

*Ohio State University Moritz College of
Law*

The Ohio State University Moritz College of Law Working Paper
Series

Year 2004

Paper 6

Occupation Failures and the Legality of Armed
Conflict: The Case of Iraqi Cultural Property

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Abstract

US Secretary of Defense Donald Rumsfeld dismissed the looting of the Iraqi National Museum in April 2003 by remarking, “stuff happens.” In doing so, he gave an early indication that in planning to invade Iraq, the Bush Administration failed to take seriously the legal obligations of an occupying power. Occupying powers have a variety of binding legal obligations, including obligations to stop looting, protect cultural property, and protect persons in detention. Yet, the Administration sent a wholly inadequate force to fulfill those obligations, and, more seriously, the force received no direct and imperative orders to do so. As a result, in addition to the questionable basis for initiating war the war in the first place, the Administration conducted it in a way that amounts to an independent ground for concluding the decision to invade Iraq on March 19, 2003, violated international law.

This article focuses on the Administration's failure to protect Iraqi cultural property as one clear example of the Administration's disregard for its obligations. The article discusses cultural property and the long, continuous development of legal principles, through treaties and rules of customary international law for the protection of cultural property in wartime—developments in which the United States has played a leading role. On the eve of the Iraq invasion, no US leader could have been in doubt about the legal requirements to stop looting and protect cultural property. Yet, we find little evidence of any preparation to do so. The article analyzes the literature on Iraqi war planning to understand why this lapse occurred. It further analyzes the consequences of this failures, including: the possibility that individuals will be held accountable; the high cost to the US associated with the war, and Iraq's right to claim reparations, including in-kind reparations from US holdings of Iraqi cultural property.

Working Paper
20 August 2004

**Occupation Failures and the Legality of Armed Conflict:
The Case of Iraqi Cultural Property**

Mary Ellen O'Connell¹

“...[I]t's the same picture of some person walking out of some building with a vase, and you see it 20 times and you think, 'My goodness, were there that many vases? Is it possible there were that many vases in the whole country?'”

Donald Rumsfeld, US Secretary of Defense,
April 11, 2003²

The US State Department estimates that 13,400 objects were looted during April 2003 from the Iraqi National Museum alone.³

To wage war consistently with international law, a national leader must be able to answer at least three questions in the affirmative: Is there a right to resort to force? Is the use of force necessary? If it is necessary, can it be carried out in a way that the cost in terms of

* William B. Saxbe Designated Professor of Law and Fellow of the Mershon Center, The Ohio State University. With thanks for research assistance to Sara DePaul, J.D. This paper was presented as a work in progress to the Islamic Art Circle at the School of Oriental and African Studies, University of London, May 19, 2004. I am grateful to Professor Doris Abouseif-Behrens, the organizer, and to the audience for helpful questions and comments. The paper was also presented at a Faculty Workshop at the Moritz College of Law of The Ohio State University, March 31, 2004. Professor Marc Spindelman organized the Workshop and he and the other participants, again asked helpful questions and made useful comments, for which I am grateful.

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² Voice of Am. Press Releases & Documents, April 12, 2003, at 2003 WL 17342366; *see also* Linda Diebel, *Rumsfeld on Chaos in Iraq: 'Stuff Happens,' U.S. Defence Secretary Shrugs It Off, Red Cross Says Order Must Be Restored*, TORONTO STAR, April 12, 2003, 2003 WL 18626289.

³ State Department Press Release and Documents, Sept. 25, 2003, *see* <http://www.state.gov>.

human lives, property, and damage to the natural environment will not outweigh the value of resorting force? If the answer to *any* of these questions is no, the use of force is unlawful. International lawyers tend to focus on the first question, understandably. Why analyze necessity and proportionality standards if the president or prime minister has no legal right to go to war in the first place? And when there is a right, the analysis of necessity and proportionality typically shifts from the strategic to the tactical level. As a result, there is a tendency to overlook the second and third equally important questions in the decision for war.

This paper takes up the third question in assessing the Bush Administration's decision to use force against Iraq. Applying a conservative analysis of the formal sources of international law—treaties and customary rules clearly binding on the United States—we reach the conclusion that the *manner* in which the Bush Administration decided to carry out the use of force in Iraq rendered the decision unlawful, independently of the answers to questions one and two. The decision to invade “on the cheap” violated America's international law obligations on the conduct of war.⁴ Lawfully invading and occupying Iraq required a commitment to protecting civilians and their property during fighting and in the subsequent occupation. Human Rights Watch has made a strong case that the Administration failed to take adequate precautions to protect civilian lives.⁵ The evidence is overwhelming that the rights of persons in US military custody were violated.⁶ Among the violations are numerous cases of individuals held in detention indefinitely simply because there were not sufficient US personnel to process detainees. This paper looks at the failure of -US forces to protect the Iraqi people's extraordinary cultural heritage, both during the invasion and during the occupation of Iraq.

The paper begins by discussing cultural heritage in light of legal requirements to protect certain objects even at the cost of resources, military advantage and risk to lives. The paper then considers the rules that have grown up over time to protect cultural heritage in war and links the requirement of protection to the *ab initio* decision to go to war. In addition to various treaties on the law of armed conflict, the customary law principles of necessity and proportionality mandate the protection of cultural property even in the waging of a righteous and necessary conflict. The final part of the paper looks at the US-led invasion of Iraq, the failure to plan for protection, and the consequences of that failure. One foreseeable consequence is the likelihood of future Iraqi claims to reparations, including in-kind reparations of cultural property held in coalition countries.

⁴ Regarding the legality of invading Iraq, *see infra*, notes ___ - ___ and accompanying text.

⁵ *See* Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq*, <http://www.hrw.org/reports/2003/usa1203/>

⁶ *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (Feb. 2004), available at www.globalsecurity.org AND MAJOR GENERAL ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (Mar. 12, 2004)(Taguba Report), available at www.gwu.edu/~nsarchiv/

I. Cultural Heritage and Cultural Property

Cultural heritage is what a society continues to possess from its past that relates to its culture. Cultural heritage can take the form of literature, dance, music, art, handcrafts, buildings and structures of archeological significance, and other such tangibles and intangibles. Here we will focus on cultural property, a smaller category within the larger cultural heritage concept. “Cultural ‘property’ is ‘that specific form of property that enhances identity, understanding, and appreciation for the culture that produced the particular property.’”⁷ The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict defines cultural property in Article 1:

For the purposes of the present Convention, the term “cultural property” shall cover, irrespective of origin or ownership:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;⁸

According to Merryman, the idea of cultural property in the 1954 Convention “culminates a development in the international law of war that began in the mid-19th century.”⁹

⁷ Lucille A. Roussin, *Cultural Heritage and Identity*, 11 *CARDOZO J. INT’L & COMP. L.* 707 (2003), quoting Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 *B. U. L. REV.* 559, 569 (1995); citing also Randall Mason, *Conference Reports: Economics and Heritage Conservation: Concepts, Values, and Agendas for Research*, Getty Conservation Institute, Los Angeles (Dec. 8-11, 1998), 8 *INT’L J. OF CUL. PTY.* 550, 561 (1999); Lyndel V. Prott & Patrick J. O’Keefe, “Cultural Property” or “Cultural Heritage,” 1 *INT’L J. OF CULTURAL. PROP.* 307 (1998); Frank G. Fechner, *The Fundamental Aims of Cultural Property Law*, 7 *INT’L J. OF CULTURAL. PROP.* 376, 378-80 (1998).

⁸ Article 1 continues:

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a); (c) centers containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as “centers containing monuments.”

1954 Convention for the Protection of Cultural Property in the Event of an Armed Conflict, 249 UNTS 240, art. 4(3)[hereinafter 1954 Hague Convention]. (

⁹ John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 *AM. J. INT’L L.* 831 (1986).

The US and UK are signatories only to this convention. As signatories they have at least an obligation not to defeat the objects and purposes of the treaty pending its coming into force.¹⁰ The United States has not ruled out ratifying the 1954 Convention, so the Convention is still “pending its coming into force.” In 1994, the top lawyers at the United States Departments of State and Defense reviewed the Convention and supported its submission to the Senate for ratification. It was not submitted at that time, however, apparently owing to a shortage of experts to prepare the submission.¹¹ In addition, much of the 1954 Convention is binding as customary international law, especially basic provisions that build on prior law and have been reinforced by subsequent treaties, such as article 1.¹²

The Hague Convention places cultural property in a category of special legal protection in time of war.¹³ The preamble states that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world” and “the preservation of cultural heritage is of great importance for all peoples of the world...”¹⁴ The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property adds that “cultural property constitutes one of the basic elements of civilization and national culture” and that “it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations.”¹⁵

Cultural property is of such importance to people and their countries because it helps to explain and represent their past. In other words, we can learn about history by examining and studying cultural property, but in addition as a people we can form an identity from the accomplishments that have occurred in the past, and exist today in the form of cultural objects. Accordingly, ‘the material objects through which the highest achievements of the human spirit are embodied must therefore be

¹⁰ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 8, 1155 UNTS 331.

¹¹ See, Hays Parks, *Protection of Cultural Property From the Effects of War*, in *THE LAW OF CULTURAL PROPERTY AND NATURAL HERITAGE: PROTECTION, TRANSFER AND ACCESS*, 3-24 (Marilyn Phelan et al. eds., 1998).

¹² See David A. Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law*, 11 B.U. Int'l L.J. 349, 387-89 (1993). See also, Jan Hladik, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Notion of Military Necessity*, 81 RICR/IRRC 621 (1999).

¹³ Merryman, *supra* note, at 841.

¹⁴ 1954 Hague Convention, *supra* note, preamble.

¹⁵ Nov. 14, 1970, 823 U.N.T.S. 232, preamble[hereinafter 1970 UNESCO Convention].

treasured, as well as those objects that simply help to define who we are and how we live as a people.¹⁶

In this age of globalization, the protection of cultural heritage becomes even more significant. Cultural property, as part of each peoples' "contribution to the culture of the world," stands as a link to the very roots of civilization. The next section goes into detail about the laws protecting cultural property in the event of armed conflict.

II. Protection of Cultural Property in War

Through the ages, humanity has sought to limit both the resort to war and the conduct permitted in war. Both endeavors protect cultural property. By limiting resort to war, the damage and destruction to cultural property caused by war is also coincidentally limited. The restrictions on conduct in war have typically included protection of cultural property. These twin efforts to control war are traditionally divided into two sets of legal rules: the *jus* (or *ius*) *ad bellum* governing the decision to go to war and the *jus* (or *ius*) *in bello* governing how a war is to be waged. The *jus in bello* applies equally to all sides in a conflict, regardless of a party's violation of the *ad bellum* rules.¹⁷ The *in bello* rules take account of military necessity; respecting them should not give an advantage to one side or the other in a conflict. Moreover, all sides to a conflict typically claim they are acting lawfully. What state would ever agree that it was bound by the rules of the aggressor? Thus, international law needs only one set of *in bello* rules.

Despite their equal application regardless of the *ad bellum* violation, the *in bello* rules are intrinsically linked to the *ad bellum* rules. A state deciding for war must be willing to respect the *jus in bello*. Refusing to do so can render an otherwise lawful resort to armed force unlawful.¹⁸ In this section, we trace the broad outlines of how the *jus in bello* with respect to cultural property and the general *jus ad bellum* have evolved from earliest times until the day the US-led coalition decided for war against Iraq in 2003.

Both categories of law have ancient pedigrees and both have continued to grow and develop despite constant challenges. In the 5th Century, St. Augustine introduced the Just War Doctrine that not only restricted when force should be used, but also how.

¹⁶ Sarah Eagen, *Preserving Cultural Property: Our Public Duty: A Look at How and Why We Must Create International Laws that Support International Action*, 13 PACE INT'L L. REV. 407, 411-412 (2001), quoting LYNDEL V. PROTT & P. J.O'KEEFE, LAW AND CULTURAL HERITAGE 8 (1984).

¹⁷ For a discussion of this point, see, Christopher Greenwood, *The Relationship Between the Ius Ad Bellum and Ius In Bello*, 9 REV. INT'L STUD. 221, 225-30 (1983).

¹⁸ *Id.* at 222-24. See also, the literature on the law of armed conflict, more widely known as "humanitarian law," in particular: YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT (2004); THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT (Dieter Fleck ed., 1995)[hereinafter THE HANDBOOK OF HUMANITARIAN LAW]; L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (2000); ASSISTING THE VICTIMS OF ARMED CONFLICT AND OTHER DISASTERS (Frits Kalshoven ed., 1989); FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR (1987); GEOFFREY BEST, HUMANITY IN WARFARE (1980).

Augustine drew principally on Christian teaching that combines the Old and New Testaments, but he was also heavily influenced by Greek and Roman principles. The Greeks and Romans promoted mercy in wartime especially towards defenseless persons, including enemy prisoners.¹⁹ Both ancient communities had principles for the protection of cultural property.²⁰ Augustine counseled fighting war always with an eye on winning the peace. Even wars fought against evil men to stop them from committing further evil had to be done in a way that did not reduce the enemy to an outlaw. If the overriding justification of any war was to create lasting peace, the conduct of war had to be carried out in a way that would allow for future trust.²¹

The Church in the Middle Ages perpetuated Augustine's ideas on both the resort to war and the conduct of war.²² In addition, unwritten codes—codes of chivalry—also carried forward to modern international law principles on the conduct of war.²³ Hugo Grotius, the reputed father of international law, devoted considerable space in his 17th century *The Law of War and Peace* to the proper conduct of armed conflict. He wrote in detail on the use of reprisals, the treatment of property, treatment of the sick and wounded, burial rights, and much more. Among the most important principles, he includes the basic requirement that the waging of war is not unlimited: Grotius had seen the violation of these principles and more in the brutal Thirty Years' War. One of the most infamous acts of the war was the plundering of the Palatine Library in Heidelberg.²⁴ When the war ended with the Peace of Westphalia in 1648 "the nature of relations between fighting men had changed."²⁵ The system of chivalry faded out as professional officer corps replaced

¹⁹ GREEN, *supra* note, at 21-22; THE LAW OF WAR: A DOCUMENTARY HISTORY 4-5 (Leon Friedman ed., 1972).

²⁰ THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note, at 4; Joshua Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 AIR FOR. L. REV. 277, 281-81 (1997).

²¹ WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW 107-08 (trans. & rev'd, Michael Byers 2000).

²² GREEN, *supra* note, at 24.

²³ GREEN *supra* note, at 24-25; Geoffrey Parker, *Early Modern Europe*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD, 40, 42 (Michael Howard et al. eds., 1994).

²⁴ JOHN HENRY MERRYMAN & ALBERT E. ELSER, LAW, ETHICS AND THE VISUAL ARTS 1-2 (4th ed. 2003), quoting, Charles De Visscher, *International Protection of Works of Art and Historic Monuments*, US Department of State, Documents & State Papers, 821, 823 (June 1949).

²⁵ GREEN, *supra* note, at 28.



knights in the new military organizations of sovereign states.²⁶ Lawful war became “a hostile contention by means of armed forces carried on between states.”²⁷ This change opened new possibilities for the imposition of *in bello* obligations; though the rise of the sovereign state was undermining the *ad bellum* rules based on natural law principles.

Grotius’ successor as the most influential international law scholar of his time, Emmerich de Vattel (1714-1767), helped foster the concept of absolute sovereignty in the emerging state system. Vattel thought in terms of what would best serve his employers, various princes and rulers of small states in Central Europe. He believed they wanted strong principles of non-intervention and equality. He insisted on express consent as necessary to bind a state. He did not believe a ruler could be judged by other rulers on his decision to go to war. In the conduct of war, too, Vattel considered what would strengthen the position of a ruler over the long term. He recounts how the Duke of Alva’s decision to execute 20,000 citizens of The Netherlands resulted in a backlash that Spain could not contain, eventually costing it the territory. Vattel, therefore, recommended that in the conduct of war respect be shown for the principles of humanity, forbearance, truthfulness and honor.²⁸ Complying with the law of war would diminish the interest in retaliation and foster trust, which is needed to eventually reach an agreement on peace. With respect to property, here is just one relevant excerpt from Vattel’s writing:

For whatever cause a country be devastated, those buildings should be spared which are an honor to the human race and which do not add to the strength of the enemy, such as temples, tombs, public buildings, and all edifices of remarkable beauty. What is gained by destroying them? It is the act of a declared enemy of the human race thus wantonly to deprive men of these monuments of art and models of architecture....We still abhor the acts of those barbarians who, in overrunning the Roman Empire, destroyed so many wonders of art....²⁹

Vattel’s influence reached the Americas where Benjamin Franklin and other Founding Fathers were his avid readers.³⁰ In 1785, Franklin concluded with Frederick the Great of

²⁶ Robert C. Stacy, *The Age of Chivalry*, in THE LAWS OF WAR, *supra* note, at 27, 39.

²⁷ GREEN, *supra* note, at 28-29.

²⁸ VATTEL, *supra* note, at 338.

²⁹ VATTEL, *supra* note, at 293-295.

³⁰ ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 161 (rev’d ed., 1962).

Prussia a treaty of friendship and commerce that also codified principles for the conduct of conflict. The treaty is credited with being one of the first international agreements to contain humanitarian law principles in written form.³¹ Vattel's teaching on the law *in bello* was plainly ignored, however, by revolutionary France. According to De Visscher, the 18th century was relatively free of plundering, then,

...however, the lust for spoliation revived once again, bursting forth with unprecedented violence.

The wars of the Revolution, the Consulate, and the Empire show that France, with her well-known ruthlessness, plundered palaces, museums, and churches in the provinces conquered by her armies...Just as Rome once did, Paris was destined to enrich herself with the artistic treasures of conquered peoples; those treasures were regarded as trophies of victory and the adornments of a nation that, by initiating the love of freedom in Europe, deserved to become the center of sciences and arts.³²

In the negotiations of 1815 that ended the Napoleonic wars, delegates made demands that France return looted objects.³³ These demands began the development of an international legal prohibition on pillage of cultural property as well as the remedy of return.

With advances in technology, civilians and soldiers alike began suffering the effects of war in ways that led to demands for safeguards. The United States Civil War was particularly brutal and induced President Lincoln to approve the drafting of "General Orders No. 100" by Francis Lieber, a German-American professor of international law at Columbia College, now Columbia University. The result was a detailed manual for Union forces to guide their conduct in the war. "Lieber's Code was the first attempt to set down, in a single set of instructions for forces in the field, the laws and customs of war."³⁴ Lieber had himself fought in Europe before immigrating to the United States. He lost one son fighting for the Confederacy and had two other sons who fought for the

³¹ THE HANDBOOK OF HUMANITARIAN LAW, *supra* note, at 17.

³² De Visscher, *supra* note.

³³ MERRYMAN & ELSEN, *supra* note, at 5-8.

³⁴ THE HANDBOOK OF HUMANITARIAN LAW, *supra* note, 18.



Union.³⁵ He was uniquely qualified to produce a manual that rapidly won wide acceptance. By the end of the 19th century, the leading western military powers adopted either Lieber's Code directly or adapted it for their own militaries. According to Hays Parks, "While well-deserved credit is given the Swiss humanitarian Jean Henri Dunant for establishment of the modern law of war, the codification of the law of war as to protection of cultural property rests more with Dr. Francis Lieber...."³⁶

Among the important provisions on the protection of cultural property in the Lieber Code are:

Art. 35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places which are besieged or bombarded.

Art. 44. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking...are prohibited....

Art. 45. All captures and booty belong...primarily to the government of the captor.³⁷

³⁵ RICHARD SHELLY HARTIGAN, LIEBER'S CODE OF THE LAW OF WAR, 5-7, 15 (1983).

³⁶ Parks, *supra* note, at 3 (footnotes omitted.)

³⁷ *See also*, Art. 36:

If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies...nor shall they ever be privately appropriated, or wantonly destroyed or injured.

See also, Articles 14, 15, 16, 31, 34, 37, and 46 and Parks, *supra* note, at 3-5.

Not long after the Lieber Code was drafted, the first multinational treaty for limiting the conduct of war was concluded. The Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was the result of the efforts of Henri Dunant. Dunant had observed the grave suffering of the wounded left on the battlefield after the battle of Solferino, Italy in 1859. He formed an organization prepared to help such victims in the future. It became the International Committee of the Red Cross (ICRC). In 1864 states signed the first multinational treaty to protect the victims of war—the sick and wounded on the battlefield. The Convention codified protections for the wounded as well as allowing for Red Cross and other humanitarian personnel to assist them.³⁸

Czar Alexander II of Russia called another conference on protection of war victims and restrictions on the conduct of war in 1874 in Brussels.³⁹ (He had called an earlier conference in 1868 to prohibit the exploding bullet. The result was the Declaration of St. Petersburg in which the parties renounced the use of exploding projectiles weighing less than 400 grams.) The British, the leading military power at the time of the Brussels conference had little interest in a treaty restricting the conduct of war and succeeded in blocking the adoption of a binding text. Nevertheless, the declaration produced by the fifteen participating states provided important protections, including for cultural property:

The Property of parishes (communes), or establishments devoted to religion, charity, education, arts and science, although belonging to the State, shall be treated as private property.

Every seizure, destruction of, or willful damage to, such establishments, historical monuments, or works of art or of science, should be prosecuted by competent authorities.⁴⁰

The Brussels Declaration also paved the way for another meeting in 1880 in Oxford, England that resulted in the *Manual of the Laws of War on Land*.⁴¹ The Lieber Code, the Declaration of St. Petersburg, and the *Oxford Manual* were all important precursors to the Hague Peace Conferences of 1899 and 1907. The Conferences were called to promote peace and ameliorate war. To accomplish the first, a permanent arbitration facility was created. For the second, various *in bello* rules were codified in agreements on the

³⁸ THE HANDBOOK OF HUMANITARIAN LAW, *supra* note, at 18; GREEN, *supra* note, at 30

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⁴⁰ Cited in MERRYMAN & ELSÉN, *supra* note, at 25.

⁴¹ GREEN, *supra* note, at 31-32.

conduct of war, agreements that remain binding law today. The 1899 Conference adopted various declarations prohibiting the use of certain weapons as an annex of regulations on the conduct of land warfare. In 1907, the 1899 conventions were amended and ten more conventions relating to the conduct of war were added.⁴² Hague Convention (IV) of 1907 included a somewhat modified annex of regulations on land warfare. These “Hague Regulations” are still a central part of the law of war, particularly with respect to the protection of cultural property. Article 56 of the Hague Regulations requires:

The Property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as private property.

All seizure or destruction or willful damage done to institutions of this character, historic monuments, works of art and science is forbidden, and should be made the subject of legal proceedings.

The Hague Regulations also require that the occupying power maintain law and order:⁴³

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety [*l'ordre et la vie publics*], while respecting, unless absolutely prevented, the laws in force in the country.

The Convention proper to which the Regulations are attached also contains an important provision relevant to the topic of this paper: Article 3 states, “A Belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”⁴⁴

The Hague Peace Conferences did not prevent the First World War, nor apparently significantly mitigate the suffering of the military or civilians. The parties to the conflict did accept “Hague Law” as governing the conflict and some litigation occurring during

⁴² GREEN, *supra* note, at 31-32.

⁴³ Convention Respecting the Laws and Customs of War on Land (1907 Hague Convention IV), Oct. 18, 1907, Annex, art. 43, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631 [hereinafter HR].

⁴⁴ *Id.* at art. 3.

and after the war relied on it. The Allies particularly wished to punish Germany for the destruction of the University of Louvain in Belgium and the Cathedral of Rheims. Article 246 of the Treaty of Versailles provided that: "Germany undertakes to furnish to the University of Louvain, within three months after a request made by it and transmitted through the intervention of the Reparation Commission, manuscripts, incunabula, printed books, maps and objects of collection corresponding in number and value to those destroyed in the burning by Germany of the Library of Louvain."⁴⁵

The Treaty of Versailles also launched a new effort to improve the law prohibiting resort to war. It provided for the creation of a new organization with the responsibility to maintain international peace and security: The League of Nations. The League was organized under its Covenant of April 28, 1919. In addition to establishing the new organization, the Covenant also required that states try arbitration before resort to force. League members were committed to collective action against unlawful uses of force.⁴⁶ Despite its central role in drafting the Versailles Treaty and the League Covenant, the United States did not join the League. To try to demonstrate that it was nevertheless committed to peace, the US promoted the Kellogg-Briand Pact of 1928.⁴⁷ The parties to the Pact renounced war and committed themselves to seeking the peaceful settlement of disputes.

Owing to the great suffering of civilians in the First World War, the International Committee of the Red Cross began work on a convention aimed at protecting civilians in time of war.⁴⁸ The final draft of a civilians convention was approved at the 1934 Tokyo International Conference of the Red Cross, but the Second World War broke out before the Tokyo draft could be submitted to a diplomatic conference. In the Americas, a specific agreement for the protection of cultural property was concluded in 1935, the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, or the Roerich Pact.⁴⁹ Twenty-one states signed the Pact, although only eleven became

⁴⁵ Signed June 28, 1919, available at <http://www.yale.edu/lawweb/avalon/imt/menu.htm>

⁴⁶ League of Nations Covenant, *reprinted in* 1 MANLEY O. HUDSON, INTERNATIONAL LEGISLATION 7-8 (1931).

⁴⁷ Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

⁴⁸ PETER MACALISTER-SMITH, INTERNATIONAL HUMANITARIAN ASSISTANCE: DISASTER RELIEF ACTIONS IN INTERNATIONAL LAW AND ORGANIZATION 11-12 (1985); *see also*, COMMENTARY TO THE 1949 GENEVA CONVENTION IV 3-9 (Jean Pictet ed., 1958).

⁴⁹ CLXVII L.N.T.S. 290 (1936); *see also* Karl Josef Partsch, *Protection of Cultural Property*, in HANDBOOK OF HUMANITARIAN LAW, *supra* note, at 377, 378.

parties. Still, the Pact introduced some innovations to cultural property protection that became part of later agreements, such as a registry for listing cultural property to be protected in wartime and an emblem to be placed on protected buildings.

Despite these various treaties and the existence of the League, German and Japanese leaders, imbued with a sense of their moral and cultural superiority and of their destiny to rule other peoples, initiated wars in stunning disregard of the prohibitions on the use of force and the rules in place on the conduct of war. The Nazis systematically plundered or destroyed cultural property wherever they went. In addition to the well-known theft of cultural property from Jews and other Nazi victims, the Nazis destroyed 427 museums in the Soviet Union.⁵⁰ Following the war, around 200 high political, business, and military leaders in Germany and the Far East were tried and punished for these law violations. The League Covenant, the Kellogg-Briand Pact, the Hague Conventions, and the Geneva Conventions (of 1929) were cited as law binding on the aggressors and forming a basis for individual accountability.⁵¹ At Nuremberg, two leading Nazi officials, Hermann Goering and Alfred Rosenberg, were charged specifically with plunder of cultural property.⁵² The Allies, in turn, are criticized for the terror bombing of the treasure city of Dresden, the unnecessary destruction of the ancient monastery of Monte Cassino, and other acts inconsistent with the law of armed conflict. At the end of the war, the Soviets plundered over a million objects from Germany, claiming them as reparations and replacement for what they had lost.⁵³

⁵⁰ MERRYMAN & ELSEY, *supra* note, at 28-29.

⁵¹ For a detailed account of the Nuremberg trials, see TELFORD TAYLOR THE ANATOMY OF THE NUREMBERG TRIALS (1992); on the Tokyo trials, see A.C. BRACKMAN, THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS (1989). In addition to these trials of high-ranking political officials and military officers, thousands of other trials were held for war crimes. Ralph Steinhardt estimates the number conservatively at 10,000. See Ralph Steinhardt, INTERNATIONAL HUMANITARIAN LAW IN THE COURTS OF THE UNITED STATES: YAMASHITA, FILARTIGA, AND 911, 36 GEO. WASH. INT'L L. REV. 1, n. 27 (2003).

⁵² I INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF MAJOR WAR CRIMINALS, 279-82, 288-92, 293-98 (1948).

⁵³ KONSTANTIN AKINSAH, ET AL, BEAUTIFUL LOOT, THE SOVIET PLUNDER OF EUROPE'S ART TREASURES (1995); see also, 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 (1997-98); THE SPOILS OF WAR (Elizabeth Simpson ed., 1997).

The overwhelming need to prevent another such world war was the motivating factor in creating the United Nations and its Charter. Since the adoption of the Charter in 1945, international law has prohibited the use of force except in self-defense or with the authorization of the UN Security Council.⁵⁴ The right of self-defense is the right to use armed force against an armed attacker when that force can prevent future attacks and is proportional in the circumstances. Despite the many violations of these rules since 1945, they have been reinforced on a regular basis and remain the binding law on the right to resort to armed force.⁵⁵

The vast and intentional destruction and looting of cultural property in the Second World War was one motivating factor in the development of the 1949 Geneva Conventions. The 1949 Geneva Conventions “provide protection for all those who, as a consequence of an armed conflict, have fallen into the hands of the adversary. The protection envisaged here is, hence, not protection against the violence of war itself, but against the arbitrary power which one belligerent party acquires in the course of the war over persons belonging to the other party.”⁵⁶ Thus, Geneva law focuses most essentially on combatants no longer fighting (*hor de combat*), civilians, and their property. However, detailed protection of cultural property was provided for only in 1954 in the Hague Convention mentioned above. The United States never became a party to the 1954 Convention out of concern that the Convention’s balance is weighted too heavily toward protection and away from the rights of military necessity. Still, the US agrees that much of the Convention is customary international law, including the key provision in Article 4(3): “The High Contracting Parties further undertake to prohibit, prevent and, if

⁵⁴ Article 2(4) is the most basic principle regulating the use of force in international law:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

UNITED NATIONS CHARTER art. 2, para. 4, 59 Stat. 1031. T.S. No. 993, 3 Bevans 1153, *amended* 24 U.S.T. 2225, T.I.A.S. 7739 [hereinafter U.N. CHARTER]; see also generally on use of force: YORAM DINSTEIN, *WAR AGGRESSION, AND SELF-DEFENSE* (3d ed. 2001); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* (2000); HILAIRE MCCOUBREY & NIGEL D. WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* (1992); IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963).

⁵⁵ On the current state of the *jus ad bellum* see, Mary Ellen O’Connell, *Releasing the Dogs of War*, *Review of Christine Gray’s International Law and the Use of Force*, 97 AM. J. INT’L L. 446-49 (2003).

⁵⁶ KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* *supra* note, at 40.

necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”⁵⁷

In the 1970s, following the Biafran and Vietnam wars, the International Committee of the Red Cross convened another major conference to update the 1949 conventions. Two Protocols emerged from the conferences in 1977.⁵⁸ Additional Protocol I is devoted to international armed conflicts. Additional Protocol II is devoted to non-international armed conflict where rebel forces have gained control of territory. Both Protocols supplement the Geneva Conventions, filling some gaps and updating some provisions. In certain cases, provisions based on the Hague Conventions are also included. Provisions on the protection of cultural property are found in Additional Protocol I Article 53 and in Additional Protocol II Article 16:

Article 53 Protection of Cultural Objects and of Places of Worship

Without Prejudice to the provisions of the [1954] Hague Convention..., and of other relevant international instruments, it is prohibited:

- (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (b) to use such objects in support of the military effort;
- (c) To make such objects the object of reprisals.

Article 16 Protection of Cultural Objects and Places of Worship

Without Prejudice to the Provisions of the [1954] Hague Convention..., it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

Additional Protocol I also makes certain kinds of destruction of cultural property a grave breach of the Protocol in Article 85.⁵⁹ Grave breaches are particularly serious violations

⁵⁷ 1954 Hague Convention, *supra* note.

⁵⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3 (1979)[hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, 1125 U.N.T.S. 609 (1979)[hereinafter APII].

⁵⁹ API, art. 85 Repression of breaches of this Protocol

of the law of the Conventions. States have a duty to suppress grave breaches, by, among other measures, providing for penal sanctions and by searching for and prosecuting persons accused of grave breaches—regardless of the accused’s nationality.⁶⁰

The official commentary on Additional Protocol I says the obligation in Article 53 is stricter than that of the Hague Convention, “since it does not provide for any derogation, even ‘where military necessity imperatively requires such a waiver.’ As long as the object concerned is not made into a military object by those in control....”⁶¹

The United States has signed but not ratified either Protocol. It has declared some provisions generally binding as customary international law,⁶² including some of the provisions protecting civilians and civilian objects. The United States does not believe, however, that the prohibition on reprisals against civilian objects is part of customary international law, including, apparently, reprisals against cultural property.⁶³ The British share this position with the United States and have made an elaborate reservation to

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- a. The provisions of the [1949] Conventions relating to the repression of breaches and grave breaches, supplemented by the Section, shall apply to the repression of breaches and grave breaches of this Protocol....
 4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed willfully and in violation of the Conventions or the Protocol:
 - (d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, ...the object of attack causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and ... [the object is] not located in the immediate proximity of military objectives.

⁶⁰ See, e.g., Geneva Civilians Convention, art. 146; see also L.C. GREEN, *supra* note, at chap. 18.

⁶¹ CLAUDE PILOUDET ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS 647 (1987). See also, Parks, *supra* note at 3-19-3-21.

⁶² December 12, 1977, the United States signed Additional Protocols I & II of August 1977. During the Reagan Administration, the State Department did a thorough review of the Protocols and decided to submit APII to the Congress for advice and consent on the question of ratification. With respect to API, it decided that it would not submit it for advise and consent but rather declare those provisions it liked binding as customary international law. Michael Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419-31 (1987); see also US ARMY OPERATIONAL LAW HANDBOOK 5 (2001). For a debate in the US on the merits of API, see George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT’L L. 1 (1991); Abram Sofaer, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims, The Rationale for the United States Decision*, 82 AM. J. INT’L L. 784 (1988).

⁶³ Matheson, *supra* note, at text accompanying footnotes 33 & 35.

Additional Protocol I that will allow them to take reprisals against civilians in some limited circumstances.⁶⁴

The next major development in the protection of cultural property in time of war came when the Security Council established courts in 1993 and 1994 to try international law crimes from the armed conflicts in the former Yugoslavia and the genocide in Rwanda. The Statute for the International Tribunal for the former Yugoslavia gave authority to prosecute grave breaches of the Geneva Conventions and certain serious violations of the laws or customs of war. In addition to listing extensive or wanton destruction of property not justified by military necessity as a crime, the ICTY Statute also includes the “seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science” and “plunder of public or private property.”⁶⁵ The Rwanda Statute mentions only pillage.⁶⁶ The two statutes helped pave the way for the Rome Statute of the International Criminal Court. The Rome Statute specifically addresses destruction of cultural property in Article 8(2): “For purposes of this statute, ‘war crimes’ means:

(b)(x): Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.⁶⁷

In addition to these various treaties, customary international law rules have also emerged with importance to cultural property protection have evolved. In addition to various treaty rules now part of customary international, the general customary law principles of necessity and proportionality govern all decisions on the use of force.⁶⁸ Necessity refers

⁶⁴ See, United Kingdom declarations and reservations to Additional Protocol I at <http://www.icrc.org/ihl.nsf/db8c9c8d3ba9d16f41256739003e6371/0a9e03f0f2ee757cc1256402003fb6d2?OpenDocument>

⁶⁵ See 1993 Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/25704 (May 3, 1993), at 36-40.

⁶⁶ Statute of the International Tribunal for Rwanda, UN Doc. SC/5974 (Jan. 12, 1995), at 107-110.

⁶⁷ 37 ILM 999-1019 (1998).

⁶⁸ Fundamentally, the principles of necessity, proportionality are the central customary law principles of international humanitarian law. (Some would add humanity and distinction though these are arguably included in necessity and proportionality.) The three concepts are closely related and not always listed individually. API, art. 51(5): “In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy.” Judith Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391 (1993). The Lieber Code’s definition of necessity is “Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.” The International Court of Justice (ICJ) confirmed the status of necessity and proportionality as customary international law in the Nuclear Weapons Case, the Nicaragua Case, and Oil Platforms. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 240-46; *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* 1986 I.C.J. 14, para. 237 (June 27) and *Oil Platforms (Iran v. U.S.)* 2003 I.C.J. para. 43, 74; see also,

to military necessity, and the obligation that force is used only if necessary to accomplish a reasonable military objective.⁶⁹ Proportionality prohibits that “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to concrete and direct military advantage anticipated.”⁷⁰ Military necessity and proportionality are both a sword and a shield. While these principles protect cultural property when there is no necessity great enough to warrant destruction, if such property is turned to a military purpose, the protection is lifted. In 2003 and 2004, insurgents in Iraq turned mosques into military objectives. Nevertheless, the United States generally refrained from attacking mosques.⁷¹ During the Gulf War, the United States decided that cultural monuments at the ancient site of Ur were more precious than destroying Iraqi aircraft that Saddam Hussein had ordered to be placed near them.⁷²

These customary principles also influence the legality of a resort to force. In the Nicaragua Case decided in 1986, the International Court of Justice (ICJ) said, “Even if the United States activities in question had been carried on in strict compliance with the canons of necessity and proportionality, they would not thereby become lawful. If however, they were not, this may constitute an additional ground of wrongfulness.”⁷³ Similarly, in 2003, the ICJ said the following regarding necessity and proportionality: “whether the response to the [armed] attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.”⁷⁴

Greenwood, too, argues that the legal basis on which force is initiated is linked to how a conflict is conducted. If the basis for using force is the right of self-defense,

Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 240 (1996); Michael Reisman & Douglas Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT'L L. 86, at 94-95 (1998).

⁶⁹ Reisman & Stevick, *supra note*, at 94.

⁷⁰ API, art. 51(5). According to Gardam: “The legitimate resort to force under the United Nations system is regarded by most commentators as restricted to the use of force in self-defense under Article 51 and collective security action under chapter VII of the UN Charter. The resort to force in both these situations is limited by the customary law requirement that it be proportionate to the unlawful aggression that gave rise to the right. In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy.” Gardam, *supra note*, at 391.

⁷¹ See, e.g., Sabrina Tavernise, *Baghdad Slum Fuels Power of Radical Cleric*, INT'L HERALD TRIB., Aug. 16, 2004, 2004 WL 77534917.

⁷² UNITED STATES DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR 613 (1992); see also Birov, *supra note*, at 234.

⁷³ Nicaragua *supra note*, at para. 237.

⁷⁴ Oil Platforms, *supra note*, at para. 74, citing Nicaragua *supra note*, at para. 194.

[t]his right permits only the use of such force as is reasonably necessary and proportionate to the danger. This requirement of proportionality, ... means that it is not enough for a state to show that its initial recourse to force was a justifiable act of self-defense and that its subsequent acts have complied with the *ius in bello*. It must also show that all its measures involving the use of force, throughout the conflict, are reasonable, proportionate acts of self-defence. Once its response ceases to be reasonably proportionate then it is itself guilty of a violation of the *ius ad bellum*.⁷⁵

Saddam Hussein's conduct of the Gulf War included vast disregard for the law of armed conflict that even if he had had a basis for invading Kuwait,⁷⁶ the way he did it would have undermined the legality of the war. By contrast, the Coalition fighting to defend Kuwait took the law of armed conflict seriously. One of the most important examples was the decision not to occupy all of Iraq and change the regime in Baghdad. The wisdom of this decision is contested in some circles today, but the legal limits on what the Coalition could do restricted any greater use of force against Iraq than was necessary to liberate Kuwait. When the Coalition liberated Kuwait, it provided for its future security in the form of a buffer zone on the territory of Iraq.⁷⁷ Similarly, in 2001, when the United States and the United Kingdom acted in collective self-defense against Afghanistan, Secretary of State Colin Powell indicated that the US would not aim to eliminate the ruling Taliban entirely.⁷⁸ The US wanted to clear all Al Qaeda operations from Afghanistan. It did not need to overthrow the Taliban for that purpose. Events seemed to have overtaken the United States, however, when suddenly the Northern Alliance—long engaged in a war for control of Afghanistan—continued on to Kabul and completely routed the Taliban from power. The US apparently did not intend this outcome and may not be responsible for the disproportionate effects of its decision to use force in self-defense.⁷⁹

⁷⁵ Christopher Greenwood, *The Relationship between ius ad bellum and ius in bello*, 9 REV. INT'L STUD. 221, 223 (1983).

⁷⁶ See e.g., awards of the United Nations Compensation Commission, <http://www.unog.ch/uncc> (This is the body charged with overseeing claims against Iraq arising from the Gulf War. Over \$200 billion in claims were made, most for acts that violating the law of armed conflict.)

⁷⁷ Mary Ellen O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait*, 15 S. ILL. U. L.J. 453 (1991); but see DINSTEIN, *supra* note, at 211-12.

⁷⁸ Pamela Constable, *U.S. Hopes To Attract Moderates in Taliban; Powell Sees Them in 'New Afghanistan'*, WASH. POST, Oct. 17, 2001, at A24.

⁷⁹ Another proportionality issue did arise in Afghanistan, however, several governments, including, Afghanistan's own interim government, criticized the United States for continuing to bomb after the Taliban fell in December 2001. See, discussion in Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. R. 889 (2002).

In short, when a leader decides to resort to war, whether in self-defense or with Security Council authorization,⁸⁰ the decision must be consistent with the principles of necessity and proportionality. Lawful armed force today is for the purpose of law enforcement. It is force to counter a previous unlawful use of force or threat of unlawful force. Lawful resort to force today can be compared to the force of the police countering the force of the criminal. The exceptional uses of force that are lawful today must arguably be as limited as possible.

Limiting the use of force that may be used provides the beneficial side effect of protecting cultural property. The less force used, the less likely museums, protected buildings, and other cultural monuments will be destroyed. The less force used, the less likely that civil society will collapse and give way to looting and theft of cultural property. Thus, by the eve of the US-led invasion of Iraq important treaties and rules of customary international law combined to create an established and widely known norm of cultural property protection in time of armed conflict.

III. Iraq and the Optimist's Plan

The US-led invasion of Iraq on March 19, 2003, cannot be justified on the basis of self-defense or Security Council authorization. The Bush Administration and some scholars have argued that Security Council's resolutions from the Gulf War could provide the authority to use force against Iraq in 2003. The argument hardly bears scrutiny.⁸¹ The

⁸⁰ For a discussion of the humanitarian law binding on the Security Council, see Mary Ellen O'Connell, *Debating the Law of Sanctions*, 13 EUR. J. INT'L L. 63 (2002).

⁸¹ For analysis of resort to war in Iraq and conclusion that it was unlawful, see Sean Murphy, *Assessing the Legality of Invading Iraq*, GEO. L. REV. (forthcoming in 2004); Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT'L L. 590 (2003); Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 611 (2003); Mary Ellen O'Connell, *Addendum to Armed Force in Iraq: Issues of Legality* (April 2003), <http://www.asil.org/insights/insigh99a1.htm> but see, William Howard Taft, IV & Todd Buchwald, *Preemption, Iraq, and International Law*, 97 Am. J. Int'l L. 557 (2003) (Legal Adviser and Deputy Legal Adviser to the State Department.)

Mark Danner confirms that the Administration had at least two other reasons besides the proffered justification of enforcing UN Security Council resolution for using force in Iraq—reasons that could not be justified in international law:

National Security: To remove Iraq as a threat to American dominance of the Persian Gulf and to Israel, and make it America's central ally and base in the region, replacing as increasingly unstable and Islamicist Saudi Arabia, from which American troops could be withdrawn.

Regional Transformation: To make Iraq an example of Arab democracy as the first step in 'the transformation of the Middle East' which, in the words of national Security Adviser Condoleezza Rice, 'is the only guarantee that it will no longer produce ideologies of hatred that lead men to fly air planes into buildings in New York and Washington.'

Mark Danner, *Iraq: The New War*, N.Y. REV. OF BOOKS, Sept. 25, 2003, at 88, 90, citing, Jeffrey Sachs, *The Real Target of the War in Iraq was Saudi Arabia*, FIN. TIMES, Aug. 13, 2003; see also, Robert Badinter, *La vraie raison de la guerre qui s'annonce*, LE NOUVEL OBSERVATEUR, Feb. 20, 2003; Dana Milbank, *Patience on Iraq Policies Urged*, WASH. POST, Aug. 26, 2003, at 1.

US lacked a legal basis for resorting to force in the first instance. In addition, the manner in which the war was conducted forms an independent basis for arguing the decision to use force against Iraq was unlawful. As discussed above, using more force than is necessary or pursuing the wrong military objectives can render even a use of force in self-defense unlawful. The argument here is that other failures to respect the *jus in bello* can also render an otherwise lawful use of force unlawful. In the case of the US use of force against Iraq, it must be asked whether invading the whole country and changing the regime was proportional to the stated US goal of enforcing the Security Council's Gulf War resolutions, where overthrowing Saddam had not been contemplated. Even if it was necessary and proportional to overthrow Saddam, the decision to invade and occupy the country while intentionally disregarding the obligations of an occupying power amount to *ad bellum* violations. The decision by United States military and political leaders to send a force that had neither the orders to fulfill the *in bello* obligations, nor the practical means to do so, undermined any legal basis the United States had to invade the country in the first place.

We now know of several significant and intentional failures to mandate respect for the law of armed conflict with regard to the occupation of Iraq. US Secretary of Defense Donald Rumsfeld refused to listen to his military experts regarding the number and type of troops needed to maintain order after the invasion. Secretary Rumsfeld ordered, at the request of the C.I.A., that certain persons in military detention be hidden from the ICRC.⁸² This order clearly violated provisions of the Geneva Conventions.⁸³ Other persons in US military detention have been tortured, abused, and subjected to inhuman treatment. Military detention centers in Iraq have had too little food, medicine, and other basic necessities for detainees.⁸⁴ In part, the problems may be traced to the lack of trained, professional Military Police and Military Intelligence personnel.

⁸² See, Edward T. Pound, *Iraq's Invisible Man*, U.S. NEWS & WORLD RPT., June 28, 2004, at 32, 2004 WL 61556471; Thom Shanker & Andrea Elliott, *U.S. Admits Error in Secret Jailing of Iraqi Suspect*, INT'L HERALD TRIB., June 19, 2004, at 8, 2004 WL 77531132; Christopher Cooper, *Rumsfeld Defends Hiding prisoner at CIA Urging*, WALL ST. J., June 18, 2004, at A6, 2004 WL 56932344; *Rumsfeld Ordered Iraqi Prisoner Held 'Off the Books': Report*, AGENCE FR.-PRESSE, June 16, 2004, 2004 WL 83388614.

⁸³ If the "disappeared" persons qualified as prisoners of war, Rumsfeld's order breached, for example, the Prisoner's Convention, arts. 69 & 70: "Immediately upon prisoners of war falling into its power, the Detaining Power shall inform them and the Powers on which they depend, through the Protecting Power, of the measures take to carry out the provisions of the present Section...." "Immediately upon capture, or not more than one week after arrival at a camp, ..., every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency...." If the individuals do not qualify as prisoners of war, Rumsfeld's order violated, for example, the Civilians Convention, arts. 105 and 106: "Immediately upon interning protected persons, the Detaining Powers shall inform them, the Power to which they owe allegiance and their Protecting Power of the measures taken for executing the provisions of the present Chapter." "As soon as he is interned, or at the latests not mor ethan one week after his arrival in a place of internment, ..., every internee shall be enable to send direct to his family, o the one hand, and to the Central Agency provided for by Article 140, on the other, an internment card...." See also the Taguba Report, *supra* note, at 27: "... 'ghost detainees' ...[were] moved around within the facility to hide them from a visiting International Committee of the Red Cross (ICRC) survey team. This maneuver was deceptive, contrary to Army Doctrine, and in violation of international law."

⁸⁴ See notes ___ - ___, *supra*.

These and other failures to fulfill the Hague and Geneva obligations of an occupying power clearly undermine any legitimacy of the US invasion of Iraq. Likewise, US forces were not ordered to protect the Iraqi National Museum and archeological sites from looting both during the invasion and during the occupation, constituting another breach of obligation.

One might ask whether failures to adequately prepare for war or failure to give the right orders can amount to *in bello* violations. Certainly sending too few troops to fulfill the obligations of an occupying power appears to be of the nature of an omission rather than commission. Arguably a political or military commander making a good faith effort to send the right number of troops or all the troops available might not violate the *in bello* rules. That situation is almost the opposite of the one we saw in Iraq. It can hardly be in good faith to ignore the advice of leading experts. Moreover, the failure of leadership to ensure that military personnel follow the laws of war and the failure to issue orders that fulfill the requirements of a lawful occupation can certainly be considered clear violations.

US Vice President Richard Cheney, Secretary Rumsfeld, and Deputy Secretary of Defense Paul Wolfowitz had all advocated war with Iraq to remove Saddam Hussein from power since the end of the Gulf War in 1991.⁸⁵ These advocates of the war were willing to believe information from Iraqi defectors that the war would be easy and low cost, advise that contradicted the Pentagon's own projections. This scenario made the case for war more palatable for those, like President Bush, who were more hesitant. Apparently, Secretary Rumsfeld based his decisions on the prediction that Iraq's top military leaders would overthrow Saddam Hussein and take over the country in a military coup⁸⁶ and that Iraqis would rally to the Americans, hailing them as liberators. Theoretically, the US would not need to become an occupying power, instead turning the nation over to a grateful and capable, soon-to-be-democratic Iraq.

So when the scenario did not materialize, the US and its coalition partners, Poland, Australia, and Britain had insufficient troops and the wrong kind of troops to ensure order, prevent looting, and protect lives. The US found enough troops to protect the Oil Ministry, but not the Iraqi National Museum or other cultural heritage sites. Indeed, the invading forces, by protecting the oil industry's infrastructure did recognize and fulfill part of their obligation to the Iraqi people. But that is perhaps offset by the failure to protect libraries, museums, archeological digs, and other sites of significance to the local population.

⁸⁵ Rick Wilson, *The Dreams of the Neocons Cheney, Rumsfeld Targeted Iraq Long Before Sept. 11 Attacks*, CHARLESTON GAZETTE, Aug. 13, 2004, 2004 WL 59655497. For a discussion of "neo-conservatism" and its advocacy of war, see SHADIA B. DRURY, *THE POLITICAL IDEAS OF LEO STRAUS* 29 (1988).

⁸⁶ General Wesley K. Clark, *Iraq: What Went Wrong*, N.Y. REV. OF BOOKS, Oct. 23, 2003, at 52.

Months before the invasion, the Bush Administration had been warned by a number of organizations and experts that cultural sites would need protecting from bombing and looting.⁸⁷ Considerable looting had occurred after the 1991 Gulf War, so the likelihood of it occurring again was known.

In January [2003], the Archaeological Institute of America issued a statement calling on 'all governments' to protect cultural sites both during and after a war. A mix of scholars, museum representatives, collectors and dealers made the same case during a briefing at the Department of Defense. 'I did a lot of the talking,' said McGuire Gibson, an Iraq specialist at the University of Chicago's Oriental Institute. 'They had a list of 150 sites, and I said there were many more than that, and that the biggest problem was the aftermath.'⁸⁸

The United States Army War College issued a study dated February 2003 describing post-conflict requirements in Iraq. The authors state: "While it would be best to let the Iraqis control access to historic and cultural sites, an occupying power assumes responsibility for security of such places. Particular attention must be paid to religious and historic sites that have great importance; their damage or destruction could fan discontent or inspire violence, not just in Iraq but around the region."⁸⁹ Army Chief of Staff General Eric Shinseki testifying before Congress also in February 2003 about the size of force needed to invade Iraq said the following:

Something on the order of several hundred thousand soldiers... We're talking about post hostilities control over a piece of geography that's fairly significant, with the kinds of ethnic tensions that could lead to other problems. And so it takes a significant ground-force presence to maintain a safe and secure environment, to ensure that people are fed, that water is distributed, all the normal responsibilities that go along with administering a situations like this.⁹⁰

⁸⁷ The following organizations contacted the Administration: The Archaeological Institute of America, the American Association of Museum Art Directors, the American Schools of Oriental Research, and the American Association for Research in Baghdad, among others. Almira Poudirer, *Alas, Babylon! How the Bush Administration Allowed the Sack of Iraq's Antiquities*, THE HUMANIST, July 1, 2003, 2003 WL 9650839.

⁸⁸ Guy Gugliotta, *Scholars Fret About Fate of Antiquities After War*, MILWAUKEE J. & SENTINEL, Mar. 17, 2003, 2003 WL 3311078; see also, Michael D. Lemonick, *Iraq: Baghdad's Treasures*, TIME (Canada ed.) April 28, 2003, 2003 WL 11985904.

⁸⁹ Conrad C. Carne & W. Andrew Terrill, *Reconstructing Iraq: Insights, Challenges, and Missions for Military Forces in a Post-Conflict Scenario*, Feb. 2003, US ARMY WAR COLLEGE, STRATEGIC STUDIES INSTITUTE 49-50, <http://www.carlisle.army.mil/ssi/pubs/pubResult.cfm/hurl/PubID=182/>

⁹⁰ Christopher Dickey, *Shadowland: Tinker, Tailor, Jurist, Spy; When It Came To Acting On Intelligence About Iraq, There Were None So Blind As Those Who Would Not See*, NEWSWEEK, Jan. 30, 2004, at 2004, WL 72543809; see also, Mark Matthews & Tom Bowman, *After Year in Iraq, No End in Sight: Conflict: Despite Predictions of Quick Victory and Rebuilding, Tens of Thousands of U.S. Troops are Likely to Remain in Country For Years*, BALTIMORE SUN (quoting Kenneth Pollack quoting a Rand Corporation

General Shinseki knew what the obligations would be in Iraq. The scenarios prepared in advance of the invasion called for as many as 250,000 troops.⁹¹ The invading force that was sent numbered about 170,000. About 130,000 troops remained for the occupation. Former Secretary of the Army Thomas White explained why the decision was made to send an inadequate force: “all of us thought a big force is going to be required for quite some time...That’s what Shinseki said. That’s what I said. It’s been Don Rumsfeld’s view that the military asks for too much force.” Paul Wolfowitz, Rumsfeld’s deputy, said in response to General Shinseki, that his estimate was “wildly off the mark,” and a figure of 100,000 was closer to the Pentagon’s expectations.”⁹²

Rumsfeld refused to listen to the experts who said a large force would be needed. But he also refused to take seriously the legal obligations that required a larger force. According to the San Diego Union Tribune: “Though Pentagon officials were warned as early as January 2003, and repeatedly since, that a US invasion would place cultural treasure in grave danger, and though international law mandates the protection of artistic treasures in time so of war, Defense Secretary Donald Rumsfeld made the point again and again that soldiers were not there to stop plunder.”⁹³ US and British troops said there were too few of them to restore order.⁹⁴

One author provides the following account of events at the Iraqi National Museum:

The commander of a tank battalion from the Army’s Third Infantry Division told Reuters that his troops encountered ‘stiff resistance’ from the museum, including small arms fire and a rocket-propelled grenade. The tank battalion took casualties, and since the museum was ‘defended’ by Iraqis, it lost its protected status. Apparently that loss became permanent because after the actual fighting the tanks and armed soldiers stood by and watched the looting.

estimate of 500,000 troops as the right number to properly occupy Iraq. Mar. 18, 2004, at 2004 WL 72798977; Carne & Terrill, *supra* note.

⁹¹ Thom Shanker, *In Memoir, U.S. General Tells of Gaps in War Plans*, N.Y. TIMES, Aug. 1, 2003, at 10.

⁹² Dickey, *supra* note.

⁹³ Jennifer de Poyen, *Looting of Iraqi Museum Was a Blow to All Peoples*, SAN DIEGO UNION-TRIB., April, 20, 2003, 2003 WL 6578806; The lack of serious regard for legal obligations have been demonstrated even more dramatically regarding the abuse of detainees in Afghanistan, Cuba and Iraq. *See Mr. Rumsfeld’s Responsibility*, WASH. POST, May 6, 2004, at A34; Seymour Hersh, *The Gray Zone*, THE NEW YORKER, May 24, 2004, at 38.

⁹⁴ Diebel, *supra* note. Too few troops is also a factor cited in the abuse of detainees at military detention centers. See Taguba Report, at 23.

It was in connection with the looting and plunder that Secretary Rumsfeld made his now famous comment, “Freedom’s untidy. And free people are free to make mistakes and commit crimes and do bad things.”⁹⁵

The Hague Regulations, however, state unequivocally that people are not free to commit crimes. It is the duty of the occupying power to stop them. Nor may the occupying power claim excuses such as military necessity for failing to protect cultural property from looting and theft during an occupation.⁹⁶ The failure to give the proper orders appears to be related to the desire to keep costs low—protecting cultural property or thousands of detainees would require thousands more troops. The failure to give the proper orders is even more directly related to a general contempt for international law on the part of the same US officials advocating for war. Secretary Rumsfeld has made clear time and again that he does not recognize international law as applying to the United States. In Seymour Hersh’s second article in *The New Yorker* on the prisoner abuse scandal in Iraq, he wrote: “No amount of apologetic testimony or political spin last week could mask the fact that, since the attacks of September 11th, President Bush and his top aides have seen themselves as engaged in a war against terrorism in which the old rules did not apply.”⁹⁷ President Bush’s lawyer, White House Counsel Judge Alberto Gonzalez has referred to the Geneva Conventions as outmoded and “quaint.”⁹⁸

As a result of invade on the cheap and dismissing legal obligations, the United States had neither a large enough force nor obviously a force with the right orders to fulfill its Hague Regulation, 1954 Hague Convention, or Geneva Convention duties.

US officials dismissed the outcry over the Iraqi National Museum because the director misstated the number of objects lost. He gave numbers as high as 170,000. The US State Department now estimates it was 13,400. Worse in many ways was the total lack of security around archeological sites:

The extent of illicit excavation in Iraq today is unprecedented. Iraqi archaeologists and the CPA [Coalition Provisional Authority] ministry of culture report that in the last 10 months [April 2003-February 2004] the destruction at archaeological sites has reached a previously unimagined level... Without the guards at ancient sites and police at border points in the country, Iraqi cultural heritage will continue to be plundered.⁹⁹

⁹⁵ Joel Brinkley, *Rumsfeld Defends Rebuilding of Iraq*, INT’L HERALD TRIB., May 28, 2003, at 5, 2003 WL 56175967.

⁹⁶ 1954 Hague Convention, *supra* note, art. 4(3); *see also* Partsch, *supra* note, at 396.

⁹⁷ Seymour M. Hersh, *Chain of Command*, NEW YORKER, May 12, 2004, www.nyorker.com

⁹⁸ Alberto R. Gonzales, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, Jan. 25, 2002, available at http://www.msnbc.com/modules/newsweek/pdf/gonzales_.pdf.

⁹⁹ Zainab Bahrani, *In the Fray: British and Swiss Get Tough About Smuggling* WALL ST. J., Feb. 18, 2004, at D4; *see also*, Martin Gottlieb, *Looters Swarm Over Remote Sites, Study Finds*, N.Y. TIMES, June 12, 2003, at A14.

In June 2003, a US Army Judge Advocate, just returned from Iraq, related that he had e-mailed the Pentagon starting in the fall of 2002 for the plan for post-hostilities operations. He was told then it was too soon to get it. He e-mailed in January and was told it was too soon. In February he was told he would get it—they were working on it. In March he started e-mailing weekly. After the invasion began, he e-mailed daily. He was assured he would get the plan before the Division reached Baghdad. When he reached Baghdad, he e-mailed, “We are here.” As of June, he had not received a plan. He was angry enough to share this information at a conference on international military law, despite the risk to his career in openly criticizing the Administration.¹⁰⁰

Retired general Wesley Clark, has written, “[I]n September 2002, I was disappointed to learn that only a few discussions of postwar planning for Iraq had taken place. ‘Not a popular subject on the third floor [where Defense Department policy is decided by civilian leaders],’ I was informed. When planning finally began that autumn, it was based on the assumption that a US invasion would be welcomed as a liberation by most Iraqis.”¹⁰¹ According to Anthony Cordesman, “The same strategy designed to deliver a carefully focused attack on the regime did not provide enough manpower to simultaneously occupy and secure the areas that the Coalition liberated...and deal with the wide range of local, regional, ethnic and religious divisions [the Coalition] encountered.”¹⁰²

The lack of adequate pre-war planning left the US with a force that, at the end of major fighting:

was incapable of providing security, stopping the looting and sabotage, and establishing a credible presence throughout the country—even within Baghdad. The ensuing disorder vitiated some of the boost in US credibility that was won on the battlefield, and it opened the way for deeper and more organized resistance during the following weeks.¹⁰³

Mark Danner, James Fallows, and other journalists have confirmed that planning for the occupation was taken away from the State Department and handed to the Pentagon.¹⁰⁴ Months of planning was discarded and instead the Pentagon’s optimists relied on the views of Iraqi expatriates who told them what they wanted to hear:

¹⁰⁰ Complete citation on file with the author.

¹⁰¹ Clark, *supra* note, at 53.

¹⁰² Anthony Cordesman, *Iraq and Conflict Termination: The Road to Guerrilla War?*, Center for Strategic and International Studies, July 28, 2003, *quoted in* Danner, *supra* note, at 88.

¹⁰³ Clark, *supra* note, at 52.

¹⁰⁴ For a very comprehensive report on the planning for the war, see James Fallows, *Blind into Baghdad*, ATLANTIC, Feb. 2004, www.theatlantic.com

...Pentagon officials... hastily constructed a plan based largely on optimistic assumptions about the warmth of the Iraqis' attitude toward the Americans, and about the ease with which new leaders could be imposed on the existing governing institutions. Many of these expectations, which were encouraged by favored Iraqi expatriates, dovetailed perfectly with the Pentagon's own reluctance to provide sufficient military police and dirty its hands with other distasteful 'nation-building' tasks. When their assumptions proved unfounded, administration officials were excruciatingly slow to admit reality and make adjustments. These first weeks of the occupation, in which security in Baghdad collapsed, chaos ruled the streets, and the fledgling occupation authority daily issued conflicting statements and made promises it did not keep, were a fiasco.¹⁰⁵

According to Seymour Hersh, again, "[s]ecrecy and wishful thinking...are the defining characteristics of Rumsfeld's Pentagon...."¹⁰⁶ It had been a hard sell since 1998 for Rumsfeld and other proponents of war in Iraq to finally get the President's approval. Making a realistic estimate of the cost of the war in lives, dollars, and prestige may have dissuaded the President. After all, despite all the efforts to come up with a persuasive case that Saddam Hussein had weapons of mass destruction, on the eve of the war, the President had very little evidence in hand. He had no evidence of a link between Saddam and Al Qaeda.¹⁰⁷ Without a persuasive case for war, the cost, at least, would need to be acceptable.

II. Consequences

What consequences may flow from these violations of the law of armed conflict? There is only a small chance of individual accountability by US leaders. By contrast, high intangible costs have already been paid. Between these categories, there is a moderate possibility that the United States and its coalition partners may one day pay actual damages or provide in-kind reparations for failing to protect Iraqi cultural property.

With respect to individual accountability, we do have increasing numbers of cases where individuals have been held responsible for violating the law of armed conflict. This law is structured so that the individual's state of nationality will, in the first instance hold him or her responsible. Where this does not happen, increasingly other countries and international courts are enforcing the law. For example, the Serbian leader Slobodan Milosevic and other top Serb military and political officials have been charged with violating the laws and customs of war by the prosecutor for the International Criminal

¹⁰⁵ Danner, *supra* note, at 89.

¹⁰⁶ Hersh, *supra*.

¹⁰⁷ See the Report of the 9-11 Commission, <http://www.9-11commission.gov/report/911Report.pdf>

Tribunal for Yugoslavia.¹⁰⁸ The United States is not subject to the jurisdiction of any international criminal court, so this avenue is unlikely for American leaders. A number of national courts, however, have exercised jurisdiction over non-nationals who have committed war crimes, at least where there is a link to the jurisdiction such as residence.

In *D.P.P. v. T.*, the defendant, identified in the press as Refic Saric,¹⁰⁹ was a Croatian national living in Denmark under a temporary visa for persons from the territory of the former Yugoslavia.¹¹⁰ He was tried and sentenced to eight years in a Danish prison “for assault of a particularly cruel, brutal or dangerous nature and of such a malicious character and with such grave consequences as to constitute particularly aggravating circumstances...on 5 August 1993 in the Croatian POW camp of Dretelj in Bosnia...”¹¹¹ Saric’s crimes occurred in Bosnia. No Danish citizens appeared to be among the victims. Nevertheless, since Saric was in Denmark, Danish courts took jurisdiction under a law implementing the Geneva Conventions in Danish criminal law.¹¹²

Any violation of the laws or customs of war is a war crime. Certain actions of US officials with respect to Iraq may even amount to grave breaches, such as the failure to protect detainees from abuse and torture. The failure to protect cultural property is a war crime but probably not a grave breach. Still, top political and military officials are responsible for the war crimes they order and the ones carried out by their subordinates. According to L.C. Green:

Every individual, regardless of rank or governmental status, is personally liable for any war crime or grave breach that he might commit.

A commander, that is to say, anyone in a position of command whatever his rank might be, including a Head of State or the lowest non-

¹⁰⁸ See <http://www.un.org/icty/>

¹⁰⁹ *Bosnischer Muslim beteuert seine Unschuld*, SÜDDEUTSCHE ZEITUNG, Aug. 12-13, 1995 at 6.

¹¹⁰ *The Director of Public Prosecutions v. T.* (Sentence passed by the Eastern High Court (3rd Div) Denmark, Nov. 22, 1994) (Danish Ministry of Foreign Affairs, Legal Service, Unofficial Translation) (on file with the author).

¹¹¹ *Id.*

¹¹² *Id.* See also, www.icrc.org for a complete database of national court cases enforcing the Geneva

commissioned officer, who issues an order to commit a war crime or a grave breach is equally guilty of the offence with the subordinate actually committing it. He is also liable if, knowing or having information from which he should have concluded that a subordinate was going to commit such a crime, he failed to prevent it, and if being aware of such commission, fails to initiate disciplinary or penal actions.

Any commander failing to exercise proper control over his forces with the result that they commit crimes, even if he remains unaware of this when he should have known, is also liable for war crimes. This is because a commander is responsible for the behaviour of his troops and ensuring that they behave in accordance with the law of armed conflict.¹¹³

United States officials are most unlikely to take up residence in a jurisdiction that allows for enforcement of the law of war as Denmark does. The United States and its coalition partners, however, have already faced serious negative consequences for their actions and inaction in Iraq. They have not faced the classic consequence—payment of simple damages. They have, however, paid indirectly through the need to commit resources to helping find Iraqi antiquities and restore cultural heritage sites. The United States has established a process for the return of objects and has recovered a number of the most important, including the Vase of Wraka.¹¹⁴ They have paid more substantially through the loss of financial and other support from states that normally would assist them. They have also paid in the form of diminished legitimacy in governing Iraq and lost standing in the world.

Unlike the Gulf War of 1990-1991 where the United States received billions of dollars in donations,¹¹⁵ or the major contributions of money, troops, and expertise provided during the Afghan war, allies have provided far less assistance in the invasion and occupation of Iraq. The coalition is also paying for its failure to plan:

The weeks of looting and disorder that followed not only continued the destruction of Iraq's infrastructure, preventing the Americans from supplying the country with electricity and other basic services. More important, the looting and mayhem destroyed American political authority

¹¹³ GREEN *supra* note, at 303 (footnotes omitted.)

¹¹⁴ See United States State Department website tracking missing Iraqi cultural property:

<http://exchanges.state.gov/culprop/irmissing.html>

¹¹⁵ *Paying the Costs*, L.A. TIMES, Mar. 1, 1991, at A10.



even before it could be established; such political authority is rooted in the monopoly of legitimate violence, which the Americans after standing by during weeks of chaos and insecurity, were never able to attain.¹¹⁶

Another, more tangible consequence may yet materialize for the coalition with respect to cultural property. International law generally requires that a state using force unlawfully should pay reparations for damage caused by failing to comply with the *jus in bello*.¹¹⁷ Iraq has already paid \$18 billion and is still paying to Kuwait and others for its unlawful invasion in 1990.¹¹⁸ The same rule requires the US, UK, and other members of the coalition to pay for the damage caused in Iraq by an unlawful invasion and occupation. The United States has, however, never paid reparations for unlawful uses of force. We can have no expectation that it will do so willingly this time. We can expect some attempts to use judicial systems around the world to enforce the international law on the use of force against the United States and its coalition partners. The German Federal Prosecutor was pressed to initiate criminal proceedings against members of the German

¹¹⁶ Danner, *supra* note, at 88.

¹¹⁷ See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ (Advisory Opinion), <http://www.icj-cij.org>; ILM paras. 152-52 (2004); Hague Convention (IV), *supra* note, at art. 3.

¹¹⁸ The Security Council “[r]eaffirms that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.” UN SC Res. 687 (1991), para. 16. See the United Nations Compensation Commission, <http://www.unog.ch/uncc/ataglance.htm>

government for indirectly assisting the United States in invading Iraq.¹¹⁹ Other direct and indirect attempts to bring legal actions for US violations respecting Iraq are bound to occur, despite the fact similar attempts have always failed in the past.

With respect to cultural property, however, the invading states may face a far more tangible consequence—future claims of in-kind reparations. The four nations of the invading force may face future claims to return publicly held Iraqi antiquities. The existence of such an obligation takes us squarely into the debate that has raged since Lord Elgin stripped the Parthenon of its extraordinary marble artwork: “Internationalists” or “retentionists” oppose the proponents of “cultural nationalism” with respect to the obligation to return cultural property to the place of origin. The retentionists are losing this battle.

In 1979, Amadou-Mahatar M'bow, Director-General of UNESCO called on states to return cultural heritage using the following powerful argument:

...I call on historians and educators to help others to understand the affliction a nation can suffer at the spoliation of the works it has created. The power of the *fait accompli* is a survival of barbaric times and a source of resentment and discord which prejudices the establishment of lasting peace and harmony between nations....

Two thousand years ago, the Greek historian Polybius urged us to refrain from turning other nations' misfortunes into embellishments for our own countries. Today when all peoples are acknowledged to be equal in dignity, I am convinced that international solidarity can, on the contrary, contribute practically to the happiness of mankind.

The return of a work of art or record to the country which created it enables a people to recover part of its identity, and proves that the long

¹¹⁹ Press Release of the Generalbundesanwalt (Chief Federal Prosecutor), dated 21 March 2003, <http://www.presseportal.de/story.htx?nr=431233>: “As it cannot be the task of German criminal courts to exercise a kind of international criminal jurisdiction, the provision applies only to those wars of aggression to which, according to the intent of the perpetrator, the Federal Republic of Germany should be a party. ... In the present criminal law assessment, it is not to be decided whether the use of force by the United States without or against the will of the Security Council might be lawful under international law.” (Translation by the authors). One noteworthy attempt in the US using civil law was the lawsuit, *Committee of Citizens Living in Nicaragua v. Reagan*, 859 F. 2d 929, 939 (D.C. Cir. 1988).

dialogue between civilizations which shapes the history of the world is still continuing in an atmosphere of mutual respect between nations.¹²⁰

Merryman, perhaps the leading advocate of internationalism, has urged in response that “cultural nationalism is a form of nationalism and for that reason is subject to all the usual concerns: the tendency to become invidious, to breed rivalry, misunderstanding and conflict, and to divide rather than unite. The 1954 Hague Convention spoke of ‘the cultural heritage of mankind’ in a spirit of internationalism.”¹²¹ Yet, even Merryman concludes that the “right of return” is today the more dominant principle: “The repeated assumption, or assertion, of the premise that cultural objects belong in their nations of origin gives it a growing momentum. As consensus grows, law may not be far behind.”¹²² Merryman quotes the International Council of Museums for the view that the “community of nations now considers as an element of *jus cogens* the right of all people to recover property which forms an integral part of their cultural identity.”¹²³

In a subtle but important way the recent payment of reparations for crimes of the Second World War also supports return. The current ethos in the United States is toward pressing liability and righting wrongs—at least against foreign countries. The ethos opposes settlement and forgiveness. This ethos is sympathetic to the Russian argument that they may keep objects looted from Germany to substitute for objects looted or destroyed by the Nazis.¹²⁴ The Russians argue the Germans can never afford to repay

¹²⁰ *A Plea for the Return of Irreplaceable Cultural Heritage to Those Who Created It*, MUSUEM 58 (1979).

¹²¹ MERRYMAN & ELSEN, *supra* note, at 266.

¹²² MERRYMAN & ELSEN, *supra* note, at 266. See also, Jordana Hughes, *The Trend Toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes*, 33 GEO. WASH. INT’L L. REV. 131 (2000).

¹²³ MERRYMAN & ELSEN, *supra* note, at 267; quoting, *Study of the Principles, Conditions, and Means for the Restitution or Return of Cultural in View of Resconsitution Dispersed Heritages*, 31 MUSUEM 62 (1979).

¹²⁴ MERRYMAN & ELSEN, *supra* note, at 64-70; Akinsha, *supra* note; see also, LYNN H. NICHOLAS, *THE RAPE OF EUROPA* (1994). The long-time curator of the Pushkin Museum in Moscow, Irina A. Antonova,

them in money—though, of course they should try—but at any rate some things are irreplaceable.¹²⁵ The Russians point to the Versailles Treaty and the demand that Germany substitute books from its own collections for the books destroyed at the University of Louvain.¹²⁶ After the Second World War, some agreements for substitutions in kind were also made.¹²⁷ This ethos supports return to Iraq even of objects acquired decades ago and purchased or acquired lawfully. When the norm of war reparations is married to the norm of cultural nationalism, the argument for return of Iraqi cultural heritage is compelling.¹²⁸

V. Conclusion

When the leaders of the United States, Poland, the United Kingdom, and Australia considered going to war in Iraq, their decision should have rested on the answers to three preliminary questions: was there a legal right to use force; did it make sense to use force in the circumstances, and could they use force in a way that would not cost a

has said “...Soviet troops saved these artworks while the fascists wrecked ours; we deserve some form of compensation.” Alan Riding, *The World: Are Finders Keepers?*, N.Y. Times, Mar. 12, 1995, at sec. 4, p. 3.

¹²⁵ The Germans are trying, however, to replace some things. They are paying to replace the famous Amber Room, for example, even though it was long suspected that the Room’s amber was destroyed in the hands of the Soviets. A strong case was made confirming the suspicions in the summer of 2004. See Adrian Levy & Cathy Scott-Clark, *The Amber Façade*, Guardian Weekend, May 22, 2004, at 15.

¹²⁶ *Supra* note.

¹²⁷ See Treaty of Peace with Italy, Feb. 10, 1947, art. 79(1), 49 U.N.T.S. 3, 46; Treaty of Peace with Hungary, Feb. 10, 1947, 41 U.N.T.S. 135, 135; Treaty of Peace with Bulgaria, Feb. 10, 1947, 41 U.N.T.S. 21, 21. See also, Sephan Wilske, *International Law and the Spoils of War: To the Victor the Right of Spoils?*, 3 UCLA J. INT’L L. & FOR. AFF. 223, n. 199 (1998).

¹²⁸ Professor Doris Behrens-Abouseif, Nasser D. Khalili Chair of Islamic Art and Archaeology SOAS, University of London, confirms that this is a feasible proposal (March 16, 2004).

disproportionate number of lives and destruction of property? The answer to the final question might have been yes but only if the US and its partners were willing to devote the resources needed to carry out the invasion in a lawful manner. In other words, to have the right to fight the war, they had to be willing to fight it right. Their unwillingness to ensure that the invasion and occupation were conducted in accordance with international law added an additional basis on which to conclude that the US-led invasion of Iraq, begun March 19, 2003, was wholly unlawful under the most fundamental principles of international law.

The invasion was a violation of our legal heritage as to why and how to fight—a legal heritage forged in wars not so long past. Iraqi cultural heritage continues to be looted with ease.¹²⁹ The US and its allies face two obligations: to stop the plunder of Iraqi cultural heritage and to make restitution for the property they made no effort to protect. That restitution best takes the form of Iraqi objects of cultural significance currently held in the US and in its partner nations in the invasion of Iraq.

Those who watched the crisis over Iraqi cultural heritage could not have been completely surprised by other failures of the occupying powers, in particular, the abuse of persons in US military detention. This failure, too, resulted from dismissing the legal obligations of occupation in the rush to war.

¹²⁹ The US and UK have taken some steps in national law to deter Iraqi antiquities from entering the art market, *see*, Patty Gerstenblith, *Legal Damage Control for Iraq's Looted Cultural Heritage: The Need for U.S. Import Restrictions*, JURIST (Feb. 23, 2004) at <http://www.jursit.law.pitt.edu/forum/gerstenblith1.php>

In June 2004, the United States State Department announced that twenty trucks had been sent to protect archeological sites in Iraq. *See* <http://exchanges.state.gov/culprop/> (visited Aug. 20, 2003). But in August 2004 a journalist and his translator were missing while investigating organized and dangerous gangs smuggling antiquities out of Iraq. John F. Burns, *Taken at Gunpoint, U.S. Journalist and His Translator are Missing in Iraq*, N.Y. Times, at A10.