

**THE PROTECTION OF CULTURAL PROPERTY
DURING TIMES OF ARMED CONFLICT:
*HAVE WE FAILED IRAQ?***

by:



A Research Paper submitted in partial fulfilment of the requirements for the degree *Magister Legum* (International and Human Rights Law) at the Faculty of Law, University of the Western Cape.

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DECLARATION

I, Fadlah Adams, hereby declare that the research paper *The Protection of Cultural Property during times of Armed Conflict: Have we failed Iraq?* is my own authentic work and has not been submitted for any degree or examination at another university. All the sources quoted and referred to herein, have been acknowledged and referenced completely.

SIGNATURE: _____

DATE: 13 November 2006



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Dedicated to all the victims of the 2003 Iraq War...



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LIST OF ABBREVIATIONS

1954 Hague Convention-	The Convention for the Protection of Cultural Event of Armed Conflict
1954 Hague Protocol-	The 1954 Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict- First Protocol
1970 UNESCO Convention-	1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property
Additional Protocol I -	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977
Additional Protocol II-	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977
Geneva Convention I-	Geneva Convention for Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949
Geneva Convention II-	Geneva Convention for Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of at Sea of August 12, 1949

Geneva Convention III-	Geneva Convention Relative to the Treatment of Prisoners of War of August 12 1949
Geneva Convention IV-	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
ICA-	International Council of Archives
ICOM-	International Council of Museums
ICOMOS-	International Council of Museums and Sites
ICRC-	International Community of the Red Cross
IFLA-	International Federation of Library Associations and Institutions
Roerich Pact-	Washington Treaty on the Protection of Artistic and Scientific Institutions and Monuments 1929
Second Protocol-	The 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property
The 1954 Hague Convention-	The 1954 Hague Convention for the Protection of Cultural Property



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CHAPTER 1

1. Introduction

*Why care about monuments?
Lives are being lost.
Families are becoming refugees
Children are being maimed
Why care for monuments?
Some day the conflict will be over...
Some day people will return to their homes...
Somehow shattered lives will have to be rebuilt...¹*

Culture can be broadly conceptualised as the complex values, customs, beliefs and practices which constitute the way of life of a specific group.² It is regarded as a 'whole range of practices and representations through which a social groups' reality (or realities) is constructed and maintained.³ Often these practices and representations form an integral component of the heritage of a particular group. By its very definition, heritage is regarded as something of historic value.⁴ A particular heritage object, building or site can be seen as having simultaneously historical value (commemorating a person or event or idea), aesthetic value (pleasing the senses), spiritual value (serving as an object of veneration or place of worship), community or political value (aiding the coherence of a social group or some other political goal), educational value (interpreting the object yields knowledge), and of course economic value.⁵

¹ A poem on the website of the United Nations Educational, Scientific and Cultural Organisation (UNESCO). Available online at http://www.unesco.org/culture/legalprotection/war/html_eng/index_en.shtml (accessed on 17 September 2006)

² T. Eagleton, *The Idea of Culture*, Blackwell Manifestos, United Kingdom, 2000, p. 34.

³ J. Frow, *Cultural Studies and Cultural Value*, Oxford, 1995, p. 3.

⁴ R. Mason and M. De La Torre, 'Heritage Conservation and Values in Globalising Societies' in *UNESCO World Culture Report 2000: Cultural Diversity and Pluralism*, UNESCO, France, 2000, p. 167.

⁵ *Ibid.*

Tangible heritage such as buildings, locations and sites, artworks and artefacts as well as intangible heritage⁶ such as languages, music, oral traditions, customs communal practices, traditional skills and so on are all becoming more widely recognised as essential means of articulating identity and meaning for local communities, regions, nations and humankind as a whole.⁷ In a rapidly changing world, cultural heritage plays an increasingly significant role. It provides people with a sense of who they are, where they come from and what their lives mean. It furthermore enables a society, group or class to experience, define, interpret and make sense of its conditions of existence.⁸

Many of us have, however, inherited our cultural assets as a result of the investment and conservation decisions of the past. Thus, our present day actions in either caring for or neglecting these assets during our custodianship of them will affect the extent to which our future generations will benefit from them.⁹

1.1 The nature and significance of the study

The world's cultural heritage is increasingly exposed to ever-growing threats, including destruction by war and human conflict. The destruction of war breaks traditions and cuts off the transfer of knowledge and experience to future generations,¹⁰ forcing these generations to start anew. It is submitted that the main purpose of cultural property destruction is to erase ethnic, religious and cultural memories and therefore undermine or eliminate groups' identities and existence.¹¹ History has shown us that the destruction and loss of cultural heritage has constantly occurred as a consequence of fanatic

⁶ The discussion of heritage in general applies to both tangible and intangible heritage. However, for the purposes of this paper, heritage will be regarded as tangible heritage only. The term cultural heritage and cultural property are thus used interchangeably.

⁷ D. Throsby, 'Cultural Policies and Cultural Heritage: Introduction' in *UNESCO World Culture Report 2000: Cultural Diversity and Pluralism*, UNESCO, France, 2000, p. 128.

⁸ Eagleton *op cit* p. 35

⁹ A. Klamer and D. Throsby, 'Paying for the Past: The Economics of Cultural Heritage' in *UNESCO World Culture Report 2000: Cultural Diversity and Pluralism*, UNESCO, France, 2000, p. 138.

¹⁰ P. Kaks, 'Threats and Measures: Some Examples of how to Deal with the Protection of Cultural Heritage on a Short and Long-Term Basis.' Presented at the *Conference Protecting Cultural Heritage: International Law after the war in Iraq*, 3 February 2006 232.

¹¹ S. Zgonjanin 'The Prosecution of War Crimes for the Destruction of Libraries and Archives during Armed Conflict', Vol. 40 No. 2, *Library & Culture*: 2005 p. 128

iconoclasm or as ‘collateral’ damage.¹² In numerous conflicts, belligerents have tried to obtain a psychological advantage by directly attacking the enemy’s cultural property without the justification of military necessity.¹³

Throughout the twentieth century, the destruction and pillage of the adversary’s non-renewable cultural resources became the tool to erase the manifestation of the adversary’s identity.¹⁴ International armed conflicts and internal wars have, over the years, shown a pattern of increase in the destruction of symbols and monuments associated with the victims. This horrendous practice continued to remain an inveterate and pervasive feature of military conflict until the international community realised the stringent need for laws regulating the destruction of cultural property. Based on this premise, the period between 1950s to the late 1970s saw the adoption of major conventions, recommendations and charters all aimed at the protection of cultural heritage.¹⁵

1.2 The scope of the study

This aim of this research paper is to assess the historical developments aimed at protecting cultural property in the event of armed conflict. Reference will be made to the basic principles of International Humanitarian Law, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict¹⁶ and the Protocols additional thereto. The United States led war in Iraq in 2003 provides a specific example of the gross violations of laws and rules governing the protection of cultural property. Thus, an assessment will be made on the application of the present cultural property protection laws juxtaposing the extent of damage to cultural property in the case of Iraq.

¹² F. Francioni ‘The Destruction of The Buddha’s of Bamiyan and International Law’ Vol. 14 *European Journal of International Law*: 2000, p. 619

¹³ H. Abathi ‘The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia’ Vol. 14 *Harvard Human Rights Journal*: 2001, p.2

¹⁴ Zgonjanin *op cit* p. 3

¹⁵ These are namely, the Hague Convention for the Protection of Cultural Property in the even of Armed Conflict [1954]; the International Charter for the Conservation and Restoration of Monuments and Sites [1964] the Convention on the means of prohibiting and preventing illicit import, export and transfer of ownership of cultural property [1970] and the Convention concerning the Protection of World Cultural and Natural Heritage [1972] also known as the World Heritage Convention.

¹⁶ Hereafter referred to as the 1954 Hague Convention

1.3 Limitation of the study

This research paper will focus on the international laws governing the protection of cultural property during times of armed conflict. However, with regard to the 2003 United States war in Iraq, the research paper enters into a brief discussion on the international law of occupation. Discussion of the latter is purely elementary so as to understand the context of the relevant international cultural property laws during this particular conflict.

1.4 Research Methodology

The research relies quite extensively on primary sources in the form of books and journal articles relating to the topic. Secondary sources such as recent conference papers presented and the use of electronic methods have also been consulted do to the fact that they often provide the most current and contentious issues. This research paper, in so far as possible, adopts the updated Oxford (documentary-note) method of referencing, so as to particularly conform with the modern sources of information.¹⁷ Reference to the latter have been from reputable websites and referenced accordingly.

1.5 Chapter Overview

Chapter Two follows this brief introductory chapter and deals with a brief overview of international humanitarian law. Chapter Three deals with the history of cultural property protection. It is sub-divided into a number of parts according to the evolution of the laws on cultural property.

¹⁷ The updated Oxford Referencing System is available online at the Deacon University, Australia. See www.deakin.edu.au/studentlife/academic-skills/undergraduate/handouts/oxford-docnote.php (accessed on 30 September 2006.)

Chapter Four introduces the applicable case study of the 2003 United States -Iraq war and the devastating cultural tragedies that occurred during the war. Chapter Five addresses the laws of occupation within the context of the war. It sets out the relevant cultural property protection laws indicating that there was indeed onus on the United States to protect Iraq's cultural property.

Chapter Six puts forth recommendations providing a concise summary of the study and concludes the research paper.



CHAPTER 2

International Humanitarian Law: *An Overview*

2.1 What is International Humanitarian Law?

War has always been an outlet for one of man's most powerful instincts and for a long time, it was the most important form of relationships among peoples.¹⁸ One need only analyse the statistics on the number of conflicts over the last few centuries to find that the evils of war has prevailed for reasons that often seem completely absurd. The World Wars have destroyed lives and devastated countries on a scale impossible for us to comprehend.¹⁹

However, it is hardly possible however to find documentary evidence of when and where the first legal rules of a humanitarian nature emerged. Since the beginning of time, powerful lords, tribal leaders, religious figures, wise men and warlords from all continents have attempted to limit the consequences of war by means of generally binding rules.²⁰

In today's modern age, wars are, in principle, to be fought within the constraints of International Humanitarian Law.²¹ A branch of public international law, international humanitarian law relates to the way in which a war is being fought. This is often termed in legal parlance as the *jus in bello*²² aspects of the war.

¹⁸ J. Pictet, *Development and Principles of International Humanitarian Law* Martinus Nijhoff Publishers, 1985, p. 79

¹⁹ Kaks *loc cit*

²⁰ H.P. Gasser *International Humanitarian Law: An Introduction* Paul Haupt Publishers, 1993, p. 7

²¹ Today's universal and for the most part written humanitarian law can be traced directly back to two persons who, during the 19th century, encountered the harrowing experience of war. These were namely Henry Dunant and Francis Lieber. Despite that these individuals were unaware of each other's existence, they made essential contributions to the concept and contents of contemporary international humanitarian law. However it should be noted that the context of the war which they encountered very different. Dunant witnessed the tragedies of an international armed conflict and Lieber an internal armed conflict.

²² Contrast to the *jus ad bellum* which is the reason why States/parties go to war- i.e. the rules governing the use of force.

Making no claim that it can put an end to the scourge of war, humanitarian law aims to attenuate the unnecessary harshness of war.²³ Its primary purpose is therefore to make war more 'humane'. It does so by seeking to mitigate the effects of war in two ways. Firstly, it limits the choice of means and methods of conducting military operations, and secondly it obliges the belligerents to spare persons who do not or no longer participate in hostile actions.²⁴

2.1.1 The 'Laws' of International Humanitarian Law

During the 19th century, multilateral treaty-making developed into an important instrument for the regulation of international relations. It thus comes as no surprise that the early development of the law of war also originated through this channel. Consequently, by the turn of the 20th century, the international community had negotiated a series of international agreements all serving to codify restrictions on the generality of methods of warfare.²⁵

International Humanitarian Law can be divided into two parts of law namely Hague Law and Geneva Law²⁶. The texts of the Hague is principally the result of the Hague Conventions of 1899, as revised in 1907. Its main objectives are to regulate the hostilities based in part on military necessity and the preservation of the State.²⁷

Conversely, Geneva Law tends to safeguard persons who not taking part in the hostilities and military personnel placed *hors de combat*.²⁸ The texts were developed exclusively for the benefit of war victims and in contrast to the Hague Law, States have no rights against individuals.²⁹ The Law consists essentially of four Geneva Conventions of

²³ Pictet *op cit* p. 61

²⁴ Gasser *op cit* p. 3

²⁵ M.C. Driver, 'The Protection of Cultural Property During Wartime' Vol. 9 No. 1 *Reicel* 2000: p. 3.

²⁶ Note that according to its purpose, Hague Law is often as the Law of War and Geneva Law as Humanitarian Law. This distinction can often be found in early writings of authors.

²⁷ Pictet *op cit* p. 2

²⁸ Meaning *out of combat*. These are persons who do not take a direct part in the hostilities.

²⁹ Pictet *loc cit*

1949³⁰ and two additional Protocols of 1977.³¹ Combined, these documents constitute an imposing legal corpus comprising of approximately 600 articles all codifying the rules protecting the person in armed conflicts.³² Essentially, international humanitarian law finds its application irrespective of whether a formal declaration of war was made³³ and disregards the cause of the conflict or any justification thereof.

It is important to note that many of the provisions within International Humanitarian Law have gradually led to the emergence of customary principles.³⁴ As such, they are binding on all States (regardless of ratification of the treaties) and also on armed opposition groups in case of rules applicable to non-international armed conflict.³⁵ The customary principle relating to the conduct of hostilities was officially recognised in the Martens Clause of the preamble to the 1907 Hague Convention IV, including, its annexed Regulations Respecting the Laws and Customs of War on Land.³⁶

As pointed out, one of the aims of Hague Law is to regulate the conduct of hostilities. It is thus within this very domain that the 1954 Convention on the Protection of Cultural Property originated.



³⁰ Convention I on the Amelioration of the Condition of the wounded and sick in Armed Forces, Convention II applies mutatis mutandis as Geneva Convention I but to Armed Forces at Sea; Convention III relative to the Treatment of Prisoners of War and Convention IV relative to the Protection of Civilian Persons in time of War.

³¹ Protocol I deals with the Protection of Victims of International Armed Conflict and Protocol II relates to the Protection of Victims of Non-International Armed Conflicts.

³² Pictet *loc cit*

³³ Common Article 2(1) to the Geneva Conventions of 1949 provide that, '[T]he Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more parties of the High Contracting Parties, even if a state of war is not recognized by one of them.'

³⁴ Driver *op cit* 4 Also see W. Sandholtz, 'The Iraqi National Museum and International Law: A Duty to Protect', *Columbia Journal of Transnational Law*, Vol.44: 2005: p. 223

³⁵ J.M Haenckaerts, 'Study on Customary International Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict', *International Review of the Red Cross* Vol. 87 No. 857: 2005, p. 197

³⁶ The Martens Clause states: 'Until a more complete code of law is issued, the high contracting parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of civilised nations, as they result from the usage established among civilised peoples from the laws of humanity and the dictates of public conscience.'

CHAPTER 3

History of the Protection of Cultural Property

3.1 Early Days...

Since time immemorial there have been references to the protection of cultural property that is of value to a people. The very first express legal reference to the protection of cultural property can, however, be traced back to the initial Hague Laws. These provide evidence of the early and inveterate protection of cultural property within the laws of armed conflict. Subsequently, Article 27 of the 1899 Hague Convention II Respecting the Laws and Customs of War on Land (as revised in 1907) provides,

“In sieges and bombardments all necessary steps must be taken to spare as far as possible, buildings dedicated to religion, art science...historic monuments...provided they are not being used for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand”.

Article 56 in the same Convention further provides that in occupied territory, protection from seizure, destruction or damage for ‘institutions dedicated to religion, charity and education, the arts and sciences as well as historic monuments and works of art and science’.³⁷ Thus, it is evident that the Hague Regulations confers a wide degree of protection on cultural and religious institutions in occupied territory.

It is submitted that the Regulations are indeed flawed with regard to the cultural protection provisions.³⁸ When engaged in a bombardment, all that a belligerent is bound to do is take the necessary steps to spare cultural property and places of worship ‘as far as

³⁷ Despite the provisions of the Hague Regulations, there were many instances of destruction of or damage to cultural property during the First World War. For a general account of the destruction, see A.P.Rogers *Law on the Battlefield*, Second Edition, Manchester University Press, 2004, p. 136.

³⁸ D. Yoram *The Conduct of Hostilities under the Law of International Armed Conflict* Cambridge University Press, 2004, p. 154.

possible'.³⁹ Furthermore, the protection afforded under the Regulations are subject to the explicit admonition that the objects in question must not be 'used at the time for military purposes'.⁴⁰

3.2 The Roerich Pact⁴¹

In 1929, the first treaty dedicated solely to the protection of cultural property was developed. The regional treaty entered into force on 26 August 1935 and is open for signature by states of the Pan-American Union. State parties to the Convention are required to send the Pan American Union a list of property to be protected under the Pact.

The Pact confers neutral status in peace and war on, *inter alia*, historic buildings, cultural institutions and monuments and provides that such property shall be respected and protected.⁴² However, should this property be used for military purposes, it loses any protection afforded to it under the Pact. Provision is also made for the use of a protective flag indicating cultural property.⁴³

Interesting to note is the fact that the treaty does not explicitly prohibit the looting and pillaging of cultural property. The regional Roerich Pact remains the sole regional international treaty designed specifically to protect cultural property during wartime and may be viewed as a precursor to the 1954 Hague Convention.⁴⁴

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Also known as the Washington Treaty on the Protection of Artistic and Scientific Institutions and Monuments 1929

⁴² Driver *loc cit*

⁴³ A red circle containing a triple sphere on a white background. Although the emblem is still in use today, it is more likely that States party to both the Pact and the Hague Convention, will use the emblem of the latter

⁴⁴ A draft convention for the protection of historic buildings and works of art in time of war was prepared in 1939 under the auspices of the League of Nations. Although it was never implemented, the draft was evidently a forerunner of the Cultural Property Convention of 1954. See generally, Rogers *op cit* p. 139

3.3 Customary International Law

According to the ICRC study on Customary International Law⁴⁵, a customary duty exists on States which have effective control over a territory, to prevent and avoid systematic acts of destruction against cultural property, irrespective if the State being party to the cultural property protection laws. It is submitted that the aforementioned duty derives from at least two customary norms that have been formed by international practice in the field of protection of cultural heritage.⁴⁶ In terms of Rule 38 of the ICRC study,⁴⁷

“Each party to the conflict must respect cultural property:

- A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives
- B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.”

The first of these customary rules lies in the principle according to which cultural heritage constitutes part of the general interest of the international community as a whole. There are several instances of international practice to confirm the existence of such an obligation including, *inter alia*, the 1907 Hague Laws and the Roerich Pact. It is submitted that the principle therefore places an *erga omnes*⁴⁸ obligation on a State.⁴⁹ State practice furthermore establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

⁴⁵ Heanckaerts and Boswald conducted an extensive study on the various rules of international humanitarian law and their emergence into customary international law. See Haenckarts J.M. and Doswald-Beck L *Customary International Humanitarian Law: Vol 1: Rules* 2004

⁴⁶ Francioni *op cit* 186

⁴⁷ Haenckarts and Doswald-Beck *op cit* p. 129

⁴⁸ These are norms that create obligations owed to all States, in the public interest, such as, *inter alia*, the protection of human rights and the protection of the general environment against massive degradation. See Francioni, *loc cit*, for a discussion on the International Court of Justice’s judgement in the Barcelona Traction case *vis-à-vis* the principle of *erga omnes*.

⁴⁹ Francioni *ibid*

3.4 The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

World War Two saw the widespread destruction and pillage of European cultural property. Desecration of irreplaceable cultural property and extensive damage to cultural centres, historic towns, cathedrals, medieval churches and buildings were all deliberately destroyed by all parties to the conflict.⁵⁰ It was these ‘cultural tragedies’ that ultimately provided the impetus for the international community to draft a set of laws specifically aimed at the protection of cultural property in the event of armed conflict. Nearly a decade later, in 1954, the Hague Convention was drafted aspiring to provide and improve protection of cultural property during war.⁵¹

The Convention is further supplemented by two protocols. The first of 1954, deals with the prevention and export of cultural property from occupied territory, its safeguard and return. The second, of 1999, is more comprehensive and endeavours to improve the implementation of the Convention. In essence, the Convention places an equal obligation on defenders and attackers by requiring States party to refrain from uses of cultural property that would expose it to danger in armed conflict and to refrain from acts of hostility against cultural property.⁵²

3.4.1 Scope of application of the 1954 Hague Convention

In the preamble to the Convention, the Contracting Parties recognise the great importance of the protection of cultural property for all members of the international community. Further, it recognises that the ‘damage of cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind’. This represents the emerging enunciation of the concepts of ‘common heritage’ and ‘common concern’ that is of importance to all nations universally.

⁵⁰ For a general account of the looting and damage to cultural property, during the Second World War, see Sandholtz, *op cit*, p. 209

⁵¹ According to Articles 18(1) and (2) and Article 19, the Convention is applicable to: wars; international armed conflicts; partial and total occupation and non-international armed conflicts (civil wars).

⁵² Rogers *loc cit*.

3.4.1.1 Definition of Cultural Property

The Convention defines cultural property as,

“movable or immovable property of great importance to the cultural heritage of every people’ and includes, ‘monuments of architecture, art or history, whether religious or secular; archaeological sites 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.”⁵³

Further, the definition also covers buildings in which such objects are collected and refuges intended to shelter such property during armed conflict. It also extends to cultural centres, being those containing large amount of cultural property or the buildings housing it, and transports.⁵⁴

It is immediately apparent that the definition in the Convention is both wider and narrower in scope than that of the previous Hague Regulations. While the categories of property are wider, they do not include charitable and educational institutions (unless of importance).⁵⁵ Furthermore, the property must be of great importance to the cultural heritage of every people which can lead to precarious decisions on what is of importance to all people.

3.4.2 Protection under the 1954 Hague Convention

The Convention provides for two-tiers of cultural property protection. These are, namely, general and special protection.

⁵³ Article 1.

⁵⁴ Rogers *op cit*, p. 139.

⁵⁵ *Ibid.*

3.4.2.1 General Protection

The scope of general protection is found in Article 4 of the Convention. This article provides that the High Contracting Parties agree to refrain from:

- “ (a) using cultural property, its immediate surroundings and appliances for purposes that are likely to expose it to damage in the event of armed conflict;
- (b) acts of hostility directed against cultural property; and
- (c) reprisals against cultural property, even if the enemy has unlawfully attacked cultural property.”⁵⁶

Article 4(3) further provides that parties are obliged to prevent theft, pillage, misappropriation and acts of vandalism against cultural property and shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

In addition, the protection afforded to cultural property may only be waived in the event where ‘military necessity imperatively requires such waiver’.⁵⁷ It is submitted that if imperative requirements of military necessity⁵⁸ can trump the protection of cultural property, no progress has been achieved since the Hague Regulations ‘as far as possible’ exhortation, since the attacking force is prone to regard almost any military necessity as ‘imperative’.⁵⁹ Interestingly, acts of reprisals may not be waived on the grounds of military necessity and that it can never be used to justify recourse to reprisals.⁶⁰

⁵⁶ Article 4(1) of the 1954 Hague Convention.

⁵⁷ Article 4(2) of the 1954 Hague Convention.

⁵⁸ Military objective and the principle of proportionality play a crucial role in the justification of whether an act is committed in a situation that can be considered military necessity. See Y. Askar, *Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent Court of Arbitration*, Routledge, 2004, p. 168

⁵⁹ Yoram, *op cit*, p. 158.

⁶⁰ Reprisals are not actions taken in the conduct of military operations, they are actions taken to redress violations of the law of war Rogers *op cit* 141.

The Convention also makes provision for a cultural property to bear a distinctive emblem so as to facilitate its recognition.⁶¹ The distinctive emblem is to take the form of a single blue and white triangular shield and may be used alone or repeated three times to indicate the type of cultural property under protection.⁶² This emblem is to be prominently displayed on the exterior of the structure or within the perimeter of sites containing cultural property.

3.4.2.2 Special Protection

Article 8, Chapter II, of the Convention introduces a special protection regime for some cultural property. Article 8(1) provides,

“There may be placed under special protection, a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance, provided that they:

- (a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point such as, for example, an aerodome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;
- (b) are not used for military purposes.”

If the cultural property in question is situated in the vicinity of an important military objective, it may continue to benefit from special protection, in accordance with Article 8(5), provided that the Party concerned undertakes to make no use of the objective (and in the case of a port, railway station or aerodome, to divert all traffic therefrom).⁶³

⁶¹ Article 6 pursuant to Article 16.

⁶² Normally, a single emblem is used in the case of ‘ordinary’ cultural property and three emblems are used for buildings or places that require ‘special protection’. Refer to Article 17 on the Use of the Emblem.

⁶³ Yoram, *op cit*, p. 159.

Palpably, the special protection is accessible only to a *limited number* of objects of *very great importance*. Special protection is furthermore only granted to cultural property by its entry into the ‘International Register for Cultural Property Protection’ made in accordance with the provisions and conditions of the Convention.⁶⁴ Special protection may also be granted to transport exclusively engaged in the transfer of cultural property provided that the triple emblem along with a signed and dated authorisation by the contracting party is displayed on the exterior of the mode of transport.⁶⁵

It has been asserted that special protection is only marginally more satisfactory than that of general protection explaining why the Register established for cultural property under special protection actually lists only half a dozen items.⁶⁶

3.4.3 Enforcement and Regulations for Execution of the Convention

The enforcement provisions contained in article 28 of the Convention provide:

“The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all steps necessary to prosecute and impose penal or disciplinary actions upon those persons, whatever nationality, who commit or order to be committed a breach of the present Convention.”

The Convention is silent on the matters of extradition measures for transgressors of the Convention. It is thus the responsibility of States to take the necessary steps within their national criminal law to prosecute those citizens accused of damage to cultural property in a third country. It is however submitted, that the Contracting Parties were reluctant to create a precedent by developing any explicit international criminal measures and that

⁶⁴ Article 6, Chapter II. Contracting Parties have been reluctant to submit properties to the register and to date, cultural sites in four States (Austria, Germany, the Holy See and The Netherlands) as well as the entire Vatican City State have been entered into the register. Also see, Rogers, *op cit*, p. 142.

⁶⁵ Article 12 pursuant to Article 17(1)(b).

⁶⁶ Yoram, *op cit*, p. 160. Contracting Parties have been reluctant to submit properties to the register and to date, cultural sites in four States (Austria, Germany, the Holy See and The Netherlands) as well as the entire Vatican City State have been entered into the register.

few have legislated within national law for specific criminal action in relation to crimes against cultural property during wartime.⁶⁷

The procedures by which the Convention is to be applied are defined in the Regulations to the Convention.⁶⁸ Under the Regulations, as soon as a Contracting Party is engaged in an armed conflict, it should appoint a 'Protecting Power' to represent and safeguard their interests during the conflict.⁶⁹ Contracting Parties may call upon UNESCO for technical assistance in organising the protection of their cultural property although it is submitted that States have been reluctant to do so.⁷⁰

While the 1954 Hague Convention is not a new concept in every respect, it is the first *comprehensive* treaty concerning the protection of cultural property in the event of armed conflict, which is not restricted to a particular region and which provides effective protection for the most valuable assets of the cultural heritage.⁷¹ The Convention does, however, have its shortcomings. It is purported that it falls short of adequately addressing many important issues, including, *inter alia*, criminal responsibility and jurisdiction over cultural crimes in internal conflicts⁷², provision for restitution or sanctions as well as the interpretation of imperative military necessity.⁷³

3.5 The 1954 Protocol for the Protection of Cultural Property in the Event of Armed Conflict

At a comparatively late stage in the 1954 Hague Conference proceedings it became clear that there was an irreconcilable split between States that wanted to include, in the Convention, binding controls over the transfers of movable cultural property within war

⁶⁷ Driver, *op cit*, p. 6

⁶⁸ Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict.

⁶⁹ Article 2 Chapter I

⁷⁰ Driver *loc cit*

⁷¹ F. Kalshoven *Belligerent Reprisals* Sijthoff, 1971, p. 273.

⁷² The Convention is applicable entirely in the event of international armed conflict, while certain fundamental provisions are declared *ipso facto* in the event of an internal armed conflict. See Article 9 as well as Kalshoven *ibid*.

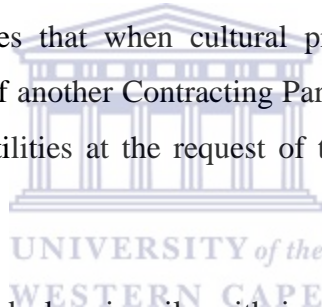
⁷³ Zgonjanin, *op cit*, p. 139

zones and occupied territories.⁷⁴ Many States objected on the basis that including these provisions within the Convention might restrict or interfere with the international trade in cultural property.⁷⁵ After much compromise however, a separate legal instrument drafted concurrent to the Hague Convention was created known as the 1954 Protocol for the Protection of Cultural Property in the Event of Armed Conflict.⁷⁶

In terms of Article 1 of the Protocol, Contracting Parties are to:

- “i) Prevent the exportation of cultural property from territories occupied by the party during armed conflict;
- ii) Return any imported cultural property from any territory occupied by it;
- iii) Indemnify ‘good faith’ purchasers of cultural property when returning property to the previously occupied country.”

Furthermore, Article 5 provides that when cultural property has been deposited for protection within the territory of another Contracting Party, the objects are to be returned following the cessation of hostilities at the request of the competent authorities of the territory whence it came.



It is evident that the Protocol deals primarily with issues relating to the protection of movable cultural property from occupied territory, and on the safeguarding and return of such exported property at the end of the conflict. The Protocol only applies to a limited class of objects those constituting the cultural or spiritual heritage of peoples.⁷⁷

A significant objective of the Protocol is that it prohibits the looting and pillage of cultural property by belligerents during armed conflicts, thereby building on the foundation of the 1907 Hague Convention. A power in adverse occupation of another

⁷⁴ P. Boylan, ‘The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict’. Paper presented at the 68th IFLA Council and General Conference: *A Blue Shield for the Protection of our Endangered Cultural Heritage* 18-24 August 2002. (Hereinafter referred to as the 68th IFLA Conference)

⁷⁵ *Ibid.*

⁷⁶ Now referred to as the First Protocol, following the March 1999 Diplomatic Conference to update the Convention.

⁷⁷ Rogers, *op cit*, p. 153.

power's territory may not export from that territory any cultural objects which may be found within it.⁷⁸ Under the Protocol, upon the cessation of hostilities, States are liable to return cultural property or pay compensation if such property was exported during their period of occupation of a territory and must pay an indemnity to anyone who has subsequently held the property in good faith. The Protocol also applies irrespective of whether such territory is a party to the Protocol.⁷⁹ Where any party to the Protocol finds that cultural property has been improperly exported from the territory of a party to an armed conflict has been imported into its own territory, it must take control thereof with a view to return it either immediately or at the latest upon the request of the party from whose territory it came.⁸⁰

States which adopt the First Protocol must establish and enforce measures required to implement its provisions. Some States have however been reluctant to ratify the Protocol due to the provisions regarding the indemnity of 'good faith' purchasers, as this provision may be contrary to the principles embodied within their domestic legislation.⁸¹ The Protocol also explicitly provides that cultural property shall never be retained at the end of hostilities as war reparations.

It is interesting to note that there is a marked difference between the First Protocol and the Convention. The First Protocol omits the provision that cultural property loses its protection when used for military purposes. It only prohibits acts of hostility against cultural property, whilst the Convention was more exhortatory in requiring steps to be taken to spare cultural property.

⁷⁸ H. Mc Coubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, Second Edition, Ashgate Dartmouth, 1998, p. 121

⁷⁹ Driver *loc cit* submits that the effectiveness of these provisions in preventing the illicit trade of cultural property on the international market is marred because the largest markets for such trade are the United States and the United Kingdom, both of whom are not party to the Protocol.

⁸⁰ Parties to an armed conflict have the right to entrust items of their cultural property to a neutral power for safekeeping during the conflict. Such property is to be returned upon the conclusion of the conflict. See Mc Coubrey *loc cit*

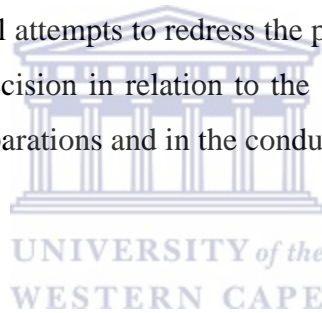
⁸¹ Driver *op cit* 7

3.6 The 1999 Second Protocol to the Hague Convention

The shortfalls of the 1954 Hague Convention and the First Protocol soon became apparent in the decades following its entry into force.⁸² Various studies were conducted during the 1960s to 1990s regarding the failures of the Hague Convention provisions in armed conflicts.⁸³ The Yugoslavian civil wars of the early 1990's further demonstrated the need for a review on the current laws protecting cultural property during armed conflict.

Only in 1999 however, was it decided to adopt a new supplementary legal instrument to the 1954 Hague Convention in the form of an Additional Protocol (known as the Second Protocol).⁸⁴ Despite its long gestation period and the deep-seated differences between States, the new measure was formally adopted through unanimous consensus. Essentially, the Second Protocol attempts to redress the problems of the 1954 Convention with much more detail and precision in relation to the actions that State Parties should take both within peacetime preparations and in the conduct of armed conflicts.⁸⁵

3.6.4 General Provisions



Chapter 1 of the Second Protocol enumerates the necessary preamble and definitions. It has, however, maintained the same definition of cultural property to that of Article 1 in the 1954 Hague Convention.

⁸² See Hladik's paper on 'The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its 1999 Second Protocol: Comparisons between Provisions Related to Safeguarding and Respect for Cultural Property under General Protection'. Presented at the *Conference Protecting Cultural Heritage: International Law after the war in Iraq*, 3 February 2006.

⁸³ See UNESCO'S 1993 'Boylan Report'. The Report indicates that there were serious problems with the interpretation and practical application of the 1954 Convention. Also see A. Roberts and R. Guelff, *Documents on the Laws of War*, Third Edition, Oxford, 2000, p. 699

⁸⁴ Boylan at the 68th IFLA Conference, *loc cit*.

⁸⁵ P. Boylan, 'Implementing the 1954 Hague Conventions and its Protocols: Legal and Practical Implications'. Paper presented at the *Conference Protecting Cultural Heritage: International Law after the war in Iraq*, 3 February 2006. (Hereinafter referred to as the Iraq Cultural Heritage Conference)

Chapter 2 addresses the general provisions regarding the protection of cultural property and greatly amplifies and clarifies the provisions of the 1954 Convention in respect to ‘protection’ in general. Accordingly, Article 5 reiterates the preventative measures to be undertaken in peacetime to safeguard cultural property against the foreseeable effects of an armed conflict including, *inter alia*, the compilation of inventories and the emergency preparedness measures.⁸⁶

In recognition of the threats posed to cultural property, Article 6(a) provides that a waiver on the basis of ‘imperative military necessity’ can only be invoked when the following two conditions⁸⁷ are met, namely:

- “ i) that cultural property has, by its function, been made into a military objective; and
- ii) that there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.”

Further, a belligerent State planning such an attack is required to notify the counterpart authorities prior to launching an attack on protected cultural property and an effective advance notice must be given whenever circumstances permit.⁸⁸ The efficacy of this provision is further attenuated as the required lead-time between the issuance of a warning and the launching of a military strike is not specified.⁸⁹ Article 7 insists on precautions being taken in attack, to do everything feasible to verify that the objectives to be attacked are not cultural property⁹⁰ and to avoid or minimise incidental damage to such cultural property (incidental damage which, in any event, must not be excessive in relation to the military advantage anticipated).⁹¹

⁸⁶ Article 6 of Second Protocol. See also Driver, *op cit*, p. 8

⁸⁷ Pursuant to Article 4 paragraph 2 of the Second Protocol.

⁸⁸ Article 6(c) to (d).

⁸⁹ Driver *loc cit*.

⁹⁰ Under Article 4 of the Second Protocol.

⁹¹ Yoram, *op cit*, p. 164

The Chapter also clarifies (and limits very considerably) what an occupying power may do in relation to cultural property within occupied territories. Furthermore, it requires the occupying power to prohibit and prevent all illicit export, removal or change of ownership of cultural property.⁹²

3.6.2 Enhanced Protection

Chapter 3 creates a new category of ‘Enhanced Protection’ for the most important sites, monuments and institutions. According to Article 10, cultural property may be assigned to ‘enhanced protection’ and placed upon an international list providing it meets the following criteria:

- “ i) it is cultural heritage of the greatest importance for humanity;
ii) adequate national legislation has been enacted to ensure its protection; and
iii) it has not become a ‘military objective’ and a declaration has been issued by the Part in control of the territory that it will not be used for military purposes.”

The Protocol establishes an International Committee for the Protection of Cultural Property in the Event of Armed Conflict,⁹³ assigned with the responsibility for maintaining a list of property under enhanced protection and to supervise the implementation of the Protocol.⁹⁴ States who wish to include their cultural property to the list, are to direct their proposals to the Committee who has the final decision regarding such property’s inclusion on the list. A fund is also established through which the Committee may provide financial and technical assistance to support preparatory measures in times of peace, emergency measures during periods of armed conflict and restoration measures after the cessation of hostilities.⁹⁵

⁹² Article 9 of the Second Protocol. The Chapter also places very narrow limits on archaeological excavations and the alteration or change of use of cultural property whilst the territory is occupied. See Boylan at the 68th IFLA Conference, *loc cit*.

⁹³ See Article 24 of the Second Protocol.

⁹⁴ Article 27 of Second Protocol. Also see Rogers, *op cit*, p. 143

⁹⁵ Article 29 (1) and (2) of the Second Protocol. Also see Driver, *op cit*, p. 9

3.6.3 Penal and Administrative Sanctions

Arguably the most substantial innovation of the Second Protocol are the provisions set forth in Chapter 4 of the Protocol. Essentially, States undertake to adopt the necessary measures with regard to the determination of criminal responsibility, jurisdiction, extradition and mutual legal assistance.⁹⁶

The Chapter establishes five new explicit crimes in relation to intentional breaches of the laws governing cultural property protection and respect. Article 15 therefore criminalises the following:

- “ i) making cultural property under enhanced protection the object of attack;
- ii) using cultural property under enhanced protection or its immediate surroundings in support of a military action;
- iii) extensive destruction or appropriation of cultural property protected under the 1954 Hague Convention and Second Protocol;
- iv) making cultural property protected under the 1954 Hague Convention and Second Protocol the object of attack; and
- v) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the 1954 Hague Convention.”

The first three of the aforementioned provisions are subject to universal jurisdiction⁹⁷ and are extraditable offences.⁹⁸ Further, States have jurisdiction when an alleged offender is present on their territory however the Protocol clearly indicates that nationals of States which are not party thereto do not incur individual criminal responsibility and that the Protocol does not impose an obligation to establish jurisdiction over such persons.⁹⁹

⁹⁶ Advisory Service on the Practical Advice for the Protection of Cultural Property in the Event of Armed Conflict, ICRC p. 22. Available at [www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5WZH7P/\\$FILE/Practical_Advice_for_the_Protection_of_Cultural_Property_in_the_Event_of_Armed_Conflict.pdf?OpenElement](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5WZH7P/$FILE/Practical_Advice_for_the_Protection_of_Cultural_Property_in_the_Event_of_Armed_Conflict.pdf?OpenElement). (Accessed on 18 September 2006).

⁹⁷ Article 16 Second Protocol.

⁹⁸ *Ibid*, article 18.

⁹⁹ *Ibid*, article 16 (2)(b).

In addition, States are required to prosecute or extradite any person accused of committing offences against property under enhanced protection or of having caused extensive damage to cultural property.¹⁰⁰ Provision is also made for general obligations with regard to mutual legal assistance, including, *inter alia*, assistance in connection with investigations, extraditions or the obtaining of evidence.¹⁰¹

The provisions of the 1954 Hague Convention regarding the obligation to prosecute at national level continues to apply to the two latter categories of Article 15. Article 21 clarifies the measures to be taken. Accordingly, parties to the Second Protocol must adopt the necessary legislative, administrative or disciplinary measures to terminate or to impose sanctions on other violations when they are committed intentionally.¹⁰² These include any use of cultural property in violation of the 1954 Hague Convention or the Second Protocol, and the intentional illicit export, other removal or transfer of cultural property.

The Second Protocol therefore obliges a State to take all the necessary steps under its domestic law to make such offences punishable by appropriate penalties when they are committed intentionally and in direct violation of the 1954 Convention or Second Protocol. It is submitted that implementing the Chapter 4 provisions requires major new legislation at the national level, and is arguably the main reason why many States have delayed its ratification of the Protocol.¹⁰³

3.6.3 Other Provisions

Chapter 5 concentrates on non-international armed conflicts, such as civil wars and internal 'liberation' conflicts. It does not however apply to internal disturbances such as riots and isolated or sporadic acts of violence as specified by Article 22(2). Furthermore,

¹⁰⁰ *Ibid*, article 18.

¹⁰¹ *Ibid*, article 19.

¹⁰² ICRC Advisory Service *loc cit*.

¹⁰³ Boylan at the Iraq Cultural Heritage Conference, *loc cit*.

the provisions of the Protocol may not be invoked as a justification for direct or indirect intervention by an external State in the territory in which the conflict occurs.

The other major advance and significant innovation is Chapter 6 which establishes, *inter alia*, a clear role for civil society. The International Committee of the Blue Shield (ICBS)¹⁰⁴ and its constituent international professional non-governmental organisations¹⁰⁵, together with ICCROM¹⁰⁶ and the ICRC, will have important standing advisory roles in relation to the to the Committee established under the Protocol.¹⁰⁷

Chapter 7 of the Protocol strengthens the 1954 Hague provisions in placing an obligation on States to ensure the dissemination, information and training of the Convention, Protocols and the general principles of cultural property protection.¹⁰⁸ There is now a call for States to raise awareness among the general public within the education system, and not merely among military personnel and cultural sector officials as the 1954 text previously stipulated.¹⁰⁹

3.6.4 Conclusion

The provisions of the Second Protocol represent a significant improvement to the protective regime established under the 1954 Hague Convention. Improvements regarding enforcement and extradition regimes have been brought in line with those of Protocol 1. It remains to be seen, however, whether States would be willing to nominate cultural property for enhanced protection given their reluctance to do so under the original regime.¹¹⁰ Highly important constitutional issues need to be addressed at the national level, such as the extension of the principle of international jurisdiction for the

¹⁰⁴ Also known as Blue Shield and was initially created to cover the two areas of cultural property protected by the 1954 Hague Convention. See Boylan at the 68th IFLA Conference, *loc cit*.

¹⁰⁵ Namely the ICA-International Council of Archives, IFLA-International Federation of Library Associations and Institutions, ICOMOS- International Council of Museums and Sites and the ICOM-International Council of Museums.

¹⁰⁶ The International Centre for Conservation, Rome.

¹⁰⁷ Boylan at the 68th IFLA Conference, *loc cit*.

¹⁰⁸ Article 30 of Second Protocol.

¹⁰⁹ Boylan at the 68th IFLA Conference, *loc cit*.

¹¹⁰ Driver *op cit*, p. 9

most serious new ‘cultural war crimes’ (as enumerated above), in order for this Protocol to execute effectively. Thus, the success of the Protocol (and the 1954 Hague Convention) will ultimately be reliant upon extensive ratification and the enactment of effective domestic legislation.¹¹¹ The process of enactment into domestic law does, however, take a significant length of time. Based on this premise, there has unfortunately been an unwillingness by States have been to ratify the Protocol.¹¹²



¹¹¹ South Africa has not as yet ratified the Second Protocol.

¹¹² As at October 2006 January 2006 the Second Protocol had 42 State Parties, but it is known that a significant number of further States (including most of the 23 original signatory States that have not yet ratified) are currently preparing for ratification through their national and legislative procedures. In this regard, see the online link, <http://portal.unesco.org/la/convention.asp?KO=15207&language=E> (accessed on 30 September 2006)

CHAPTER 4

Crimes Against Culture

4.1 Introduction:

Iraq is home to one of the richest cultural treasure troves in the world. The Babylonians, Sumerians and Assyrians lived in the fertile region called Mesopotamia, which is wedged between the Tigris and Euphrates Rivers.¹¹³ The Tigris Euphrates Valley is considered to be the cradle of a number of civilisations.¹¹⁴ From the fifth millennia B.C., this region gave rise to many sanctimonious events sacred to Jews, Christians and Muslims alike.

During 9 to 12 April 2003, the nation of Iraq fell victim to one of the greatest international cultural tragedies. Amidst the chaos that resulted from the United States led invasion of Iraq, looters took their advantage and descended on Iraq's National Museum in the capital of Baghdad. During these fateful few days, the National Library was also set alight with thousands of volumes and historical documents ravaged by the inferno. Just south of the capital, looting at archaeological sites also commenced.¹¹⁵ While the media submersed the world with these ghastly images, the United States coalition troops failed to prevent or ameliorate these cultural calamities. As a result, many priceless antiquities that remained intact for five millennia were now either missing, shattered or destroyed.

¹¹³ Their remnants still remains a hot commodity on the art market today. See A.M. Miller 'The Looting of Iraqi Art: Occupiers and Collectors Turn Away Leisurely from the Disaster' *Case Western Reserve Journal of International Law* Vol.37 No.49, 2005, p. 51

¹¹⁴ S. Cattan, 'The Imperiled Past: Appreciating Our Cultural Heritage' *UN Chronicle* No.4, 2003, p. 71

¹¹⁵ See Gerstenblith's paper, 'The Case for Changes in International Law in the Aftermath of the 2003 Gulf War'. Presented at *Conference Protecting Cultural Heritage: International Law after the war in Iraq*, 3 February 2006.

4.1.2 Fair Warnings

Several months before the 2003 plundering commenced in Iraq, officials at numerous organisations, including the United Nations (U.N.), the British Museum and the Archaeological Institute of America, became concerned that war in Iraq would put historical sites and cultural institutions at risk.¹¹⁶ In the face of what seemed like an inevitable invasion of Iraq, no-one wanted a repeat performance of the looting and destruction that occurred during the 1991 Gulf War when looters ransacked nine of Iraq's museums and stole over 4,000 objects.¹¹⁷

Basing their concern on the ubiquitous pillage and plunder of some of the world's greatest artworks and artefacts in previous conflicts, these cultural organisations attempted to prevent another great loss of cultural heritage. UNESCO had also taken a number of steps to ensure that the different parties involved in the conflict were aware of the terms of the 1954 Hague Convention and its two additional protocols relating to the protection of cultural property.¹¹⁸ They called for the firm protection of museums and archaeological sites throughout Iraq, particularly the National Museum in Baghdad. Home to one of the world's most extensive collections of artefacts dating back to the Mesopotamian era, the National Museum is considered the 'Seat of Civilisation' and, as such, is the repository of many of the most precious pieces of artwork in the world.¹¹⁹

Despite the international calls and the Iraqi attempts to ensure that culturally significant artwork and artefacts were not destroyed during the invasion, these warnings went unheeded.

¹¹⁶ N. Oder and A. Albanese 'Blue Shields Warns of Iraq Damage' *Library Journal* 15 April 2003, p. 18.

¹¹⁷ Miller, *op cit*, p. 65

¹¹⁸ I.M Johnson, 'The Impact on Libraries and Archives in Iraq of war and looting in 2003: A Preliminary Assessment of the damage and the subsequent reconstruction efforts' (2005) *International Information and Library Review*, 2005, p. 4. Available at www.sciencedirect.com/science/journal/10572317. (Accessed on 17 September 2006)

¹¹⁹ In the months and weeks before the anticipated invasion in 2003, the museum also implemented auxiliary measures to safeguard much of its collection, moving many ancient books, manuscripts and scrolls to offsite bomb shelters and storage rooms. See S. Paroff, Another Victim of the War in Iraq: The Looting of the National Museum in Baghdad and the Inadequacies of International Protection of Cultural Property' *Emory Law Journal*, Vol.53, 2004, p. 2024.

4.2 Duty to Protect

On 9 April 2003, millions watched worldwide how the statue of Saddam Hussein was pulled down in the Iraqi capital signifying the ‘fall of Baghdad’ and the old regime. At the same time, a period of lawlessness befell Iraq. During the fighting, in the days prior to the fall, security measures to protect the museum were abandoned due to the dangerous fighting in Baghdad.¹²⁰ Taking advantage of the anarchic situation between 10 to 13 April 2006, mobs looted the museum. During these three days, approximately 6,000 to 10,000 objects went missing from the museum.¹²¹ The subsequent international opprobrium and reactions from governments echoed those expressed by the museum staff in mourning the apparent catastrophe and laying blame on the United States.¹²²

Al-Radi, is one of the many authors who argue that there were in all probability two groups of thieves.¹²³ The first were the ‘professionals’ and the second an unruly local mob who resided in the immediate vicinity of the museum. The mystery remains as to the identity of the professionals. Were they foreigners or simply local people taking advantage of the chaos to help themselves to objects from the museum?¹²⁴ Although it is not within the scope of this research paper to investigate the identity of these ‘thieves of Baghdad’, it can reasonably be surmised that a duty surely existed to protect the treasured items from theft.

¹²⁰ Paroff, *op cit*, p. 2026.

¹²¹ S. Al-Radi, ‘The Destruction of Iraq National Museum’ *Museum International*, Vol. 55 No.3-4, 2003, p. 106. Although a steady trickle of returning objects has been taking place since Colonel Matthew Bogdanos declared a general amnesty for anyone who brings back an object. As a result more than 2,500 objects have been returned by locals. See M. Bogdanos paper, ‘Thieves of Baghdad and the World’s Cultural Heritage’, presented at the Iraq Cultural Heritage Conference, *loc cit*.

¹²² Sandholtz, *op cit*, p. 190.

¹²³ Al-Radi, *op cit*, p. 104. Also see Miller, *op cit*, p. 74.

¹²⁴ Al-Radi, *ibid*.

4.2.1 The watchful *blind* eye of the United States Troops

It would appear that with the rise of insurgency in Iraq, the United States military did nothing to stop the looting of Iraq's most important buildings¹²⁵ and adhere to the laws warranting the protection of cultural property. Further disrespect for these laws surfaced when the United States allowed its troops to fire on, and from, mosques and other historic buildings during the battles of Falluja and Ramadi.¹²⁶

There has, subsequently, been immense international criticism towards the Bush Administration for failing to station troops at the museum during and after the fighting in Baghdad. Such criticism is further strengthened by the fact that troops were stationed at the Iraqi Oil Ministry and oil fields in order to protect Middle Eastern oil during the chaotic time.¹²⁷ Miller submits that despite the museums and libraries being just blocks away from the Baghdad Oil Ministry, the United States tanks remained staunchly parked outside at the Oil Ministry during the height of the looting.¹²⁸ Evidence suggests, that museum officials had begged the soldiers to intervene,¹²⁹ and eyewitness reports confirm that the United States did nothing to stop the looting.¹³⁰

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¹²⁵ R.J. Kramer and R.C Michalowsky, 'War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq' *British Journal of Criminology* Special Issue, July 2005, p 253.

¹²⁶ There are reports of substantial damage to the mausoleum of Yahya bin al-Qasim in Mosul, where a bomb launched in an air raid hit the dome of the thirteenth century monument. Furthermore, the placement of snipers on top of Malwaiya in Samarra (the ninth century spiral minaret of the Great Mosque) was also an ill-conceived decision that attracted insurgent fire towards the monument and a bombing that left the upper terrace substantially damaged. More insurgent attacks that included powerful car and truck bombs have also affected cultural heritage, sites, including damage to the entrance of the mausoleum of Ali in Najaf. It is indeed questionable as to whether these fall within the ambit of 'imperative military necessity'. See G. Palumbo, 'The Study of Iraq's Cultural Heritage in the Aftermath of the 2003 War', *Brown Journal of World Affairs* Vol.12 No.1, 2005, p. 227.

¹²⁷ Paroff, *op cit*, p. 2027.

¹²⁸ Miller, *op cit*, p. 66

¹²⁹ The duty placed in the armed forces to protect cultural property is reiterated in a briefing sheet issued by UNESCO *vis-à-vis* rules relating to the 1954 Hague Convention. These rules are, subsequently, given to soldiers in the armed forces and reads, *inter alia*,

'[Y]ou have a responsibility as a professional soldier to protect cultural property...if you break the rules of the law of war...you discredit yourself, your unit and your country...you are also liable for severe punishment or court martial'. See 'The Protection of Cultural Property- Soldiers Rules' at www.unesco.org/culture/legalprotection/war/images/soldiers.doc (accessed on 30 September 2006).

¹³⁰ According to Al-Radi, *op cit*, p. 105, "Muhsin, the [museum] guard, tried to convince the American crew stationed nearby to come and protect the museum- they came once and drove off the looters, but refused to remain saying that 'they had no orders to do so'...". Also see Miller *loc cit*.

Senior United States military officials have, however, admitted that there was a ‘void in security’ and that the inadequate protection of the museum was, ‘due to a failure to anticipate Iraq’s cultural riches would be looted by its own people.’¹³¹ However, the defence of ignorance by United States officials is difficult to accept especially considering that the international warning calls before the invasion predicted the possibility of civilian looting.¹³² Most of the concerns voiced before the invasion were an effort to protect Iraqi cultural institutions from falling prey to unscrupulous military appropriation or to bombing and destruction.¹³³ Astonishingly, however, the United States Secretary of Defence, Donald Rumsfeld denied, at a press conference held on 15 April 2006, that he received any forewarnings about the need to protect Iraq’s rich cultural heritage.¹³⁴ Although it is not within the scope of this research paper to discuss the mandate and *modus operandi* of the armed forces, the actions and reactions by the United States armed forces and government officials certainly adds *gravitas* when one investigates the reasons for the United States invasion of Iraq in the first place.

There exists, however, a legal lacunae in the transition period between war fighting and effective occupation of a territory. In order to therefore ascertain responsibility for the looting and destruction of cultural property within Iraq one needs to analyse the context of the United States presence in Iraq in 2003. Chapter three of this research paper, discussed the various wartime conventions dealing with the protection of cultural property and, consequently, Chapter five will elaborate on the various cultural property provisions within the *milieu* of the International Law of Occupation.¹³⁵

¹³¹ These were comments made by general Vincent Brooks. See Paroff, *loc cit.* and Sandoltz, *op cit.*, p. 196.

¹³² Paroff, *ibid.* Also see A. Roberts, ‘The End of Occupation: Iraq 2004’ *International and Comparative Law Quarterly*, January 2005, p. 27

¹³³ Paroff, *op cit.*, p. 2025

¹³⁴ Rumsfeld was, however, later corrected by General Richard Myers. Also see Sandholtz, *op cit.*, p. 194sq for an extensive account of the reactions, comments and the contradictions in the offered by the senior United States government and military officials, *vis-à-vis* the looting..

¹³⁵ Note that this research paper shall not delve into the technicalities on the law of occupation. The discussion’s aim is merely to better understand the context in which the United States were obliged by international law to protect Iraq’s cultural property.

CHAPTER 5

The International Law of Occupation and the Protection of Cultural Property

5.2 International Law of Occupation

The law of occupation is a branch of international law which governs the actions and responsibilities of a nation's military occupation of a foreign territory.¹³⁶ According to Lavoyer, 'once a situation exists which factually amounts to an occupation, the law of occupation applies regardless of the lawfulness or otherwise of the occupation'.¹³⁷

Occupation law stems from a number of sources.¹³⁸ These include, the 1907 Hague Regulations on the Laws of War,¹³⁹ the Fourth Geneva Convention, Additional Protocol I of 1977¹⁴⁰ and customary international law.¹⁴¹ Each of these shall be considered next.

5.1.2 The 1907 Hague Convention

The 1907 Hague Convention requires in Article 43 that the occupying power shall

“[T]ake all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

The obligation to maintain law and order therefore includes within its scope an obligation to *prevent* looting of Iraqi public property, including cultural property.¹⁴² The

¹³⁶ For a general discussion on the laws of occupation, see F. Kalshoven and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, Third Edition, ICRC, 2001, p. 65sqq.

¹³⁷ J. P. Lavoyer, 'Ius in Bello: Occupation Law and the war in Iraq'. Paper presented at the 98th Annual Meeting of the American Society of International Law, Lieber Society Interest Group Panel, 1 April 2004.

¹³⁸ For the purposes of this research paper, only the sources relevant to international humanitarian law will be discussed.

¹³⁹ Namely article 42 to article 56 of the Regulations.

¹⁴⁰ These are namely, article 63, article 68, article 69 and article 71 of the Additional Protocol I.

¹⁴¹ Miller, *op cit*, p. 67. Also see Lavoyer, *loc cit*.

qualification of ‘in his power’ and ‘as far as possible’ indicates that this is not an absolute requirement. It is thus dependant on the occupying power having time to its disposal, with other pressing commitments, and the resources, to deal with public order.¹⁴³ Pillaging and confiscation of private property are, however, strictly forbidden, with the Convention expressly commanding that the occupying power respect religious convictions and practices of the occupied territory.¹⁴⁴ Furthermore, Articles 27 and 56 of the Convention binds all states under international law to spare cultural institutions and prohibits the confiscation, destruction or wilful damage of the institutions’ property.

Since the 1907 Hague Convention is recognised as customary international law, its provisions are binding on all individuals as well as states.¹⁴⁵ Thus the United States are bound by the 1907 Hague Convention and its provisions.¹⁴⁶

5.1.3 The 1954 Hague Convention

As illustrated in Chapter three¹⁴⁷ of this research paper, Article 4(3) of the 1954 Hague Convention compels contracting parties to ‘prohibit, prevent and if necessary, put a stop to any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against cultural property’. Thus, it places a high standard on an occupying power to, *inter alia*, preserve the occupied territory’s cultural treasures and ancient antiquities. Furthermore, in addition to ensuring that armed troops do not intentionally or unintentionally harm or loot the cultural property of the invaded nation, the language of

¹⁴² C. Phuong, ‘The Protection of Iraqi Cultural Property’ *International and Comparative Law Quarterly*, Vol. 53 No. 4, 2004, p. 988.

¹⁴³ It is submitted that war-fighting troops are generally not best equipped for such duties. See Rogers, *loc cit*, in this regard.

¹⁴⁴ Article 47^{sqq} of the 1907 Hague Convention.

¹⁴⁵ M. Sassoli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ *European Journal of International Law*, Spring 2005, p. 662.

¹⁴⁶ Phuong, *op cit*, p. 935.

¹⁴⁷ See the ‘General Provisions’ in Chapter 3.4.3.1 *supra*.

the 1954 Convention indicates that the occupying power must take measures to ensure that other actors do not do the same.¹⁴⁸

The United States is not, however, party to the 1954 Convention.¹⁴⁹ It can be argued that Art 4(3) is part of customary international law to the extent that it is an elaboration of the general obligation under international law for an occupying force to maintain law and order in the territory it occupies.¹⁵⁰ Accordingly, just as the 1907 Hague Convention is binding because it codifies existing customary international law, so too are the provisions of the 1954 Hague Convention.¹⁵¹ Thus it can be inferred that the obligations as purported in the Conventions are indeed binding on the United States.¹⁵²

5.1.4 The Geneva Conventions and their Protocols

The Fourth Geneva Convention dedicates an imposing thirty-one articles to the laws of occupation,¹⁵³ and discusses, within these articles, the fundamental obligations governing occupying forces. Furthermore, Common Article 2(2) of the Geneva Conventions provide,

“[T]he Conventions shall also apply to all cases of partial or total occupation of a territory of a High Contracting Power, even if the occupation meets with no armed resistance.”

¹⁴⁸ This would therefore apply to parties outside of the armed conflict. See Paroff *op cit* 2036. Note that Paroff, at, *op cit*, p. 2037, also opines that the Convention can be interpreted as not imposing an obligation on an occupying power to protect cultural property in wartime. Also see Sandholtz, *op cit*, p. 188

¹⁴⁹ The United States are, however, a signatory to the Convention. Sandholtz submits that although the United States played an active role in the diplomatic conference that produced the treaty, their primary point of contention was whether or not to include language creating an exception for ‘military necessity’. See Sandholtz, *op cit*, p. 229 in this regard. In the early 1990’s the United States government did however contemplate ratification of the treaty. In this regard, see former United States President, Bill Clinton’s, ‘Message to the Senate Transmitting the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict’. *Administration of William J Clinton*, 6 January 1999, p. 13.

¹⁵⁰ As provided for in Article 43 of the 1907 Hague Convention. Also see Phuong, *loc cit*.

¹⁵¹ For general information on this, consult Haenckaerts, *loc cit*.

¹⁵² Note that the Captain Joshua Kastenberg of the United States, contends that the Convention is just a reflection of customary international law, but has never risen *per se* to the level of customary international law. Astoundingly, this agreement proves to be the most important question in analysing responsibility for the looting of the National Museum. See Phuong, *loc cit* and Paroff, *op cit*, p. 2039.

¹⁵³ From article 47 to article 78 of Geneva Convention IV.

Reaffirming the provisions of the 1954 Hague Convention, Article 53 of Protocol I of 1977 addresses the protection of cultural property and places of worship.¹⁵⁴ Combined, the Geneva Conventions with its Additional Protocols and 1954 Hague Convention, recognise the destruction of cultural property as a *war crime*.¹⁵⁵ Thus, the destruction of cultural property is prosecutable as a violation of the Geneva Conventions.

While both the United States and Iraq are parties to the 1949 Geneva Conventions, neither State is a party to Protocol I of 1977. The United States signed but did not, however, ratify the Protocol.¹⁵⁶ Iraq neither signed nor ratified it.¹⁵⁷ As a result, neither State is bound by the Protocol's mandate to avoid destruction of cultural property.

5.1.5 The Second Protocol to the Hague Convention of 1954

As established in Chapter three of this research paper,¹⁵⁸ the Second Protocol endeavours to overcome the shortfalls of the 1954 Convention. Article 15 of the Second Protocol extends Article 4(3) of the 1954 Convention by providing that '*theft, pillage or misappropriation of, or acts of vandalism*' are serious violations of the Protocol.

The Second Protocol also provides for criminal responsibility for private actions. Under the interpretation of the Convention, the occupying power has the responsibility to prevent illicit conduct, either by private individuals, state actors or both.¹⁵⁹ However, the Second Protocol was not in force in April 2003¹⁶⁰ when the National Museum was looted. Thus the provisions are not applicable.

¹⁵⁴ Bearing in mind that Geneva Convention IV addresses the treatment of civilians with the 1977 Additional Protocol elaborating on these rules applying to the protection of civilians. For a general discussion on the protection of places of worship and religious objects, see H. Mc Coubrey, 'The Protection of Creed and Opinion in the Laws of Armed Conflict', *Conflict and Security Law*, Vol.5, 2000, p. 154.

¹⁵⁵ These can be found in article 50 of Geneva Convention I, article 51 of Geneva Convention II, article 147 of Geneva Convention IV and article 85(4)(d) of Additional Protocol 1 of 1977. Paroff, *op cit*, p. 2040.

¹⁵⁶ Paroff, *ibid*.

¹⁵⁷ Paroff, *ibid*.

¹⁵⁸ See 'The 1999 Second Protocol to the Hague Convention' at Chapter 3.6 *supra*.

¹⁵⁹ Paroff, *op cit*, p. 2042.

¹⁶⁰ See note 112, *supra*.

It can accordingly be surmised that under international occupation law, the United States' failure to protect Iraq's cultural property from looting represents a complete departure from responsibilities of an occupying power as governed by the 1907 and 1954 Hague Conventions, the Fourth Geneva Convention, Additional Protocol I of 1977, and customary international law. This consequently leads to the further enquiry, as to whether they were indeed an occupying power at the time of the looting and destruction and if so, are the United States indeed responsible?

5.2 Responsibility

Although we assume that the United States did not actively participate in the looting, it is undeniable that they *failed to act* to prevent the pervasive looting which occurred during its occupation in Iraq.¹⁶¹ The critical question therefore remains as to when the United States eventually became an occupying power under international law. In order to ascertain this, a timeline of events needs to be plotted *vis-à-vis* the United States invasion in Iraq.¹⁶²

On 20 March 2003, President Bush officially announced to the world that the United States had begun a 'broad and concerted campaign' against Iraq aimed at toppling the regime of Saddam Hussein.¹⁶³ On Wednesday, 9 April 2003, the United States invaded Baghdad, and the city fell into the United States control with remarkable speed.¹⁶⁴ Once it established military authority over Iraq, the United States triggered the rules and responsibilities of international occupation law which governs the behaviour of an occupying state. Miller, however, opines that the United States troops were successful in establishing relative order in Baghdad by Sunday, 13 April 2003.¹⁶⁵

¹⁶¹ Miller, *op cit*, p. 70.

¹⁶² Due to the extensive details of the timeline, it cannot be included within the research paper. However, consult Al-Radi, *op cit*, p. 104*sq* and Miller, *op cit*, p. 70*seq* in this regard.

¹⁶³ Miller, *op cit*, p. 67. Paroff however disagrees on this point. See Paroff, *op cit*, p. 2029.

¹⁶⁴ Miller, *op cit*, p. 70.

¹⁶⁵ Miller *ibid*.

Conversely, however, one might argue that the United States cannot be expected to claim responsibility for the looting after just a day or two after its arrival in Baghdad. This argument fails, however, because the law of occupation enters into effect the moment an occupying power establishes its *authority* in the territory.¹⁶⁶ This argument is supported by of Article 42 of the 1907 Hague Regulations¹⁶⁷ which provides,

“Territory is considered occupied when it is actually placed under the authority of the hostile army...the occupation extends only to the territory where such authority has been established and can be exercised.”

The United States ousted the Iraqi regime and established a ruling power when its tanks rolled unimpeded through the streets of Baghdad on Wednesday, 9 April 2003.¹⁶⁸ Thus, the United States assumed the role of an occupying power in Baghdad when it established its authority in the city and possessed the power to exercise its authority by the presence of troops and weapons.¹⁶⁹ Accordingly, and thus in line with Article 43 of the 1907 Hague Regulations, the United States was responsible for restoring public order and safety when the looters ransacked the National Museum and Library.

5.3 Conclusion

In the early days following the occupation, looting, and not insurgency represented the greatest threat to ‘public order and welfare of the local population’.¹⁷⁰ The United States, as an occupying power, had an obligation under international law and international humanitarian law in particular,¹⁷¹ maintain public order and to protect the cultural property of Iraq from being looted. They, however, failed to do so.

¹⁶⁶ Miller, *op cit*, p. 71

¹⁶⁷ 1907 Hague Convention IV: Regulations.

¹⁶⁸ *ibid*

¹⁶⁹ Miller, *loc cit*.

¹⁷⁰ Sassoli, *op cit*, p. 667.

¹⁷¹ See Kramer and Michalowski, *op cit*, p. 432 for a discourse on occupation and international humanitarian law crimes.

It is important to note that a State commits an internationally wrongful act not only when its actions breach an international obligation, but when it fails to act by omission to prevent such a breach.¹⁷² Despite the extensive strategies employed by the United States government in the months following the looting,¹⁷³ the United States still breached its obligation under international law to prevent the commission of cultural crimes in Iraq. It can be said that the United States consequently failed by omission to prevent the commission of these crimes.



¹⁷² Miller, *ibid.*

¹⁷³ From May 2003, the United States government agencies commenced with rehabilitation efforts in Iraq. By mid-July 2003, the United States Department of State proposed an extensive programme of activity to preserve Iraq's cultural heritage. In addition hereto, vast amounts of funds were made available to support projects to rebuild Iraq's cultural heritage. See Johnson, *op cit*, p. 9sq in this regard.

CHAPTER 6

Conclusions and Recommendations

6.1 Recommendations

The looting of the National Museum in Iraq, Baghdad during the United States led war in 2003 is only one of the most recent examples of the depredation of cultural property that can be part of the human cost of war.¹⁷⁴ Read in conjunction with chapter three of this research paper, the Iraqi example suggests that the international frameworks dealing with the protection of cultural property suffers from a number of weaknesses, which will briefly be assessed and recommendations put forth.¹⁷⁵

The most critical change that needs to occur, *à présence*, is that States which are regularly engaged in international armed conflicts, such as the United States, opt for ratification of the 1954 Hague Convention.¹⁷⁶ Despite the fact that this research paper suggested that 1954 Hague Convention has reached the status of customary international law,¹⁷⁷ the ratification of the Convention would certainly clarify the obligations of the United States military. I agree with Gerstenblith's submission, in that ratification of the Convention by the United States would encourage, *inter alia*, better preparation during war planning and concrete gathering of information as to the locations of cultural sites in a war zone.¹⁷⁸ This would, subsequently, avoid the last-minute efforts to obtain the

¹⁷⁴ The Permanent Court of Arbitration: Peace Palace Papers 'Resolution of Cultural Property Disputes' edited by the International Bureau of the Permanent Court of Arbitration. <http://www.pcacpa.org/ENGLISH/RP/#Resolution%20of%20Cultural%20Property%20Disputes>. (accessed on 30 September 2006)

¹⁷⁵ In an attempt not to confuse the reader, the research paper shall only discuss a limited number of shortcomings and recommendations thereto, *vis-à-vis* the scope of the research paper.

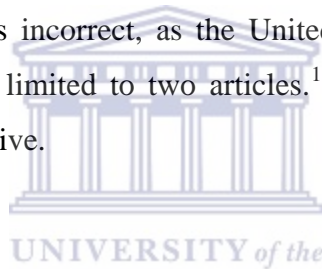
¹⁷⁶ Note that in May 2004, the United Kingdom announced that it has started taken the necessary steps in ratifying the Convention and both Protocols. See Gerstenblith, *loc cit*, and Phuong, *op cit*, p. 4.

¹⁷⁷ See 'The 1954 Hague Convention' at Chapter 5.1.3 *supra*.

¹⁷⁸ Gerstenblith, *loc cit*.

necessary information and minimise the risk that cultural sites may be accidentally targeted.¹⁷⁹

It is also important to note that the events in Iraq have highlighted the urgency in addressing the problem of trafficking in stolen Iraqi cultural property.¹⁸⁰ This, once again, demonstrates the urgency for ratification of the 1954 Protocol. As established in Chapter three *supra*,¹⁸¹ State Parties are required, under the 1954 Protocol, to prevent the exportation of cultural property from occupied territories, take into custody any cultural objects imported either directly or indirectly from occupied territory, and return at the end of the hostilities from occupied territory. It is opined, that due to the fact that the United States is party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,¹⁸² that there is no need for the United States to ratify the 1954 Protocol.¹⁸³ Gerstenblith contends that this perception is incorrect, as the United States' implementation of the 1970 UNESCO Convention is limited to two articles.¹⁸⁴ Thus, the ratification of the 1954 Protocol is indeed imperative.



¹⁷⁹ *Ibid.*

¹⁸⁰ Some items have been recovered, but most remain somewhere on the black market. See J. Warring, 'Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property' *Emory International Law Review*, Vol. 19, 2005, p. 55. Also see the Interpol International Conference on the Cultural Property Stolen in Iraq, available at <http://www.interpol.int/Public/WorkOfArt/Iraq/Minutes.asp>

Although, it is not within the scope of this research paper, I submit that due to the fact that the United States is considered a 'market nation' for the illicit trade in cultural property, it bears a double responsibility in recovering stolen cultural property both on Iraqi and home soil. Positive action on the part of the United States in this regard could ultimately contribute to the restoration of a stronger sense of national identity for the people of Iraq. Furthermore, I opine, and perhaps too overly optimistic at this delicate 'post-war' stage, that ingenuous efforts by the United States in this regard, could have a long-term effect in strengthening diplomatic relations between the United States and the Arab world. For a general discussion on laws regulating the illicit antiquities market, see S.R.M. Mackenzie, 'Dig a bit Deeper: Law, Regulation and the Illicit Antiquities Market' *British Journal of Criminology* May 2005, p. 249.

¹⁸¹ See 'The 1954 Protocol for the Protection of Cultural Property in the Event of Armed Conflict' at Chapter 3.5 *supra*.

¹⁸² Hereinafter referred to as the 1970 UNESCO Convention. Note that the United Kingdom as well as Iraq is also party to this particular Convention.

¹⁸³ See Gerstenblith, *loc cit.* Also see Phuong, *loc cit.*, for a discord on the 1970 UNESCO Convention's within the context of the 2003 Iraq War.

¹⁸⁴ Namely, article 7(b)(i) and article 9. The former provides, that State parties must prohibit the import of cultural property stolen from museums and other public monuments and institutions in another State party, 'provided that such property is documented as appertaining to the inventory of that institution'. Article 9 envisages enhanced cooperation between State parties in the event of a State party's cultural heritage being

I agree with Gerstenblith, in noting, that although the 1954 Hague Convention imposes an obligation on States to prevent looting and vandalism of cultural sites,¹⁸⁵ this obligation is most likely to be interpreted as a constraint on the actions of a particular State's own military.¹⁸⁶ It is clear that the drafters of the 1954 Hague Convention, in all probability, did not anticipate a situation in which the threat to cultural heritage would come from the local population, rather than from the attacking force.¹⁸⁷ This demonstrates that international law should impose an obligation on States to restrain the local population from acts of vandalism, looting and misappropriation of cultural property. Two recommendations may thus be put forth in this regard. Firstly, that a State Party should undertake efforts to the extent feasible under the conditions of active armed conflict to protect cultural sites and monuments from threats of pillage, vandalism and looting, *regardless* of who the actors are.¹⁸⁸ Secondly, that the 1954 Hague Convention needs to clarify that the occupying power has an obligation to prevent looting and vandalism of cultural sites and institutions in situations that are neither active hostilities nor formal occupations.¹⁸⁹ This would therefore call for an expansion of the obligations of occupying powers in respect of long-term occupations and the duty to provide affirmative protection for cultural sites, monuments and repositories.¹⁹⁰

The protection of cultural property is ultimately left in the hands of governments, legislatures and national military authorities. The sustained protection of cultural property during wartime is dependant on the political will of nations to enact domestic legislation. There remains, however, a general reluctance by States to do so. States that have not signed the conventions promise the protection of cultural property whereas

in immediate danger of pillage. Such cooperation may thus include the imposition of import and export controls. See Phuong, *op cit*, p. 90*seq.*

¹⁸⁵ Article 4 of the 1954 Convention. See Chapter 3 *supra*.

¹⁸⁶ Gerstenblith, *loc cit*.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ A timeline would be useful in making such an assessment. According to Gerstenblith, *loc cit*, this would be in the time period after the United States authorities gained control of Baghdad but before the occupation was formally recognised by the United Nations on 22 May 2003.

¹⁹⁰ Gerstenblith, *loc cit*.

nations that do sign and ratify the cultural property conventions¹⁹¹ do not always adhere to the principle of *pacta sunt servanda*. It is indeed worrisome that many States are merely paying lip-service to their commitment to cultural property protection.¹⁹²

Despite the efforts of the international community and all the developments that have taken place in the last decades in the field of cultural property protection, one element remains common to all cases of destruction: the failure of the justice system to prosecute and punish those who are responsible.¹⁹³ Given the magnitude of the problem relating to the destruction of cultural property, it is surprising how little jurisprudence there exists in this particular field.¹⁹⁴

Ad hoc criminal tribunals have created some progress in establishing criminal responsibility.¹⁹⁵ Furthermore, the Rome Statute of the International Criminal Court¹⁹⁶ provides for the jurisdiction for war crimes.¹⁹⁷ Implicit herein is the extensive destruction of cultural property.¹⁹⁸ This research paper, established that the United States was under a responsibility under international occupation law, to foresee that the looting would occur.¹⁹⁹ Despite adequate warnings given prior to the invasion of Iraq, the United States subsequently failed to plan for the cultural tragedies that ensued.

¹⁹¹ Since the entry into force of the 1954 Convention, two additional UNESCO treaties have contributed to the international law on cultural property. Although there only brief references to armed conflict, they are namely, the 1970 UNESCO Convention, *supra*, and the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage.

¹⁹² I agree with Paroff's, assertion, *op cit*, p. 2054, in that the international laws protecting cultural property will only be truly effective once the great nations of the world decide that such property of worth protecting and act upon that decision.

¹⁹³ Zgonjanin, *op cit*, p. 141.

¹⁹⁴ I submit that this could perhaps be as a result of the protracted and politicised nature of these cases. According to the International Bureau of the Permanent Court of Arbitration, many of the Holocaust-era cases of looted or stolen art remain unresolved and continue to emerge. See Permanent Court of Arbitration Peace Palace Papers *loc cit*. Also see M. Sassoli and A. Bouvier, *How does Law protect in War?* First Edition, ICRC, 1999, pp. 168, 193, 989 and 1022 in this regard.

¹⁹⁵ Namely, article 3(d) of the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia. See Abathi, *loc cit*, for a discussion on the protection of cultural property during armed conflict and the practice of the ICTY. Also see Sandholtz, *op cit*, 224 on the indictment charges against Slobodan Milosevic, *vis-à-vis*, destruction of cultural property.

¹⁹⁶ The 1998 Rome Statute of the International Criminal Court entered into force on 1 July 2002.

¹⁹⁷ The war crimes provisions, for both international and non-international armed conflict, can be found in article 8 of the Statute

¹⁹⁸ See Article 8(2)(a)(iv). Also see articles 8(2)(b)(ix), 8(2)(b)(xii) and 8(2)(b)(xvi)

¹⁹⁹ See 'International Law of Occupation and the Protection of Cultural Property', at Chapter 5.2 *supra*.

Questions of accountability is thus a pressing issue, but as neither Iraq nor the United States is a member of the International Criminal Court, it is most likely that national courts will have jurisdiction to prosecute the 'cultural crimes' committed during the armed conflict in Iraq. One certainly wonders whether this will indeed occur in light of the responses and justifications the United States have put forth for their failure to protect Iraqi cultural property.²⁰⁰ The looting and destruction in that occurred in Baghdad illustrates just how important it is to prosecute individuals responsible for such crimes before memories fade and before more destruction takes place.²⁰¹

Although, this research paper merely scratched the surface in its analysis of the shortcomings and recommendations, one can only hope that the international community firmly review the current cultural property protection laws.

6.2 Conclusion

Events that rouse universal opprobrium also tends to provoke the demands for strengthening and clarifying the rules of law. This is evident if one assesses the evolution of the laws governing the protection of cultural property, as the present research paper has done in Chapters two and three. To summarise, the first step in creating laws solely for the protection of cultural property protection, was the Roerich Pact, which emerged as a result of the cultural losses during the First World War. The Nazi plundering and the cultural tragedies of the Second World War gave way to the first international Hague Convention and Protocol of 1954 devoted to cultural property protection. Building hereon, the cultural atrocities in the former Yugoslavia triggered the process that produced substantial improvements on the 1954 Convention in the form of its Second Protocol, as well as prosecutions at the ICTY for crimes against cultural property.²⁰² The United States led war in Iraq in 2003, once again portrayed that there is indeed room for

²⁰⁰ See Sandholtz *supra* for the responses

²⁰¹ Zgonjanin, *loc cit.*

²⁰² Sandholtz, *op cit*, p. 240 and note 134 *supra*.

the improvement of the existing cultural property protection laws, as was discussed above.

The brazen pillage and destruction of cultural property during times of armed conflict often causes an irretrievable loss of significant information about our universal past. This research paper certainly established that Iraq was home to the greatest collection of Mesopotamian artefacts in the world.²⁰³ The United States *laissez-faire* response to the looting and destruction of these irreplaceable artefacts, is indicative of the fact that the protection of cultural property is not a top political priority. While the oil fields do not have a century of international conventions supporting their protection, the United States prioritised the oil fields over remnants of civilisations past.²⁰⁴ Although, nothing will bring back the thousands of priceless artefacts lost and destroyed in the April 2003 looting, one can only hope that the international community notes the ‘lessons learned’ exercise and bears this in mind, should future conflicts arise.

Finally, the 1954 Hague Convention reassuringly provides us, in its preamble, that the world owns cultural property in a collective sense and that the ancient history of one nation reflects the ancient history of many. Although this is debatable, the fact that we all share a common cultural heritage, regardless of our origin or location, is in my opinion, somewhat consoling, and reaffirms the ancient South African *Nguni* language adage of ‘*Umuntu ngumuntu ngabantu*’.²⁰⁵ Therefore, if we are truly deemed to be an inextricably-bound international community, it is imperative that we honour our responsibilities and take all measures possible to ensure that *our* cultural heritage is accrued with the utmost respect and protection.

²⁰³ See ‘Crimes Against Culture’ at Chapter 4.1 *supra*.

²⁰⁴ Paroff, *op cit*, p. 2054.

²⁰⁵ Translated as ‘We are all people through other people’. The extract was obtained from the ‘One World, One People’ Exhibition at the Origins Centre Museum situated at the University of the Witwatersrand, Johannesburg.

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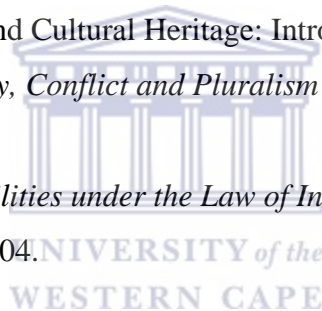
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