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## Notes

# Cultural Apocalypse Now: The Loss of the Iraq Museum and a New Proposal for the Wartime Protection of Museums

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## INTRODUCTION

In April of 2003, the Iraq Museum in Baghdad was looted.<sup>1</sup> Fifteen thousand pieces were stolen and lost to the illicit trade in cultural artifacts.<sup>2</sup> A collaborative effort between international customs agencies, cultural agencies, museum professionals, and universities led to the recovery of thousands of artifacts.<sup>3</sup> However, the repatriation efforts constituted a questionable victory. The museum, as it was before the looting, no longer exists.<sup>4</sup> To date, the recovered objects represent less than fifty percent of the original collection.<sup>5</sup> Many objects were also destroyed in the course of the looting.<sup>6</sup> Items too large for looters to transport were dismembered with chain saws and

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\* J.D. Candidate, 2007, University of Minnesota Law School; B.A., Columbia University, 2003. I would like to thank my family and friends for their support, even though they will probably never read beyond this page.

1. THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD: THE LOST LEGACY OF ANCIENT MESOPOTAMIA 1 (Milbry Polk & Angela M. H. Schuster eds., 2005) [hereinafter LOOTING OF THE IRAQ MUSEUM].

2. *Id.* at 1, 8.

3. *Id.* at 2.

4. *Id.* at 9.

5. *Id.* at 2.

6. *Id.*

sledgehammers.<sup>7</sup> During the United States' invasion that served as a catalyst for the looting, the museum building itself sustained severe structural damage but miraculously escaped total destruction.<sup>8</sup> The Iraq Museum was much more than a repository of objects; it was a record of human progress.<sup>9</sup> It held some of the greatest treasures from ancient Mesopotamia, the birthplace of civilization.<sup>10</sup> The loss of the museum was devastating, not just for Iraq, but for the entire world.

This Note explores international law regarding the protection of museums during armed conflict. Part I will briefly discuss the history of looting, the theft of cultural property, and the development of international safeguards for museums. Part II critiques post-World War II international responses to the looting of museums by examining the recent case of the looting of the Iraq Museum. This section also stresses the importance of protecting museums in times of war, rather than waiting for the dispersal of museum collections to occur before attempting any action. This Note concludes that international safeguards for cultural property have been ineffective in protecting museums, argues that international law should cease to treat museums as necessary casualties of war, and proposes ways to provide greater protection to museums during times of armed conflict.

## I. WARTIME LOOTING OF MUSEUMS AND TRADITIONAL INTERNATIONAL RESPONSES

### A. TO THE VICTORS GO THE SPOILS: LOOTING

The theft or destruction of cultural artifacts during wartime is a longstanding practice.<sup>11</sup> Nations have often waged wars primarily for the purpose of pillaging.<sup>12</sup> There is no greater sign

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7. *Id.* at 8.

8. *See id.*

9. *Id.* at 5.

10. *Id.*

11. Charles de Visscher, "International Protection of Works of Art and Historic Monuments," U.S. Department of State, *Documents and State Papers* 821, 823 (June 1949).

12. Jeanette Greenfield, "The Spoils of War," in *THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* 34, 35 (Elizabeth Simpson ed., 1997) [hereinafter *THE SPOILS OF WAR*] (describing the Crusades, which were ostensibly holy missions, but were predominantly excuses to pillage the rich lands from Central Europe to Jerusalem).

of crushing defeat than the loss of national treasures, while bringing home the spoils of conquest shows complete victory.<sup>13</sup> Museums, as places where valuable cultural artifacts are stored for safekeeping, are a natural target for invaders and looters.<sup>14</sup> It may seem preposterous to make the protection of museums a priority in times of war, when human beings are dying and the fates of nations hang in the balance. However, museum looting is among the most long lasting and supremely devastating effects of wartime destruction.<sup>15</sup> The true impact of looting is not recognized until much too late. The protection of museums in times of war may help to prevent cultural obliteration, lead to better rebuilding after war, and preserve museum collections for future generations. Such protection can also improve post-war international relations, by allowing a war-torn populace to draw strength and perspective from its own cultural history.

The history of museum looting in times of war begins with the legendary destruction of the Great Library of Alexandria, housed in a museum quite dissimilar from the modern conception of a museum.<sup>16</sup> The Great Library was the first library of its kind, and the grandest library of the ancient world.<sup>17</sup> The Museum was predominantly a center for learning, a place to serve the Muses.<sup>18</sup> Unlike earlier temples dedicated to the Muses, this Museum was dedicated to practicing the Muses' arts and storing the resulting works.<sup>19</sup> Members of the Museum were accomplished poets, scholars, writers and scientists.<sup>20</sup> The members lived and worked together, with the greatest works of the ancient world at their fingertips.<sup>21</sup> The

13. Visscher, *supra* note 11, at 823.

14. CECIL GOULD, TROPHY OF CONQUEST: THE MUSÉE NAPOLEON AND THE CREATION OF THE LOUVRE 13 (1965).

15. See LOOTING OF THE IRAQ MUSEUM, *supra* note 1, at 5. The looting of the Iraq Museum was not merely the loss of an Iraqi cultural institution; it was the loss of a record of 10,000 years of civilization. In any case where a part of the human experience is destroyed, the cost is global.

16. The meaning of the word "museum" has changed over time. The modern definition of a museum is "[a]n institution for the acquisition, preservation, study, and exhibition of works of artistic, historical, or scientific value." WEBSTER'S II NEW COLLEGE DICTIONARY 722 (Margery S. Berube et al. eds., 1995). The Greek word *mouseion*, from which the English word *museum* was derived, means "of the Muses." *Id.*

17. LIONEL CASSON, LIBRARIES IN THE ANCIENT WORLD 31 (2001).

18. KONSTANTINOS SP. STAIKOS, THE GREAT LIBRARIES: FROM ANTIQUITY TO THE RENAISSANCE (3000 B.C. TO 1600 A.D.) 62-63 (Timothy Cullen trans., 2000).

19. CASSON, *supra* note 17, at 33.

20. *Id.*

21. MATTHEW BATTLES, LIBRARY: AN UNQUIET HISTORY 28-30 (2003).

papyrus scrolls in the various buildings of the complex totaled over 500,000.<sup>22</sup>

The famous fire that is rumored to have destroyed the Museum and Library of Alexandria took place in 48 B.C.<sup>23</sup> That year, Julius Caesar crossed the Rubicon and became involved in Cleopatra's war against her brother, Ptolemy XIII, for the throne.<sup>24</sup> Outnumbered and cornered, Caesar burned the ships in the harbor of Alexandria to forestall any attempt by Ptolemy XIII to take back the city by sea.<sup>25</sup> The fire is supposed to have spread to the city, destroying the Museum and the Library.<sup>26</sup>

The Museum of Alexandria and other museums of the ancient world were not repositories of cultural artifacts.<sup>27</sup> Until the birth of the modern museum, objects of value were stored in—and looted from—temples, palaces, churches, and monasteries.<sup>28</sup> During the Renaissance, the discovery of long-buried classical artifacts in Rome fueled a desire for collection and preservation previously unknown.<sup>29</sup> The treasures unearthed by the wealthy and powerful were placed in private collections that would eventually become the first museums.<sup>30</sup>

These early collections were basically gatherings of assorted artifacts maintained by prosperous individuals in private residences.<sup>31</sup> Collection owners invited educated and accomplished guests to view their pieces, but kept the contents largely to themselves.<sup>32</sup> It was not until the late eighteenth century that these private collections were transformed into public museums.<sup>33</sup> So it was, that over time, the word *museum* came to mean “a collection of objects of art, of monuments of

22. See CASSON, *supra* note 17, at 36. Some estimates place the number of scrolls at over 700,000. STAIKOS, *supra* note 18, at 70.

23. CASSON, *supra* note 17, at 45. There is some dispute over the timing of the destruction of the library. *Id.* Some scholars believe that Caesar caused only minor damage to the library, and that it merely fell into disuse over the next few centuries. *Id.* at 46. In this scenario, the library would have been destroyed along with much of Alexandria during Emperor Aurelian's siege of the city in 270 A.D. *Id.*

24. *Id.* at 45–46.

25. See BATTLES, *supra* note 21, at 23–24.

26. See CASSON, *supra* note 17, at 46.

27. 1 DAVID MURRAY, *MUSEUMS: THEIR HISTORY AND THEIR USE 1* (Routledge/Thoemmes Press 1996) (1904).

28. See Greenfield, *supra* note 12, at 35.

29. MURRAY, *supra* note 27, at 13.

30. *Id.* at 13, 18.

31. See *id.* at 78–101.

32. See *id.* at 78–101.

33. GOULD, *supra* note 14, at 13 (discussing the conversion of royal collections in Florence, Vienna and Stockholm into public museums).

antiquity or of specimens of natural history, mineralogy, and the like, and generally of what were known as 'rarities' and 'curiosities.'<sup>34</sup>

In pre-Revolutionary France, as elsewhere, art and cultural artifacts were almost entirely under the control of the Church and the Crown.<sup>35</sup> During the revolution of 1789, French revolutionaries seized these holdings, and made them the property of the French people.<sup>36</sup> In 1793, the Louvre was opened as a public museum, boasting the best of French royal and ecclesiastical art treasures.<sup>37</sup>

Although the Louvre contained many beautiful works, the French remained unsatisfied, and their subsequent European campaigns became as much about cultural expropriation as territorial expansion.<sup>38</sup> Only one year after the opening of the Louvre, a shipment of stolen art arrived from Belgium and was placed in the new museum.<sup>39</sup> The brutally systematic looting of Belgium<sup>40</sup> established a procedure for looting a conquered state that would be followed throughout the Napoleonic Wars.<sup>41</sup>

The scrupulously planned Napoleonic invasions placed great emphasis on the loot expected for each prospective conquest.<sup>42</sup> A newly-formed military commission created a catalogue of artifacts that might be found in a given country.<sup>43</sup> Napoleon especially desired to conquer Italy, not for land, but for its vast wealth of art and cultural artifacts.<sup>44</sup> This aspiration was not motivated by a love of art, only the desire to achieve total French domination of the European continent.<sup>45</sup> Subjugation of Italy, the cultural center of Europe, could only be complete once its treasured objects were removed to the Louvre.<sup>46</sup> So began a new era of looting, in which conquering nations emptied the museums of other countries to fill their own.

Due to increasing concern over protecting cultural property

34. MURRAY, *supra* note 27, at 35–36.

35. GOULD, *supra* note 14, at 13.

36. *Id.*

37. *Id.*

38. Greenfield, *supra* note 12, at 35.

39. GOULD, *supra* note 14, at 30.

40. Visscher, *supra* note 11, at 824.

41. GOULD, *supra* note 14, at 41–43.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 43.

46. *Id.*

after the defeat of Napoleon, looting proved to be a minor issue in the wars of the next century.<sup>47</sup> For instance, the territorial stalemate that occurred during World War I forestalled any plans for extensive looting during that war.<sup>48</sup> However, despite new protection of cultural artifacts, the Napoleonic looting model would be extensively and ruthlessly employed by the Nazis during World War II.<sup>49</sup>

Unlike Napoleon, Hitler had a certain appreciation of art, having been an unsuccessful artist himself.<sup>50</sup> He was also very aware of the power represented by cultural, as well as physical, domination. After visiting Paris for the first time in 1940, Hitler remarked, "Wasn't Paris beautiful? . . . Berlin must be made far more beautiful. . . . In the past I often considered whether we would not have to destroy Paris. But when we are finished in Berlin, Paris will be but a shadow."<sup>51</sup> To fulfill Hitler's destructive and egomaniacal dream, the Nazis seized treasures from across Europe.<sup>52</sup> Since the Nazi army had a policy against looting, separate branches of government evolved to manage Nazi looting procedures.<sup>53</sup> Hitler established the Einsatzstab Richtsleiter Rosenberg<sup>54</sup> and the Dienststelle Mühlmann<sup>55</sup> for the sole purpose of confiscating art to glorify the Third Reich.<sup>56</sup> In the Napoleonic tradition of systematically plundering conquered cities, the Nazi seizure of art and artifacts took place with an efficiency and thoroughness previously unseen.<sup>57</sup>

The Nazi cultural program had two facets: confiscation and

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47. JOHN HENRY MERRYMAN & ALBERT E. ELSER, LAW, ETHICS AND THE VISUAL ARTS 25 (Kluwer Law Int'l 1998) (1979).

48. See GARY JONATHON BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 82-83 (2000). As in most wars, there was some looting. *Id.* At the beginning of World War I, the French seized art from German nationals living in France. HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART 28 (BasicBooks 1997) (1995). German troops also sacked a few French towns. BASS, at 88. However, such relatively minor looting activity is outside the scope of this article.

49. See generally FELICIANO, *supra* note 48, at 24-30.

50. *Id.* at 17-18.

51. *Id.* at 17.

52. *Id.* at 16.

53. MERRYMAN & ELSER, *supra* note 47, at 26-27.

54. GERARD AALDERS, NAZI LOOTING: THE PLUNDER OF THE DUTCH JEWRY DURING THE SECOND WORLD WAR 43 (Arnold Pomerans & Erica Pomerans trans., 2004).

55. *Id.*

56. *Id.* at 45.

57. See FELICIANO, *supra* note 48, at 15.

destruction.<sup>58</sup> Nazis emptied Western European museums, designating seized art the property of the Third Reich.<sup>59</sup> Hitler planned to house some of these works in a never-realized Nazi museum of art, while others entered the private collections of high-ranking Nazis, and still more disappeared on the black market.<sup>60</sup> Jewish and Eastern European cultural artifacts suffered a different, irreversible fate.<sup>61</sup> Beginning in Germany, art owned by Jewish families or created by Jewish artists was seized, sold, or generally destroyed.<sup>62</sup> During the ensuing occupations, "substandard" works of art produced by "inferior" Eastern Europeans were to be eradicated along with the people themselves, their culture, and their language.<sup>63</sup> In all, the Nazis destroyed over one-half million objects.<sup>64</sup>

Since the days of antiquity, looting has been a commonplace facet of war.<sup>65</sup> It has been used as a method of compensating soldiers,<sup>66</sup> and as a way to demonstrate victory.<sup>67</sup> Roman law considered cultural artifacts *res nullius* during war.<sup>68</sup> Although the Nazi plunder of Europe was essentially conducted in this Roman tradition, the conception that art becomes ownerless during war has changed over the centuries.<sup>69</sup> The next section will discuss these developments for the protection of cultural artifacts.

## B. TO THE CONQUERED RETURN THE SPOILS: REPATRIATION

The tradition of looting is as old as war.<sup>70</sup> However, as long as artwork and antiquities have been pillaged, there has been considerable unease about the practice.<sup>71</sup> Over time, anti-looting sentiments became the foundations for international law regarding the protection of cultural artifacts.

Perhaps the earliest condemnation of looting practices, and

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58. *Id.* at 16.

59. *Id.*

60. *Id.* at 15–16.

61. *Id.* at 16.

62. MERRYMAN & ELSEN, *supra* note 47, at 26.

63. FELICIANO, *supra* note 48, at 16.

64. Greenfield, *supra* note 12, at 38.

65. AALDERS, *supra* note 54, at 11.

66. *Id.*

67. GOULD, *supra* note 14, at 43.

68. AALDERS, *supra* note 54, at 11.

69. Greenfield, *supra* note 12, at 38.

70. GOULD, *supra* note 14, at 13.

71. Visscher, *supra* note 11, at 823.



the first attempt to differentiate cultural artifacts from other riches, may be found in the writings of the Greek historian Polybius.<sup>72</sup> After the Roman conquest of Greece, Polybius wrote:

One may perhaps have some reason for amassing gold and silver; in fact, it would be impossible to attain universal dominion without appropriating these resources from other peoples, in order to weaken them. In the case of every other form of wealth, however, it is more glorious to leave it where it was, together with the envy which it inspired, and to base our country's glory, not on the abundance and beauty of its paintings and statues but on its sober customs and noble sentiments. Moreover, I hope that future conquerors will learn from these thoughts not to plunder the cities subjugated by them, and not to make the misfortunes of other peoples the adornments of their own country.<sup>73</sup>

Despite this moving protest, no legal protection for cultural artifacts existed for many centuries thereafter.<sup>74</sup> The Roman tradition of parading the cultural spoils of war denigrated by Polybius was revived in the Renaissance, along with the interest in all things ancient.<sup>75</sup> The looting of cultural artifacts during wartime was, for all practical purposes, a perfectly acceptable part of customary international law in that era.<sup>76</sup>

During the eighteenth century, a new theory of war eliminated plunder as a secondary military objective.<sup>77</sup> This was not due to any new legal protections for cultural artifacts, but rather due to an increased concentration on destroying an enemy's military capabilities.<sup>78</sup> However, by the nineteenth century, widespread concern about looting reemerged,<sup>79</sup> primarily as a result of the Napoleonic Wars and the concurrent French cultural conquest of Europe.<sup>80</sup> In opposition to the French looting policies, Quatremère de Quincy argued eloquently for a universal republic of arts and sciences:

[T]he concern of all parts in the preservation of the whole . . . is a concern for civilization, for perfecting the means of attaining happiness and pleasure, for the advancement and progress of education and reason: in a word, for the improvement of the human race. Everything

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72. *Id.*

73. POLYBIUS, *THE HISTORIES* (n.p. n.d.), reprinted in Visscher, *supra* note 11, at 823.

74. Visscher, *supra* note 11, at 823.

75. *Id.*

76. *See id.*

77. *Id.* at 824.

78. *See id.*

79. MERRYMAN & ELSEN, *supra* note 47, at 25.

80. *See Greenfield, supra* note 12, at 35.

that can help toward this end belongs to all peoples; no one of them has the right to appropriate it for itself, or to dispose of it arbitrarily.<sup>81</sup>

Quatremère de Quincy's idealist view did not stop French plunder of Europe. However, he and likeminded critics forced the French government to invent a rationale for the looting.<sup>82</sup>

As a result, French looting procedures became a blend of ancient barbarism and modern international law practices.<sup>83</sup> Often, artifacts were stolen incident to occupation, without further justification.<sup>84</sup> With increasing criticism of such behavior, the French conquerors sought to legitimize the seizures.<sup>85</sup> They lamented deterioration of great works of art in other countries, claiming only the superior French restorers could save them.<sup>86</sup> Of course, rather than being returned to their original museums, these "restored" works of art permanently became a part of the Louvre collection.<sup>87</sup> The French also justified the seizures using more formal legal means.<sup>88</sup> For example, occasionally they used reparations as a justification to confiscate artwork.<sup>89</sup> In Italy, the French experienced the strongest resistance to the removal of cultural artifacts, leading them to obtain title to the pieces in formal post-invasion peace treaties.<sup>90</sup>

Immediately after Napoleon's first defeat and abdication in 1814, the former owners of plundered artifacts sought the return of their property.<sup>91</sup> A convoy containing pictures seized from Spain was halted just over the French border.<sup>92</sup> Pope Pius VII was able to negotiate the restoration of his archives and papers.<sup>93</sup> After Napoleon's final defeat at Waterloo in 1815, however, negotiations ceased.<sup>94</sup> The Congress of Vienna

81. *Lettres au général Miranda sur le préjudice qu'occasioneraient aux arts et à la science le déplacement des monuments de l'art de l'Italie, le démembrement de ses Écoles et la spoliation de ses collections galeries, musées, etc., 1796, reprinted in Visscher, supra note 11, at 824.*

82. *See GOULD, supra note 14, at 67–68.*

83. *See Visscher, supra note 11, at 824–25.*

84. *See id.* at 824.

85. *See id.* at 824–25.

86. *GOULD, supra note 14, at 68.*

87. *See id.*

88. *See Visscher, supra note 11, at 824–25.*

89. *Id.* at 825.

90. *Id.* at 824–25.

91. *See Dorothy Mackay Quynn, The Art Confiscations of the Napoleonic Wars, 50 AM. HIST. REV. 437, 445 (1945).*

92. *Id.* at 443.

93. *Id.* at 446.

94. *See GOULD, supra note 14, at 117.*

mandated the return of many more of the treasures.<sup>95</sup> It was the first attempt by conquered peoples to reclaim stolen objects and the first international attempt to repatriate cultural artifacts.<sup>96</sup>

The French, meanwhile, saw the *repatriations* as illegal seizures.<sup>97</sup> They pointed to treaties made with conquered states, claiming the artifacts had been legally acquired.<sup>98</sup> The Allies categorically refused to honor the purported transfers of title, believing such transfers were made under duress.<sup>99</sup> For the first time, both conqueror and conquered appealed to international legal norms to justify both looting and repatriation.<sup>100</sup>

Unfortunately, returning everything was not that simple.<sup>101</sup> Not all of the artifacts survived the long and hazardous journey to France, let alone the return trip.<sup>102</sup> The director-general of the Louvre challenged every claim of previous ownership, and as a result, many of the plundered artifacts remained in France.<sup>103</sup> Some of the artwork was sold, and the new owners refused to give up their possessions.<sup>104</sup> For example, Tsar Alexander I purchased a great deal of the looted artwork from France, and refused to participate in the repatriation efforts.<sup>105</sup> Since attempts to restore plundered artifacts were largely unsuccessful, the international community began to reconsider the role of pillaging in times of war.

The devastating effect of museum looting on cultural identity during the Napoleonic Wars marked the beginning of increasing international concern over the possible illegality of

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95. See Greenfield, *supra* note 12, at 35-36.

96. See Visscher, *supra* note 11, at 826.

97. See Quynn, *supra* note 91, at 459.

98. *Id.*

99. See Visscher, *supra* note 11, at 826.

100. See *id.* at 825-26.

101. See GOULD, *supra* note 14, at 62.

102. See *id.* ("The transport of huge quantities of fragile, infinitely precious and in some cases very large and heavy objects away from the climatic conditions to which they had grown accustomed, under the noses of a hostile populace, exposed to extremities of heat, cold and damp, over primitive roads at the mercy of brigands, or seas controlled by corsairs or the British navy, in some cases over the Alps—this would have constituted a challenge worthy of the organizing powers of Bonaparte himself and of the devoted resourcefulness of his staff. Anyone with experience of moving works of art might well consider it criminal lunacy to even make the attempt.")

103. *Id.* at 118, 128.

104. See Quynn, *supra* note 91, at 459-60.

105. See *id.*

looting.<sup>106</sup> Reparation efforts after the wars became the basis for a “very general principle of the integrity of the artistic heritage of conquered nations.”<sup>107</sup> Under this rubric, even theoretically legal means of acquisition, such as treaties made during occupation, were considered unlawful.<sup>108</sup>

During the rest of the nineteenth century, countries further developed this new legal condemnation of looting.<sup>109</sup> In 1863, President Lincoln promulgated Instructions for the Government of Armies of the United States in the Field, also known as the Lieber Code.<sup>110</sup> Article 35 stated “Classical works of art . . . must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.”<sup>111</sup> These ideas spread to Europe, where the wartime protection of cultural artifacts became a customary rule of international law.<sup>112</sup>

The first attempt to create an *international* agreement on the protection of museums and cultural artifacts was the 1874 Declaration of Brussels, organized by Russia and involving a total of fifteen states.<sup>113</sup> One part of the declaration stated:

The property of parishes (communes), or establishments devoted to religion, charity, education, arts and sciences, although belonging to the State, shall be treated as private property. Every seizure, destruction of, or willful damage to, such establishments, historical monuments, or works of art or of science, should be prosecuted by competent authorities.<sup>114</sup>

However, Great Britain resisted and the multilateral convention never became binding on the parties.<sup>115</sup> In 1880, the Institute of International Law created the Manual of the Laws

106. See MERRYMAN & ELSÉN, *supra* note 47, at 25.

107. Visscher, *supra* note 11, at 826.

108. See *id.*

109. See *id.* at 827.

110. Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, Apr. 24, 1863 [hereinafter The Lieber Code], reprinted in THE SPOILS OF WAR, *supra* note 12, at 272–73.

111. *Id.* art. 35.

112. See Visscher, *supra* note 11, at 827. (“From the sixteenth century on, the claims of pillaged cities and countries became numerous: coinciding with the awakening of national feeling, those claims attest the depth of their resentment. During the nineteenth century, the doctrine of international law was accepted by all.”)

113. MERRYMAN & ELSÉN, *supra* note 47, at 25.

114. Declaration of Brussels art. 8, 1874, reprinted in MERRYMAN & ELSÉN, *supra* note 47, at 25.

115. MERRYMAN & ELSÉN, *supra* note 47, at 25.

and Customs of War.<sup>116</sup> The manual affirmed that institutions devoted to the arts and sciences could not be seized, and emphasized that causing damage to these institutions was forbidden, except when militarily necessitated.<sup>117</sup>

Between 1899 and 1907, similar protections of museums and cultural artifacts were integrated into binding international agreements in a series of conventions that took place in The Hague.<sup>118</sup> The fourth of these conventions established that "seizure [or] destruction or willful damage" to cultural institutions or artifacts "is forbidden, and should be made the subject of legal proceedings."<sup>119</sup> So, by the start of the twentieth century, looting was condemned throughout the West and prohibited by international rules on the law of war.<sup>120</sup>

These developments led to a new kind of restitution process in the aftermath of World War I.<sup>121</sup> In the Treaties of Versailles and Saint-Germaine, the Triple Entente mandated the return of cultural artifacts from the Central Powers.<sup>122</sup> Surprisingly, the objects sought to be returned had not been stolen in the course of this war.<sup>123</sup> They were objects *previously* acquired by Central Power states and now returned to their countries of origin as reparations for losing this war.<sup>124</sup> Even more incredibly, these returned artifacts had not necessarily been seized illegally by Germany and its allies in past wars or invasions.<sup>125</sup> Rather, some of the returned objects had been acquired by these states through entirely legal means, such as a direct sale.<sup>126</sup> These reparations even more firmly solidified the international condemnation of looting during wartime and affirmed the

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116. *Id.* The agreements included a Convention on Pacific Settlement of International Disputes, an 1899 Convention on Laws and Customs of War on Land, and a 1907 Convention on Laws and Customs of War on Land. *Id.* at 25–26.

117. Institute of International Law Manual of the Laws and Customs of War art. 53, 1880, reprinted in MERRYMAN & ELSEN, *supra* note 47, at 25–26.

118. MERRYMAN & ELSEN, *supra* note 47, at 26.

119. Hague IV, 1907, reprinted in MERRYMAN & ELSEN, *supra* note 47, at 26.

120. *See* Visscher, *supra* note 11, at 829.

121. *See id.* at 827.

122. *Id.* at 829.

123. *Id.*

124. *See id.* Germany was forced to return certain historical artifacts and works of art seized from France during the war of 1870–1871. Treaty of Peace with Germany art. 245, June 28, 1919, T.S. 658 [hereinafter Treaty of Versailles].

125. Visscher, *supra* note 11, at 829.

126. *Id.* Germany also had to restore the original Koran of the Caliph Othman to the King of the Hedjaz, which had been presented to Wilhelm II by Turkish authorities. Treaty of Versailles, *supra* note 124, art. 246.

importance of the unity of museum collections.<sup>127</sup> Artifacts were seen as remaining tied to a specific culture regardless of how long they were kept in another country.<sup>128</sup>

The Nazis were especially attuned to this idea.<sup>129</sup> In the infamous Kümmel report, the Nazis claimed title to every piece of artwork that ever had any connection with Germany.<sup>130</sup> As if in answer to Napoleon, Hitler demanded the return of all cultural artifacts that had been removed beyond German borders, whether by looters or by sale.<sup>131</sup>

For the most part, however, the Nazis looted museums in country after country, without any attempt to justify their actions by couching their pillaging in legal terms.<sup>132</sup> They reverted to an ancient form of looting, seizing artifacts as an incidental part of conquest.<sup>133</sup> Nazi pillaging was particularly atrocious when considered against the movement towards developing international law safeguards for cultural artifacts in the nineteenth century.<sup>134</sup> By the end of World War II, the cultural treasures of Europe had been scattered and destroyed, and the international legal community was faced with serious problems regarding restitution and reparation.<sup>135</sup>

Initial restitution efforts were far from successful.<sup>136</sup> One serious problem was the number of pillaged pieces, since millions of cultural artifacts had been forcibly relocated during the war.<sup>137</sup> In some cases, there was nothing to return, as hundreds of thousands of cultural artifacts were also

127. See Visscher, *supra* note 11, at 828.

128. See *id.*

129. See generally FELICIANO, *supra* note 48, at 24–30.

130. See *id.* at 24–26.

131. See *id.* at 26–29.

132. See Visscher, *supra* note 11, at 828.

133. KENNETH D. ALFORD, *THE SPOILS OF WORLD WAR II: THE AMERICAN MILITARY'S ROLE IN STEALING EUROPE'S TREASURES* 278 (1994).

134. See Greenfield, *supra* note 12, at 38.

135. See MERRYMAN & ELSEN, *supra* note 47, at 26–27.

136. See Michael J. Bazylar & Roger P. Alford, *Introduction*, in *HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY* 1, 2–3 (Michael J. Bazylar & Roger P. Alford eds., 1997) [hereinafter *HOLOCAUST RESTITUTION*]. (“With hundreds of thousands of pieces of art confiscated by the Nazis during the war, the Allies’ approach was one of repatriation to the country of origin, with each government responsible for the ultimate return of the art to the rightful owners. Not surprisingly, many governments did not rigorously pursue this objective, leaving thousands of pieces of looted art subject to claims for restitution by their previous owners.”)

137. See LYNN H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* 407 (1994).

destroyed.<sup>138</sup> Furthermore, given the unfathomable proportions of the Holocaust, there were often no owners to whom the specific pieces could be returned.<sup>139</sup> To make the situation even more complicated, during the post-war occupation American and Russian soldiers became just as adept at looting as the Germans.<sup>140</sup> Following the Nazi example, the conquering Allies invaded German museums and stole cultural artifacts.<sup>141</sup> For that reason, Allied forces were not entirely interested in promoting the general return of cultural artifacts, preferring to keep the artifacts in their own museums.<sup>142</sup> Many items remain missing, so restitution efforts continue to this day.<sup>143</sup>

In fact, it is only in the past few decades that the Holocaust restitution movement has really gained momentum.<sup>144</sup> Unlike other foci of the movement,<sup>145</sup> the restitution of looted art has occurred slowly, one piece at a time.<sup>146</sup> The first part of the process, locating the piece of art, has been aided with the advent of computers and the Internet.<sup>147</sup> There are also entities, such as the New York State Banking Department's Holocaust Claims Processing Office, which specialize in recovering art stolen from Holocaust victims.<sup>148</sup> However, even after survivors or their heirs locate a specific piece of lost art in a museum or private collection, there is a great deal of time and expense involved.<sup>149</sup> Each claim must be investigated thoroughly to secure the proper documentation and establish the Holocaust-era provenance of

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138. Greenfield, *supra* note 12, at 38.

139. See Monica S. Dugot, *The Holocaust Claims Processing Office: New York State's Approach to Resolving Holocaust-Era Art Claims*, in HOLOCAUST RESTITUTION, *supra* note 136, at 271–72. The heirs of Holocaust victims have been the primary beneficiaries of the recent Holocaust restitution movement. See *id.*

140. *Id.*

141. *Id.*

142. ALFORD, *supra* note 133, at xi.

143. NICHOLAS, *supra* note 137, at 443.

144. See Bazylar & Alford, *supra* note 136, at 2–3. After Germany paid Holocaust survivors over \$50 billion in 1952, some considered restitution completed. *Id.* This view failed to take into account the looted art, dormant Swiss bank accounts, confiscated insurance policies, and many other aspects of Holocaust restitution. *Id.*

145. See *id.* at 3–4. There have been major settlements for Holocaust survivors and their heirs in insurance, banking, and slave labor litigation. *Id.*

146. Dugot, *supra* note 139, at 273. (“Given that each art claim involves a specific and identifiable object, art claims have been resolved on a case-by-case basis.”)

147. See, e.g., The Art Loss Register, <http://www.artloss.com> (last visited Sept. 23, 2006). The Register traces art looted by the Nazis. See *id.*

148. See Dugot, *supra* note 139, at 272.

149. See *id.* at 272–73.

the artifact.<sup>150</sup> Then follows an extended negotiation or litigation period, after which, if the claim is valid and compelling, the object might be returned.<sup>151</sup> Needless to say, the Holocaust art restitution process is a difficult one, and no matter how many items are restored, it will never be a complete success.

After the Second World War, the international community began to develop a new framework for the protection of cultural artifacts, which remains in force today. These major international legal protections for museums in times of war were developed by the United Nations Educational, Scientific and Cultural Organization (UNESCO).<sup>152</sup>

The first post-war attempt to safeguard cultural artifacts was the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (Hague Convention).<sup>153</sup> Museums are included within the definition of cultural property to be protected under the Hague Convention.<sup>154</sup> The contracting parties

undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.<sup>155</sup>

The parties must also thwart attempts to loot cultural property.<sup>156</sup> However, obligations to protect cultural property are considered waived in cases of military necessity.<sup>157</sup> The first Protocol to the Hague Convention deals predominantly with the restitution and recovery of cultural artifacts.<sup>158</sup> A second

150. *Id.* at 273–74.

151. *Id.* at 274–76.

152. Lyndel V. Prott, *Principles for the Resolution of Disputes Concerning Cultural Heritage Displaced During the Second World War*, in *THE SPOILS OF WAR*, *supra* note 12, at 227.

153. UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, *opened for signature* May 14, 1954, 249 U.N.T.S. 215 [hereinafter Hague Convention].

154. *Id.* art. 1(b) (“buildings whose main and effective purpose is to preserve or exhibit . . . movable cultural property . . .”).

155. *Id.* art. 4(1).

156. *Id.* art. 4(3).

157. *Id.* art. 4(2).

158. Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, *opened for signature* May 14, 1954, 249 U.N.T.S. 358 [hereinafter Protocol to the Hague Convention].



Protocol reaffirms and refines the principles discussed in the Hague Convention.<sup>159</sup>

Two other recent conventions also address the problem of stolen cultural artifacts. In 1970, UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO 1970).<sup>160</sup> UNESCO 1970 does not deal directly with the problems of wartime protection of museums.<sup>161</sup> As the title of the Convention suggests, the emphasis is on returning artifacts, rather than on preventing their initial seizure. However, the Convention does affirm that "[t]he export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit."<sup>162</sup> The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 (UNIDROIT Convention) further supplemented the UNESCO conventions by providing basic legal rules for the restitution and return of stolen artifacts.<sup>163</sup> However, the UNIDROIT Convention contains no discussion of wartime seizures.

From the content of these documents, it appears that the main concern of the international community is the restitution of illegally seized cultural artifacts. Although the Hague Convention purports to create protections for cultural property, the Protocol to the Hague Convention only discusses repatriation.<sup>164</sup> The other conventions are almost entirely focused on the return of stolen items.

After World War II, the international legal community soundly condemned the practice of looting in times of war and created a general prohibition against looting by invading powers. More recently, museum looting in times of war or during armed conflict has not been as systematic as that which occurred during the Napoleonic Wars and World War II. Recent

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159. Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, *opened for signature* Mar. 26, 1999, 38 I.L.M. 769 [hereinafter Second Protocol to the Hague Convention].

160. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *opened for signature* Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO 1970].

161. Prott, *supra* note 152, at 227.

162. UNESCO 1970, *supra* note 160, art. 11.

163. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *opened for signature* June 24, 1995, 34 I.L.M 1322 [hereinafter UNIDROIT Convention].

164. Prott, *supra* note 152, at 225, 227.

condemnations of artifact theft do not adequately protect museums from looting by non-invaders during war. The failure of these international safeguards in the case of the Iraq Museum, as well as a possible remedy for the recurring tragedy of wartime devastation of museums, will be discussed in the following section.

## II. THE FAILURE OF INTERNATIONAL PROTECTIONS FOR MUSEUMS

### A. THE LOOTING OF THE IRAQ MUSEUM

Looking at the case of the Iraq Museum, it might appear that the looting was an inevitable consequence of an invasion, and that the repatriation efforts were very successful under the circumstances. After all, war is war, and casualties are inevitable. When lives are being lost, cultural artifacts are not of paramount importance. This view might be more persuasive if the looting had occurred in another century, or with less technologically-developed state actors. However, in this age of scrupulously organized invasions, precision bombing, and military planners, there was no reason that the Iraq Museum could not have been protected. The looting of the Iraq Museum in April of 2003 constituted a failure of supposed international legal protections for cultural artifacts.

The Hague Convention and its Protocols, the major international instruments for the safeguarding of cultural artifacts, provided woefully inadequate protections for the Iraq Museum. First, the Hague Convention can have little efficacy when it is not accepted by many countries throughout the world.<sup>165</sup> Second, a military necessity exception for protection of cultural artifacts further weakens the protections granted by the convention.<sup>166</sup> Third, the convention relies too much on the countries involved to protect their own cultural property.<sup>167</sup> Fourth, the international legal community offers little effective assistance.<sup>168</sup> Finally, the Hague Convention and the UNESCO conventions focus too heavily on repatriation and the recovery of

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165. See *infra* notes 170–179 and accompanying text.

166. See *supra* note 157 and accompanying text. See *infra* notes 183–192 and accompanying text.

167. See *infra* notes 193–206 and accompanying text.

168. See *infra* notes 207–213 and accompanying text.

items.<sup>169</sup> Rather, the focus should be on the prevention of looting.

### 1. *The (Not Entirely International) International Protections*

The first main problem with the Hague Convention, as with most multilateral agreements, is the fact that a limited number of states have ratified it.<sup>170</sup> Fewer still are party to the two Protocols to the Hague Convention.<sup>171</sup> The United States has ratified neither the Convention nor the protocols. On the other hand, Iraq ratified both the Hague Convention and the first Protocol in 1967.<sup>172</sup>

The Hague Convention offers guidance for such situations, in which only one of the parties to an armed conflict has ratified the Convention. It states that:

If one of the Powers in conflict is not a Party to the present Convention, the Powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations. They shall furthermore be bound by the Convention, in relation to the said Power, if the latter has declared that it accepts the provisions thereof and so long as it applies them.<sup>173</sup>

Therefore, Iraq was required to protect its cultural property during and after the United States invasion. The United States was not.

When the United States invaded and attempted to take over in April 2003, there was no Iraqi government left to follow the Hague Convention and protect cultural artifacts. The U.S. military did very little to protect the museum. The Iraq Museum was put on the military's no-target list, meaning only that it would not be bombed.<sup>174</sup> After the looting began on the

169. See *infra* notes 215–227 and accompanying text.

170. There are currently 115 state parties to the Hague Convention. List of parties to the Hague Convention, <http://portal.unesco.org/la/convention.asp?KO=13637&language=E> (last visited Nov. 20, 2005).

171. There are currently ninety-three state parties to the Protocol to the Hague Convention. List of parties to the Protocol of the Hague Convention, <http://portal.unesco.org/la/convention.asp?KO=15391&language=E> (last visited Nov. 20, 2005). There are forty-one state parties to the Second Protocol to the Hague convention. List of parties to the Second Protocol of the Hague Convention, <http://portal.unesco.org/la/convention.asp?KO=15207&language=E> (last visited Nov. 20, 2005).

172. THE SPOILS OF WAR, *supra* note 12, at 296.

173. Hague Convention, *supra* note 153, art. 18(3).

174. Douglas Jehl and Elizabeth Becker, *Experts' Pleas to Pentagon Didn't Save*

afternoon of April 10, a Thursday, one museum official ran through Baghdad looking for American soldiers to put a stop to the plunder.<sup>175</sup> A tank manned by five marines returned to the museum with him, fired a few shots, and the crowd of several thousand looters scattered.<sup>176</sup> When the tank left after thirty minutes, however, the crowd returned.<sup>177</sup> Although the military promised to patrol the museum starting on Sunday, the museum had been decimated by Friday night.<sup>178</sup> It took only forty-eight hours for looters to strip the museum of thousands of artifacts.<sup>179</sup>

The Hague Convention cannot be considered an effective protection for cultural artifacts in armed conflicts that involve non-party states.<sup>180</sup> If a non-party invades a Convention party, there is still no protection for the invaded country's artifacts. As a result, the fact that powerful nations like the United States and the United Kingdom have not ratified the Hague Convention is concerning. Even though the protection of museums may have become something of a customary rule of international law,<sup>181</sup> the case of the Iraq Museum is evidence that non-parties will not offer protections for cultural institutions of their own accord.

## 2. *The Convenient Fiction of Military Necessity*

Another problem regarding the Hague Convention is the waiver of protections for cultural spaces in cases of military necessity.<sup>182</sup> Although some form of a military necessity exception has existed since the Lieber Code,<sup>183</sup> the military exception has allowed countries to justify unneeded destruction of cultural property in a supposedly incontrovertible manner.

The Hague Convention states that the obligations to protect cultural artifacts "may be waived only in cases where military

*Museum*, N.Y. TIMES, Apr. 16, 2003, at B5.

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

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. See *supra* notes 170–173 and accompanying text.

181. See *supra* note 112 and accompanying text.

182. See *supra* note 157 and accompanying text.

183. The Lieber Code, *supra* note 110, art. 38. ("Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the army or of the United States.")

necessity imperatively requires such a waiver."<sup>184</sup> However, the Convention does not go on to explain what might constitute a "military necessity."

The United States initially refused to ratify the Hague Convention because the original draft did not contain a military necessity exception.<sup>185</sup> Other governments argued that the military necessity clause was inconsistent with the aspirations of the Convention.<sup>186</sup> Even though the clause was ultimately added, the United States still refused to become a party to the Hague Convention.<sup>187</sup> Nevertheless, the United States justified its failure to safeguard the Iraq Museum on military necessity grounds.<sup>188</sup> General Richard Myers, chairman of the Joint Chiefs of Staff, explained that combat operations were more important than protecting the museum.<sup>189</sup> Other military personnel claimed that there were not enough troops to attend to the looting.<sup>190</sup> Although these excuses seem to indicate that the United States was ignorant of the possibility of looting, groups of art experts and scholars repeatedly warned the U.S. government about the probability of looting in the months before the invasion.<sup>191</sup> Furthermore, the military was reminded of the recent experience of the first Gulf War, in which nine regional museums in Iraq were demolished by looters.<sup>192</sup>

The Hague Convention legitimizes the myth of military necessity in the protection of cultural property. This exception is really an excuse for the destruction of cultural property when it is militarily *convenient*, or when it is supposedly militarily *inconvenient* to protect cultural property. In the time when it was technologically difficult to limit wartime destruction, military necessity could excuse accidentally bombing a museum situated near a military base. Today, the United States incorrectly believes that the claim of insufficient troops to guard a museum constitutes military necessity, even though the failure to provide troops is more likely due to the inconvenience of protecting the museum than any military necessity. In this

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184. Hague Convention, *supra* note 153, art. 4(2).

185. John Henry Merryman, *Cultural Property Internationalism*, 12 INT'L J. CULTURAL PROP. 11, 20 (2005).

186. *Id.*

187. *Id.*

188. Jehl and Becker, *supra* note 174.

189. *Id.*

190. Burns, *supra* note 175.

191. Jehl and Becker, *supra* note 174.

192. LOOTING OF THE IRAQ MUSEUM, *supra* note 1, at 1.

era when invasions are scrupulously planned, there is no reason museums cannot be immediately secured against destruction, whether by bombing or looting.

### 3. *Over-reliance on National Action*

The Hague Convention places a great deal of emphasis on the ability of a party to respond to threats against its cultural property. In many cases, this may be an undue burden on the resources of a country, especially one preparing for armed conflict.

Under the Hague Convention, protection of cultural artifacts is to begin before the start of hostilities. The Convention states that "Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate."<sup>193</sup> Once armed conflict has begun, the party is charged to conduct its military operations in such a way as to ensure the safety of cultural property.<sup>194</sup> If cultural artifacts are urgently threatened, they must be removed.<sup>195</sup>

As discussed previously, there was no Iraqi government to protect the Iraq Museum once the looting commenced, and the U.S. military proved disobliging.<sup>196</sup> The only force remaining between the Iraq Museum and the hordes of looters was its staff. Museum workers desperately tried to protect the museum from pillaging in the days before the United States' invasion.<sup>197</sup> They holed up in the museum, trying to protect what they could.<sup>198</sup> Some easily transportable artifacts were sent to safety

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193. Hague Convention, *supra* note 153, art. 3. The Second Protocol to the Hague Convention explains that these measures "shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property." Second Protocol to the Hague Convention, *supra* note 159, art. 5. However, this Protocol has not been ratified by Iraq, and so it will not be discussed here.

194. See *supra* notes 153–157 and accompanying text.

195. Hague Convention, *supra* note 153, arts. 12–13.

196. See *supra* notes 173–174 and accompanying text.

197. John Noble Wilford, *Art Experts Fear Worst In the Plunder Of a Museum*, N.Y. TIMES, Apr. 13, 2003, at B3 [hereinafter *Art Experts*].

198. *Id.*

elsewhere.<sup>199</sup> The museum workers unsuccessfully attempted to protect more fragile artifacts with sandbags.<sup>200</sup> Finally, some of the most valuable pieces were placed in the underground vaults of the museums.<sup>201</sup> Except for the successful removal of some pieces from the museum, these safeguards were for naught. The few remaining museum officials were no match for the thousands of looters armed with guns, knives, axes, and clubs.<sup>202</sup> The museum was completely ransacked, and the steel doors of the underground vaults were blown away.<sup>203</sup>

When a country is preparing for armed conflict, especially against a more powerful state, cultural artifacts are not a priority. This leaves the duty of protecting the cultural artifacts to an ill-equipped museum staff<sup>204</sup> incapable of repelling droves of armed looters.<sup>205</sup> In addition, museums lack the capability and necessary funds to safely transport all artifacts, which are often fragile and unwieldy, out of harm's way.<sup>206</sup>

#### 4. *The Impotent International Organization*

In contrast to the great weight placed on national action by the Hague Convention, relatively little is expected of international organizations. The ineffectiveness of the international legal community is apparent here, as in many multilateral conventions, since there is no police power to deal with noncompliance. Where the issue is not noncompliance, but actual non-recognition of the Hague Convention, international organizations play an even smaller role.

The Hague Convention does not leave much room for UNESCO in the protection of cultural artifacts. The parties:

may call upon the United Nations Educational, Scientific and Cultural Organization for technical assistance in organizing the protection of their cultural property, or in connexion with any other problem arising out to the application of the present Convention or the Regulations for its execution. The Organization shall accord such assistance within the limits fixed by its programme and by its resources.<sup>207</sup>

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199. LOOTING OF THE IRAQ MUSEUM, *supra* note 1, at 8.

200. *Art Experts*, *supra* note 197.

201. LOOTING OF THE IRAQ MUSEUM, *supra* note 1, at 8.

202. Burns, *supra* note 175.

203. LOOTING OF THE IRAQ MUSEUM, *supra* note 1, at 8.

204. *See id.*

205. *Id.*

206. *Id.*

207. Hague Convention, *supra* note 153, art. 23(1).

UNESCO is therefore not compelled to act in order to protect cultural artifacts. Rather, it is given the option of responding to requests from parties, if the circumstances prove favorable.

Before the United States' invasion of Iraq, the United Nations made no plans to protect cultural artifacts. When the looting began, the United Nations still took no action. Even after the Iraq Museum had been, for all practical purposes, destroyed, the United Nations did nothing. Any and all initiatives to protect the Iraq Museum were developed by art experts and scholars.<sup>208</sup> In the months before the United States' invasion, experts insisted that effective safeguards be created for the museum.<sup>209</sup> After the looting, a group of over 230 scholars from twenty-five countries delivered a petition to the United Nations that called for the protection of the Iraqi artifacts.<sup>210</sup> International museum leaders also suggested a moratorium on the purchase of antiquities from Iraq and proposed amnesty for anyone returning a piece to the museum.<sup>211</sup> A group of thirty experts also sent a mission to Iraq to assess the extent of the losses and begin repatriation efforts.<sup>212</sup> After all of these efforts by concerned individuals, the United Nations began working to halt illicit trade in Iraqi artifacts and to find some of the looted pieces.<sup>213</sup>

If international agreements for the protection of cultural artifacts are to be at all effective, there must be an actual means of ensuring the safety of the property, beyond the limited resources of national governments in armed conflicts. When it becomes clear that neither state involved in armed conflict is willing or able to create adequate safeguards for cultural artifacts, the international community must take responsibility for keeping the property safe.

##### 5. *The Inefficiency and Ineffectiveness of Repatriation*

While the Hague Convention is focused on protecting cultural artifacts during armed conflict, the Protocol to the

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208. Jehl and Becker, *supra* note 174.

209. *Id.*

210. *Art Experts*, *supra* note 197.

211. John Noble Wilford, *Curators Appeal for a Ban On Purchase of Iraqi Artifacts*, N.Y. Times, Apr. 16, 2003, at B5 [hereinafter *Curators Appeal*].

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

213. *Id.*



Convention and other U.N. conventions deal with the return of artifacts after they have been looted or with controls on exportation of stolen cultural property.<sup>214</sup> Postponing concern about cultural artifacts until after a war is over does not account for the incredible amount of damage and loss that may occur in the interim.

The Protocol to the Hague Convention requires an occupying party to prevent the exportation of cultural artifacts from an occupied land.<sup>215</sup> It also provides that, at the end of hostilities, an occupying nation must return all cultural artifacts belonging to the occupied country; cultural property may not be kept as war reparations.<sup>216</sup> UNESCO 1970 starts from the proposition that "it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export."<sup>217</sup> The Convention then discusses in detail the ways to prevent illicit transfer of cultural artifacts and the means of effecting the return of illegally exported pieces.<sup>218</sup> The UNIDROIT Convention simply states that "the possessor of a cultural object which has been stolen shall return it."<sup>219</sup> The rest of the Convention describes an elaborate protocol for restitution of stolen cultural artifacts and return of illegally exported cultural objects.<sup>220</sup> The main focus of these agreements is returning cultural artifacts to their country of origin, not preventing the circumstances which necessitated the return in the first place.

There are several reasons why restitution efforts have been generally lamentable in the case of the Iraq Museum. While several thousand artifacts have already been recovered, and no doubt more will be returned as the years go on, many thousands more may never be found.<sup>221</sup> Since professional thieves were responsible for a great deal of the looting, many of the most valuable pieces—both historically and monetarily—are probably well-hidden in private collections.<sup>222</sup> Due to a lack of a complete museum inventory, it is also impossible to know exactly what

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214. See *supra* notes 153–164 and accompanying text.

215. Protocol to the Hague Convention, *supra* note 158, § 1(1).

216. *Id.* § 1(3).

217. UNESCO 1970, *supra* note 160, para. 5.

218. *Id.* arts. 5–14.

219. UNIDROIT Convention, *supra* note 163, art. 3(1).

220. *Id.* arts. 3–7.

221. LOOTING OF THE IRAQ MUSEUM, *supra* note 1, at 2.

222. Jehl and Becker, *supra* note 174.

was taken.<sup>223</sup> This makes restitution almost unworkable, as the international law enforcement community cannot control the illegal export of stolen artifacts unless told which artifacts have actually been stolen.<sup>224</sup> Furthermore, many artifacts were irreparably damaged or completely destroyed.<sup>225</sup> The Iraq Museum itself was also damaged.<sup>226</sup> Doors were broken down and display cases smashed.<sup>227</sup> The Iraq Museum is no more; its collection is irreplaceable.

The emphasis on repatriation fails to take into account the number of artifacts that will be destroyed in the actual looting, let alone the destruction of the museum building and its fixtures. Even when artifacts survive looting, recovery is not easy. When professional art thieves with great knowledge of the black market are involved, there is even less chance that pieces will be recovered. There is also a general lack of understanding about how difficult it is to track what has been stolen. Finally, even after decades of repatriation efforts, thousands of artifacts may still be missing. A museum can never fully recover after being looted.

## 6. *The Failure of International Law*

The protections for cultural artifacts supposedly guaranteed by the Hague Convention failed to save the Iraq Museum when it was threatened by looters. The United States, never a party to the convention, invaded Iraq with complete disregard for the protection of the Iraq Museum even though it had been duly warned about the potential for looting. The defeated Iraqi government, even if it had wanted to do so, was unable to protect the museum. The international response came too late, and only came when prompted by art experts and scholars. Restitution efforts, as they always are, were unsuccessful when examined against the number of pieces destroyed or irretrievably lost. The devastating result of this failure of international law was the loss of a large part of the record of civilization, which will never be recovered. The next section will discuss how such tragedies as the loss of the Iraq Museum may be prevented.

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223. Riding, *supra* note 212.

224. *Id.*

225. LOOTING OF THE IRAQ MUSEUM, *supra* note 1, at 2.

226. *Id.*

227. *Id.*

## B. AN OUNCE OF PROTECTION IS WORTH A POUND OF REPATRIATION

### *1. A Proposal for Greater Protection of Museums during Armed Conflict*

The previously discussed criticisms of current international protections for cultural artifacts during wartime, especially under the Hague Convention, suggest three main changes. First, the protection of museums during periods of armed conflict must be absolute. Second, the international community must be proactive in coming to the aid of museums when war threatens. Finally, efforts to protect cultural property should focus on protecting cultural artifacts from damage and looting, not repatriation of artifacts to destroyed museums after hostilities have ceased. These three changes will go a long way towards protecting cultural artifacts.

The first necessary change to current practices is to make the protection of museums in wartime an absolute rule of international law. A new multilateral convention is desperately needed. The Hague Convention, written in 1954, is out of date. At that time, the drafters could not have known how difficult the post-World War II repatriation process would be. The recent explosion of the Holocaust restitution movement, as well as the current trend towards Western repatriation of artifacts seized during various colonial eras, has shown the problems attendant with a restitution-based, rather than a protection-based system. These developments also indicate a new willingness on the part of the international community, even the United States, to revisit current international law regarding the protection of museums in times of war. The time is ripe for UNESCO to lead the way in creating a new, workable multilateral convention.

To maximize protections for museums, there also can no longer be an exception for military necessity that allows the destruction of cultural artifacts and the institutions in which they are held. The lack of a military necessity exception requires an additional protection, one that is already a part of the Hague Convention. If the prohibition against attacking museums is absolute, there must be a stringent condemnation of using museums for military activities in times of war. Otherwise, countries engaged in armed conflict could attempt to forestall the destruction of their military operations by

conducting such operations in museums. This would cause greater risk to museums than is already present. If the militarily necessitated destruction of museums and cultural artifacts is to be completely disavowed, the prohibition against using museums for wartime purposes must be strictly enforced.

To ensure the protection of museums during times of war, there must also be a better international response when museums are imperiled by armed conflict. International organizations, especially UNESCO, should continually apprise themselves of possible armed conflicts that constitute a threat to museums. Without waiting for a request from a country preparing for war that may never come, these groups should actively assist in safeguarding museums. This may include removing some of the pieces for safekeeping, providing an armed force capable of repelling looters, or working with a government preparing for war to develop other plans for protecting museums. Ultimately, swift and effective international action will show that disregard for the safety of cultural artifacts in times of war will not be tolerated.

Finally, and most importantly, there must be less emphasis on repatriation of artifacts in multilateral conventions, and more on protection of museums and their contents. A new multilateral convention could include provisions requiring invading countries to place cultural institutions on a no-target list, to secure such institutions upon invasion along with military and government buildings, and to maintain troops outside of these institutions so long as there is a threat of looting.

Although the Hague Convention did discuss pre-conflict protection of artifacts,<sup>228</sup> the agreements since that time have shifted the focus to post-conflict return of artifacts.<sup>229</sup> Furthermore, there is now a different kind of looting than was contemplated in the post-World War II world of the Hague Convention. In modern wars, looting is less likely to be done by a supremely organized invading military than by hordes of looters and some professional thieves. With thousands of individuals looting, artifacts are even more likely to be lost forever than when plunder was meticulously organized by an invading country. A new UNESCO convention stressing the importance of *preventative* protection of artifacts could be very

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228. See *supra* note 193 and accompanying text.

229. See *supra* notes 153–164 and accompanying text.

effective in addressing these new developments.

These three changes to the current international law regarding cultural artifacts will ensure that cultural property will actually be *protected*, not just recovered. The benefits of these changes will be discussed more thoroughly in the next section.

## *2. Reasons for Greater Protection of Museums during Armed Conflict*

The reasons for creating better protections for museums go well beyond a desire to save pretty pieces of artwork. Museums are a source of national pride. When a country's cultural heritage is destroyed or stolen, it is a major blow from which a country may never recover. To add cultural loss to the already demoralizing reality of military defeat is devastating.

Still, to say that the loss of a museum is a purely national loss would be woefully inadequate. Each museum contains a distinctive record of humanity, each adding to the understanding of our world and its inhabitants. In failing to take action to protect museums and by condoning exceptions for military necessity, the international community sanctions this self-destruction.

The most lamentable part of the current international law regarding cultural artifacts is the preference for repatriation over protection. Repatriation efforts take decades, and are never entirely successful. Forgoing pre-conflict protections for post-war repatriation automatically sacrifices artifacts. Repatriation efforts can never recover all of the looted pieces, nor can they reconstitute those that were destroyed.

## *3. Greater Protection of Museums in Practice*

In visualizing how better protections for museums in times of war may work in practice, it may help to turn again to the case of the Iraq Museum. If international legal safeguards for the protection of cultural artifacts had prevented the looting of the Iraq Museum, the United States' invasion might have led to a very different scenario than the debacle it has become.

It may be argued that some of the ire felt by Iraqi citizens towards the United States after the invasion can be attributed to cultural insensitivity. Not the least of this was the U.S. military's complete disregard for the safety of Iraqi antiquities

held in the Iraq Museum and elsewhere. If the goal of the United States in invading Iraq was actually to bring democracy and freedom, protecting cultural institutions would have been a meaningful showing of goodwill. Instead of allowing the destruction of Iraqi culture and history, the United States could have made a point by keeping the Iraq Museum safe. A few troops guarding the museum would have been enough to deter looters.

Perhaps most importantly, a free and independent Iraq with unharmed cultural institutions would have led to easier, less painful rebuilding of the country after the United States' invasion. Certainly, Iraq with its culture intact would be a very different place. Military victors are already sufficiently reviled by those whom they have conquered without aiding—whether through action or inaction—the destruction of a conquered country's culture. The United States would have saved itself a great deal of trouble and expense afterwards had it attempted to protect cultural institutions during its military invasion.

War is said to be waged to achieve peace. Peace would last longer and be more successful if the wars creating it were not culturally apocalyptic. The callous way in which the United States achieved the invasion of Iraq does not portend a lasting peace between the two nations.

## CONCLUSION

If there is anything to be learned from the case of the Iraq Museum, it is the amazingly short amount of time in which a museum—and a culture—can be effectively destroyed by looters. The extent of the damage and the shocking number of items lost should serve as a warning to the international community. Museums must be given greater protection during armed conflict, if not for the sake of an individual country, then for our shared history.

