports a common cultural heritage philosophy⁸¹ reinforcing the idea that art belongs collectively to the world. The 1954 Hague Convention has a rich history and it remains the most important law to date charged with protecting cultural property in wartime.

Throughout World War II, the international community had only the 1907 Hague Convention⁸² to guide it with respect to the regulation and protection of cultural property during wartime. In light of the fact that the 1907 Hague Convention failed to protect cultural property during World War I,⁸³

⁷⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 1, 249 U.N.T.S. 240, 244 [hereinafter 1954 Hague Convention].

⁷⁸ 823 U.N.T.S. 231 (1972), reprinted in 10 I.L.M. 289 (1971) [hereinafter UNESCO Convention].

⁷⁹ See Andrea Cuning, *The Safeguarding of Cultural Property in Times of War & Peace* 11 TULSA J. COMP. & INT'L L. 211, 223 (2003) (discussing the special legal status that the 1954 Hague Convention and UNESCO bestow upon cultural property).

⁸⁰ The preamble to the UNESCO Convention, *supra* note 78, states: "Considering that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting . . ." (emphasis added).

⁸¹ Chip Colwell-Chanthaphonh & John Piper, *War and Cultural Property*, INT'L J. OF CUL. PROP., Vol. 10, No. 2, 217, 226 (2001).

⁸² Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, Jan 26, 1910, 187 Consol. T.S. 227 [hereinafter 1907 Hague Convention]; see also Colwell-Chanthaphonh & Piper, *supra* note 81, at 222-223.

⁸³ SHARON A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY* 18-19 (1977). As cited in Colwell-Chanthaphonh & Piper, *supra* note 81, at 222.

due to modern innovations in warfare which the 1907 Convention never conceived,⁸⁴ many doubted whether Europe's cultural treasures would survive World War II. Tragically, the worst fears came true, and it was this extraordinary destruction of prized architecture and cultural icons in Europe during the second world war that prompted the international community to create and sign the 1954 Hague Convention.⁸⁵

The 1954 Hague Convention updated and improved the language of the 1907 Hague Convention to better protect cultural antiquities from the disasters of modernized weaponry used in war.⁸⁶ The 1907 Hague Convention was far from obsolete, however. Although it did little to protect cultural property during World War II, the Convention proved vital after the war ended in convicting several members of the Nazi party, during the Nuremberg trials, for the pillage of cultural property.⁸⁷ The 1954 Hague Convention solved many shortcomings from past agreements; however, there still remained a crucial gap that would not be bridged for another sixteen years.

At this point in history, international law provided a written convention protecting cultural antiquities principally during wartime. It was not until 1970, with the introduction of the UNESCO Convention, that international law began to protect cultural property both during moments of war and peace. The UNESCO Convention responded to deficiencies in the Hague Conventions by addressing the rapidly expanding illegal art trade that the existing conventions were powerless to stop.⁸⁸ The UNESCO Convention largely dedicates itself to protecting the world's antiquities by establishing a cooperative network of nations who work together to prevent the illicit import and export of cultural property.⁸⁹ The signatories to the Convention

⁸⁴ Colwell-Chanthaphonh & Piper, *supra* note 81, at 222.

⁸⁵ Karl E. Meyer, *Who Owns the Spoils of War?*, *ARCHEOLOGY*, July-Aug. 1995, at 46. "[N]ot since the Goths and Vandals had Europe witnessed so spiteful an assault on other people's cultural treasures. The ancient cathedral at Novgorod was ravaged, Pushkin's house ransacked, Tolstoy's manuscripts burned and everywhere museums, churches, libraries, universities, and scientific institutes were robbed and destroyed."

⁸⁶ 1954 Hague Convention, *supra* note 77, at Art. 23-25.

⁸⁷ Victoria A. 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, 211 (Fall 1997 / Winter 1998).

⁸⁸ UNESCO Convention, *supra* note 78, Article 2:

1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international cooperation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting therefrom.

2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

⁸⁹ UNESCO Convention, *supra* note 78, Article 9:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are af-

comprise the cooperative network; as of June 2003, 100 countries had ratified the Convention⁹⁰ including the United States and Iraq.⁹¹

In the decades prior to the UNESCO Convention, international laws governing cultural property were “honored more in their breach than in their observance”⁹² and it was this dilemma that the UNESCO Convention sought to remedy. Thomas Hoving, a former director of the Met, notably wrote “that with the UNESCO hearings, the age of piracy had ended.”⁹³ However, many dispute this assertion and argue instead that the UNESCO Convention has done little to stem the tide of illegal trade in the international art market.⁹⁴

4. Sanctions

In addition to cultural property laws limiting the trade of antiquities between nations, another element plunged Iraq into a climate that was conducive to an illegal art trade: sanctions.⁹⁵ When the United Nations imposed sanctions against Iraq in 1990, the Iraqi economy fell into a deep recession creating mass poverty among the Iraqi people.⁹⁶ Thus, many would say that the looting began years ago – when the 1991 War ended.⁹⁷ Following the war, extreme poverty caused mass looting throughout the nation’s archeological excavation sites and museums, and in time these artifacts surfaced

ected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

⁹⁰ U.S. State Department, International Cultural Property Protection, International Law at <http://exchanges.state.gov/culprop/intlaws.html>.

⁹¹ Reich, *supra* note 65, at 1.

⁹² Nafziger, *supra* note 65, at 232-33 n.6.

⁹³ Thomas Hoving, *Making the Mummies Dance* (1993). See also Carol Kino, *Cultural property disputes are reshaping the art world-but how?*, Culturebox, July 28, 2003, available at <http://slate.msn.com/id/2086136/>.

⁹⁴ COLIN RENFREW, *supra* note 67, at 2; “[A]lthough the UNESCO Convention . . . was adopted as long ago as 1970, the destruction of archaeological sites through looting has increased rather than diminished in the thirty succeeding years.”

⁹⁵ Toner, *supra* note 14, at H2.

⁹⁶ Hershel Shanks, *Plundering Iraq: Should Looted Antiquities be Returned to Rogue States?*, *ARCHAEOLOGY ODYSSEY*, Mar./Apr. 2002 (quoting John M. Russell as stating, “. . . the economic sanctions essentially destroyed modern Iraqi culture, moving them quite a few steps back in terms of their standard of living, standard of health and nutrition and so on. The sanctions have been a disaster for everybody except Saddam.”).

⁹⁷ Reich, *supra* note 65, at 1.

for sale in the illegal art market.⁹⁸ McGuire Gibson, President of the American Association for Research in Baghdad, states that “[t]here has been a tremendous, uninterrupted wave of looting and smuggling of antiquities since the [1991] Gulf War – thousands of items a month.”⁹⁹ The Coordinator of the Illicit Antiquities Research Centre in England, Neil Brodie, agrees: “All kinds of stuff has been flowing out of Iraq: stone reliefs, inscribed clay tablets, cylinder seals, pottery – you name it.”¹⁰⁰

Before the weakening of Saddam Hussein’s power during the 1991 War, looting was an unthinkable crime.¹⁰¹ Hussein, a great lover of art and culture, enacted strict laws that protected Iraq’s cultural treasures from exportation when his party rose to power in the late 1960’s.¹⁰² “For decades, the Iraqis kept a very tight lid on stuff, and there was very, very little getting out,” stated Professor Gibson.¹⁰³ However, once Iraq’s economy began to spin out of control due to the imposition of sanctions, Hussein was unable to protect the thousands of precious excavation sites that meant money to the needy Iraqi people.¹⁰⁴ “What the sanctions did brilliantly was to set up the pre-conditions for training of a whole new set of antiquities looters.”¹⁰⁵ In the end, the United Nation’s sanctions on Iraq meant terrible consequences for the legitimate art market, as well as taking a destructive toll on the preservation of Iraqi antiquities.

D. Expert Warnings

Years before the devastating effects of sanctions permeated Iraq, nine prominent art historians in the United States pleaded with White House officials to “take every possible measure to protect” Iraq’s museums and historical treasures on the eve of the 1991 War.¹⁰⁶ They argued, “[a]s specialists in the antiquities and history of Mesopotamia, we share . . . a special responsibility for this crucial segment of our common cultural heritage.”¹⁰⁷ Although art scholars spoke these words in 1991, out of their anxiety to

⁹⁸ Barbara Crossette, *Ancient, Priceless and Gone with the War*, N.Y. TIMES, Dec. 8, 1996, § 4, at 5. (“International sanctions have impoverished the Iraqis, many of whom have sold family heirlooms for food. Today the country’s archeological treasures are . . . up for sale.”).

⁹⁹ Reich, *supra* note 65, at 1.

¹⁰⁰ *Id.*

¹⁰¹ *Buried Treasure*, WALL ST. J., Jan. 9, 2004, at W11. (“In legal, moral and ethical terms, this museum always belonged to the people, [b]ut in reality it was always Saddam’s.”).

¹⁰² Reich, *supra* note 65, at 1.

¹⁰³ Barbara Crossette, *Iraqis, Hurt By Sanctions, Sell Priceless Antiquities*, N.Y. TIMES, June 23, 1996, at 1.

¹⁰⁴ *Id.*

¹⁰⁵ Reich, *supra* note 65, at 1 (quoting the remarks of Tony Wilkinson, a professor of archeology at the University of Chicago).

¹⁰⁶ William H. Honan, *Concern for Iraqi Antiquities*, N.Y. TIMES, Feb. 1, 1991, at C26.

¹⁰⁷ *Id.*

preserve Iraq's priceless antiquities from the looming war, these sentiments were equally relevant in 2003. On the brink of the second conflict with Iraq, individuals eager to prevent history from repeating itself made fresh efforts to avert catastrophe.

In January 2003, just three months before the plundering in Iraq began, dozens of art scholars and antiquities experts met with representatives of the State Department and the Pentagon in Washington to discuss art protection in Iraq.¹⁰⁸ In the face of what seemed like an inevitable invasion of Iraq, no one wanted a repeat performance of the looting and destruction that occurred during the 1991 War when looters ransacked nine of Iraq's museums and stole over 4,000 objects.¹⁰⁹ The American Anthropological Association was one of several groups that sent letters to President George W. Bush and the Department of Defense urging them to "use all means"¹¹⁰ to protect the museums and ancient archaeological sites in Iraq from looters and thieves.

Art scholars and historians continued their campaign to warn the U.S. government of the extreme vulnerability of Iraqi antiquities to pillaging and destruction right up until the days before the invasion began.¹¹¹ They were not alone. Former leaders, exiled from Iraq, and international relief experts candidly informed U.S. officials of the looting and chaos that would likely saturate the nation during and after the invasion.¹¹² After countless meetings and emails filled with words of admonition, these individuals left the White House buoyed by assurances from government officials that their advice would not be overlooked.¹¹³ However, when the invasion commenced, any brief respite these crusaders of Iraqi culture experienced gave way to the stinging reality that Washington had ignored their warning.

E. U.S. Inaction

The wanton looting and destruction that accompanied the United States invasion of Iraq precisely fulfilled the worst fears of art scholars and historians around the world. Although U.S. tanks remained staunchly parked

¹⁰⁸ Gugliotta, *supra* note 30, at A19.

¹⁰⁹ Anita Ramasastry, *Looting and Theft of Cultural Artifacts Continues in Iraq*, YURICA REP., Apr. 22, 2003, at <http://www.yuricareport.com/Law%20&%20Legal/Legal%20Analysis%20US%20Liable%20in%20Iraq.html>.

¹¹⁰ *Id.*

¹¹¹ John Noble Wilford, *Art Experts Fear Worst in the Plunder of a Museum*, N.Y. TIMES, Apr. 13, 2003, at B3; Douglas Jehl & Elizabeth Becker, *A Nation at War: the Looting; Experts' Pleas to Pentagon Didn't Save Museum*, N.Y. TIMES, Apr. 16, 2003, B5.

¹¹² Joel Brinkley & Eric Schmitt, *The Struggle for Iraq: Prewar Planning*, N.Y. TIMES, Nov. 30, 2003, at 26 (quoting Massoud Barzani, leader of the Kurdistan Democratic Party, as stating, "On many occasions, I told the Americans that from the very moment the regime fell, if an alternative government was not ready there would be a power vacuum and there would be chaos and looting. . . . Given our history, it is very obvious this would occur.").

¹¹³ Jehl & Becker, *supra* note 111 at B5.

outside the Oil Ministry in Baghdad during the height of the looting, only sporadic military personnel offered assistance to the besieged museums and libraries just blocks away.¹¹⁴ Eyewitnesses report that U.S. soldiers did nothing when looters entered the National Museum in Baghdad and plundered 120 rooms filled with priceless artifacts.¹¹⁵ Museum officials begged the soldiers to intervene, but even a tank driving by just 50 yards away from the museum entrance refused to stop and help.¹¹⁶ One archaeologist observed looters streaming out of the National Museum "carrying antiquities on hand carts, bicycles and wheelbarrows and in boxes," and still he could not convince the U.S. soldiers to station permanent tanks outside the museum to deter looters.¹¹⁷

Amid the accusations of the U.S. military's neglect of Iraq's museums, U.S. commanders respond that they simply lacked the manpower to prevent the widespread pillaging.¹¹⁸ One Marine officer stationed near the museum stated that "we just don't have enough troops," because a large majority of U.S. forces struggled against resistance forces during the looting sprees.¹¹⁹ Major General Stanley McChrystal characterized the situation as a simple matter of priorities.¹²⁰ While looting was a problem during the invasion, it typically did not claim lives, and, consequently, U.S. soldiers beset by enemy forces were compelled to relegate the issue of looting to a lesser priority.¹²¹ Residents of the plundered cities opposed this measured decision and

¹¹⁴ Frank Rich, *And now: Operation Iraqi Looting*, N.Y. TIMES, Apr. 27, 2003, § 2, at 1. ("If the United States had enough troops to secure the Oil Ministry, it surely had the very few needed to ward off looters at the museum."); see also Jonathan Steele, *Museum's Treasures Left to the Mercy of Looters*, THE GUARDIAN, Apr. 14, 2003, at 5.

¹¹⁵ John F. Burns, *Looting; Pillagers Strip Iraqi Museum Of Its Treasure*, N.Y. TIMES, Apr. 13, 2003, at A1. See Fiachra Gibbons, *Experts Mourn the Lion of Nimrud, Looted as Troops Stood by*, THE GUARDIAN, Apr. 30, 2003, at 5 (quoting Donny George, Curator at the Baghdad Museum, as commenting, "[o]ne of our staff who lived in the museum compound went to an American tank and pleaded with them, begged in fact, for them to come in front of the museum to keep it safe, [b]ut he was told they had no orders to do so.").

¹¹⁶ Gibbons, *supra* note 115, at 5 (quoting Neil MacGregor, director of the British Museum, as stating that "[i]t's very extraordinary . . . that with American troops in Baghdad, American troops almost at the gates of the museum, this was allowed to happen,").

¹¹⁷ Burns, *supra* note 115, at A1.

¹¹⁸ John F. Burns, *Looting and a Suicide Attack As Chaos Grows in Baghdad*, N.Y. TIMES, Apr. 11, 2003, at A1.

¹¹⁹ *Id.*

¹²⁰ See *Coalition Forces Must Stop Iraqi Looting*, Human Rights Watch, NY, Apr. 12, 2003 available at <http://www.hrw.org/press/2003/04/iraq041203.htm>. See also Rich, *supra* note 114, § 2, at 1 (quoting another general (Richard Myers) as saying it was "a matter of priorities").

¹²¹ Edmund L. Andrews, *After the War: Treasures of Babylon*, N.Y. TIMES, May 27, 2003, at A14.

proffered a theory that U.S. soldiers could have prevented the destruction if American troops had taken control of each town as Iraqi troops fled.¹²²

F. Law of Occupation

The law of occupation is international law which governs the actions and responsibilities of a nation's military occupation of a foreign territory.¹²³ Occupation law draws from many sources including the Fourth Geneva Convention,¹²⁴ the 1907 Hague Regulations on the Laws of War,¹²⁵ Geneva Protocol I,¹²⁶ and by customary international law.¹²⁷ On March 20, 2003, President Bush announced to the world that the United States had begun a "broad and concerted campaign" against Iraq, aimed at toppling the regime of Saddam Hussein.¹²⁸ With this action, the United States triggered the rules and responsibilities governed by international occupation law once it established and exercised military authority over Iraq.¹²⁹

In May 2003, the United Nations Security Council, of which the United States is a permanent member, affirmatively accepted the application of international occupation law to the United States' actions in Iraq with Resolution 1483.¹³⁰ This Resolution confirms the actions of the United States and Britain in Iraq and compels them to "recogniz[e] the specific authorities, responsibilities, and obligations under applicable international law . . . as occupying powers . . ." ¹³¹ U.N. Secretary-General Kofi Annan voiced his agreement that international laws of occupation must apply to the United States during its occupation of Iraq, and "that the coalition has the responsibility for the welfare of the people in this area."¹³²

The 1907 Hague Convention marks the beginning of the United Nations' concern with the protection of cultural and religious property during

¹²² David Rohde, *In Newly Occupied Mosul, U.S. Colonel Faces 1.7 Million Added Responsibilities*, N.Y. TIMES, Apr. 13, 2003, at B5.

¹²³ David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 860 n.2 (2003).

¹²⁴ Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, paras. 47-78, 6 UST 3516, 75 UNTS 287 [hereinafter Geneva IV].

¹²⁵ 1907 Hague Convention, *supra* note 82, paras. 42-56.

¹²⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Dec. 7, 1978, paras. 14-15, 63, 69, 85, 1125 UNTS 3 [hereinafter Geneva Protocol I].

¹²⁷ Scheffer, *supra* note 123, at 860 n. 2.

¹²⁸ *Iraq War Begins*, PBS Newshour, available at <http://www.pbs.org/newshour/extra/features/jan-june03/firstattack.html>.

¹²⁹ 1907 Hague Convention, *supra* note 82, at para. 43.

¹³⁰ SC Res. 1483 (May 22, 2003), 42 ILM 1016 (2003); *see also* Scheffer, *supra* note 123, at 842.

¹³¹ SC Res. 1483 at 1016.

¹³² Ramasastry, *supra* note 109, at <http://www.yuricareport.com/Law%20&%20Legal/Legal%20Analysis%20US%20Liable%20in%20Iraq.html>.

periods of military authority by an occupying power.¹³³ The 1907 Convention requires that the occupying power use all methods at its disposal to restore public order and to ensure safety.¹³⁴ Pillaging and the confiscation of private property are strictly forbidden, and the Convention expressly commands that the occupying power respect religious convictions and practices of the occupied territory.¹³⁵

The 1954 Hague Convention for the Protection of Cultural Property was the first international convention with the principal focus of protecting the world's art.¹³⁶ The 1954 Convention outlines a mission to protect "property of great importance to the cultural heritage of every people."¹³⁷ Article 4 compels contracting parties to "prohibit, prevent, and if necessary, put a stop to any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against cultural property."¹³⁸ This governing principle holds an occupying power to a high standard by requiring the occupying State to promote the health and well being of the occupied nation's people, in addition to preserving the country's cultural treasures and ancient antiquities.¹³⁹ Although the United States has not ratified the 1954 Convention – although it is a signatory – the Convention is still binding law because it codifies existing customary international law.¹⁴⁰

Under international occupation law, the United States' failure to protect Iraq's museums and libraries from looting represents a complete departure from the responsibilities of an occupying power governed by the 1907 and 1954 Hague Conventions, the Fourth Geneva Convention, Geneva Protocol I, and customary international law. The war planners acting on behalf of the United States committed a grievous injury against the Iraqi people by failing to protect their heritage. The laws of occupation govern the international obligations of the occupying State, and the United States, as an occupying power, breached its obligation under this body of law.

III. Who is Responsible? – The Burdens of Occupation Law

The image of President Bush flickered across television sets throughout Iraq on April 10, 2003 with the declaration that the Iraqi people were

¹³³ 1907 Hague Convention, *supra* note 82, at para. 43.

¹³⁴ *Id.*

¹³⁵ *Id.* at paras. 46-47.

¹³⁶ 1954 Hague Convention, *supra* note 77, at art. 1.

¹³⁷ *Id.* at art. 1.

¹³⁸ *Id.* at art. 4(3).

¹³⁹ *Id.*

¹⁴⁰ Colwell-Chanthaphonh & Piper, *supra* note 81, at 228; see also Keith W. Eirinberg, *The United States Reconsiders the 1954 Hague Convention*, 3 INT'L J. OF CULTURAL PROP. 27, 31 (1994).

“the heirs of a great civilization that contributes to all humanity.”¹⁴¹ President Bush’s words rang hollow, however, because even as he spoke, looters carried away Iraq’s cultural past in wheelbarrows and car trunks.¹⁴² The same great civilization that Bush praised lay burned, looted, and utterly destroyed, and the Iraqi people wanted answers. One woman wept bitterly as she told a reporter that her culture was ruined.¹⁴³ Experts agreed. Paul Zimansky, an archaeologist, described the situation as the worst cultural disaster in 500 years, and yet another art scholar, Eleanor Robson, stated that “You’d have to go back centuries, to the Mongol invasion of Baghdad in 1258, to find looting on this scale.”¹⁴⁴

The cultural devastation that accompanied the April 2003 invasion was inexcusable. Although the United States did not actively participate in the looting of Iraq, its failure to stop the widespread looting and obliteration of cultural antiquities constitutes a wrongful act under international law, and the United States must take full responsibility for the consequences. Occupation law focuses on prohibiting an occupying power from committing affirmative acts of destruction against an occupied territory’s cultural property. Although this body of law does not explicitly state that a State’s omission is equivalent to a commission, a convincing argument exists which places an affirmative duty on an occupying power to prevent residents of an occupied State from looting cultural property.

This compelling argument stems from the U.N. International Law Commission’s (“ILC”) characterization of an internationally wrongful act as when a State’s conduct consisting of an action or *omission*: A) is attributable to the State under international law; and B) constitutes a breach of an international obligation.¹⁴⁵ The ILC predicates a finding of culpability on this two-prong test regardless of whether or not the State had malice or intent to cause the harm.¹⁴⁶ Occupation law compels an occupying power to protect cultural property, and although it does not specifically address whether an omission to protect that property constitutes a breach, this Note makes the argument that a State commits an internationally wrongful act not only when its actions breach an international obligation, but when it fails to act by omission to prevent such a breach.

¹⁴¹ Rich, *supra* note 114, § 2, at 1.

¹⁴² *Id.* “America sent the message that Iraq’s ‘great civilization,’ as the president called it, wasn’t worth a single tank for protection.”

¹⁴³ Dexter Filkins, *A Nation at War: The Reaction; An Art Center Left in Ashes*, N.Y. TIMES, Apr. 17, 2003, at A1.

¹⁴⁴ Rich, *supra* note 114, § 2, at 1.

¹⁴⁵ Draft articles of the International Law Commission on Responsibility of States for internationally wrongful acts, U.N. Doc. A/56/10 (2001); formally adopted by the ILC at its 2776th meeting held on July 16, 2003 (emphasis added) [hereinafter ILC for internationally wrongful acts].

¹⁴⁶ David Hodgkinson, *Compensation for Wartime Environmental Damage: Challenges to International Law after the Gulf War*, 35 VA. J. INT’L L. 405, 449 (1995).

A. Assigning the Blame

The ILC states that a State is responsible for an internationally wrongful act when that act is attributable to the State under international law.¹⁴⁷ As stated above, the United States did not actively participate in the looting; however it is undeniable that the United States *failed to act* to prevent the pervasive looting which occurred during its occupation of Iraq. Under occupation law, the United States assumed the role of an occupying power the moment it placed Iraq under its authority.¹⁴⁸ The territory affected by this swing in power includes any area where the occupying State has established its authority and has the ability to exercise it. Once the United States became an occupying power in Iraq, the laws of occupation dictate that the U.S. utilize all measures to restore, and ensure “public order and safety, while respecting . . . the laws in force in the country.”¹⁴⁹ Article 46 of the 1907 Hague Convention instructs that private property must be respected by occupying forces, and Article 47 strictly forbids the act of pillage.¹⁵⁰

Asserting, with nothing more, that the U.S. eventually became an occupying power, raises the critical question: when did the U.S. become an occupying power under international law? A timeline may be helpful in answering this question, at least with respect to Baghdad, where the majority of the looting took place at the National Museum and Library. U.S. forces invaded Baghdad on Wednesday, April 9, 2003, and the city fell into U.S. control with remarkable speed.¹⁵¹ Although pockets of resistance remained – with Iraqi loyalists still a veritable threat – the U.S. exerted undeniable control over the city of Baghdad on April 9, 2003.¹⁵² The bulk of the looting and destruction of the National Museum and Library of Iraq occurred on Thursday, April 10, 2003, and Friday, April 11, 2003, with a near loss of the entire collection of 170,000 artifacts in just 48 hours.¹⁵³ By Sunday, April 13, 2003, although U.S. troops were successful in establishing

¹⁴⁷ ILC for internationally wrongful acts, *supra* note 145, art.3 (2) (a).

¹⁴⁸ 1907 Hague Convention, *supra* note 82, para. 42.

¹⁴⁹ *Id.* at para. 43.

¹⁵⁰ *Id.* at para. 46-47.

¹⁵¹ Ian Fisher, *A Nation at War: Baghdad; Free to Protest, Iraqis Complain about the U.S.*, N.Y. TIMES, Apr. 16, 2003, at A1.

¹⁵² Burns, *supra* note 118, at 1 (describing the “power vacuum” that occurred when U.S. troops entered Baghdad on Wednesday, Apr. 9, 2003 to the sound of cheering and waving Iraqi citizens. This parade of welcome turned into a looting spree with “most of the looters . . . able to pick targets at will in plain view of American units, without fear of any American response.”).

¹⁵³ John F. Burns, *Baghdad Residents Begin a Long Climb to an Ordered City*, N.Y. TIMES, Apr. 14, 2003, at A1.

relative order in Baghdad, looting continued to occur on a more limited scale throughout Baghdad and in other cities occupied by U.S. forces.¹⁵⁴

One might argue that the United States cannot be expected to claim responsibility for looting which occurred just one day after its arrival into Baghdad. This argument fails however because the law of occupation springs into effect the moment an occupying State establishes its authority in the territory. The U.S. ousted the Iraqi regime and established ruling power when its tanks rolled unimpeded through the streets of Baghdad on Wednesday, April 9, 2003.

Thus, the United States assumed the role of an occupying power in Baghdad when it established its authority in the city and possessed the power to exercise its authority by the presence of troops and weapons.¹⁵⁵ Once the United States became an occupying power in Baghdad, it triggered the application of the rules and regulations of occupation law which govern the behavior of an occupying State.¹⁵⁶ Therefore, the United States was an occupying power, responsible for restoring public order and safety in compliance with occupation law, during the period when looters ransacked the National Museum and Library in the days following the invasion of U.S. troops. Consequently, the looting and destruction of these cultural antiquities is attributable to the United States under the international laws of occupation, thereby satisfying the first prong of the ILC's test to prove responsibility for an internationally wrongful act.

B. Committing the Breach

The second prong of the test is whether the United States' conduct constituted a breach of an international obligation. Although U.S. troops did not join the mobs of looters in their destruction of Iraq's cultural treasures, their failure to act affirmatively to stop the looters from entering museums, galleries, libraries, and excavation sites constitutes a breach of an international obligation under occupation law. A State commits an internationally wrongful act when it participates in "conduct consisting of an action or omission . . . [which c]onstitutes a breach of an international obligation of the State."¹⁵⁷ The laws of occupation outline these international obligations which govern the actions of an occupying State.¹⁵⁸

The Fourth Geneva Convention dedicates thirty-one articles to the laws of occupation and discusses with detail the fundamental obligations govern-

¹⁵⁴ Ian Fisher & John Kifner, *A Nation at War: The Streets; G.I.'s and Iraqis Patrol Together to Bring Order*, N.Y. TIMES, Apr. 15, 2003, at A1.

¹⁵⁵ 1907 Hague Convention, *supra* note 82, para. 42.

¹⁵⁶ *Id.* at art. 43.

¹⁵⁷ ILC for internationally wrongful acts, *supra* note 145, art.3 (2) (b).

¹⁵⁸ International occupation law draws from many sources including the Fourth Geneva Convention, the 1907 Hague Regulations on the Laws of War, Geneva Protocol I, and customary international law.

ing occupying forces. One of these obligations involves the protection of several types of property in the occupied territory that an occupying power is obliged to safeguard from acts of destruction. Article 53 states that: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."¹⁵⁹

Almost thirty years later, the Geneva Protocol I refined and bolstered the language of the Fourth Geneva Convention by elaborating on the property protected during a period of occupation. Article 85(4) (d) of Protocol I states that an occupying power commits a grave breach of the Protocol when it willfully makes: "the clearly-recognized historic monuments, works of art . . . which constitute the cultural or spiritual heritage of peoples . . . the object of attack, causing as a result extensive destruction thereof . . . when such works of art . . . are not located in the immediate proximity of military objectives."¹⁶⁰ This obligation holds potentially destructive behavior by the occupying power in check and highlights the importance of preserving the art and cultural heritage of the occupied territory.

The United States had an obligation to protect the cultural property of Iraq as an occupying power under international occupation law. The Fourth Geneva Convention and the 1907 Hague Convention require an occupying power to refrain from the destruction of private property in the occupied territory. The Geneva Protocol I expands the occupying power's obligation to include the specific protection of cultural property by classifying any willful destruction of the cultural heritage of a people, including historic monuments and works of art, as a grave breach of the Protocol. These international conventions condemn willful actions by the occupying power to destroy non-military targets in the occupied territory. However, a State commits an internationally wrongful act not only when its actions breach an international obligation, but when it fails to act by omission to prevent such a breach.¹⁶¹

The United States failed by omission to protect the historic monuments and works of art which the Geneva Protocol I sought specifically to protect. The art housed in Iraq's museums, galleries, libraries, and archaeological excavation sites constituted the cultural heritage of the Iraqi people and its destruction represents a devastating blow to the continuity of their rich history. Despite the expansive strategies the United States government employed in the months following the looting to restore looted and damaged objects to Iraq, this does not preclude the determination that the United States breached its obligation under international occupation law to protect

¹⁵⁹ Geneva IV, *supra* note 124, at para. 53.

¹⁶⁰ Geneva Protocol I, *supra* note 126, at art. 85(4)(d).

¹⁶¹ ILC for internationally wrongful acts, *supra* note 145, art.3 (2).

Iraq's cultural property. The United States' failure to act to prevent looters from pillaging and destroying Iraq's cultural heritage brings its conduct within the ambit of a breach of an international obligation, thereby satisfying the second prong of the ILC's test to prove responsibility for an internationally wrongful act.

The 1991 war in Yugoslavia illustrates a prime example of a State facing responsibility for an internationally wrongful act based on an omission to protect cultural property. For eight months Serbian and Croatian forces decimated the ancient port city of Dubrovnik, inciting a global outcry at the loss of a magnificently preserved medieval city.¹⁶² Following the war, the U.N. created the International Criminal Tribunal for the former Yugoslavia ("ICTY") to prosecute war crimes¹⁶³ and included crimes against cultural property in its sixteen-count indictment.¹⁶⁴ Under occupation law, the ICTY prosecuted representatives of the State for the failure to prevent the destruction of cultural property, regardless of whether they personally caused the devastation of the protected property.¹⁶⁵ The ICTY also prosecuted military officers who "knew or had reason to know that subordinates were about to do the same, or had done so, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators . . ."¹⁶⁶

Similarly, under the ICTY's stringent application of occupation law, the United States is culpable for any knowledge it possessed regarding the

¹⁶² David A. Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law*, 11 B.U. INT'L L.J., 349, 379 (1993) (citing Barry James, *Spare Dubrovnik, UNESCO Chief Pleads; Civil War Nears Renaissance City*, INT'L HERALD TRIB., Oct. 8, 1991).

¹⁶³ International Criminal Tribunal for the Former Yugoslavia, Article 3(d). The ICTY affirmed the principles and laws set out in the Geneva and Hague Conventions, and the Tribunal's existence lay firmly in its commitment to protect cultural property by vowing to prosecute anyone who violated the laws or customs of war or committed crimes against humanity. Article 3 of the ICTY states the Tribunal's intention to prosecute any individual responsible for the destruction of "institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science." See also 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, 9 (2001) (discussing that the ICTY Statute criminalized certain behaviors to prevent future atrocities from occurring. "The incorporation of norms in its Statute demonstrated the seriousness of the crimes and their condemnation by the international community as a result of its failure to protect them.").

¹⁶⁴ The ICTY held members of both Croatian and Serbian troops responsible for mutually contributing to the destruction of Dubrovnik's palaces, mansions, libraries, churches and monasteries. This set a historic precedent because it was the first time since World War II that a tribunal indicted individuals for crimes against cultural property.

¹⁶⁵ The ICTY indicted members of the armed forces of the Croatian Defense Council with counts of "wanton and extensive destruction and/or plundering of Bosnian Muslim dwellings, buildings, businesses, institutions dedicated to religion or education, and civilian personal property and livestock." ICTY, Blaskic and Kordic Indictment and Judgment.

¹⁶⁶ ICTY, Blaskic and Kordic Indictment and Judgment.

commission of cultural crimes in Iraq. By failing to take the necessary measures to prevent looters from ransacking Iraqi artifacts, war planners, acting on behalf of the United States, placed the U.S. in a position poised to breach the international obligation to protect cultural property under occupation law.

The United States may argue that it is not responsible for the destructive looting of Iraq's cultural property because the widespread pillage was an unforeseen event. Under international law, the illegality of a State's act is precluded if it is due to the "occurrence of an irresistible force or . . . an *unforeseen* event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation."¹⁶⁷ This argument fails, however, for two reasons: 1) The looting in Iraq appears to be professional and planned, which raises the question of why the United States could not foresee an open opportunity for mass looting of priceless artifacts when thousands of professional looters obviously could; and 2) The U.S. Defense Department ignored the findings of the State Department's "Future of Iraq Project" which predicted widespread looting and destruction in Iraq following the overthrow of Saddam Hussein's regime.

1. A Professional Job

In May 2003, at an INTERPOL¹⁶⁸ conference, Attorney General John Ashcroft admitted that the looting of Iraqi museums and galleries was an inside job, carried out by professionals who knew exactly what they were after and the value of their loot.¹⁶⁹ The first clue that alerted investigators to the possibility that professional art thieves orchestrated the looting was the fact that the museum records were systematically destroyed. Museum inventories provide historical information for each item in a museum's collection; more importantly, these documents provide proof that the antiquities belong to the museum. In order for a museum to register an item as stolen, it must first prove that the stolen object belonged to the museum at the time

¹⁶⁷ ILC for internationally wrongful acts, *supra* note 145, at art.23 (emphasis added).

¹⁶⁸ The International Criminal Police Organization ("INTERPOL") is the largest international police organization in the world. INTERPOL was founded in 1923 to assist cross-border criminal police cooperation and it consists of 181 member countries in five continents.

¹⁶⁹ *Looting was professional job, Ashcroft says*, ASSOC. PRESS, May 7, 2003, available at <http://www.baltimoresun.com/news/nationworld/iraq/bal-te.loot07may07,0,4063565.story> (quoting Ashcroft as saying "[f]rom the evidence that has emerged, there is a strong case to be made that the looting and theft of the artifacts were perpetrated by organized criminal groups – criminals who knew precisely what they were looking for."); see also *Pro thieves took Iraq's treasures, experts say*, ASSOC. PRESS, Apr. 19, 2003 available at <http://www.museum-security.org/03/056.html> (quoting McGuire Gibson, president of the American Association for Research in Baghdad and a professor at the University of Chicago, as stating "[i]t looks as if part of the theft was a very, very deliberate, planned action. It really looks like a very professional job.").

of the theft.¹⁷⁰ Because it is extraordinarily difficult to prove ownership without documentation, destroying museum records effectively hampers future efforts to track down stolen antiquities.¹⁷¹ An uneducated looter might not know or care about this, but a professional art thief certainly would.

It may come as no surprise then that the records office at the National Museum in Baghdad was thoroughly ransacked and destroyed.¹⁷² One expert stated, “[t]he purpose obviously is you’re making it harder for material to be identified and be claimed in the future. So if there was any organization, that to me is one indication of it.”¹⁷³ Even in the instances where the paper records and microfilm were not destroyed by looters, most of the materials were dumped on the floor and muddled in a way that will take museum employees “months if not years to sort out.”¹⁷⁴ By that time, the art may be lost forever.

The second indication that the looting was professional and planned resulted from the type of tools that looters utilized. Museum curators discovered glass-cutters, a variety not available for sale in Iraq, among the debris, leading the museum employees to believe that outside professionals stole some of the looted art.¹⁷⁵ Employees of the National Museum in Baghdad believe that some of the looters used museum keys to enter the building.¹⁷⁶ It is unclear how they gained access to these keys without a connection to a museum employee, unless they were employees of the museum themselves. In addition to glass-cutters and keys, looters employed elaborate equipment to steal valuable objects that curators were unable to lock away for safekeeping, due to the objects’ massive size. In one instance, thieves stole a 7,000 year-old bronze bust weighing hundreds of kilograms, presumably using professional equipment to remove the enormous sculpture.¹⁷⁷ Accord-

¹⁷⁰ Gottlieb & Meier, *supra* note 26, at A16.

¹⁷¹ Meier & Gottlieb, *supra* note 32, at A1 (stating that if a record exists linking a piece of art to a particular museum or a legitimate owner, then the market value on the black market is zero).

¹⁷² Joseph Coleman, *Looting of Iraqi antiquities may have been a professional job*, ASSOC. PRESS, Apr. 17, 2003 available at http://www.post-gazette.com/World/20030417_museumswp4.asp.

¹⁷³ *Id.* (quoting Neil Brodie, of the McDonald Institute for Archaeological Research in Cambridge, England).

¹⁷⁴ Gottlieb & Meier, *supra* note 26, at A16 (quoting John Curtis of the British Museum’s Near East Department).

¹⁷⁵ Jim Clancy, *Museum shattered by looters*, CNN NEWS, Apr. 16, 2003 available at <http://www.cnn.com/2003/WORLD/meast/04/15/otsc.irq.clancy/> (describing the devastated National Museum in Baghdad in April shortly after the looting with images of smashed glass and hacked in doorways and hallways piled high with rubble).

¹⁷⁶ *Looting was professional job, Ashcroft says, supra* note 169 available at <http://www.baltimoresun.com/news/nationworld/iraq/bal-te.loot07may07,0,4063565.story>.

¹⁷⁷ Clancy, *supra* note 175 at <http://www.cnn.com/2003/WORLD/meast/04/15/otsc.irq.clancy/>.

ing to museum officials, only a professional art thief could accomplish such a feat.¹⁷⁸

The third clue suggesting that professional art thieves executed the looting stems from the extreme skill and selectivity employed in their discernment of precious original artifacts from less valuable imitations. Reproductions of artifacts, which would look genuine to an angry mob of ordinary thieves, were ignored and left untouched by the looters.¹⁷⁹ The thieves had a keen eye for discriminating the original antiquities from the replica pieces. In one case, looters pillaged an entire cabinet of ancient signature seals that were extremely valuable, but left the surrounding rooms in the vault completely untouched.¹⁸⁰ Similarly, museum officials at the National Museum reported that looters ignored the expansive Egypt collection, which is historically significant but not especially valuable.¹⁸¹ "It is clear that the person who did this had intimate knowledge of the museum and its storage practices."¹⁸² Based on the fact that looters utilized museum keys to open the vaults and pick out the most valuable objects, it is not difficult for experts to arrive at a common conclusion: the looting was organized outside the country.¹⁸³

The evidence of a professionally planned looting scheme is overwhelming. If international art thieves organized the looting, it is improbable that such an elaborate orchestrated effort could be thrown together at the last moment. This raises valid speculation as to why the United States government did not plan for the possibility of looting when even the looters saw the opportunity. The United States cannot argue that the looting in Iraq was unforeseeable when hundreds of experts flocked to the White House months before the invasion bearing warnings that widespread looting would occur. The United States possessed the power to prevent the looting that occurred during the invasion and it cannot elude the responsibility it assumed when it became an occupying power in Iraq.

¹⁷⁸ *Id.*

¹⁷⁹ Coleman, *supra* note 172 available at <http://www.post-gazette.com/World/20030417/museumswp4.asp> (quoting Donny George, director general of Iraq's state board of antiquities, as stating "[t]he people who came in here knew what they wanted." . . . "These were not random looters.").

¹⁸⁰ *Looting was professional job, Ashcroft says, supra* note 169 available at <http://www.baltimoresun.com/news/nationworld/iraq/bal-te.loot07may07,0,4063565.story> (discussing that the looters appeared interested only in the valuable seals hidden in the small cabinet and disregarded the nearby rooms brimming with artifacts).

¹⁸¹ Coleman, *supra* note 172 available at <http://www.post-gazette.com/World/20030417/museumswp4.asp>.

¹⁸² *Looting was professional job, Ashcroft says, supra* note 169 available at <http://www.baltimoresun.com/news/nationworld/iraq/bal-te.loot07may07,0,4063565.story> (quoting Lt. Col. Matthew Bogdanos).

¹⁸³ *Pro thieves took Iraq's treasures, experts say, supra* note 169 available at <http://www.museum-security.org/03/056.html>.

2. Conflict within the White House

The mass looting and destruction that occurred following the 1991 War provided ample proof that U.S. troops should be prepared for more of the same following another invasion of Iraq. The State Department understood this and it spent a great deal of time and resources planning out the role that troops would play in the aftermath of the invasion.¹⁸⁴ For reasons that remain unclear, the Department of Defense disregarded the State Department's classified project, entitled the "Future of Iraq Project," (the "Project") before it ever had the chance to be useful.¹⁸⁵

What made the Defense Department's decision to discard the Project so unbelievable was that the Project had actually predicted and planned for widespread looting in Iraq following the invasion.¹⁸⁶ "It was entirely predictable that in the absence of any authority in Baghdad that you'd have chaos and lawlessness," stated a member of the project.¹⁸⁷ The Project voiced its theories regarding Iraq's susceptibility to looting in its reports to the State Department prior to the United States' invasion of Iraq. It is unclear who ordered the reports or who the intended audience was; and these questions remain unanswered because the reports were never used. In the months leading up to the U.S. invasion of Iraq, an ongoing power struggle existed between the State and Defense Departments.¹⁸⁸ In March 2003, the Defense Department asserted control over the United States' involvement in Iraq, including the invasion and post-war reconstruction planning, and the State Department's "Future of Iraq Project" was the main casualty of that control swap.

In October 2003, the State Department released thirteen volumes of detailed reports, which are not available to the public, written by the Project for the internal use of the State Department, to members of Congress and reporters for the New York Times.¹⁸⁹ These reports reveal that the Project warned that "the period immediately after regime change might offer . . . criminals the opportunity to engage in acts of killing, plunder and looting."¹⁹⁰ According to the State Department's reports, Secretary of Defense Donald Rumsfeld instructed General Jay Garner, leader of reconstruction in Iraq, to ignore the State Department's Future of Iraq Project and its ideas

¹⁸⁴ David Rieff, *Blueprint for a Mess*, N.Y. TIMES, Nov. 2, 2003, § 6, at 28.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

regarding postwar planning.¹⁹¹ This proved to be a serious error in strategy and judgment.

The Defense Department was short on time and resources with its planning of postwar events beginning less than one month before the invasion.¹⁹² Although it considered customary needs in a postwar climate – for example, housing crises and food shortages – it never expected rampant looting and mass devastation to museums and libraries. General Garner stated that he had expected angry Iraqis to destroy the symbols of Saddam Hussein's regime, including palaces and monuments, but he was utterly unprepared for the widespread looting and carnage of every public building in Baghdad.¹⁹³ "In hindsight, we would have put more military police units and more civil reconstruction units into the flow," stated one retired general, however "[i]t was not predictable at the time we were putting the plan together."¹⁹⁴ Experts refute the idea that the U.S. government did not realize there would be an insufficient number of troops to maintain peace during the invasion.¹⁹⁵ One Army Chief of Staff reports that he warned the Pentagon that in order to maintain stability in Iraq during and after the invasion, several hundred thousand troops would be necessary – a number that civilians at the Pentagon scoffed at.¹⁹⁶

The United States faces a daunting challenge if it attempts to argue its ignorance regarding the likelihood of looting in Iraq during its planning of the April 2003 military invasion. The fact that the State Department commissioned the Future of Iraq Project to outline strategies to maintain peace and order throughout the regime change demonstrates that there was a foreseeable possibility that events might not occur smoothly. The Project's detailed reports explicitly discuss the probability of mass looting, rioting, and general chaos following the U.S. invasion. These predictions should not have appeared extraordinary in light of the United States' experience in

¹⁹¹ *Id.* (discussing the content of the Future of Iraq Project reports which are unavailable to the public.).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Martha Raddatz, *Too Late? Critics Say United States Should Have Prevented Iraqi Looting*, ABC NEWS.COM, Apr. 17, 2003 available at http://abcnews.go.com/sections/wnt/World/Iraq_030417Looting_raddatz.html (quoting retired Marine Lt. Gen. Gregory Newbold).

¹⁹⁵ In the aftermath of the looting, three of President Bush's advisors resigned in protest: Martin Sullivan, Richard S. Lanier, and Gary Vikan. Mr. Sullivan told Reuters news agency that, "It didn't have to happen. In a pre-emptive war that's the kind of thing you should have planned for." Similarly, Mr. Lanier attacked "the administration's total lack of sensitivity and forethought regarding the Iraq invasion and loss of cultural treasures." See *US experts resign over Iraqi looting*, BBC NEWS WORLD ED., Apr. 18, 2003 available at <http://news.bbc.co.uk/1/hi/entertainment/arts/2958009.stm>.

¹⁹⁶ Raddatz, *supra* note 194 available at http://abcnews.go.com/sections/wnt/World/Iraq_030417Looting_raddatz.html (discussing Army Chief of Staff Eric Shinshski's assessment of the problem of troop shortages in Iraq).

the 1991 War, when looting ravaged Iraq following the U.S. military invasion. If the United States ignored these substantial warnings, this reckless conduct precludes any contention it might raise that the looting and destruction of Iraq's cultural property was unforeseeable.

IV. In Search of a Legal Remedy: A Managed Art Market

When the United States invaded Iraq in April 2003, revenues from the illegal art market were at an all time high with estimates ranging from \$300 million to \$6 billion per year.¹⁹⁷ The irony is that in a time where more laws protecting art exist than ever before, art appears to be at its most vulnerable. The international art market buckles under a multitude of laws protecting cultural property and constraining art sales simultaneously.¹⁹⁸ These laws, such as the United States' National Stolen Protection Act ("NSPA") and patrimony laws of foreign States, reduce the amount of art allowed for legal export, creating a volatile environment ripe for an expanding illegal market. It was this volatility that played a major role in the widespread looting and destruction of Iraq's cultural antiquities following the United States' invasion.

Frederick Schultz, the New York art dealer convicted in 2003 of receiving stolen antiquities in violation of the NSPA, would likely be the first person to agree that the art market has changed dramatically in the last twenty years.¹⁹⁹ Mr. Schultz now spends his days in a New Jersey prison, where he is serving 33 months for violating a law that – until recently – could not have been used to convict him of his crime.²⁰⁰ The hotly discussed *Schultz* case brought converts to both sides of the debate. Those against the decision in *Schultz* argue that U.S. courts set a dangerous precedent by permitting an NSPA indictment based on foreign patrimony laws, and they fear that the court's decision might "have a catastrophic impact on the art world and the public interests it serves."²⁰¹ On the other hand, a ma-

¹⁹⁷ E.g. Dave Gill & Christopher Chippindale, *The Trade in Looted Antiquities and the Return of Cultural Property*, 11 INT'L J. OF CUL. PROP., 50, 51 (2002) (discussing statistics from law enforcement data and statistics from the European Association of Archaeologists who estimate that the annual illegal art trade yields approximately \$4.5 billion).

¹⁹⁸ Cf. Geraldine Norman, *Talking Turkey*, THE INDEP. (London), June 13, 1993 (discussing the difficulties facing collectors in the face of complex foreign patrimony laws).

¹⁹⁹ Meier & Gottlieb, *supra* note 32, at A1 (discussing the time period surrounding Mr. Schultz's crime as "the decade . . . of enormous changes in the antiquities world, all accompanied by heightened legal scrutiny and the . . . long and bitter debate about the ethics of the trade").

²⁰⁰ *Schultz*, 333 F.3d at 416. This case marked the first instance of a U.S. court using the NSPA to prosecute and find an individual guilty of violating a foreign law which claimed ownership of all antiquities in the State of origin – even antiquities undiscovered at the time the law was enacted.

²⁰¹ Lufkin, *supra* note 57, at 316 ("Dealers, collectors and museums will be forced to abandon the trade and collection of any objects that any foreign government may ultimately

majority of art scholars and archeologists passionately fight for a nationalistic approach to art trade and preservation. They staunchly approve of applying the NSPA to dealers and collectors who buy and sell artifacts removed from their source nations in violation of foreign patrimony laws.²⁰²

Theories abound for a managed art market that would re-open the passages of trade that many nations have closed with nationalistic patrimony laws.²⁰³ A managed market offers an international approach to art collection by allowing many nations to own art from around the world; enabling collectors to study and enjoy the diversity that comes from a variety of cultures and civilizations. An infinite array of applications exists for a managed art market, and the key to establishing a system that works is to avoid extremes. For instance, it would be foolish to completely uproot existing national patrimony laws in source nations because their underlining purpose of protecting art represents the goal of most collectors. This Note suggests a managed art market that would modify existing nationalistic art laws, but would not tamper with the spirit in which these laws were conceived.

Art lobby groups speculate that a managed art market would halt illegal trade and send grave robbers and looters packing. Many experts in agreement with the philosophy of a managed art market cite preservation of antiquities as a primary objective.²⁰⁴ Often, source nations possessing the richest cultural property are in the worst economic circumstances, and many of these countries are unable to preserve their artifacts appropriately.²⁰⁵ A managed art market allows source nations to sell the property they cannot maintain for the resources they badly need.

Proponents of cultural nationalism disagree with this distribution of artifacts to wealthier nations: "To the cultural nationalist, the destruction of national cultural property through inadequate care is regrettable, but might be preferable to its 'loss' through export."²⁰⁶ To an art historian or archaeologist, the value of an artifact is interwoven in the information it offers to its historical genre. These individuals would likely argue that the significance of art is compromised if a managed market encourages objects to become disconnected from their environment of origin. Much of the debate surrounding the merits of a managed market stem from the fact that sup-

claim,"... "Existing collections also will be affected: collectors and museums that acquired objects in good faith reliance on U.S. law will be placed at risk.").

²⁰² Edmund L. Andrews, *Aftereffects: Anarchy; Iraqi Looters Tearing Up Archaeological Sites*, N.Y. TIMES, May 23, 2003 at A1.

²⁰³ Merryman, *supra* note 24, at 831.

²⁰⁴ *Id.*

²⁰⁵ John P. Shinn, *A New World Order for Cultural Property*, 34 SANCLR 977, 979 (1994) ("There is nothing new about the international movement of works of art, including permanent transfers of works of art from one nation to another. What is relatively new is the virtually wholesale illicit expatriation of works of art from nations rich in cultural heritage to nations that are rich in economic terms.").

²⁰⁶ Merryman, *supra* note 24, at 834.

porters of the theory often view art as a business, whereas detractors consider art an homage to history. These factions remain at odds with each other over every aspect of an open market, with both groups constructing valid, convincing arguments.

Art dealers and collectors respond to nationalistic ownership laws by seeking solace and strength in solidarity. Private interest groups, such as the American Council for Cultural Policy (“ACCP”), represent powerful art lobbying forces in Washington and their influence should not be underestimated.²⁰⁷ These groups argue against foreign ownership laws that prevent collectors from removing art from its nation of origin because they consider such laws retentionist in nature.²⁰⁸ In January 2003, members of the ACCP met with government officials from the State and Defense Department in Washington, where they offered “post-war technical and financial assistance” and “conservation support” to government officials.²⁰⁹ This meeting made some individuals in the art world nervous.

Many organizations consider it inappropriate for the ACCP to offer the United States government advice regarding post-war planning for Iraq’s antiquities market.²¹⁰ “The ACCP’s agenda is to encourage the collecting of antiquities through weakening the laws of archaeologically-rich nations and eliminate national ownership of antiquities to allow for easier export,” stated one expert.²¹¹ Art historians and archaeologists express alarm at any indication that the United States may seek to ease restrictions on the export of Iraqi art to wealthier “art hungry” nations.²¹²

²⁰⁷ Liam McDougall, *U.S. Accused of Plans to Loot Iraqi Antiques*, SUNDAY HERALD UK, Apr. 6, 2003 available at <http://www.sundayherald.com/32895> (discussing that the ACCP, whose membership consists of accomplished art lawyers, professional antiquities collectors, and successful art dealers, has always been a source of unease for many archaeologists due to the fact that some of the private collections held by ACCP members have questionable histories, including some pieces which were allegedly stolen by Nazi forces during World War II).

²⁰⁸ A retentionist philosophy is a belief that art should remain in the country it originated from.

²⁰⁹ McDougall, *supra* note 207 available at <http://www.sundayherald.com/32895> (discussing that many archaeologists and art historians have voiced their concern that the ACCP’s meeting with government officials at the White House in January was inappropriate. They argue that there is a clear conflict of interest between the self-interested goals of the ACCP and the duties of the United States as an occupying power in Iraq.).

²¹⁰ For instance, the Archaeological Institute of America (“AIA”), who characterizes the ACCP’s clout with the White House as substantial, states its concern over any influence the ACCP might have over U.S. policies toward antiquities in Iraq.

²¹¹ McDougall, *supra* note 207 available at <http://www.sundayherald.com/32895> (quoting AIA president, Patty Gerstenblith. The AIA is adamant about maintaining Iraq’s pre-existing laws banning the export of antiquities, and it believes that any effort by the United States to weaken those strict laws would be “disastrous.”).

²¹² *Id.* (quoting Professor Lord Renfrew, a leading British archaeologist and director of the McDonald Institute for Archaeological Research, as stating “Iraqi antiquities legislation

However, many independent collectors and dealers claim that they, not art, are under attack, citing the strict export laws of foreign nations, U.S. art protection laws, and the retentionist ideology of many art scholars and archaeologists.²¹³ In reality, most antiquities that surface on the market today appear without a trace of history or archaeological context.²¹⁴ The modern art collector has an overwhelming responsibility to research the history of any object she seeks to buy, in addition to understanding the ramifications of any national ownership laws associated with the object. Many dealers and collectors feel besieged by the amount of information that they are expected to amass before making an informed, and one may hope, legal purchase.²¹⁵

As Iraq begins the slow process of cultural renewal following the devastating looting of its past, the Iraqi people must decide the approach to international trade that will best protect their cultural property and give them the resources to rebuild. A managed art market would allow Iraq to export its cultural property legally for the first time, and enable the museums of Iraq to replenish empty shelves with Iraqi art as well as art from around the world. One might argue that it is unnecessary for Iraq to open its doors to a managed art market because it does not need the financial revenues of legal art sales. However, this argument misses the purpose of a managed art market completely. The 1954 Hague Convention represents a vivid reminder that art belongs to the world; and the pleasure of collecting and enjoying art belongs to the people of every nation. The managed art market approach embodies these principles by allowing collectors to study and enjoy the diversity that comes from a variety of cultures and civilizations.

Iraq is home to an incredibly rich source of antiquities which surpasses the art resources of most nations in the world. If the Iraqi people decide to change Iraq's existing patrimony laws in order to allow a certain percentage of art to flow freely from their nation to the hands of another, vast changes would develop in the international art market. Proponents of this shift foresee a dramatic decrease in illegal trading of cultural antiquities, in addition to a decrease in the financial burden that source nations must bear in order to maintain and preserve artifacts.²¹⁶

protects Iraq. The last thing one needs is some group of dealer-connected Americans interfering.”).

²¹³ David D'Arcy, *Legal Group to fight “retentionist” policies*, THE ART NEWSPAPER.COM, at <http://www.theartnewspaper.com/news/article.asp?idart=10176> (A retentionist philosophy is a belief that art should remain in the country it originated from).

²¹⁴ Gill & Chippindale, *supra* note 197, at 54 (discussing that in light of the stringent national ownership laws enacted over the last two decades, a large share of the objects that turn up for sale lacking biographical paperwork presumably have a checkered past).

²¹⁵ See Merryman, *supra* note 24, at 832.

²¹⁶ Shinn, *supra* note 205, at 979.

This Note does not advocate the complete termination of Iraq's patrimony laws; rather it suggests a shift in the theory behind the nationalistic laws to the principle of cultural internationalism that a managed art market embodies. The legal structure of the Iraqi art market rests on the priorities of its people: If Iraq chooses to enter a managed art market, it must learn to strike a balance between satisfying the world's desire to share Iraq's cultural history and maintaining Iraqi antiquities with a concern for integrity and preservation. If Iraq can accomplish this challenging task, it will begin a new chapter in the international art market.

V. Conclusion

The United States occupies Iraq during a tenuous time in the history of art preservation and trade.²¹⁷ The looting in Iraq during the U.S. invasion threw salt in the already festering wounds of the international art community, launching the hotly debated topics of looting, trade, and patrimony accommodations into a full-blown media frenzy. It is impossible to intelligently discuss the United States' breach of its obligation under international occupation law – to protect Iraq's antiquities from looting – without a candid review of the chaos that gripped the international art market in April 2003. The build-up of cultural property laws created a virtual stonewall effect on dealers and collectors, preventing these groups from acquiring the art they so badly wanted. The United States' invasion of Iraq provided a period of lawlessness without consequences that opened the floodgates of antiquities to the illegal art market. The combination of poverty-stricken Iraqis yearning for money, the relatively easy access to valuable antiquities following the overthrow of Saddam Hussein's iron fisted regime, and the yearning of international art collectors cut off from these treasured artifacts by cultural property laws all came together to create a situation ripe for disaster.

The United States was responsible under international occupation laws to foresee that looting would likely occur following its invasion. The hundreds of experts who trooped through the White House in the months and weeks before the invasion informed the United States of the dire condition of the international art market. The United States should have been on alert that an invasion of Iraq would create a perfect opportunity for looters in light of an art market starved for Middle Eastern antiquities protected by Iraq's nationalistic patrimony laws. The fact that the United States failed to plan adequately for a disaster so entirely foreseeable represents its gravest breach.

The path that the United States chooses to take regarding the regulation of antiquities in Iraq will not be easy – regardless of the choice. Whether it

²¹⁷ Filipov, *supra* note 5, at A14; (“It is a dangerous business, but easy compared with smuggling under the Hussein regime, when borders were closed and the punishment was death by hanging. Anyone caught these days can get off with a \$400 bribe.”).

chooses to establish a managed art market or continue the enforcement of Iraq's historical patrimony laws, nothing will bring back the thousands of priceless artifacts lost in the April 2003 looting. The Hague Convention states that the world owns cultural property in a collective sense. The ancient history of one nation reflects the history of many. When the United States failed to prevent the looting of antiquities in Iraq, it not only allowed the destruction of Iraqi art – it allowed the destruction of the world's history.