

The Laws of War and the Destruction of Cultural Property in the Iraq War 2003

Tony Caravella

Tony Caravella is the Director of State Records for the State Records Office of Western Australia. His interest in international humanitarian law grew from his studies in law at the Law School at the University of Western Australia. Since completing his Bachelor of Laws he has been involved in the International Humanitarian Law Unit of the Australian Red Cross. This paper is based on a presentation made in Perth, Western Australia, in July 2003 in the Red Cross 'Even Wars Have Limits' seminar series.¹

Cultural property has a history of being damaged, destroyed or stolen during times of armed conflict. This paper discusses that topic in the context of the war in which a coalition of forces led by the United States of America invaded Iraq in 2003. The paper firstly defines what is meant by the term 'cultural property', and discusses the importance of it. The law governing the protection of cultural property in the situation of armed conflict is then outlined, followed by a short explanation of the significance of all this to Iraq. The paper then speculates on the extent of loss or damage – it is speculative although based on a wide range of reporting sources, but speculative nonetheless. There is conflicting information on the degree of damage and loss. There is also a brief coverage of the precautions taken to protect cultural property together with discussion on what measures are being undertaken now, together with what should be done to protect the unique and precious cultural property. Finally, the paper contemplates the lessons to be drawn from this armed conflict for those working in the collection and management of cultural property and highlights the need for their collective responsibility.

Today we are fighting in a country which has contributed a great deal to our cultural inheritance, a country rich in monuments which by their creation helped and now in their old age illustrate the growth of the civilization which is ours. If we have to choose between destroying a famous building and sacrificing our own men, then our men's lives count indefinitely more and the buildings must go. But the choice is not always so clear-cut as that. In many cases the monuments can be spared without any detriment to operation needs. Nothing can stand against the argument of military necessity. That is an accepted principle. But the phrase 'military necessity' is sometimes used where it would be more truthful to speak of military convenience or even personal convenience. I do not want it to cloak slackness or indifference.

General Eisenhower, 24 December 1943, in Italy.²

What is cultural property?

What is meant by the term 'cultural property' in this paper? The meaning given to the phrase is that from the *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (hereafter 'the 1954 Hague Convention') which defines³ 'cultural property' as:

irrespective of ownership ...

- (a) moveable or immovable property of great importance to the cultural heritage of every people such as:
- monuments of architecture, art or history, whether religious or secular;
 - archeological sites;
 - groups of buildings, which as a whole, are of historic or artistic interest;
 - works of art;
 - manuscripts, books, and other objects of artistic, historical, or archeological interest;
 - scientific collections; and

- important collections of books or archives or of reproductions of the above;
- (b) buildings whose main and effective purpose is to preserve or exhibit cultural property such as:
 - museums;
 - large libraries;
 - depositories of archives; and
 - refuges intended to shelter, in the event of armed conflict, the moveable cultural property;
- (c) centers containing a large amount of cultural property as defined in (a) and (b) above.

There are two points to note from the definition: first, it is a wide definition which has a high degree of congruency with what one would probably and intuitively include in a list of 'cultural property', however, it is not exhaustive. Second, the inclusion of buildings at (b) and 'centers containing ...' at (c) is designed to protect cultural property, and access to it, by protecting the facilities which, for the most part, house or contain cultural property.

The importance of cultural property

The fact that international humanitarian law protects cultural property illustrates the vital role that it plays in the welfare of society and in the welfare and well being of individuals.

The importance of cultural property goes far beyond the mere pleasures it gives to the 'sherry sipping beauty worshippers'⁴ and to others generally. A legitimate question however is why worry about cultural property, monuments, buildings, and the like in times of war? War of course is characterised by the tragedy of the loss of life, the disruption to families, and the damage and destruction of homes and other essential infrastructure. In this scenario surely the concern for, and protection of, cultural property must give way to the concern for, and protection of, human life? Some might argue that to be concerned about cultural property in the midst of fighting and potential loss of life is foolishly optimistic.⁵ However, if one is overly pessimistic in one's outlook about such things then the future often unfolds to match one's pessimistic

outlook. Hopefully by aspiring for better things we will have a chance of an improved future where, amongst other things, life and property are respected not only in times of peace, but also in times of war.

Mercifully, armed conflicts end, and people who survive rebuild their lives. Cultural property helps restore quality of life and restore communities and people's sense of identity. It is at this phase, more than perhaps at any other time, that cultural property, and especially the records and the archives (to the extent there might be a difference) play a critical role. Cultural property helps to reconnect the victims of war with the past, the present, and the future. Not only that, but in the case of important records and archives, access to these helps re-establish legal claim to property and other rights.

Around the world people have need to access past records for many different reasons, including for academic research, genealogical research, and for the establishment and proof of legal rights. In Iraq one can expect that access to recent (and older) records will be crucial for many reasons, including the investigation of war crimes, and the identification of bodies found in mass graves. It goes without saying that the very oldest of the records and the manuscripts have worldwide significance for the history and heritage of the world.

The destruction of cultural property in its various forms is an attack on the memory of the world. It has the effect of erasing the past. Damaging the cultural property of any particular people in fact damages the cultural heritage of mankind because each people adds to the culture of the world. It can often have the strategic object of intimidation of people. It can also have another goal, to sever a people, or a race, from a geographic area. The destruction of records and other cultural property can seek to eliminate the evidence of the historical roots and connections with the land. For example in the armed conflict in Bosnia the attempt to eliminate books, documents, and works of art had as one of its objects to prevent future generations from knowing that people of different ethnic and religious tradition once shared a common heritage in Bosnia.⁶

Those who work in the field of collecting and protecting cultural objects deplore the destruction of context. Objects that turn up on the antiquarian markets or find their way to a collector's shelf are considered to be 'orphans'.⁷ Stripped of their context and other associated material they lose much of their cultural and historical meaning.

In a report prepared in 1997 for UNESCO by the International Council on Archives,⁸ known as 'the Quintana report', the key role of archives in situations of political transition was identified. The Quintana report lists archives under two broad headings as a means of enforcing *collective rights* and *individual rights* the particulars of which are set out below:

Collective Rights

1. the right of peoples and nations to choose their own path to political transition;
2. the right of the people to the integrity of their written memory;
3. the right to truth;
4. the right to identify those responsible for crimes against human rights.

Individual Rights

1. the right to discover the fate of relatives who disappeared during the period of repression;
2. the right to know what information on individuals is held in the archives of the repression;
3. the right to historical and scholarly research;
4. the right of amnesty for prisoners and political reprisals;
5. the right to compensation and reparation suffered by victims of the repression;
6. the right to restitution of confiscated goods

In the Iraq conflict, irrespective of the final domestic political outcome, and irrespective of the final geopolitical outcome, and irrespective of whether weapons of mass destruction are ever found,⁹ the recognition and the exercise of these rights will be essential to restoring peace, order, and good government.

Damage and destruction of cultural property in times of armed conflict – historical precedents

The war in Iraq is unfortunately not the only example of the damage, loss or destruction of cultural objects. There are many others. For example:

- In 213 BC the Ch'in emperor of China ordered the first recorded burning of books. His motive: books allegedly contained idle speculation and only excited people to criticise the government;
- In World War I the Library of the University of Louvain in Belgium was destroyed by the German invasion. Over 300 000 books as well as precious manuscripts and incunabula were reduced to ashes;
- In World War II in Italy the ancient Benedictine abbey at Monte Cassino was bombed by the Allies on what has been argued was erroneous intelligence reports (furthermore, it had been destroyed by the Lombards, Saracens and Normans over the centuries);
- In Cambodia in the 1970s a large part of the finest collection of Khmer antiquities in the world were destroyed or stolen;
- In Afghanistan in 1988 with the withdrawal of the Soviet troops from Kabul in 1988, Afghanistan's National Museum was ransacked. By 1996 70% of their collection was missing;
- In South Lebanon in 1997 the Israeli Defence force turned fortress ruins in Karkum, originally built in the Middle Ages, into a stronghold. Modern concrete fortifications were poured on top of the old fortifications;
- In the Gulf War in 1991 the Government of Iraq used cultural property to protect legitimate targets from attack by positioning two fighter aircraft adjacent to the temple of Ur;
- In the war in former Yugoslavia, Dubrovnik, one of the best preserved walled cities of Europe and on the World Heritage list, was hit by more than 500 rockets on 6 December 1991. Some 45% of it was damaged, and 10% destroyed;
- In Somalia in 1996, the national museum in Mogadishu was ransacked and is not yet restored;
- In Afghanistan in 2001, the giant Buddhas of Bamyán were destroyed by the Taliban armed forces. Dating back to the 3rd century and the finest example of early Central Asian

Art, they were reduced to rubble by artillery fire and explosives.

When one surveys such a long and sadly not exhaustive list of damage and destruction of cultural property it becomes all the more evident that more effort is required to protect cultural property.

The laws of war generally

The laws of war are an important and extensive component of international law.¹⁰ Since time immemorial the standards of common decency and humanity have regulated warfare. The phrase 'all is fair in love and war' most certainly misrepresents the situation, in war at least! To some it may seem contradictory that wars are, or should be, regulated, but they are. In an armed conflict the killing of an enemy is, in certain circumstances, considered to be an acceptable means to an end. However, basic principles of humanity hold that there ought not be unnecessary suffering. There are sound policy reasons why the belligerent forces, whether the aggressor or the defender, should want a 'limit' placed on war. The limits should prevent harm to civilian populations, and the minimisation of excessive damage to private and public property and to non-military infrastructure.

There is a considerable body of customary law governing armed conflicts. This customary law dates back a thousand year and more. In the second half of the 19th century the customary law began to be codified. Much of the body of modern law governing the conduct of war flows from the work commenced by Henri Dunant, founding father of the International Committee of the Red Cross/Red Crescent.¹¹ Dunant witnessed a horrifying battle in 1859 at Solferino.¹² In 1864 a treaty was initiated by an organisation called the International Committee for the Relief of the Wounded. This organisation is now the International Committee of the Red Cross. From his experience, Dunant concluded that measures ought to be taken in times of peace to alleviate the suffering of combatants in times of war. Based on this principle has grown a body of international law which includes many declarations, conventions and protocols settled in The Hague and Geneva. The main distinction between The Hague Conventions and the Geneva Conventions is that the former concentrate on setting out the international rules of war (*jus in bello*), whereas the latter set out the rules for the treatment of the 'victims of war' (such as the wounded,

sick soldiers, civilians, prisoners of war, etc). In combination both The Hague and the Geneva Conventions are aimed at regulating activities during times of armed conflict.¹³ One of those activities is the protection of cultural property in times of war.

The fundamental features of the laws of war put simply are as follows:

- *the principle of discrimination* – that is, a distinction is drawn between civilians and combatants, and a range of different rules apply to each category;
- *the principle of proportionality* which aims at avoiding or minimising the harm and damage done to people and to civilian objects. In applying this principle there is a weighing up of the potential military benefit as opposed to the potential collateral damage.

While this paper focuses on the Hague Conventions, it should be noted that Geneva Convention IV¹⁴ provides that the destruction of clearly recognisable and specially protected historic monuments, works of art, or places of worship is a 'grave breach'. As such it is a war crime and subject to universal jurisdiction.

The law governing cultural property and armed conflict

Before considering the laws of war *per se*, it is useful to be aware that there are a number of laws and international conventions governing the field of cultural rights and cultural property in times of peace. For example:

- the *UN International Covenant on Economic, Social and Cultural Rights* (adopted by the UN General Assembly in 1996);
- the *UN Universal Declaration of Human Rights (1948)*, in particular, Article 27 – 'everyone has the right to freely participate in the cultural life of the community, to enjoy the arts ...'

One should not ignore the UNIDROIT¹⁵ *Convention on Stolen Or Illegally Exported Cultural Objects* (Rome, 1995) which at Article 3(1) states: 'the possessor of a cultural object which has been stolen shall return it'. At least that is the proper sentiment; regrettably the practice is somewhat different and many wrongdoers need somewhat more motivation than the mere sentiment that a wrongdoer 'shall return' the items.

Background to the 1954 Hague Convention

The laws of war have, for quite some time, included some provision for protection of cultural property in times of war.¹⁶

In September 1939 the United Kingdom and France jointly declared that every effort should be taken to preserve 'those monuments of human achievement which are treasured in all civilized countries'.¹⁷ The German leadership of the time agreed to this declaration, although it then proceeded to plunder and destroy, whether by consent or whether by turning a blind eye to what went on. In fact this destruction on the part of the German forces was held to be criminal at the Nuremberg trials.¹⁸ In the light of long-established and general acceptance of the principle of special protection of cultural property,¹⁹ it is reasonable to hold that this protection is now part of customary international law and as such it is binding on all nation states.

As a result of the extensive destruction of cultural property from World Wars I and II, including such tragic incidents as the bombing of the Rheims Cathedral²⁰ and the burning of the library at Louvain, it became clear that the existing laws of the time were deficient. This situation was a major catalyst for establishing the 1954 Hague Convention.

We see therefore that the main international law governing the protection of cultural property in times of armed conflict is found in the 1954 Hague Convention which, when coupled with its regulations for the execution of the Convention, runs for some 23 pages. There are also two Protocols to the 1954 Hague Convention; these are titled, logically enough, the First Protocol and the Second Protocol, and these will be discussed after the following two sections which deal with some of the detail of the 1954 Hague Convention.

The main provisions of the 1954 Hague Convention in more detail

The 1954 Convention is generally viewed as setting three standards; it:

- . identifies the cultural assets of a nation;
- . obliges the contracting parties (ie the adherents) to the convention to educate its military on what those items are; and
- . provides sanctions for those who fail to respect the cultural heritage of other nations.

Article 2 of the 1954 Hague Convention states:

... the protection of cultural property shall comprise the safeguarding of and respect for such property.

The key words here are 'safeguarding' and 'respect' of cultural property. In regard to 'safeguarding', Article 3 provides:

The High Contracting 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.²¹

Did the State of Iraq comply with this Article?²² The former Iraqi regime could make an argument that part of the safeguarding measures was to place military equipment in and around places containing cultural property. The counter argument might be that such a positioning of military equipment converts the dominant purpose of such a facility from a defensive facility to an offensive one and therefore the location loses its protected status under the 1954 Hague Convention. The final judgement on this disputed question will rely on a proof of facts surrounding the military operations themselves.

In regard to 'respect', Article 4 states:

The High 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.²³

It goes on to say:

The obligations (above) may be waived only in cases where *military necessity imperatively requires* such waiver.²⁴

The notion of 'military necessity' is a somewhat ambiguous one that depends greatly on the circumstances and upon interpretation.²⁵

Perhaps one of the most important provisions of the 1954 Convention is:

The High Contracting Parties further undertake 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.²⁶

There have been many reports of the looting that occurred immediately after the fall of Baghdad. News reports referred to the 'breakdown of law and order'. In terms of international law, there is little doubt that it was the responsibility of invading parties, either as signatories to the 1954 Convention, or under customary international law, to maintain law and order.

Another important provision prevents a High Contracting Party attempting to evade its obligation under Article 4 by claiming another High Contracting Party has not applied the measures of safeguard referred to in Article 3. In other and simpler words, the obligation is strict and one side cannot blame the other for not taking precautions or for not doing enough to protect the cultural property in the circumstances.

Some other important provisions of the 1954 Hague Convention

Some other relevant provisions of the 1954 Convention include:

Assisting national authorities

This requires an occupying force to support the 'competent national authorities of the occupied country in safeguarding and preserving its cultural property'.²⁷ The occupying force is required to 'take the most necessary measures of preservation' of cultural property in the event the national authorities are unable to do so.

Distinctive marking of cultural property

There is a provision for an internationally recognised emblem to mark facilities containing cultural property. The aim is that this will facilitate recognition of the property and avoid it being a military target.²⁸

Military measures

The High Contracting Parties undertake to introduce in time of peace into their military regulations or instructions such provisions as may

ensure the observance of the 1954 Convention '... to foster in the members of their armed services a spirit of respect for the culture and cultural property of all peoples'.²⁹

Personnel

Chapter IV states that:

... personnel engaged in the protection of cultural property shall, in the interests of such property, be respected and, if they fall into the hands of the opposing Party, shall be allowed to continue to carry out their duties whenever the cultural property for which they are responsible has also fallen into the hands of the opposing Party.³⁰

Unfortunately this Article did not help in the case of Bosnian conflict in 1992. In August of that year Bosnia's National and University Library was shelled and burned. The building was shelled by Serbian nationalists using incendiary grenades (as one would when attacking a library!). During this time one Aida Buturovi, a librarian, was killed by a shard of an incoming shell while attempting to rescue books.³¹ Prima facie this was, *inter alia*, in breach of Chapter IV of the 1954 Hague Convention.

This sort of tragedy, and many repeats in history, illustrates the risk facing cultural property and those who work to protect it. In a world where warring parties might want to inflict pain to an opponent's national psyche, places of cultural or heritage significance are at great risk. Much strategic advantage may be had when a belligerent force threatens, damages, or destroys such a place. And it is all generally quite illegal!

Chapter VI of the 1954 Hague Convention sets out the *Scope of Application of the Conventions* and it is interesting for several reasons; for example, the Convention applies even if one of the High Contracting Parties does not recognise the state of war.³² A feature of modern armed conflict is that often it is of a *civil* or *internal* nature, that is, not extending beyond the borders of the particular nation State. The 1954 Hague Convention anticipates this by binding the High Contracting Parties even in the event of armed conflict not of an international character and occurring within the territory.³³

UNESCO is given the central and important task of providing assistance and services in respect to cultural property to the parties of an armed conflict.³⁴

1954 Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict – ‘The First Protocol’

Some of the features of the First Protocol include:

- provisions for the prevention of the export of cultural property from occupied territory;
- the safeguarding and return of any such property; and
- where cultural property has been deposited in third states (for protection) provides for the return of such property. The purpose of this provision is clear, it is to deal with third party states that might resist returning such precious things.

The Second Protocol

The Second Protocol to the Hague Convention³⁵ was finalised in 1999, however it has not yet entered into force because it has insufficient signatories.³⁶

The Second Protocol seeks, in recognition of ‘the need to improve the protection of cultural property in the event of armed conflict’ to establish ‘an enhanced system of protection for specifically designated cultural property’.

It aims to enhance the protection afforded to cultural property by creating criminal responsibility and jurisdiction for serious violations.³⁷ It also provides for prosecution by the High Contracting Parties *in accordance with their domestic law*. This is an extremely important aspect of, and necessary tool for, the enforcement of international humanitarian law. This is so in the light of there being no appointed and universally accepted global policeman. The absence of such enforcement mechanisms has often frustrated the operation of international humanitarian law. The establishment of the International Criminal Court will go some way towards providing a further remedy to this problem,

however, the Court still does not have the support of the United States of America and this lack of support is a substantial, although not fatal, weakness.

A further important strength of the Second Protocol lies in that it provides for extradition, dissemination of information, and international cooperation.³⁸ All these procedures support the enforcement of the provisions of the relevant law.

In the light of the sad and long history of the damage, theft, pillage or destruction of cultural property in times of armed conflict, we can only hope that sufficient States galvanise promptly to bring the Second Protocol into force. As at February 2004 none of the major (Iraq, the United States, the United Kingdom, and Australia) parties to the Iraq war are signatories to the Second Protocol.³⁹

Which of the belligerents in the Iraq War are signatories to the Convention and Protocols?

The first thing we need to consider is whether the belligerents in the Iraq war were subject to the relevant laws of war. Unfortunately the major parties to the Iraq war were *not* all signatories to the 1954 Hague Convention and First Protocol as can be observed from the following table:

Country	Date of Signature	Date of Ratification or Accession
Iraq	14 May 1954 (Convention and Protocol 1)	21 December 1967
USA	14 May 1954 (Convention only)	Not ratified
UK	30 December 1954 (Convention only)	Not ratified
Australia	14 May 1954 (Convention only)	19 Sep 1984

Notwithstanding that the USA and the UK have not ratified the 1954 Convention it should be noted that the US Defense and State Departments jointly formally recommended in the mid 1990s that the President should ratify the Hague Convention, although not the First Protocol. At least one commentator has suggested the reluctance to ratify the First Protocol might in fact be due to objections from the art and antiquities trade.⁴⁰ Further, the publicly stated policy of both the USA and the UK is to comply with the principle of the Hague Convention even though neither country is formally a party to it. If it is in fact the case, and it is a very reasonable one to accept, that the invading forces were committed to the principles of the 1954 Hague Convention, what then explains the damage and destruction, to the extent that it occurred, and to the extent that it was caused by the invading forces? Was it due to a negligence, or to a recklessness, or to a lack of training, or simply because these sorts of things happen in war?

Under customary law of war there is little doubt that all the parties were indeed bound, especially when one considers the USA and UK are signatories to the Conventions even though they have not formally ratified them. It is in this respect that the voice of the international community is so vital to create the political pressure upon nation states so that they do the proper thing. In the absence of an international law enforcer, and notwithstanding the International Criminal Court, much of the effectiveness of international humanitarian law relies on political pressure and international opprobrium.

Iraq – a place of significant cultural property

There are said to be some 10 000 ancient sites in Iraq, many dating back to 3000 BC. The importance of Iraq as the place where civilization began is generally accepted. It is the longest surviving continuous tradition of civilization in the world. It is much older than Egypt. We can trace much of our western heritage to Mesopotamia.

The fertile plains of Iraq and the surrounding mountains were the birthplace of agriculture, of writing, of cities, of codified laws, of irrigation, the 24-hour day and astronomy. It is generally accepted that much important ancient material remains buried and that thousands of cuneiform tablets, many used to record business activities of the time, still remain unstudied.

Iraq is the birthplace of the Code of Hammurabi (1792-1750 BC) and this is accepted as the oldest known archive of the world. With its 285 articles of social and administrative laws, it is a collection of jurisprudence for the organisation of social life.

In the light of the cultural and archeological richness of Iraq it is not surprising that Iraq itself has had a high level of respect, and matching domestic legislation, for the protection of cultural property. Iraqi domestic law requires everything excavated within the nation's borders to be turned over to the National Museum for cataloguing and subsequent distribution of samples to regional museums.⁴¹ There is some irony in the fact that when Iraq occupied Kuwait in 1990 they moved promptly to protect museums from looting before removing the collections themselves. While much of this has been returned, some 20% remains missing. As further evidence of just how seriously Iraq has treated its cultural objects, there is a report from the head of the National Museum, Dr Donny George, that ten smugglers who stole and cut up a large ancient sculpture were executed for that crime.

How much damage was there to cultural property in Iraq?

It is extremely difficult even at this point in time to establish the precise extent of the damage to cultural property in Iraq. There is simply a lack of reliable facts. Perhaps another case of where the first casualty of war is the 'truth'? When one examines the reporting (on the internet and elsewhere) a picture initially emerges of immense devastation, but with the passage of days, weeks, and months, the estimates are reviewed and reduced significantly. *Reuters* reported in mid-April 2003 that 170 000 objects from the National Museum were destroyed or looted. At the end of April 2003 the *Guardian* newspaper reported that plundered artifacts numbered in the thousands, not hundred of thousands. The US Department of State, Cultural Property Office reports that of these 2 000 to 3 000 some 33 are from the main museum, the rest are undocumented making them less likely to be recovered and more easily traded on the black market. But there is still much estimation and speculation. However, what seems to be reliable information is:

Insufficient troops were committed to control the entire city of Baghdad and other areas of cultural significance. This in turn resulted in large scale looting. Reports suggest that all 12 hospitals east of the River Tigris were immediately

guarded, however, the National Museum was on the other side, and as it turned out the wrong side, of the river;

- The troops that were there were capable of providing security to any facility they were ordered to protect, as demonstrated by the protection provided to the Ministry of Oil, the Palestine Hotel, the Sheraton Hotel, the Airport, and the Republican Palace;
- Most of the facilities that suffered loss of cultural objects were in two areas and each could have been protected by small (ie 2-3 tank crews) according to one University of Chicago report;
- Reports suggest that some soldiers were asked to protect the manuscript, archives and library collections and took the view that they were not policeman and that their orders did not extend to protecting facilities of this kind;
- It is undeniable that the invading States were warned of the potential for looting of cultural treasures.

On the basis of the above facts and others, allegations have been made that the US forces appear to have knowingly neglected their legal duty under the international law of belligerent occupation to 'restore and maintain law and order'.

The report of an expert mission to Iraq in June-July 2003 and titled *Assessment of Iraqi cultural heritage: Libraries and archives*^{A2} reported that the National Archives in Baghdad occupied the same building as the National Library. A serious fire destroyed parts of the archives collection, however, other parts of the collection had been moved and survive. The same fire totally destroyed the Central Public Library.

Other reports which still need to be verified are:

- In late April 2003 there was a report that the National Museum staff being Ba'athist operatives stole their own artifacts;
- Late April 2003 US soldiers reported that the National Museum had been used as a defensive military position (and would have lost its protected status under the 1954 Hague Convention);

There are reports that suggest Iraqi soldiers attempted to defend the National Museum from invading forces on 8 April, however, no Iraqi soldiers were present later to stop the looting. American tanks took up position in the Museum's grounds on the 16 April, by which time substantial looting had taken place;⁴³

Major concern exists over archeological sites throughout Iraq that have still to be catalogued. Many cultural objects remain to be unearthed and without effective and ongoing protection they may suffer the greatest looting and loss. Put simply, the world will not know what it has lost.

What precautions were taken before hostilities began?

As already discussed the 1954 Hague Convention requires that precautions be taken in times of peace to protect cultural property in times of armed conflict. There are indeed reports of precautions being taken before hostilities began. For example, in April 2003 it is reported that Museum staff in Baghdad were sandbagging large objects and moving smaller ones to safe places. This is indeed a testimony to the professionalism and dedication of the people involved.

A precursor to taking preventative or protective action is foresight and a risk assessment that damage or destruction is likely in the particular circumstances. That the damage or destruction to cultural property was foreseeable in the prevailing circumstances leading up to the commencement of actual hostilities is fairly clear. The members of the group known as 'Historians of Islamic Art' in a letter to President George W Bush wrote:

... this destruction was not only preventable, it was also predicted. Meetings between American archeologists made it clear that Iraq's cultural patrimony would require protection in the aftermath of military victory.

Some examples where effective precautions appear to have been taken are:

Iraqi House of Manuscripts

In this case there has been a long program of microfilming and imaging in the 1990s (some 8 million folios). These were moved

to shelter before the war. Efforts to save the manuscript collection from the impending war began 4 months prior to war and continued right up to the week before hostilities. Many rare and fragile manuscripts were taken to one shelter, microfilms to another and CD-ROMs to a third location.

Ministry of Endowments and Religious Affairs at the Central Library

Staff had taken steps to protect the collections by moving them. Some were moved to the Qadiriya Mosque complex where they were put under armed guard. There is a report that at least one armed guard was shot and killed while guarding the collection. With the collection unguarded looting occurred.

National Library and Archives

Located across from the Ministry of Defence, this was completely burned and looted although there has been some suggestion that some of the more important documents may have been taken to safe custody.

There is a sad irony in terms of the measures that Iraq *might* have taken to further protect cultural objects. It has been reported that the Iraq Department of Antiquities was in the invidious position of being unable (because of the trade sanctions against Iraq) to obtain photographic film to document their collections, or vehicles to patrol their sites, while at the same time being forced to watch the unhindered flow abroad of looted antiquities. Political and military circumstances certainly conspired against cultural property in Iraq.

It must be noted that the protection of cultural property is not solely the obligation of the armed forces. After armed hostilities have commenced, not only is the military and the state obliged to protect cultural property, the occupying military, if one exists, has an identical duty.

Could more have been done to protect the cultural objects? No doubt the answer to this question is yes. In a letter by Martin E Sullivan, in which he tenders his resignation as Chair of the President's Advisory Committee on Cultural Property, he said the loss and destruction of Iraqi cultural property could have been prevented.

Laws of war – effective or ineffective?

In respect to the laws of war it been said, that 'A person stands a better chance of being tried and judged for killing one human than for killing 100 000'.⁴⁴ From what has been said so far in respect to the history of damage and destruction to cultural property in wars generally, and in the Iraq conflict specifically, one might conclude that the laws of war are ineffective. However, to draw such a conclusion would be to oversimplify a complex situation. Such a conclusion would also need to ignore the many instances where the laws of war have been effective. It would be easy to conclude on the basis of some, or even widespread, loss or damage to cultural property that the laws of war are ineffective. On the other hand we could conclude that but for the laws of war there would be much greater loss or damage.

Human Rights Watch said, '... although international justice mechanisms provide imperfect remedies, they are a vitally necessary alternative to impunity'.⁴⁵ It would be incorrect to assume that there was complete disregard for the laws of war in the Iraq conflict. More generally, one needs to look no further than the 1991 Gulf war to find a clear example of the effectiveness of the laws of war. There, a 'no-fire target list' was observed where cultural property was known to exist.⁴⁶

The laws of war continue to evolve, and when the dust settles in the Iraq conflict they will no doubt evolve some more. For example, after the horrors of the wars in the former Yugoslavia and Rwanda, the United Nations Security Council created two ad-hoc international criminal tribunals.⁴⁷ Through these mechanisms the world saw the arrest of people suspected of committing the gravest of war crimes. The Tribunals were not fettered by the official status of the suspects either. For example, we saw the indictment of the head of state of Yugoslavia, Slobodan Milosevic.

Partially as a result of these ad-hoc Tribunals, and partially due to other pressures we have seen the creation of the International Criminal Court (ICC) which aims to enforce laws against grave crimes when national courts are unable, or unwilling, to do so.

The ICC offers great potential to successfully carry out the charter of enforcing international humanitarian law, and it is hoped that its jurisdiction might one day extend to act as a deterrent to those who would commit the crimes associated with cultural property.

The ICC aside, we ought not ignore the prosecutions that have already occurred, or that are under way, against those that have allegedly breached the laws of war. For example:

- In October 1998 the UK arrested former Chilean President Pinochet charging him with human rights crimes;
- In August 2003 prosecutions recommenced in Buenos Aires against military officers for gross human rights violations during the war in Argentina;
- In Chad the national court brought action against the former dictator Hissene Habre's associates;
- In August 2001 an ad-hoc Human Rights Court on East Timor was established;
- The UN Mission in Kosovo commenced proceedings to try serious crimes committed during armed conflicts there in 1999;
- Mechanisms were put in place to bring to justice the war criminals in Sierra Leone and in Cambodia;
- In South Africa the Truth and Reconciliation Commission brought closure and justice to many of the appalling human rights abuses of the former apartheid regime;
- The Iraqi Governing Council has drafted a law to establish a tribunal to prosecute for serious war crimes committed during the Ba'ath Party rule.

What are the lessons from the Iraq conflict?

As a result of the giant global media networks, coupled with the independent news services, the world community today is aware of most armed conflicts. It is likely that the world community will learn lessons from the Iraq conflict. For example:

Comprehensive indexing of cultural property

The Iraq conflict illustrates the urgent need for comprehensive identification, cataloguing and indexing of cultural property. It is only by knowing what exists that we can ever hope to control it, and to repair or recover it if damaged or stolen. The provenance of cultural property

must be properly established, and we should aim to have comprehensive photographic evidence on record.

Compliance, violation and enforcement

It is clear that the invaders (or the liberators, depending on your personal view of the war in Iraq) are bound by the laws of war. The problem of course is, as is so often the case, in the compliance, or enforcement, of these laws. More mechanisms must be developed to improve compliance with the laws of war, whether these mechanisms take the form of better education, more attractive incentives, harsher sanctions, stiffer penalties, more comprehensive precautions, wider naming and shaming, or whatever else might work, or a combination of all these measures.

Preparation in times of peace

The Iraq conflict highlights the question confronting military planners and combatants, that is, whether to save a life (or lives) or whether to save cultural property. At the heart of the dilemma is what takes priority when a choice must be made? Such a choice confronts the military planners and the combatants. This scenario emphasises the need to take precautions and to make preparations *in times of peace* for the protection of irreplaceable cultural property. That property is important to all humanity. It knows no political, religious, or geographic borders. By making preparations before hostilities commence, there is some chance that the occurrence of this difficult choice, that is, whether to take a life or whether to destroy irreplaceable cultural objects, might be reduced, if not eliminated.

Occupying power's duty to establish law and order

One important lesson that we learn from the Iraq experience is that an occupying force has an extremely strict duty in establishing law and order and in protecting and preserving cultural property. It is not sufficient for an occupying force to say that the looting of cultural property is 'an unfortunate thing' because the forces were too involved in combat to stop it. US Defense Secretary Donald Rumsfeld said, in regard to the looting, 'To the extent it happens in a war zone, its difficult to stop'. It is difficult to accept that such a dismissal and shrug of the shoulders eliminates or mitigates the culpability of the invading forces for the loss of irreplaceable cultural property.

Occupying forces have a strict duty under the laws of occupation. Professor Francis Boyle of the University of Illinois College of Law argues the occupying forces are responsible for law and order and someone should have given the order to stop the looting and to protect the buildings containing cultural property. If the troops were too thin on the ground then this is a planning, resourcing, and management failure. An extremely heavy burden and duty rests on the invading forces to plan to make sure looting is prevented. On an objective test, setting aside all politics they failed to meet this justifiably strict obligation.⁴⁸

The need to push ahead with ratification of the Second Protocol

An important lesson from Iraq is the urgency it places on the need to get the Second Protocol into force. One can only speculate in the event the Second Protocol was in force whether it would have prevented some of the loss. Its criminal responsibility provision might have helped to some degree, or at least not militated.

The need to support the agencies that protect cultural property

A clear lesson is that there cannot be an absolute reliance on the state to protect cultural property. There is a vital role to be played by non-government organisations and the like. For example, agencies such as the International Committee of the Blue Shield (ICBS),⁴⁹ and others, which work to protect the world's cultural heritage threatened by wars and natural disasters, all need financial and other support. The ICBS is especially important in responding to emergency situations. Its work is recognised in the Second Protocol. UNESCO also has an important role to play in this field too and must be properly resourced to be able to perform its work.

Other lessons

A further lesson is that the experience in Iraq can remind us that the long-term stress, unfair treatment (as has been reported was the norm under the former regime of Saddam Hussein) and mob mentality will give rise to looting. We would also do well to remember, that antiquities are not just commodities. They are not something to add to our small private collections. They are part of the global heritage.

The fate of cultural property in the Iraq conflict also brings into the focus the need for honesty about the bigger picture as far as antiquities

are concerned. Should we not genuinely address the hypocrisy that is identified by Geoffrey Robertson QC who reminds us that we have failed to provide effective law requiring the return of cultural treasures that have been plundered by, amongst others, 19th century explorers?⁵⁰ Attempts to develop such a law have been thwarted as Robertson says, by 'sterile debate over whether such artifacts are part of the common heritage of mankind'.

What needs to be done now?

Insofar as what needs to happen to preserve and restore cultural objects (at least those that can be restored), there is much to do. Firstly, from the perspective of external nations and experts prepared to help, consultations must occur with the Iraqi experts so as to identify what (and when) assistance is required. The aim should be to minimise the paternalistic approach which could create more problems for a country already in crisis. Having established this, the following other things need to be done:

- generally, offer technical and financial assistance as necessary;
- restoration of the physical premises;
- replacement of plundered equipment;
- reconstitution of collections;
- archaeological sites must be protected – whereas before the war it is reported that 1 600 guards protected sites throughout Iraq, immediately following the war there were none;⁵¹
- comprehensive inventory and cataloguing of the collections;
- replacement of published works and non-original copies (this can be done from collections held around the world);
- comprehensive microfilming and data storage of the remaining collections (to avoid future loss);
- the occupying forces, and other nations must ratify the 1954 Hague Convention and the Protocols. It is something of a irony that Iraq ratified it over 35 years ago, the US and the United Kingdom have not. Ratification by these countries

will show a clearer commitment to preserving cultural property in times of armed conflict;

the physical facilities housing the cultural property must be made secure so that no further loss or damage occurs. This is highlighted by recent reports suggesting for example that the Baghdad Museum is nervous about reopening for fear of being a terrorist target;⁵²

central bodies such as the United Nations must play a central role in the post-conflict situations, as in the pre-conflict situation. Agencies such as the International Committee of the Blue Shield should be used to coordinate disaster response in the short term, and to advocate, on an ongoing basis, for the protection of cultural property;

appropriate training should be offered wherever required.⁵³

What is being done now?

The experience in armed conflict suggests that during the combat the greatest threat is likely to come by way of direct physical damage and fire from bombardment. After the fighting, harm to cultural objects collections will be due to damage to the buildings that house them and due to a dislocation of services and staff whose job it is to manage the collections.⁵⁴ In the former Yugoslavia the experience (according to UNESCO) was that the archives suffered more damage from later effects than from the actual fighting.

In recent weeks it seems that the CPA (Coalition Provisional Authority), the US/UK occupation authority and the Civil Affairs Units of the US military have been making substantial efforts to address the situation, for example:

the US has reserve officers (with advanced academic training in anthropology, museum curatorship and the like) assisting Museum staff and non-government organisations on assignment at the Baghdad zoo, monuments, and collections;

many Iraqi staff are working in difficult circumstances, without pay or assurance of job security, to preserve their cultural heritage. Their efforts ought to be applauded and rewarded by the international community;

- countries like Jordan that border Iraq have stationed experts at the border to apprehend stolen or smuggled antiquities;
- Interpol (at a conference held in May 2003) recommended expansion of the Interpol database of stolen works of art and recommended establishing a task force for the tracking of Iraqi stolen cultural property;⁵⁵
- the US Department of State announced on 29 April 2003, a contribution of US\$2 million to protect and restore Iraqi antiquities and to produce an online list of items looted with the aim to assist in the interdiction and recovery of objects worldwide;
- efforts are underway to relocate many of the collections (or parts of them) to secure custody;
- it was reported in May 2003 that Ayatollah Sistami issued a fatwa which argued against revenge killings and prohibited the buying and selling of antiquities.⁵⁶ This fatwa, and earlier clerical exhortations coupled with US forces tighter border inspections, could help keep the antiquities in Iraq;
- the UK has tabled an Order in Council (for which no consultation or primary legislation was necessary) to implement the UN Security Council *Resolution 1483*. It is now illegal in the UK to import, export, sell, own, or handle Iraqi cultural property taken from Iraq since August 1990. Most importantly the burden of proof of legal provenance is on the holder of the property, not the prosecuting authority;
- according to the US Department of State Cultural Property Office report, since 23 May 2003 the Bureau of Immigration and Customs Enforcement (ICE), and the Department of Homeland Security have been involved in a joint operation to identify items looted, detain and seize, authenticate their value, and prosecute those involved in transportation;
- ICE Agents launched an information campaign designed to prompt the return of looted items. Rewards are offered. Reports already indicate that looted items have turned up in the USA, Jordan, France and Switzerland;⁵⁷

- FBI Agents are working in Iraq to assist in criminal investigations against looters;
- a Bill is before the US House of Representatives. It aims to impose a complete moratorium on the import of all Iraqi antiquities.

Does all this constitute shutting the door after the horse has bolted? Maybe or maybe not. Time will tell. However, given that the stakes are so high, then all that could be done ought to be done.

Conclusion

There is enormous need for help from the international community for the preservation of cultural property in Iraq. It is not difficult to agree with the view of one commentator who said of post-liberation Iraq where 'People are too scarred by the past and too wary of the future to believe that their long nightmare may have concluded'. The international community must contribute to ending that nightmare by taking all measures to return, rescue and restore Iraq's cultural property.

If we learn lessons about the need to protect cultural objects in times of armed conflict then that would be one positive outcome from the war in Iraq. There will always be those who seek to profit from war. For example, there is much to be concerned about the arguments put forward by those who argue that the 'legitimate dispersal of cultural material' is the best way to protect it. Some collectors and curators want to be free to buy antiquities and therefore lobby to have the antiquities legislation of Iraq watered down in the aftermath of the war. Others argue that the reason that there is a black market in antiquities is because there is no legal market to satisfy demand. Proponents of this view say the law should allow for the sale and export of cultural property that Iraq already has in abundance (for example, clay tablets, cylinders etc).⁵⁸ With these sorts of pressures on cultural property in times of peace, all the more needs to be done to protect cultural property in times of war. Much work remains to be done to achieve international consensus on what is acceptable behavior apropos cultural property, and for the enforcement of laws to ensure that is the dominant behavior.

The war in Iraq may, for some and for a while at least, be seen as leading to the fall of a hated despotic tyrant. For others there will continue to be questions on whether the invasion was legitimate. In the longer term

the war may also be viewed as the loss, or the theft, or the destruction of some of the oldest treasures of western civilization. Simon Jenkins in the *Timesonline* put it 'we know of the sacking of the library of Alexandria in AD624, but who cares what caused it?' Will the same be said of the war in Iraq?

Endnotes

1 The author thanks Livia Iacovino and Evelyn Wareham for providing feedback on an earlier draft of this paper. The author also thanks the advice of Andras Riedlmayer for assistance in respect to current research in this area. Any errors in the paper are the author's exclusively.

2 Although this was spoken 60 years before the Iraq war the sentiment expressed here is as applicable today as it was spoken, that is, cultural property must be protected in war.

3 In Article 1.

4 With particular thanks to PG Wodehouse for this irresistible phrase.

5 These issues are explored in David Rieff, *A Bed for the Night: Humanitarianism in Crisis*, Vintage Books, 2003.

6 Andras Riedlmayer, 'Erasing the Past: The Destruction of Libraries and Archives in Bosnia-Herzegovina', at fp.arizona.edu/messasoc/Bulletin.bosnia.htm.

7 Jane C Waldbraun, 'Iraq's Plundered Past: Picking up the Pieces in Baghdad', *Archaeology*, vol. 56, no. 4, July/August 2003, at www.archaeology.org.

8 Antonio Gonzalez Quintana, *Archives of the Security Services of Former Repressive Regimes*, UNESCO, Paris, 1997.

9 Bearing in mind that the alleged possession by Iraq of, and capacity to deploy, weapons of mass destruction was a major premise on which the war was justified, publicly at least.

10 It is beyond the scope and beyond the word limit of this article to attempt anything more than a cursory overview of the international law aimed at protecting cultural property in times of armed conflict. For more coverage of the laws of war the reader is referred to A Robert & R Guelff (eds), *Documents on the Laws of War*, Oxford University Press, Oxford, 1995.

11 For an account of the life and work of Henri Dunant, see Caroline Moorhead, *Dunant's Dream: War, Switzerland and the History of the Red Cross*, Harper Collins, London, 1999.

12 300 000 men waged the Battle of Solferino in Lombardy in 1859 when Napoleon III defeated the Austrians. The battle was fought over a period of 15 hours. Over 40 000 men were killed and tens of thousands were left to die owing to the absence of medical services.

13 For example some of the areas regulated include the use of explosive projectiles, the use of asphyxiating gases, the laying of mines, bombardment by naval forces, genocide, treatment of prisoners of war, protection of civilians, and others.

14 The full title of the Geneva IV Convention is: *Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (1949).

15 International Institute for the Unification of Private Law.

16 There is reference to protection of cultural property in the 1899 Hague Convention II.

17 A Robert & R Guelff (eds), *Documents on the Laws of War*, Oxford University Press, Oxford, 1995, p. 339.

18 Article 6(b) of the 1945 Charter of the International Military Tribunal at Nuremberg.

19 Also affirmed in Article 53 of 1977 Geneva Protocol I and Article 16 of the 1977 Geneva Protocol II.

20 The City of Rheims was shelled in 1914, the Cathedral was the main target. At the time the Cathedral was serving as a hospital and had a red flag attached to the tower.

21 Note, the term 'High Contracting Party (or Parties)' is the term used in the Convention's Articles to refer to the States that have agreed, signed, and ratified the convention, or treaty, or protocol, as the case may be.

22 A more detailed analysis of this question is provided below, see 'What precautions were taken before hostilities began?'

23 Article 4(1).

24 Article 4(2).

25 The Second Protocol seeks to regulate and clarify the concept of 'military necessity', such is its ambiguity. See Article 6 of the Second Protocol.

26 Article 4(3).

27 Article 5.

28 Article 6.

29 Article 7.

30 Article 15.

31 Note, it was originally reported that the death was due to sniper fire, however, it is now known the death was due to the shelling. The author thanks Andras Riedlmayer for the update on this point.

32 Article 18.

33 Article 19.

34 Indeed UNESCO has done a lot of work in this area and has some excellent material on its website in terms of cultural property, its Memory of the World project, and a particularly good paper titled 'Lost Memory - Libraries and Archives Destroyed in the Twentieth Century', UNESCO, 1996, at www.unesco.org/webworld/mwm/administ/en/detroit.html.

35 The complete title of the Second Protocol is *Second Protocol to the Hague Convention of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999*.

36 After a convention or protocol is finalised there is usually a provision requiring a specified number of signatories sign the instrument before it comes into force.

37 Article 15.

38 Article 18 & 19 respectively.

39 See the UNESCO website, at www.unesco.org/culture/laws/hague/images/2plist.doc.

40 See Patrick Boylan posting on JUSTWATCH listserv at listserv.acsu.buffalo.edu/cgi-bin/wa?A2=ind0304&L=justwatch- &P=R6 (accessed 23 February 2004).

41 As reported in G Gugliotta, 'Global Hunt is Launched for Iraq's Looted Heritage', *Washington Post*, 2 May 2003.

42 Jean-Marie Arnoult, 'Assessment of Iraqi cultural heritage: Libraries and archives', UNESCO 26 00 00 526A, at www.ifla.org/VI/4/admin/iraq2407.htm (accessed 16 February 2004).

43 See 'War and cultural heritage' in *Actueel*, Oktober 2003, at kvc.minbuza.nl/artikelen (accessed 12 February 2004).

44 Jose Ayala Lasso, former United Nations High Commissioner for Human Rights, reported in 'Establishment of an International Criminal Court' at www.un.org/law/icc/general/overview.htm (accessed 17 February 2004).

45 Richard Dicker and Elise Keppler, 'Beyond The Hague: The Challenges of International Justice' at hrw.org/wr2k4/10.htm (accessed 17 February 2004).

46 See James AR Nafziger, 'Protection of Cultural Heritage in Time of War and its Aftermath', International Foundation for Art Research, at www.ifar.org/heritage.htm (accessed 16 January 2004).

47 The first being the International Criminal Tribunal for the Former Yugoslavia (1993) and the second the International Criminal Tribunal for Rwanda (1994).

48 Martin Sullivan, Chairman of President Bush's Cultural Property Advisory Committee, faulted the planner and not the troops on the ground on the 'Good Morning America' television show, 18 April 2003.

49 The ICBS consists of 4 non-government organisations, namely: the International Council on Archives (ICA), the International Council on Museums (ICOM), the International Council of Monuments & Sites (ICOMOS) and the International Federation of Library Associations & Institutions (IFLA).

50 Geoffrey Robertson QC, *Crimes Against Humanity: The Struggle for Global Justice*, Penguin, Victoria, 1999, p. 148.

51 As reported in A Riding, 'Experts Despair of Iraq's Stopping Loss of Relics', *New York Times*, 4 May 2003.

52 See Jennie Matthew, 'Baghdad museum too afraid to reopen' at www.middle-east-online.com/english/?id=8773 (accessed 16 February 2004).

53 The report by Jean-Marie Arnoult, 'Assessment of Iraqi cultural heritage: Libraries and archives' makes similar recommendations.

54 See *Emergency programmes to safeguard records in the event of armed conflict*, at www.unesco.org/webworld/archives/sro_citra/index.html.

55 See www.interpol.int/Public/ACPO/PressReleases/PR2003/PR200306.asp.

56 Reported in *Iraq Manuscript Collections, Archives and Libraries Situation Report*, International Federation of Library Associations and Institutions (IFLA), 8 June 2003.

57 See www.middle-east-online.com/english/?id=8773.

58 See 'Cops and Markets: Use incentives, not tighter bans, to preserve Iraq's heritage', 6 February 2004, at www.opinionjournal.com/taste/?id=110004655.