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# ARTS AND ARMS: AN EXAMINATION OF THE LOOTING OF THE NATIONAL MUSEUM OF IRAQ

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**Abstract:** In April 2003, the National Museum of Iraq was extensively looted. At the time, the United States was an occupying power of Iraq and subsequently bore the brunt of considerable international press speculation that the United States was, at best, ill-prepared to protect the museum and, at worst, indifferent to the devastation wrought upon the considerable number of priceless artifacts. Beyond international dismay, however, lay the possibility that the United States was bound by both custom and treaty to protect Iraq's cultural property. Though the damage to the artifacts may be irreparable, there are solutions available to the United States that serve to both remedy past and protect against future destruction and loss of cultural property.

## INTRODUCTION

The arts and the army are unlikely bedfellows. During World War II, however, the U.S. military formed the Monuments, Fine Arts and Archives (MFAA) division to protect European cultural property during and after hostilities.<sup>1</sup> As a result of the 2003 invasion of Iraq and the subsequent destruction of the National Museum of Iraq, scholars have called for the reformation of this division, terminated in 1946.<sup>2</sup> Surprisingly, despite the hostilities of 2003, the destruction was rendered not by bombs, but by looting.<sup>3</sup>

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<sup>1</sup> See generally NAT'L ARCHIVES AND RECORDS ADMIN., RECORDS OF THE AM. COMMISS'N FOR THE PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS (THE ROBERTS COMMISS'N) (2007), available at <http://www.archives.gov/research/microfilm/m1944.pdf> [hereinafter NAT'L ARCHIVES].

<sup>2</sup> See Constance Lowenthal & Stephen Urice, *An Army for Art*, N.Y. TIMES, Apr. 17, 2003, at A25.

<sup>3</sup> See Oriental Inst. of Univ. of Chi., Iraq Museum Database, <http://oi.uchicago.edu/OI/IRAQ/dbfiles/Iraqdatabasehome.htm> [hereinafter Iraq Museum Database] (last visited Mar. 27, 2009); see also Lowenthal & Urice, *supra* note 2, at A25.

Although the true extent of the looting can only be estimated, it is clear that the United States did not deploy adequate troops to protect Iraqi cultural property despite appeals from cultural policy groups, academics and civilians.<sup>4</sup> An estimated 15,000 artifacts remain missing from the museum.<sup>5</sup> Iraq is considered the Cradle of Civilization and harbors priceless artifacts from Babylonian, Assyrian and Sumerian kingdoms.<sup>6</sup> Some missing artifacts date from before 9000 B.C. while others represent the earliest human-made tools.<sup>7</sup>

This Comment investigates the United States' obligation as an occupying power to reasonably protect cultural property of the occupied nation's war zones. The Comment focuses on the events of the Iraq War, specifically the preventable looting of the National Museum of Iraq. In the pages that follow, the Comment will explore whether and to what extent the obligation exists under international treaties and custom.

Part I focuses on the events surrounding the looting of the National Museum of Iraq and discusses their import to the international community generally and to the United States' past and future policy specifically. Part II provides the legal background on the U.S. obligation as an occupying power to reasonably protect cultural property. Finally, Part III proposes the existence of the United States' obligation as an occupying power and suggests the possible remedies for the breach of its obligation, which largely focus on defining the obligation's future applicability.

## I. BACKGROUND

The United States has occupied Iraq since 2003 and is considered Iraq's occupying power under the Geneva Convention Relative to the Protection of Civil Persons in Time of War (1949 Geneva Convention).<sup>8</sup>

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<sup>4</sup> See generally Editorial, *Iraq's Stolen Heritage*, ASAHI SHIMBUN (Japan), Apr. 22, 2003, available at 2003 WLNR 8997677 (describing U.S. failure to make museum protection a priority or enforce control of the museum).

<sup>5</sup> Iraq Museum Database, *supra* note 3.

<sup>6</sup> Mark Vallen, *We Are the Heirs of 3000 Years of Civilization*, ART FOR A CHANGE, Dec. 2003, <http://www.art-for-a-change.com/News/iraq.htm>.

<sup>7</sup> Iraq Museum Database, *supra* note 3.

<sup>8</sup> See Geneva Convention Relative to the Protection of Civil Persons in Time of War arts. 2, 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention 1949]; see also Press Release, Security Council, Acting on Iraq's Request, Extends "For Last Time" Mandate of Multinational Force, U.N. Doc. SC/9207 (Dec. 18, 2007) (illustrating U.S. Secretary of State Condoleezza Rice's willingness to extend mandate of Multinational Force in Iraq in Annex II).

During its time as an occupying power, the United States has not adequately protected Iraqi zones of cultural property.<sup>9</sup> The United States' failure to protect Iraqi zones of cultural property was internationally recognized through press coverage of several days of looting at the National Museum of Iraq.<sup>10</sup> Though the international press initially exaggerated the severity of the looting, the incident nonetheless exacerbated the perception of U.S. indifference.<sup>11</sup>

The National Museum of Iraq's looting from April 9 to April 11, 2003 resulted in the loss of 15,000 artifacts.<sup>12</sup> Since 2003, about 5000 pieces have been returned, such as the famous Warka Vase which dates to 3000 B.C., though many have been lost or damaged.<sup>13</sup> The United States and the United Kingdom have led efforts to return the stolen artifacts.<sup>14</sup> Despite these efforts, the international public has expressed dismay at the lack of foresight of the U.S. Army.<sup>15</sup> Indeed, the lead U.S. investigator into the looting shares the sense of international dismay.<sup>16</sup>

The international reaction to the looting warrants an investigation into the existence of an obligation of the United States to reasonably protect cultural property.<sup>17</sup> Negative international reaction to the looting of the museum was extended to the war itself.<sup>18</sup> If the United States offends international sentiment by neglecting to respect national cultural property, it can expect an adverse impact on its diplomacy and global perception generally.<sup>19</sup>

Investigating the existence of a U.S. obligation to reasonably protect cultural property is furthermore important in terms of the United States' responsibility to maintain public order as an occupying power.<sup>20</sup>

<sup>9</sup> See Dan Vergano, *On the Trail of Stolen Iraqi Art*, USA TODAY, Nov. 3, 2005, at D1.

<sup>10</sup> See *id.*

<sup>11</sup> See David Aaronovitch, *Lost from the Baghdad Museum: Truth*, GUARDIAN (London), June 10, 2003, at 5.

<sup>12</sup> William Harms, *Archaeologists Review Loss of Valuable Artifacts One Year After Looting*, UNIV. CHI. CHRON., Apr. 15, 2004, at 15.

<sup>13</sup> *Id.*

<sup>14</sup> See Mark Brown, *British Museum and Army Team Up in Move to Rescue Iraq's Heritage*, GUARDIAN (London), Feb. 26, 2008, at 15.

<sup>15</sup> Vergano, *supra* note 9.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> See Mark Schone, *The Looting of Iraq: Robbing the Cradle of Civilization, Five Years Later*, SALON.COM, Mar. 20, 2008, [http://www.salon.com/news/feature/2008/03/20/iraq\\_roundtable](http://www.salon.com/news/feature/2008/03/20/iraq_roundtable) (emphasizing the importance of the military's cultural awareness, as well as the global prevalence of and interest in the looting).

<sup>20</sup> See Hague Convention Respecting the Laws and Customs of Land art. 43, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention 1907]; see, e.g., Lowen-

The Hague Convention Respecting the Laws and Customs of Land, to which the United States is a party, requires an occupying power like the United States in Iraq to maintain public order.<sup>21</sup> It does not, however, specify whether preventing this type of looting is a tenet of maintaining public order.<sup>22</sup> As weapons become more precise, the United States will grow increasingly accountable for destruction wrought because of the increased measure of control it possesses; it is possible that the United States will be held increasingly accountable for destruction of cultural property not only by weapons but also by human looting.<sup>23</sup>

Though this investigation is relevant in light of future concerns over the American presence in Iraq and potentially in other nations, it is rooted in the past.<sup>24</sup> Even if the United States is not bound by the 1949 Geneva Convention to reasonably protect cultural property, it may have obligations under international customary law formed decades ago.<sup>25</sup>

In World War II, the U.S. Army formed the MFAA section to combat the destruction of European heritage.<sup>26</sup> Although the federal Roberts Commission that advised the MFAA did not explicitly state its formation was out of consideration for international law or obligation, its scope was international.<sup>27</sup> The Roberts Commission consulted extensively with the British government to determine which pieces of art were unaccounted for and to devise plans for regaining them.<sup>28</sup> The Roberts Commission also established liaisons with French, Dutch, and Belgian governments favoring restitution and reparations.<sup>29</sup> The U.S. government continued presidential efforts through the auspices of the Roberts Commission until the commission's termination in 1946.<sup>30</sup>

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thal & Urice, *supra* note 2, at A25 (stating looting occurred as product of the "chaos that engulfed Baghdad").

<sup>21</sup> See Hague Convention 1907, *supra* note 20.

<sup>22</sup> See *id.*

<sup>23</sup> See Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict pmbL, Aug. 7, 1954, 249 U.N.T.S. 215 [hereinafter Hague Convention 1954].

<sup>24</sup> See NAT'L ARCHIVES, *supra* note 1, at 1.

<sup>25</sup> See *id.* at 1, 4 & 6 (describing U.S. large-scale and international protection of cultural property effort during World War II); North Sea Continental Shelf (F.R.G. v. Neth., Den.) 1969 I.C.J. 3, 42 (Feb. 20) (indicating practice establishing international customary law must have sufficient degree of participation, especially by affected states); Geneva Convention 1949, *supra* note 8, art. 53; see also Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 277 (Nov. 20) (indicating consistency in State practice is a consideration in determining whether international customary law established).

<sup>26</sup> See NAT'L ARCHIVES, *supra* note 1, at 1.

<sup>27</sup> See *id.* at 1 & 4.

<sup>28</sup> See *id.* at 4 & 6.

<sup>29</sup> See *id.* at 4.

<sup>30</sup> See *id.* at 1 & 5.

In 1956, eight years after the Roberts Commission's termination, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) entered into force.<sup>31</sup> Though the United States is not a party to this Convention, the goals the Convention espouses are consistent with the actions the United States took in forming the MFAA.<sup>32</sup> Though there is an extremely high threshold for establishing international customary law,<sup>33</sup> it is evident that at the very least there exists a discernible international movement toward the protection of cultural property—and that the United States has recognized the move.<sup>34</sup>

## II. DISCUSSION

As a result of the extensive looting of the National Museum of Iraq, the United States may have violated both treaty<sup>35</sup> and customary international law.<sup>36</sup> The United States is a ratifying party to the 1949 Geneva Convention<sup>37</sup>, which may contain restrictive terms limiting an occupying power's right to destroy property of the occupied state.<sup>38</sup> International customary law may also bind the United States, which potentially recognized international customary law through its action during World War II.<sup>39</sup>

### A. *Geneva Conventions and Protection of Cultural Property*

The disastrous effects of World War II on civilians inspired the 1949 Geneva Convention.<sup>40</sup> The 1949 Geneva Convention provisions were meant to supplement rather than invalidate the earlier conven-

<sup>31</sup> See Hague Convention 1954, *supra* note 23; NAT'L ARCHIVES, *supra* note 1.

<sup>32</sup> Compare Hague Convention 1954, *supra* note 23, pmbl. (agreeing to "take all possible steps to protect cultural property" from "damage"), with NAT'L ARCHIVES, *supra* note 1, at 3 (explaining MFAA responsible for "protecting" cultural property from "damage").

<sup>33</sup> See, e.g., *Asylum Case*, 1950 I.C.J. at 277.

<sup>34</sup> See NAT'L ARCHIVES, *supra* note 1, at 4.

<sup>35</sup> See Geneva Convention 1949, *supra* note 8, art. 53; Hague Convention 1907, *supra* note 20, arts. 43 & 56.

<sup>36</sup> See NAT'L ARCHIVES, *supra* note 1, at 1; see, e.g., *North Sea Continental Shelf* (F.R.G. v. Neth., Den.), 1969 I.C.J. 3, 42 (Feb. 20).

<sup>37</sup> Int'l Comm. of the Red Cross, State Parties—1949 Geneva Convention, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited Oct. 20, 2008).

<sup>38</sup> See Geneva Convention 1949, *supra* note 8, art. 53.

<sup>39</sup> See NAT'L ARCHIVES, *supra* note 1, at 4; *North Sea Continental Shelf*, 1969 I.C.J. at 277.

<sup>40</sup> See Int'l Comm. of the Red Cross, Fourth 1949 Geneva Convention, <http://www.icrc.org/ihl.nsf/INTRO/380?OpenDocument> (last visited Mar. 27, 2009).

tion provisions.<sup>41</sup> The United States was a party to both the earlier conventions as well as the 1949 Geneva Convention.<sup>42</sup>

The 1949 Geneva Convention binds the United States as a ratifying party to comply with the Convention's provisions as an occupying power in Iraq at least so long as the period of occupation.<sup>43</sup> The looting of the National Museum of Iraq occurred during the period of occupation and thus subjects the United States to review for compliance with Geneva Convention provisions.<sup>44</sup>

Article 53 of the 1949 Geneva Convention prohibits the "destruction by the Occupying Power of real or personal property belonging . . . to the State or to other public authorities . . . unless such destruction is rendered absolutely necessary."<sup>45</sup> Although the 1949 Geneva Convention generally deals with individual civilian protection, the negotiating parties agreed to refer in Article 53 to State property despite the provision's reach somewhat beyond the scope of the Convention.<sup>46</sup> The negotiation parties' departure from the subject matter of the Convention in this provision reveals its importance; the fact that the parties make note of this departure in the Commentaries further demonstrates that the provision is central rather than aberrational.<sup>47</sup>

The negotiating parties' Commentaries also note that Article 53 must be understood in a "very wide sense."<sup>48</sup> The parties' decision to extend the Article's protection to State property is in accordance with a broad understanding of the 1949 Geneva Convention's intent to afford protection to civilians.<sup>49</sup> The intent of the 1949 Geneva Convention with regard to Article 53 is further clarified because Article 53 serves to reinforce rules previously laid out in the 1907 Hague Convention.<sup>50</sup>

Article 56 of the 1907 Hague Convention protects property of "institutions dedicated to . . . the arts and sciences, even when State property," from "seizure . . . destruction or willful damage" by an occupying power at the risk of "legal proceedings."<sup>51</sup> The Article declares destruc-

<sup>41</sup> *See id.*

<sup>42</sup> *See* Geneva Convention 1949, *supra* note 8; Int'l Comm. of the Red Cross, *supra* note 40.

<sup>43</sup> *See* Geneva Convention 1949, *supra* note 8, arts. 2 & 6.

<sup>44</sup> *See id.*; Security Council Press Release, *supra* note 8, annex II.

<sup>45</sup> Geneva Convention 1949, *supra* note 8, art. 53.

<sup>46</sup> *See id.* art. 53 cmt. 1.

<sup>47</sup> *See id.*

<sup>48</sup> *Id.*

<sup>49</sup> *See id.*

<sup>50</sup> *See id.*

<sup>51</sup> Hague Convention 1907, *supra* note 20, art. 56.

tive occupying power activity “forbidden,” a term also used in reference to pillaging activity by the occupying power.<sup>52</sup> As in the 1949 Geneva Convention, the breadth of the Article is strengthened by its clarity and unconditional terms.<sup>53</sup>

If the United States is subject to “legal proceedings” due to the destruction and loss of the National Museum of Iraq’s artifacts, the United States’ accountability will be dependent on whether or not its failure to prevent the organized and sustained looting of the museum can be considered destruction or “willful damage.”<sup>54</sup> It is clear that treaty law binds an occupying power to refrain from destruction of property at the same time that it extends protection to arts institutions, although State owned, like the National Museum of Iraq.<sup>55</sup> It is less clear, however, what level of protection the United States is bound to offer those institutions and whether the knowledge of museum looting and subsequent lack of a response can be equated with willful destruction.<sup>56</sup>

### B. *Possible Sources of International Customary Law*

If the United States is not held accountable under treaty law for the looting of the National Museum of Iraq, it may nonetheless be accountable under international customary law.<sup>57</sup> The potential sources of international customary law that could be applied to the looting of the National Museum of Iraq are treaties and instances of the United States and other States protecting occupied States’ arts or cultural institutions.<sup>58</sup>

The 1907 Hague Convention’s substantive provisions are considered embodiments of international customary law.<sup>59</sup> As such, they bind the entire international community rather than strictly the ratifying

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<sup>52</sup> *Id.* arts. 47 & 56.

<sup>53</sup> Compare Hague Convention 1907, *supra* note 20, art. 56 (declaring destruction of cultural property “forbidden”), with Geneva Convention 1949, *supra* note 8, art. 53 (declaring destruction of cultural property “prohibited”).

<sup>54</sup> See Geneva Convention 1949, *supra* note 8, art. 53; Hague Convention 1907, *supra* note 20, art. 56.

<sup>55</sup> See Geneva Convention 1949, *supra* note 8, arts. 2, 4 & 53; Hague Convention 1907, *supra* note 20, art. 56.

<sup>56</sup> See Geneva Convention 1949, *supra* note 8, art. 53; Hague Convention 1907, *supra* note 20, art. 56.

<sup>57</sup> See Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, U.N. Charter annex.

<sup>58</sup> See *id.* art. 38.

<sup>59</sup> See Int’l Comm. of the Red Cross, Hague Convention 1907, <http://www.icrc.org/ihl.nsf/INTRO/195?OpenDocument> (last visited Mar. 27, 2009).



parties.<sup>60</sup> If Article 56 is considered substantive, it would be doubly binding on the United States as customary and treaty law.<sup>61</sup> Furthermore, if Article 56 is considered customary law, the definition of destruction and willful damage is determined by the international community's common practices.<sup>62</sup>

Even before European art and arts institutions were devastated during World War II, the United States recognized the universal value of arts institutions and the terrible social cost of their destruction in wartime.<sup>63</sup> In 1935, the United States entered the Roerich Pact with 21 other North and South American States.<sup>64</sup> The object of the Roerich Pact was the preservation of arts institutions and immovable monuments in face of hostilities.<sup>65</sup> Though the protection afforded by the Roerich Pact is focused against bombing and targeted destruction, the Pact nonetheless broadly requires that arts institutions be "respected and protected by belligerents."<sup>66</sup>

The Roerich Pact of North and South America inspired the rest of the world to establish the 1954 Hague Convention.<sup>67</sup> More than 100 states from Asia, Europe and Africa ratified this treaty.<sup>68</sup> The treaty centers on the protection of cultural property—which encompasses arts institutions like the National Museum of Iraq—from destruction during wartime and times of peace.<sup>69</sup> The treaty manifests a two-sided effort, whereby possessor States act in peacetime to devise means of protection for their cultural property while hostile States act in wartime to refrain from the destruction of cultural property.<sup>70</sup> Article 4 of the 1954 Hague Convention explicitly requires states to "prohibit, prevent, and,

<sup>60</sup> See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 47 (June 21).

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> Roerich Pact and Banner of Peace, [http://www.roerich.org/nr\\_pact\\_banner.html](http://www.roerich.org/nr_pact_banner.html) (last visited Mar. 27, 2009).

<sup>64</sup> *Id.*

<sup>65</sup> See Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, preamble, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 289 [hereinafter Roerich Pact].

<sup>66</sup> *Id.* art. 1.

<sup>67</sup> See Hague Convention 1954, *supra* note 23, arts. 1–7; Int'l Comm. of the Red Cross, Hague Convention 1954, <http://www.icrc.org/ihl.nsf/INTRO/400?OpenDocument> (last visited Oct. 20, 2008).

<sup>68</sup> Int'l Comm. of the Red Cross, *supra* note 67.

<sup>69</sup> See Hague Convention 1954, *supra* note 23, preamble, art. 1.

<sup>70</sup> See *id.* arts. 3 & 4.

if necessary, put a stop to any form of theft, pillage, or misappropriation” of cultural property.<sup>71</sup>

The Roerich Pact read together with the Hague Convention seem to present a united front of States, encompassing the entire globe.<sup>72</sup> The States share a common burden of protecting their own and other States’ cultural property to ensure the common benefit of posterity’s enjoyment and understanding of great works and history.<sup>73</sup> Though the United States is not a party to the Hague Convention for Protection of Cultural Property, it is a signatory and is thus at least nominally tied to both treaties.<sup>74</sup>

If the United States’ concern for cultural property is exclusively reserved for that of the Americas, its concern runs counter to the purpose of the Roerich Pact—and the majority of the parties and signatories to the Roerich Pact, recognizing this, also are parties to the 1954 Hague Convention.<sup>75</sup> The United States’ interest in the preservation of international cultural property should be strengthened in recognition of American diversity and the possibility, therefore, that many Americans may be tied to cultural property located outside the Americas.<sup>76</sup> Furthermore, as war becomes increasingly global in nature, an emphasis is placed on the need for more extensive international protection in wartime.<sup>77</sup> The large number of State parties that have committed

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<sup>71</sup> *Id.* art. 4.

<sup>72</sup> Compare Roerich Pact, *supra* note 65, with Int’l Council on Monuments and Sites, Ratifiers of Hague Convention of 1954, <http://www.icomos.org/ihl.nsf/INTRO400?OpenDocument> (last visited Oct. 20, 2008) (revealing State parties represent most world continents).

<sup>73</sup> See generally Hague Convention 1954, *supra* note 23, art. 2 (declaring “protection of cultural property shall comprise the safeguarding of and respect for such property”); Roerich Pact, *supra* note 65, art. 1 (declaring cultural property must be “respected and protected” by both “belligerents” and “personnel of institutions”).

<sup>74</sup> See Int’l Comm. of the Red Cross, State Signatories—Hague Convention 1954, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=400&eps=S> (last visited Feb. 22, 2009).

<sup>75</sup> See Roerich Pact, *supra* note 65, preamble (stating purpose of treaty is to preserve “all nationally and privately owned . . . monuments which form the cultural treasure of peoples”). Compare Int’l Council on Monuments and Sites, *supra* note 72, with Roerich Pact, *supra* note 67 (illuminating fact only two parties to Roerich Pact not also parties to 1954 Hague Convention).

<sup>76</sup> See Jessica Eve Morrow, *The National Stolen Property Act and the Return of Stolen Cultural Property to Its Rightful Foreign Owners*, 30 B.C. INT’L & COMP. L. REV. 249, 251 (2007).

<sup>77</sup> See Michael McAndrew, *Wrangling in the Shadows: The Use of the United States Special Forces in Covert Military Operations in the War on Terror*, 29 B.C. INT’L & COMP. L. REV. 153, 153–54 (2006).

themselves by treaty to the preservation of cultural property in wartime is an indication of international customary law.<sup>78</sup>

The joint reading of the Roerich Pact with the 1954 Hague Convention to demonstrate an international custom of protecting the possessor state's cultural property like museums is encouraged by several concrete and consistent examples of States' behavior in wartime.<sup>79</sup> The National Museum of Beirut acted to protect its cultural heritage during hostilities in the 1970s and 1980s.<sup>80</sup> Iraq acted to protect museums in Kuwait, though ultimately about twenty percent of the museum artifacts were lost.<sup>81</sup> Russia requisitioned a huge number of artifacts from Germany after World War II that had been taken from German Jews during Nazi rule but failed to consistently return the artifacts to the owners.<sup>82</sup> Though State behavior is indicative of an international custom, assessment of whether the United States failed to adhere to international custom in its failure to protect the National Museum of Iraq is complicated by the fact that the United States did not affirmatively destroy, but instead failed to protect, cultural property.<sup>83</sup>

### III. ANALYSIS

If the United States' failure to protect the National Museum of Iraq from looting is to be considered destruction of cultural property in violation of international customary or treaty law, there are several courses of action the United States and the international community may take to remedy the situation.<sup>84</sup>

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<sup>78</sup> See *North Sea Continental Shelf*, 1969 I.C.J. at 42; Roerich Pact, *supra* note 65; Int'l Council on Monuments and Sites, *supra* note 72.

<sup>79</sup> See *North Sea Continental Shelf*, 1969 I.C.J. at 42; *Asylum Case*, 1950 I.C.J. at 277.

<sup>80</sup> Neil Brodie, *Focus on Iraq: Spoils of War*, 56 *ARCHAEOLOGY* 4, July/Aug. 2003, available at <http://www.archaeology.org/0307/etc/war.html>.

<sup>81</sup> *Id.*

<sup>82</sup> Associated Press, *Trophy Art Collection Displayed in Moscow*, *Russ. J.*, Mar. 3, 2003, available at <http://www.russijournal.com/node/14986>.

<sup>83</sup> See Hague Convention 1954, *supra* note 23, art. 4.3 (requiring merely that States "undertake" to prevent looting); Roerich Pact, *supra* note 65, art. 2 (failing to detail requirements of "protection and respect due to" cultural property).

<sup>84</sup> See Brodie, *supra* note 80; see also Corine Wegener, *Cultural Heritage Disaster Preparedness and Response*, 2003 *INT'L COUNCIL OF MUSEUMS* 253, 254, available at [http://icom.museum/disaster\\_preparedness\\_book/country/wegener.pdf](http://icom.museum/disaster_preparedness_book/country/wegener.pdf); P. Ishwara Bhat, *Protection of Cultural Property Under International Humanitarian Law: Some Emerging Trends*, 2001 *INDIAN SOC. OF INT'L L. Y.B. OF INT'L HUMANITARIAN & REFUGEE L.* 4, 10, available at <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/4.html>.

A. *Trial: The United States Before the International Community*

The International Criminal Tribunal of the former Yugoslavia (ICTY) was established to punish those responsible for the war atrocities committed in the territory of the former Yugoslavia since 1991.<sup>85</sup> The approbation of the ICTY demonstrates not only the seriousness of the war crimes committed, but also the international community's condemnation of the acts.<sup>86</sup>

A crime specifically addressed by the ICTY was the destruction of cultural property during wartime; the ICTY was especially concerned by the destruction of the Mostar Bridge and Old Town of Dubrovnik by Serb-controlled federal troops.<sup>87</sup> The bridge and historic village were considered cultural property because the former was a symbol of the connection between the area's Muslim and Croat communities and the latter was a town dating to the year 667 A.D.<sup>88</sup> Commentators have characterized the destruction of these pieces of cultural property as an "instrument to erase the manifestation of the adversary's identity"<sup>89</sup> and an insult to the "memory of humanity."<sup>90</sup>

In the midst of the destruction of human life and dignity in the war in the former Yugoslavia, it is significant that the ICTY addressed the destruction of cultural property.<sup>91</sup> Although the war in the former Yugoslavia was not international in character, but rather civil, and thus not subject to any sanctions under the 1954 Hague Convention, the ICTY nonetheless investigated and renounced the destruction of cultural property.<sup>92</sup> Furthermore, the ICTY cited the 1949 Geneva Convention as relevant authority, a convention also applicable to the United States but with added force because its hypothetical dispute with Iraq would be international in character and thus clearly subject to international treaty law.<sup>93</sup>

The ICTY's considerations illustrate the international community's conception of the severity of destruction of cultural property during

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<sup>85</sup> Hirad 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, 3 (2001).

<sup>86</sup> *See id.* at 3–4.

<sup>87</sup> U.N. Security Council, Comm'n of Experts, *Destruction of Cultural Property Report*, sec. I(c), S/1994/674/Add. 2 (Vol. V) (Dec. 28, 1994) (*prepared by M. Keba M'Baye*).

<sup>88</sup> *Id.* secs. III(a), II(a).

<sup>89</sup> Abtahi, *supra* note 85, at 1.

<sup>90</sup> *Id.* at 32.

<sup>91</sup> *See* U.N. Security Council, *supra* note 87, sec. II(c); Abtahi, *supra* note 85, at 1.

<sup>92</sup> U.N. Security Council, *supra* note 87, sec. I(b).

<sup>93</sup> *See id.*

wartime and occupation.<sup>94</sup> In the unlikely event, due to political reasons, that the United States is subject to such considerations, sanctions would be imposed because the dispute with Iraq is international in character and thus within the jurisdiction of the relevant binding Geneva Conventions.<sup>95</sup> As such, the United States should follow either or both of two courses of action in anticipation or recognition of those sanctions.<sup>96</sup>

### 1. Funding to Alleviate National Museum of Iraq Losses

Perhaps the most obvious course of action the United States can take to alleviate the National Museum of Iraq's losses is some sort of monetary contribution.<sup>97</sup> Whether the monetary contribution takes the form of a sum representing the worth of the cultural property losses or supplies meant to facilitate the repair and restore process, the course of action will serve the dual purpose of sanctioning the United States and aiding the National Museum of Iraq.<sup>98</sup> Though this course of action may be the easiest, it is far from the best.<sup>99</sup>

Ironically, monetary contribution may be counter-productive.<sup>100</sup> The U.S. State Department has already sent the National Museum of Iraq new office furniture, computers, air conditioners and other supplies.<sup>101</sup> One commentator, who served the United States in the protection of arts, monuments and other cultural property as an Army Reserve major and arts curator, felt that the empty shipment of supplies was not only unnecessary, but also burdensome and duplicative.<sup>102</sup> Indeed, the commentator noted that it would be far more valuable for the United States to commit its experts or at least a designated, long-term volunteer team.<sup>103</sup> Without coordination between National Museum of Iraq restoration personnel and the United States, the use of monetary contribution will continue to be ineffective—and thus ultimately meaningless.<sup>104</sup>

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<sup>94</sup> See *id.* sec. I(c).

<sup>95</sup> See Geneva Convention 1949, *supra* note 8, art. 2.

<sup>96</sup> See Brodie, *supra* note 80.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See Wegener, *supra* note 84, at 257.

<sup>101</sup> See *id.*

<sup>102</sup> See *id.* at 256–57.

<sup>103</sup> *Id.* at 257.

<sup>104</sup> See generally *id.* (reinforcing importance of collaboration of U.S. and National Museum resources in training and planning).

The United States should also be wary of offering monetary contributions in the form of rewards for the return of cultural property.<sup>105</sup> If rewards are too sizable, the United States may unintentionally add an incentive to continue looting or illicitly trading stolen cultural property.<sup>106</sup> Furthermore, if the United States awards the return of cultural property from outside Iraq, the United States succeeds in merely sustaining the market of looted cultural property from the National Museum of Iraq.<sup>107</sup> Perhaps the only workable form of monetary contribution in the form of rewards would be for cultural property that is readily identified as belonging to the National Museum of Iraq, thereby limiting market sustenance and avoiding incentive to loot cultural property from other sites for reward.<sup>108</sup>

## 2. Contribution Beyond Funding

Aside from the practical difficulties resulting from monetary contributions, the global significance of cultural property may render U.S. monetary contributions a shallow attempt, at best, to match the value of the cultural property lost.<sup>109</sup> The United States may serve the dual purposes of appeasing the dismayed international community and meeting the losses of the National Museum of Iraq by organizing its educated experts and pledging them to the museum.<sup>110</sup>

The United States currently has military personnel committed to the preservation of cultural property, a liaison with the Ministry of Culture at the former Coalition Provisional Authority (CPA).<sup>111</sup> Because it was difficult for additional support to get clearance with the CPA, however, and because military personnel are in a constant state of flux, the personnel committed are ill-suited to the task of a large-scale and detail-oriented museum restoration effort.<sup>112</sup> Without a treaty specifically requesting a more focused effort, it appears the United States will resign itself to the provision of inadequate personnel.<sup>113</sup>

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<sup>105</sup> See Brodie, *supra* note 80.

<sup>106</sup> *Id.*

<sup>107</sup> See *id.*

<sup>108</sup> See *id.*

<sup>109</sup> See Abtahi, *supra* note 85, at 2; Brodie, *supra* note 80.

<sup>110</sup> See Abtahi, *supra* note 85, at 3.

<sup>111</sup> Wegener, *supra* note 84, at 254.

<sup>112</sup> See *id.* at 255.

<sup>113</sup> See generally *id.* (discussing reticence of U.S. government to make contributions well-suited to unique task of museum restoration).

The United States could take steps to replace the current personnel with an educated, trained and expert group.<sup>114</sup> The group would lend the needed infrastructure for a large-scale restoration effort.<sup>115</sup> With a consolidated effort, the United States could invite and grant clearance to curators and restoration professionals from around the world.<sup>116</sup> The group could serve not only to provide updated training to the Iraqi professionals currently at work, but could prove invaluable in the restoration of the National Museum of Iraq's building, damaged artifacts, and storage collection.<sup>117</sup>

### B. Ratification of 1954 Hague Convention: Clarity for the Future

The United States can avoid the international community's condemnation and the uncertainty of the repercussions for its actions against cultural property by ratifying the 1954 Hague Convention.<sup>118</sup> By so doing, the United States would clarify its responsibilities during wartime by subjecting the effects of its actions to international treaty law.<sup>119</sup>

The United Kingdom has also been reticent in ratifying the 1954 Hague Convention.<sup>120</sup> There is an ongoing movement to encourage its ratification, largely inspired by the events at the National Museum of Iraq.<sup>121</sup> Though the United Kingdom previously stated concerns about retaining the right to use methods of warfare that may unavoidably destroy cultural property, its Ministry of Defense speculated that future conflicts will likely be geographically restricted and fought using standard methods of warfare.<sup>122</sup> The United States may likewise be concerned that the 1954 Hague Convention is not practicable in light of the possibility of global or nuclear warfare, but if the resolution of the United Kingdom is valid, the United States' concern may no longer be as dominant.<sup>123</sup>

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<sup>114</sup> See *id.* at 257.

<sup>115</sup> See *id.*

<sup>116</sup> Wegener, *supra* note 84, at 254, 255.

<sup>117</sup> See *id.* at 254.

<sup>118</sup> See Brodie, *supra* note 80; David Gaimster, *Protecting the Past in Times of War: UK Progress Towards Accession to the 1954 Hague Convention*, INST. OF FIELD ARCHAEOLOG. Y.B. & DIRECTORY, 2004, at 35, 36, available at <http://www.archaeologists.net/modules/icontent/inPages/docs/pubs/yrbk2004imster.pdf>.

<sup>119</sup> See Brodie, *supra* note 80.

<sup>120</sup> See Gaimster, *supra* note 118, at 35.

<sup>121</sup> See *id.* at 36.

<sup>122</sup> See *id.*

<sup>123</sup> See *id.*

The United States' ratification of the 1954 Hague Convention will be consistent with ideals already espoused by the MFAA and the Roerich Pact.<sup>124</sup> While the United States may have abstained from ratifying the 1954 Hague Convention to avoid accountability in the event of extreme circumstances and to retain the freedom to choose the most effective means of warfare, its decision has had the opposite effect in practice.<sup>125</sup> In not ratifying the 1954 Hague Convention, the United States remains accountable to the international community and further loses the ability to exercise control over how and when it will be held accountable.<sup>126</sup> The United States may have to affirmatively act to protect cultural property, and in that sense loses some freedom in means of warfare.<sup>127</sup> What it gains, however, is the freedom as an occupying power to control the resources and personnel devoted to protecting cultural property where it otherwise would have been forced to do so.<sup>128</sup>

Ultimately, accepting responsibility for the protection of cultural property through ratification of 1954 Hague Convention would ensure that future responsibility for the destruction of cultural property on an unpredictable international scale is avoided in that the United States would be able to exercise more discretion in acting on its obligation.<sup>129</sup> When the trade of responsibilities is accomplished, the safety of cultural property is achieved.<sup>130</sup>

## CONCLUSION

The organized looting of the National Museum of Iraq in April 2003 was a preventable disaster. If the United States had accepted its obligation under either international treaty or customary law, it could have exercised more care in protecting Iraq's cultural property. Indeed, the National Museum of Iraq's injury is felt by the entire international community because the ancient artifacts lost and damaged represent a shared history irreparably damaged.

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<sup>124</sup> See Hague Convention 1954, *supra* note 23, pmbll., arts. 3 & 4 (stating main purpose of Hague Convention 1954 to safeguard and "respect cultural property"); Roerich Pact, *supra* note 65, art. 1 (stating main purpose of Roerich Pact to ensure respect and protection for cultural property); NAT'L ARCHIVES, *supra* note 1, at 3 (stating main purpose of MFAA to protect cultural property from "damage and looting").

<sup>125</sup> See Gaimster, *supra* note 118, at 36.

<sup>126</sup> See Abtahi, *supra* note 85, at 9.

<sup>127</sup> See *id.* at 30–31.

<sup>128</sup> See *id.*

<sup>129</sup> See Brodie, *supra* note 80.

<sup>130</sup> See *id.*



The United States may act to ameliorate the situation by both looking to the future and remedying the past. To clarify its responsibility to reasonably protect cultural property in times of war in the future, the United States should ratify the 1954 Hague Convention. A limited reward system for returned artifacts could be practicable, but the United States should strongly consider the possibility of assembling a group of experts to aid in the restoration of the museum and its priceless artifacts as a more effective and well-tailored remedy to the unique form of destruction wrought upon the National Museum of Iraq.

The United States has known the benefit of cooperating internationally to preserve cultural property through its experiences with the MFAA and the Roerich Pact. It should act again to protect cultural property after the looting of the National Museum of Iraq, and in so doing, act for the benefit of the thousands of years of civilization that the artifacts embody.