

2005

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Recommended Citation

Joshua M. Zelig, *Recovering Iraq's Cultural Property: What Can be Done to Prevent Illicit Trafficking*, 31 Brook. J. Int'l L. (2005).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol31/iss1/8>

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RECOVERING IRAQ'S CULTURAL PROPERTY: WHAT CAN BE DONE TO PREVENT ILLICIT TRAFFICKING

I. INTRODUCTION

After the fall of Saddam Hussein's regime in Iraq in April 2003, Iraqi citizens engaged in widespread looting.¹ The lawlessness in the aftermath led looters to raid government buildings, libraries, schools, thousands of archaeological sites, and even burn down the National Library.² The most publicized and controversial looting occurred at the Iraqi National Museum.³ United States forces were unable to secure the Museum until April 16, when tanks finally arrived.⁴ While initial reports

1. See Rajv Chandrasekaran, *Our Heritage is Finished; Looters Destroyed What War Did Not*, WASH. POST, Apr. 13, 2003, at A1.

2. See Phillip Kennicott, *The Vanishing Past; Iraq's Proud Library Turns to Bitter Ashes*, WASH. POST, Apr. 18, 2003, at A1.

3. The looting created controversy because many critics of Coalition military planning argued that the protection of the Oil Ministry appeared to take priority at the time. See Catherine Phuong, *The Protection of Iraqi Cultural Property*, 53 INT'L & COMP. L.Q. 985, 985 (2004). Such charges of neglect even prompted the Chairman of the President's Advisory Committee on Cultural Property, Martin E. Sullivan, to resign. Sullivan stated in his resignation: "While our military forces have displayed extraordinary precision and restraint in deploying arms—and apparently in securing the Oil Ministry and oil field—they have been nothing short of impotent in failing to attend to the protection of [Iraq's] cultural heritage." Paul Richard, *Bush Panel Members Quit Over Looting; Cultural Advisors Say U.S. Military Could Have Prevented Museum Losses*, WASH. POST, Apr. 17, 2003, at C1. The United States military responded by arguing that given the history of the previous Gulf War, in which Saddam Hussein ordered the burning of oil fields, the protection of the Oil Ministry and the oil fields was a high priority. Additionally, the military claims that it was unable to secure the Museum because enemy fire was coming from the vicinity. Yaraslov Trofimov, *Iraq After Hussein: Officials Say Iraq Looting Wasn't as Bad as First Feared*, WALL ST. J., Apr. 17, 2003, at A8.

4. United States forces entered Baghdad on April 9, 2003. The looting began soon thereafter on April 10, 2003. See John F. Burns, *Pillagers Strip Iraqi Museum of its Treasure*, N.Y. TIMES, Apr. 13, 2003, at A1. Trofimov, writing about the inability to protect the museum, states the following:

[The military] couldn't move into the museum compound and protect it from looters last week because . . . soldiers were taking fire from the building and were determined not to respond. There is an Iraqi army trench in the Museum's front lawn, and Lt. Col. Schwartz said his troops found many Iraqi Army uniforms inside. "If there is any dirty trick in the book," he said, "they sure used it."

Id.

estimated that over 170,000 pieces were missing from the Museum, this figure was later shown to be mistaken.⁵ Museum directors had taken it upon themselves to secure and hide most of the Museum items. However, looters did make off with over 13,000 items.⁶ Priceless ancient artifacts such as the Warka Vase were stolen from the Museum.⁷ An amnesty program initiated by the United States military proved to be somewhat successful and, by September 2003, over 3,000 pieces had been recovered including the Warka Vase.⁸ Through the efforts of a broad coalition of international organizations and countries, including the United Nations Educational, Scientific and Cultural Organization,⁹ the International Criminal Police Organization,¹⁰ and the United States, as of June 2004, roughly 5,200 items had been recovered in six different coun-

5. Over 170,000 artifacts were mistakenly reported missing after Saddam Hussein's downfall. The estimate was so high because Western journalists arrived at the museum to find it virtually empty. Later on it was discovered that the museum staff had moved most of the artifacts into storage in anticipation of the looting. Roger Atwood, *Stop Thieves! Recovering Iraq's Looted Treasures*, WASH. POST, Oct. 3, 2004, at B2.

6. This figure was established by Colonel M. Bogdanos, the head of a thirteen member team dispatched from United States Central Command, consisting of selected military personnel from the Joint Inter-Agency Coordination Group and agents from the Bureau of Immigration and Customs Enforcement. See Colonel Bogdanos' Iraq Museum Investigation [hereinafter Bogdanos Investigation], Apr. 22, 2003–Sept. 8, 2003, available at <http://www.defenselink.mil/news/Sep2003/d20030922fr.pdf>.

7. According to the Bogdanos Investigation, the Warka Vase is "an exquisite white limestone votive vase dating from approximately 3200 B.C.E. and arguably the most significant artifact possessed by the museum." *Id.*

8. Almost half of these recovered items were returned by Iraqis under the amnesty program. *Id.* The amnesty program was created by Col. Bogdanos and his team. They met with local imams and community leaders to help them explain to Iraqis the extent of the amnesty program. The team initially struggled with the perception among the Iraqi people of the Museum's connection to the former Hussein regime and a lack of trust in the "no questions asked" policy. Bogdanos reports that eventually the program proved to be successful and Iraqis desired to return items to the U.S. forces for safekeeping until a new Iraqi government was installed. *Id.*

9. The United Nations Educational, Scientific and Cultural Organization (UNESCO) was founded on November 16, 1945, <http://www.unesco.org> (follow "About UNESCO" hyperlink).

10. The International Criminal Police Organization (Interpol), created in 1923, is the world's largest international police organization with 182 member countries. It facilitates cross-border police cooperation, and supports and assists all organizations, authorities and services whose mission is to prevent or combat international crime. Introduction to Interpol, <http://www.interpol.net/Public/Icpo/introduction.asp>.

tries.¹¹ Despite these efforts, wide-spread instances of looting are still plaguing Iraq, particularly at archaeological sites throughout the south.¹²

The efforts of UNESCO, Interpol, and the many participating nations should be applauded and may be successful in the short term. However, the long term aspiration should be for more countries to join and enforce the existing treaties and conventions established to protect cultural property during armed conflicts and prevent the illegal distribution of stolen cultural items. There are three such international agreements in place: The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,¹³ the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,¹⁴ and the 1995 UNIDROIT¹⁵ Convention on Stolen or Illegally Exported Cultural Objects.¹⁶ By increasing the number of State Parties to these agreements, it may be easier to stop illicit trafficking of stolen goods by having a uniform customs and borders system. However, these Conventions have been virtually ineffective in dealing with the current crisis in Iraq.

11. For example, Italy has confiscated more than three hundred pieces looted from the Museum. Jordan, which has worked the hardest among Middle Eastern countries to prevent itself from being used as a transshipment point, had seized 1,054 pieces by June 2004. Atwood, *supra* note 5.

12. Charlotte Eagar writes about the ongoing problem of looting archaeological sites throughout Iraq:

The real scandal is not theft from institutions, which are under 24-hour guard, but the plundering of Iraq's most ancient archaeological sites. Freelance excavators are hunting not for grand artifacts, but instead seals, inscriptions and earthenware—Iraqi treasures which still lie, undiscovered in the earth.

Charlotte Eagar, *On the Secret War to Save Iraq's Heritage from Smugglers*, TIMES (Eng.), Oct. 16, 2004, Weekend Rev., at 4.

13. The Convention for the Protection of Cultural Property in the Event of an Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Convention].

14. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 10 I.L.M. 289 [hereinafter UNESCO Convention].

15. The International Institute for the Unification of Private Law (UNIDROIT) is an independent, intergovernmental organization based in Rome. The Institute was established in 1926 by the League of Nations. Following the demise of the League, UNIDROIT was reestablished in 1940, on the basis of a multilateral agreement. About Unidroit, <http://www.unidroit.org/english/presentation/main.htm> (last visited Sept. 28, 2005).

16. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330 [hereinafter UNIDROIT Convention].

This Note will demonstrate that the Conventions and treaties established for the protection of cultural property do little to remedy the crisis in Iraq. It will argue that the most effective way to curb illicit trafficking of cultural property is for States to not only join existing treaties but to implement stringent domestic legislation to eliminate a burgeoning market for such goods.¹⁷ Furthermore, this Note will argue that because of the potential of further military intervention by the United States and the United Kingdom, it is necessary for these countries to join the 1954 Hague Convention and its Protocols in order to prevent future disasters to cultural property. Part II of this Note will discuss the history of protecting cultural property, particularly in times of armed conflict. It will discuss the creation of UNESCO and examine the three existing Conventions established to protect cultural property in times of both peace and war. Part III of this Note provides background on the history of looting and destruction of cultural property in the Middle East and then focuses on the widespread damage done throughout Iraq in the aftermath of the fall of Saddam Hussein. Part III will also examine the immediate international response and its effectiveness. Part IV analyzes effectiveness of the three existing conventions and their applicability to the situation in Iraq. Part V discusses the United Nations Security Council Resolution requiring member states to implement legislation to prevent the illicit trafficking of Iraqi cultural property.¹⁸ It will argue that this is an effective technique and that strong domestic legislation is a useful remedy.

II. BACKGROUND

A. Historical Background of Protection of Cultural Property

The first legal reference to the protection of cultural property during armed conflict can be found in the Instruction for the Government of Armies of the United States in the Field,¹⁹ also known as the "Lieber

17. The United States has two bills currently proposed in both the House of Representatives and the Senate. The Iraq Cultural Heritage Protection Act was introduced on May 7, 2003 in the House, and the Senate proposed the Emergency Protection for Iraqi Cultural Antiquities Act of 2003 on June 19, 2003. The United Kingdom adopted the Iraq Order 2003 on June 12, 2003. *See infra* Part V.

18. The United Nations Security Council passed Resolution 1483 on May 22, 2003. The Resolution required all Member States to take action to facilitate the return of Iraqi cultural property by enacting a ban on the transfer of such items. *See infra* Part V.

19. *Instructions for the Government of Armies of the United States in the Field*, promulgated as General Order No.100 by Abraham Lincoln, Apr. 24, 1863 [hereinafter Lieber Code].

Code.”²⁰ Article 34 of the Lieber Code states that cultural property should be treated as private property unless used for a military purpose.²¹ Artwork and other more traditional aspects of cultural property are protected under Article 35 of the Lieber Code.²² The Lieber Code is significant in that it places the duty to protect cultural property on both the attacker and the defender, and lays the foundation for subsequent international treaties.²³

Concern over protecting private property during armed conflict gave rise to the first international treaties providing protection for cultural property, the 1899²⁴ and 1907²⁵ Hague Conventions which produced a codified rule of war.²⁶ Both Conventions prohibit invading armies from pillaging and require them to respect the civil laws of the conquered territory.²⁷ Article 27 of the 1907 Convention provides that protection must be given to all religious, scientific, and historic monuments.²⁸ Such

20. The code was prepared by Francis Lieber. Lieber was a German-American political philosopher who, during the Civil War, authored the *Instructions for the Government of Armies of the United States in the Field*. THE COLUMBIA ENCYCLOPEDIA (6th ed. 2001–2005).

21. Lieber Code art. 34 (“As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of fine arts, or of a scientific character—such property is not to be considered public property.”).

22. Lieber Code art. 35 (“Classical works of art, libraries, scientific collections, or precious instruments . . . as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.”).

23. See David Keane, *The Failure to Protect Cultural Property in Wartime*, 14 DEPAUL-LCA J. ART & ENT. L. & POL’Y 1, 4 (2004).

24. Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803. The Convention was adopted at the First Hague Peace Conference in 1899 and entered into force in 1900.

25. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

26. Andrea Cuning, *The Safeguarding of Cultural Property in Times of War and Peace*, 11 TULSA J. COMP. & INT’L L. 211, 215 (2003) (“The concern over protecting private property became more of an international concern as a nation’s capability to conduct war was increased by many of the effects of the industrial revolution and warfare became more violent and destructive.”).

27. *Id.*

28. 1907 Hague Convention on Laws and Customs of War on Land art. 37 (“In sieges and bombardments, all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments,

buildings or monuments are to be marked by visible signs.²⁹ Aside from protection of military strikes against cultural property, Article 56 of the 1907 Hague Convention also expressly forbids the seizure, destruction or willful damage of such property, and even provides for legal proceedings in case of a violation.³⁰ Together, Articles 27 and 56 were designed to protect both the buildings and the cultural property within them.

Although the 1899 and 1907 Hague Conventions failed to protect cultural property during World War I, they were significant with respect to reparations. The Treaty of Versailles provided for the enforcement of the two Hague Conventions by requiring Germany to return to France all artwork and other cultural objects stolen during the course of the war.³¹ Although there were no prosecutions for damaging cultural property after World War I, the acts of plunder and destruction were condemned as violations of international law.³² This condemnation, combined with restitution procedures after the conflict, represented significant steps toward a clearer vision of international protection of cultural property. Unfortunately, wide-scale destruction and pillaging of cultural property occurred once again throughout World War II, further highlighting the need for more authoritative measures.³³

hospitals, and places where sick and wounded are collected, provided they are not being used at the time for military purposes.”).

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

30. 1907 Hague Convention art. 56 (“All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.”).

31. Peace Treaty of Versailles art. 245, June 28, 1919 (“The German Government must restore to the French Government the trophies, archives, historical souvenirs or works of art carried away from France by the German Authorities in the course of the war of 1870–1871 and during this last war . . .”).

32. These acts were condemned as violations of international law in the sense that they were violations of the 1899 and 1907 Hague Conventions. The spirit of these two conventions was incorporated into the Treaty of Versailles. “The principle of protection from the Hague Relations of 1899 and 1907 was given practical effect in the Treaty of Versailles, and the restitution of cultural property . . . represents an important advancement.” Keane, *supra* note 23, at 8. Additionally, the 1907 Convention was explicitly recognized as customary international law in 1946 by the International Military Tribunal at Nuremberg. ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS OF THE LAWS OF WAR 43 (2d ed. 1989).

33. Cunning, *supra* note 26, at 220.

B. History of UNESCO

The United Nations Educational Scientific and Cultural Organization (UNESCO) was founded on November 16, 1945.³⁴ Since its inception, UNESCO has worked diligently to protect the natural and cultural heritage of humanity and prevent the illicit trafficking of cultural artifacts.³⁵ UNESCO conducted its first international campaign in 1959 when it helped the Egyptian government safeguard the Abu Simel temples in the Nile Valley from flooding.³⁶ UNESCO has built a legal foundation for its cultural action, beginning with the creation of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict in 1954,³⁷ followed by the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property in 1970.³⁸ UNESCO also helped create the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects in 1995.³⁹ UNESCO responded almost immediately to the antiquities crisis in Iraq

34. Constitution of the United Nations Educational, Scientific and Cultural Organization art. 1, Nov. 16, 1945, http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html (“The purpose of the organization is to contribute peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.”).

35. Sarah Cattán, *The Imperiled Past: Appreciating Our Cultural Heritage*, UN CHRONICLE, Dec. 2003/Jan. 2004, at 7–12; see also UNESCO Constitution art. 1 § 2(c) (“By assuring the conservation and protection of the world’s inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions.”).

36. Cattán discusses UNESCO’s first effort at preserving cultural property in Egypt:

These treasures of ancient Egyptian civilization were threatened by flooding caused by the destruction of the Aswan High Dam. With some fifty countries donating half of the \$80 million necessary for the rescue, the campaign was an unexpected success. The temples were dismantled, moved to dry ground, reassembled and eventually saved. This demonstrated that the conservation of the world’s common heritage concerned all countries and encouraged UNESCO to give legal support to the global movement.

Cattán, *supra* note 35, at 7.

37. The Convention for Protection of Cultural Property in the Event of Armed Conflict, adopted at The Hague in 1954 in the wake of massive destruction of the cultural heritage in the Second World War, is the first international agreement focusing exclusively on the protection of cultural heritage. Hague Convention, *supra* note 13.

38. UNESCO Convention, *supra* note 14.

39. UNIDROIT Convention, *supra* note 16.

by working together with the United States, Interpol, and many other organizations to restore Iraq's cultural heritage.⁴⁰

C. 1954 Hague Convention

The large-scale destruction and looting during World War II⁴¹ prompted a need for a protective treaty for the tangible remains of both ancient and modern cultures.⁴² The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was implemented by UNESCO in 1954 to protect cultural heritage in war-torn countries.⁴³ The express purpose of the Hague Convention was to prevent the types of destruction and theft of cultural material that have become common in modern warfare.⁴⁴ The Hague Convention was based on the premise that cultural property is significant to all human kind and is therefore deserving of appreciation and protection.⁴⁵ The Hague Convention was unique in that it was the first international document to define the term "cultural property."⁴⁶

40. See Matthew Rose, *Paradise Lost*, ART & ANTIQUITIES, Summer 2003, at 86–87.

41. See Keane, *supra* note 23, at 8–12 (discussing the "system of organized plunder of both public and private property throughout the invaded countries of Europe during World War II." The Nazis stole more than 21,000 art objects from museums, libraries, and private homes).

42. Jennifer Lehman, *The Continued Struggle With Stolen Cultural Property: The Hague Convention, The UNESCO Convention, and the UNIDROIT Draft Convention*, 14 ARIZ. J. INT'L & COMP. L. 527, 531 (1997).

43. Cattan, *supra* note 35.

44. Neil Brodie, *Focus on Iraq: Spoils of War*, ARCHAEOLOGY, July/August 2003. Mr. Brodie believes that this is a "strong piece of legislation" that, if acceded to, would circumvent many looting problems created by warfare.

45. Lehman, *supra* note 42, at 532. See also Hague Convention, *supra* note 13, pmb1. ("Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the world.")

46. Hague Convention, *supra* note 13, art. 1, defines cultural property as:

- a. movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical, or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- b. buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges in-

The Hague Convention imposes upon states a minimum standard of respect for cultural property both in their territory⁴⁷ and the territory of others. The main obligation imposed on parties is to prohibit and prevent any form of theft, pillage, vandalism, or misappropriation of cultural property.⁴⁸ The most significant part of the Hague Convention concerns the responsibility of armed forces to protect the cultural property of other territories.⁴⁹ An occupying power's duty to protect cultural property and prevent illicit trade applies whether or not the occupied country has signed the convention.⁵⁰ Furthermore, even if an occupied country has failed to protect its own cultural property as required under Article 3, the occupier must still take all necessary measures to protect that property.⁵¹ This obligation emphasizes the global responsibility for cultural property, not just the relation between a certain state and its property.⁵²

Although the Convention effectively promotes awareness and respect for cultural property during military conflicts, it does not adequately address the illicit trafficking of such items during peacetime nor does it provide any remedies for their return.⁵³ Another problem is the lack of any true enforcement measures. This is illustrated by the fact that State Parties, while called on to prosecute and impose penal sanctions on violators, are left to create their own laws and punishments.⁵⁴ This leads to an inconsistency of domestic laws and systems that prosecute the damag-

tended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

- c. centers containing a large amount of cultural property as defined in sub-paragraph (a) and (b), to be known as "centers containing monuments."

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

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

49. *Id.* arts. 4–7.

50. *Id.* art. 5.

51. *Id.* art. 4 (the obligations under Article 4 may never be disregarded by any signing member).

52. Lehman, *supra* note 42, at 534.

53. *Id.* at 535.

54. Hague Convention, *supra* note 13, art. 28, states:

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

ing and trafficking of cultural property.⁵⁵ Subsequent treaties have attempted to solve these deficiencies. Although the Hague Convention currently has 114 State Parties, the United States and the United Kingdom are both conspicuously absent.⁵⁶ The United States and United Kingdom have both refused to ratify the convention since 1954 because the Hague Convention would limit their capacity to use nuclear weapons.⁵⁷ Even without the United States and the United Kingdom, the Hague Convention draws a significant following throughout the world with the help of UNESCO and other world organizations.⁵⁸

In response to barbaric acts against cultural property that occurred during armed conflicts in the late 1980s and early 1990s,⁵⁹ UNESCO initi-

55. When every state has different laws concerning cultural property, the inconsistency creates a chaotic system where traffickers can work in countries with more lenient legislation.

56. For a list of 114 State Parties to the Hague Convention, <http://portal.unesco.org/la/convention.asp?KO=13637&language=E&order=alpha>. See also Cuning, *supra* note 26, at 220 (“The United States and the United Kingdom did not ratify the 1954 Hague Convention because of its restrictiveness and stretch beyond customary international law.”).

57. Lehman, *supra* note 42, at 532.

58. *Id.* Parties to the Hague Convention include approximately one-half of the members of UNESCO, including nearly all other NATO states.

59. Keane notes that “[t]he initiative for the Second Protocol came largely out of the destruction of cultural property during the conflict in the former Yugoslavia.” Keane, *supra* note 23, at 36. Keane argues that the 1954 Hague Convention was proved to be inadequate by the conflict in the former Yugoslavia. Yugoslavia was a High Contracting Party of the 1954 Hague Convention. Under Article 19 of the Hague Convention, a High Contracting Party is bound to the provisions of the Convention that respect cultural property. Keane writes:

Indeed, it is clear that cultural property was the subject of deliberate attack throughout the conflict. In response to charges of deliberate destruction of cultural property, the Yugoslav federal government claimed its attacks were justified under military necessity. Similarly, the Serbs cited the defense of imperative military necessity for the shelling of Dubrovnik. They claimed that Croats were using buildings in the city center for military purposes. Such use is prohibited by the 1954 Hague Convention under the requirement of respect for cultural property contained in Article 4.

Id. at 22. Additional damage was done to religious sites, which are not protected under the 1954 Hague Convention. Thirty percent of the city of Dubrovnik’s historic center was destroyed in attacks on December 6, 1991. The practice of targeting religious institutions and cultural property was part of an “ethnic cleansing” campaign conducted by the Serbs. After hostilities ceased, the United Nations established a war crimes tribunal, the Statute of the International Tribunal for the Former Yugoslavia (ICTY), which recognized the destruction of cultural property as a violation of international law. The ICTY handed

ated a review of the Hague Convention to improve its perceived deficiencies.⁶⁰ This review began in 1991 in order to create a new agreement to improve the Hague Convention by taking into account the experience gained from conflicts and the development of cultural property law since 1945.⁶¹ The result was the Second Protocol to the Hague Convention, adopted at a Diplomatic Conference held at The Hague in 1999.⁶² The Second Protocol elaborates the goals of the Hague Convention and makes attempts to further protect cultural property.⁶³ More specifically, the Second Protocol creates a new form of “enhanced protection” for cultural property.⁶⁴ The system of enhanced protection in the Second Protocol removes the geographical restrictions of the 1954 Hague Convention by allowing for protection of cultural property located near industrial centers.⁶⁵ The Second Protocol also establishes a common fund

down two indictments for the destruction of cultural property against two high ranking Serbian officials, Radovan Karadzic and Ratko Mladic. *Id.*

60. Five areas were identified by UNESCO to be addressed in the Second Protocol: (1) the institutional aspects, (2) the precautionary measures taken in peace time, (3) the “military necessity” exception, (4) the system of special protection, and (5) individual criminal responsibility. *Id.* at 27.

61. Legal Protection for Cultural Heritage: Protection for Cultural Property in the Event of an Armed Conflict, http://www.unesco.org/culture/legalprotection/war/html_eng/index_en.shtml (last visited Sept. 28, 2005).

62. *Id.*

63. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict pmbl., Mar. 26, 1999, 38 I.L.M. 769, 769 [hereinafter Second Protocol] (“Reaffirming the importance of the provisions of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, done at the Hague May 14, 1954, and emphasizing the necessity to supplement these provisions through measures to reinforce their implementation.”).

64. Cultural property achieves enhanced protection if it is vital to humankind, is protected by domestic law, and is not used for military purposes. *Id.* Second Protocol, *supra* note 63, art. 10 states:

Cultural property may be placed under enhanced protection provided that it meets the following three conditions:

- a. it is cultural heritage of the greatest importance to humanity;
- b. it is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection;
- c. it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.

65. The restrictions are articulated in the Hague Convention, *supra* note 13, art. 8(1)(a):

to provide financial assistance to State Parties for the protection of cultural property during both times of peace and armed conflicts.⁶⁶ This provision has enormous potential to combat the destruction of cultural heritage because many poor nations that lack the financial resources to protect their cultural property can draw upon the fund established by the Second Protocol.⁶⁷

The Second Protocol also specifies what constitutes serious violations of the Protocol and defines the conditions under which individual criminal responsibility shall apply.⁶⁸ The Second Protocol imposes on its State Parties the obligation to adopt necessary measures to establish these violations as criminal offenses under domestic law.⁶⁹ However, signifi-

That there may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict provided that they are situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, a broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication.

66. Second Protocol, *supra* note 63, art. 29. This fund is managed by the Committee for the Protection of Cultural Property in the Event of Armed Conflict established in Article 24 of the Second Protocol. This Committee is composed of twelve experts who are qualified in the field of cultural heritage and are elected by the State Parties. The functions of the Committee, set forth in Article 27, include developing guidelines for the implementation of this Protocol, suspending or canceling enhanced protection for cultural property, and receiving and considering requests for international assistance.

67. Cuning, *supra* note 26, at 237.

68. Second Protocol, *supra* note 63, art. 15(1):

Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:

- a. Making cultural property under enhanced protection the object of attack;
- b. Using cultural property under enhanced protection or its immediate surroundings in support of military action;
- c. Extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
- d. Making cultural property protected under the Convention and this Protocol the object of attack;
- e. Theft, pillage, or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

69. Second Protocol, *supra* note 63, art. 15(2):

cantly, it still fails to make any uniform laws regarding the illicit trafficking of cultural property, instead requiring States to create their own such laws.⁷⁰ Thus, there is still no uniform enforcement measure. Therefore, the Second Protocol, although an overall improvement, remains ineffective as a means to prevent and stop the illicit trafficking of cultural property. The Second Protocol has also struggled with ratification.⁷¹ To date, only twenty countries have ratified the Second Protocol, with Spain being the only Western European country, and the United States yet to even sign it.⁷²

D. UNESCO Convention

UNESCO instituted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property in 1970 in response to a rash of antiquities thefts.⁷³ The UNESCO Convention provides a framework for nations to cooperate to reduce the incentive for pillage of archaeological and cultural material.⁷⁴ As of March 2005, 107 countries have signed the Convention.⁷⁵ The UNESCO Convention was designed to curb international trafficking of

Each party shall adopt such measures as may be necessary to establish as criminal offenses under its domestic law the offenses set forth in this Article and to make such offenses punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

70. The Second Protocol requires:

[E]ach Party shall adopt such legislative, administrative or disciplinary measures as may be necessary to suppress the following acts when committed intentionally:

- a. any use of cultural property in violation of the Convention or this Protocol;
- b. any illicit export, other removal, or transfer of ownership of cultural property in violation of the Convention or this Protocol.

Id. art. 21.

71. List of states party to the Second Protocol, <http://www.unesco.org/culture/laws/hague/images/2plist.doc> (last visited Sept. 29, 2005).

72. *Id.*

73. Lehman, *supra* note 42, at 538.

74. *Id.*

75. List of states that are parties to the UNESCO Convention, <http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha> (last visited Sept. 29, 2005).

national treasures and is the major international treaty for the protection of cultural property.⁷⁶ The long term purposes of the UNESCO Convention are to protect the knowledge that can be derived from archaeological material that is scientifically excavated and to preserve ethnographic material that remains in its societal context.⁷⁷ The overall benefit of the international cooperation within the Convention is a greater understanding of our common heritage.⁷⁸ Thus it is similar to the Hague Convention in recognizing the importance of cultural property and heritage.⁷⁹ Both Conventions also require that parties list the items which they believe fall under the definition of cultural property.⁸⁰ The Hague Convention strictly defines the forms of cultural property that may receive enhanced protection.⁸¹ The UNESCO Convention, however, is much more open-ended, leaving it within the discretion of the parties to determine what property falls within the definition of cultural property.⁸² Unlike the Hague Convention, however, which focuses primarily on armed conflict, the UNESCO Convention deals almost entirely with private conduct, mostly during peacetime.⁸³ The two Conventions overlap at times, particularly at the conclusion of an armed conflict.⁸⁴

76. Lehman, *supra* note 42, at 538.

77. UNESCO Convention, *supra* note 14, pmb. (“The interchange of cultural property among nations for its scientific, cultural, and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.”).

78. Lehman, *supra* note 42, at 540.

79. Hague Convention, *supra* note 13, pmb.; UNESCO Convention, *supra* note 14, pmb.

80. See UNESCO Convention, *supra* note 14, art. 1; see also Hague Convention, *supra* note 13, art. 8.

81. Hague Convention, *supra* note 13, art. 8.

82. See UNESCO Convention, *supra* note 14, art. 1.

83. Karin E. Borke, *Searching for a Solution: An Analysis of the Legislative Response to the Iraqi Antiquities Crisis of 2003*, 13 DEPAUL-LCA J. ART & ENT. L. 381, 410 (2003).

84. Andrea Cuning discusses the relationship between the two conventions:

The UNESCO Convention is complimentary to the 1954 Hague Convention in that the two documents work together to protect cultural property in time of peace and in the event of armed conflict. Often the two agreements overlap due to the fact that most claims for repatriation of cultural property are brought in times of peace at the conclusion of an armed conflict and many countries that have not provided implementing legislation for the 1954 Hague Convention may have implemented the UNESCO Convention regarding the return of stolen cultural property.

Cuning, *supra* note 26, at 226.

The UNESCO Convention takes significant measures to prevent the illicit trafficking of cultural property. The Convention explicitly prohibits the importation of cultural property illegally exported or stolen from a foreign nation.⁸⁵ Free-market nations are somewhat reluctant to join the Convention because they believe that it lacks adequate protection for good faith purchasers.⁸⁶ The UNESCO Convention has specific obligations with regards to exporting and importing cultural objects.⁸⁷ The Convention imposes upon exporting states the obligation to issue authorized certificates to show that the exported property was fully sanctioned.⁸⁸ Along with this certification process, the UNESCO Convention requires State Parties to ensure that museums within their territory do not acquire cultural property illegally exported from another State Party.⁸⁹ Perhaps most importantly, Article 7(b) of the Convention prohibits the importation of cultural property stolen from museums and other public monuments and institutions in another State Party, provided that such cultural property is documented as belonging to that particular institution.⁹⁰

85. UNESCO Convention, *supra* note 14, art. 3.

86. Only recently did France, the United Kingdom, and Japan become State Parties. Borke, *supra* note 83, at 409. Borke explains that market nations have been slow to accede to the UNESCO Convention out of reluctance to restrict their art markets. *Id.*

87. UNESCO Convention, *supra* note 14, arts. 6–7.

88. The State Parties to the UNESCO Convention undertake:

- a. to introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations;
- b. to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned expert certificate;
- c. to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property.

Id. art. 6.

89. The State Parties to the UNESCO Convention agree:

To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after entry into force of this Convention in both States.

Id. art. 7(a).

90. *Id.* art. 7(b)(i).

Archaeological materials are dealt with separately in Article 9.⁹¹ However, Article 9 only envisages enhanced cooperation between State Parties should a State Party's archaeological materials be in danger of being pillaged.⁹² If an agreement is not reached, the property may not be protected under the Convention. Therefore, if cultural property is not fully documented as a museum or institutional piece, the UNESCO Convention does not provide an adequate mechanism to compel restitution.

Although the UNESCO Convention represents a significant attempt to curtail illicit trafficking of cultural property, it falls short in its overall effectiveness because of a lack of uniformity in legal recourse.⁹³ As with the Hague Convention, it allows states to apply their own substantive law regarding cultural property. This lack of uniform structure renders the UNESCO Convention ineffective as a means of solving the problem of illicit trafficking.⁹⁴

E. UNIDROIT Convention

The third primarily international agreement in this area, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 aims to establish common legal rules for the restitution and return of cultural objects between State Parties to the Convention.⁹⁵ The

91. *Id.* art. 9 ("Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other State Parties who are affected. The State Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irreparable injury to the cultural heritage of the requesting State.").

92. Phuong, *supra* note 3, at 990.

93. The UNESCO Convention requires states to "take necessary measures, consistent with national legislation." UNESCO Convention, *supra* note 14, art. 7. Article 8 of the Convention requires States to impose sanctions on persons who deal with stolen cultural property, but does not require States to criminalize such conduct. By allowing States to impose their own laws, an inconsistency is created which makes combating illicit trade very difficult. *See id.* art. 8.

94. Lehman, *supra* note 42, at 541.

95. UNIDROIT's purpose is to study means and methods for modernizing, harmonizing and coordinating private and in particular commercial law as between States and groups of States. *See* "Purpose" of UNIDROIT, <http://www.unidroit.org/english/presentation/main.htm>. *See also* UNIDROIT Convention, *supra* note 16, pmb1. ("Determined to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimum legal rules for the restitution

fundamental tenet of the UNIDROIT Convention is that the possessor of stolen property should return it to the original private owner.⁹⁶ The UNIDROIT Convention seeks to correct the failings of the UNESCO Convention by shifting the focus onto recipients in wealthy nations rather than counting on developing countries to police their own borders.⁹⁷ It does this by creating a single harmonized source of law which requires any form of artifact deemed a piece of cultural property to be returned even if theft cannot be proven.⁹⁸ Additionally, the UNIDROIT Convention enables private claims to be pursued in national legal systems.⁹⁹ Whereas the UNESCO Convention allows only State Parties to request restitution of stolen or illegally exported objects, the UNIDROIT Convention allows private individuals to initiate restitution procedures.¹⁰⁰

and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of the cultural heritage interest of all.”).

96. UNIDROIT Convention, *supra* note 16, art. 1:

This Convention applies to claims of an international character for:

- a. the restitution of stolen cultural objects;
- b. the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of promoting its cultural heritage.

97. Lehman, *supra* note 42, at 543. *See also* Phuong, *supra* note 3, at 992 (“Since the 1970 UNESCO Convention was criticized for not being sufficiently specific, UNESCO requested the UNIDROIT to work on a supplementary convention on stolen or illegally exported cultural objects.”).

98. UNIDROIT Convention, *supra* note 16, ch. III. This provision allows a Contracting State to merely claim that the object was illegally exported in order to demand its return. Theft need not be proven.

99. Under the UNIDROIT Convention:

- (1) A claim under Chapter II and a request under Chapter III may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.
- (2) The parties may agree to submit the dispute to any court or other competent authority for arbitration.
- (3) Resort may be held to the provisional, including protective, measures available under the law of the Contracting State where the object is located even where the claim for restitution or request for return of the object is brought before the courts or other competent authorities of another Contracting State.

Id. art. 8.

100. *Id.* arts. 2, 8.

Another area covered by the UNIDROIT Convention which improves upon the UNESCO Convention concerns the trafficking of archaeological artifacts.¹⁰¹ The UNIDROIT Convention covers unlawfully excavated, or lawfully excavated but unlawfully retained cultural objects.¹⁰² Unlike the UNESCO Convention, it does not require museum certification from the country of origin. Moreover, the convention provides that a bona fide purchaser of stolen items does not receive good title.¹⁰³ Instead, the Convention requires that the purchaser return it, and upon return is entitled to "payment of fair and reasonable compensation," provided that he had no knowledge of it being stolen and he exercised due diligence upon acquiring the object.¹⁰⁴ Thus, there is a good faith requirement in purchasing cultural property. It is argued that this requirement of good faith will ultimately deter illicit trafficking of cultural property because without an act of good faith the possessor will not be compensated when he is required to return it.¹⁰⁵ Therefore, the UNIDROIT Convention could be the most effective means of curtailing illicit trafficking because it establishes a common set of legal rules and extends its reach to pri-

101. *Id.* art. 3.

102. The UNIDROIT Convention requires:

- (1) The possessor of a cultural object which has been stolen shall return it.
- (2) For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.
- (3) Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.
- (4) However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor.

Id.

103. *Id.* art. 4(5) ("The possessor shall not be in a more favorable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.").

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

105. See Lehman, *supra* note 42, at 547.

vately owned property. Unfortunately, however, only about twenty states have ratified this Convention.¹⁰⁶

III. LOOTING IN IRAQ

Iraq, long considered the “cradle of civilization,”¹⁰⁷ was home to many ancient cultures. Ancient Mesopotamia, the fertile valley of land between the Tigris and Euphrates Rivers, was inhabited by the Sumerians, Babylonians, and Assyrians.¹⁰⁸ The historical and biblical significance of the land and its artifacts is universal to virtually all people and religions.¹⁰⁹ There are over ten thousand officially registered archaeological sites throughout Iraq and like the National Museum, many of these sites were looted and pillaged, as well.¹¹⁰

There is an unfortunate history of looting and destruction of cultural property in the Middle East. For example, after the Soviet withdrawal from Afghanistan, there was substantial looting in Kabul in 1988 at Afghanistan’s National Museum.¹¹¹ Virtually all that remained was subse-

106. List of countries that are Parties to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, www.unidroit.org/english/implement/i-95.htm.

107. Cattani, *supra* note 35 (“The Tigris-Euphrates Valley is the cradle of a number of major civilizations, starting from the fifth millennium B.C.E., and the scene of events sacred to Jews, Christians and Muslims alike.”). See also John Malcolm Russell, *Why Should We Care?*, ART JOURNAL, Winter 2003, at 22–29 (“In Iraq are preserved the traces of the first hunter-gatherer families that roamed the Cradle of Civilization; the first villagers who invented farming and herding so they could live in one place, and the irrigation so they could live almost any place; the first city dwellers who developed royalty, writing, and religion in order to manage their environment; the first citizens of states with all the complex responsibilities that citizenship entails. The ideas of city, citizen, civic duty, civic architecture, civilization: all these arose first in Iraq. They discovered the civilization that we live today.”).

108. Rose, *supra* note 40, at 87. For a more detailed description of the ancient Mesopotamian Cultures, see Andrew Lawler, *Saving Iraq’s Treasures*, SMITHSONIAN, June 2000, at 42–46, 49–55 (discussing the history of Uruk, Ashur, Babylon, Hatra, and Summarra and the archeological significance of each city).

109. Irene J. Winter, *What Can be Done to Recover Iraq’s Art?*, WASH. POST, Apr. 27, 2003, at B3 (writing that the looted artifacts “represent ‘our’ heritage, to the extent that civilization as we know it began in the Tigris-Euphrates Valley, and to the extent that events recorded in the Old Testament, sacred to Jews, Christians and Muslims alike, are deeply rooted in Mesopotamia.”).

110. Edmund L. Andrews, *Iraqi Looters Tearing Up Archaeological Sites*, N.Y. TIMES, May 22, 2003, at A1.

111. Brodie, *supra* note 44 (“In the fighting that followed the Soviet withdrawal from Kabul in 1988, Afghanistan’s National Museum was ransacked. By 1996, 70 percent of the museum’s collections were missing and archaeological sites throughout Afghanistan were being devastated in the search for saleable material.”).

quently destroyed by the Taliban in 2001.¹¹² Ironically, when the Iraqis occupied Kuwait in 1990, they quickly set up protections for museums and antiquities in order to steal for themselves.¹¹³ The aftermath of the Gulf War created a thriving international market for Iraqi antiquities. The sanctions imposed on Iraq after the Gulf War¹¹⁴ made resources scarce and left museums and archaeological sites open to theft.¹¹⁵ Despite warnings by many international cultural experts to heed the lessons learned from previous incidents,¹¹⁶ large-scale looting occurred at major museums, libraries, archives and other archaeological centers when the United States invaded Baghdad in April 2003.¹¹⁷ A prominent warning was issued by the Archaeological Institute of America, urging the government

112. Cuning details the damage inflicted by the Taliban regime:

First, human figures in pictures were painted over. Then . . . the authorities ordered the destruction of all statues and non-Islamic shrines. The dynamiting of the huge Buddhas at Bamiyan seized most of the world's attention. But Taliban officials also vandalized the museum, smashing the remains of the collection with hammers and axes.

Cuning, *supra* note 26, at 233.

113. Brodie, *supra* note 44.

114. S.C. Res. 661, U.N. Doc. S/RES/660 (Aug. 6, 1990). See John Daniszewski, *Antiquities Theft in Iraq Threatens Legacy to World*, L.A. TIMES, Dec. 30, 1996, at A1 (discussing how sanctions in Iraq left the Iraqi economy in a "downward spiral, and Iraqis are selling whatever they own just to survive . . . jewelry, rugs and furniture, along with antiquities and artwork, have flooded bazaars and been taken out of the country in huge quantities.").

115. Phuong, *supra* note 3, at 989.

116. Guy Gugliotta, *Pentagon Was Told Of Risk to Museums; US Urged to Save Iraq's Historic Artifacts*, WASH. POST, Apr. 14, 2003, at A19. Gugliotta discusses the effect of the first Gulf War on looting in Iraq:

[Scholars] were especially concerned because of the example provided by the 1991 Gulf War. Allied forces had scrupulously avoided targeting Iraqi cultural sites during the bombing of Baghdad twelve years ago—one attack put only a shrapnel dent in the National Museum's front door even as it leveled a telecommunications facility across the street. The end of that war kicked off a looting rampage, and eventually allowed systematic smuggling to develop. Artifacts from inadequately guarded sites were dug up and hauled away during the twelve years between the wars.

Id.

117. Baghdad fell to Coalition forces on April 9, 2003. The majority of the looting at the National Museum occurred during April 10–11. Cattan, *supra* note 35 (describing looting at the National Museum in Baghdad, as well as many other homes of cultural heritage, such as the National Archives, the Manuscripts Centre, and the Baghdad library).

to “observe international treaties on cultural property, to work to minimize damage to archaeological sites and artifacts, to prevent looting, and to facilitate the preservation of Iraqi Cultural Heritage in the wake of any conflict.”¹¹⁸ The United States, however, did little during the invasion to protect cultural property in Iraq.¹¹⁹

The National Museum in Baghdad, an archaeological museum, was for eighty years a depository for thousands of artifacts and manuscripts.¹²⁰ Many archeological objects were kept in five storerooms in the Museum, three of which were subject to significant looting.¹²¹ The items in these rooms are among those missing, and because they were not previously catalogued, it is extremely difficult to know exactly what has been

118. Borke, *supra* note 83, at 399. Additionally, there was also a warning given by members of the United States Presidential Advisory Committee on Cultural Property. Phuong, *supra* note 3, at 985 (“US army news briefing held a few days before the looting took place indicates that US forces knew perfectly well that the Iraqi National Museum would be a prime target for looters.”). The Archaeological Institute of America repeated their pleas for the coalition forces to protect the museum and the archaeological sites the day before the looting began in an April 9, 2003 letter. The letter reads:

We therefore call upon Coalition forces to provide immediate security, where necessary, for museums and major archaeological sites; to make public statements condemning the looting of sites and museums and warning that cultural objects removed from Iraq are stolen property; and, where necessary, to make appropriate shows of force to stop looting.

See Letter from Archaeological Institute to Officials in the Department of State, the Department of Defense, the White House, and the Military (Apr. 9, 2003), *available at* <http://www.archaeological.org/pdfs/home/Letter04-09.pdf>.

119. The Iraqis, however, did take precautions, particularly at the National Museum in Baghdad. Prior to the war, the museum staff moved many of the most valuable pieces into bank vaults and other hidden safe locations. The only items that remained in the gallery were those that were too large or too fragile to remove or were permanently attached to a display. John Malcolm Russell, *We're Still Missing the Looting Picture*, WASH. POST, June 15, 2003, at B05.

120. Lawler, *supra* note 108, at 42. John Malcolm Russell provides a description of the importance of the Museum:

The Iraq Museum is a national archaeological museum, which means everything excavated in Iraq goes there. Many of these objects, found in houses, temples, palaces, graves, farms, towns and cities, and left behind by people long dead who survive only in these traces, were of equal importance to those on display.

Russell, *supra* note 119, at B5.

121. Russell, *supra* note 119, at B5.

lost.¹²² The more high profile objects that were stolen from the Museum were the Warka Vase, a sacred limestone piece from Uruk, a marble head of Poseidon, and an Assyrian ivory carving.¹²³ The Warka Vase and the accompanying marble face of a woman were subsequently returned.¹²⁴ The looting was described by United Nations Secretary General Kofi Annan as “a wound inflicted to all mankind.”¹²⁵ The United States’ first response was to issue an amnesty program which allowed the return of any items looted, no questions asked.¹²⁶ The amnesty program was a success from the start.¹²⁷ By September 2003, the United States military reported that 3,411 items were recovered, 1,700 of which were returned under the amnesty program. However, 10,000 items were still missing.¹²⁸

Although it was later discovered that initial figures of looted objects from the National Museum were inflated,¹²⁹ an even greater tragedy occurred in southern Iraq, where countless archaeological sites were pilaged.¹³⁰ This looting continues today, as there are many recently reported incidents of unsanctioned excavations where thieves are stealing priceless artifacts.¹³¹ Regardless of the success of recovering stolen mu-

122. This problem will be discussed in detail below. The UNESCO Convention does little to protect artifacts and other cultural property that is not certified by the State from which they came.

123. Lawler, *supra* note 108.

124. Rose, *supra* note 40, at 86 (“The Warka Vase was returned on June 12 after three unidentified Iraqis drove up to the museum and pulled it out, wrapped in a blanket, from the trunk of their car. The men, who were not interrogated, were thanked and allowed to leave.”). The Lady of Warka sculpture was returned after having circulated among five potential Iraqi sellers. Atwood, *supra* note 5, at B2 (writing that the last would-be Iraqi seller was “frustrated at his inability to find a buyer, buried it in an orchard, where it was retrieved after American investigators received a tip-off.”).

125. Cattani, *supra* note 35, at 71.

126. *Id.*

127. Bogdanos Investigation, *supra* note 6 (describing how the program has been “enormously successful”).

128. Gugliotta, *supra* note 116, at A19. *See also* Bogdanos Investigation, *supra* note 6.

129. Atwood, *supra* note 5.

130. Russell, *supra* note 119, at B5 (arguing that, “[B]y far the greatest cultural disaster occurred in Southern Iraq, where looters plundered major archaeological sites.”).

131. Russell discusses the extent of the looting occurring throughout Iraq:

Ambassador Pietro Cordone, whom the Americans have appointed senior advisor to the Iraqi Ministry of Culture, took a helicopter tour throughout the south that revealed the extent of the destruction. At site after site, he observed dozens, and sometimes hundreds, of illegal diggers systematically turning the ground inside out, recovering objects favored by the export market, discarding every-

seum pieces, the pillaging of these archaeological sites represents a tragedy of enormous proportions.¹³² The United States' and its allies' continuing failure to protect these sites from looters has also been compounded by accusations of damage inflicted by coalition military equipment.¹³³ *The China Daily* proclaimed: "It is immoral for the United States to destroy Iraq's culture while trying to rebuild the country economically and politically. The self-proclaimed 'liberators' cannot escape worldwide criticism at a time when UNESCO is launching a strong campaign across the world to protect endangered cultural heritages."¹³⁴ Claims that the archaeological and cultural property was better protected under Saddam Hussein's regime were also made.¹³⁵ Even if the archaeological items were to be recovered, a concern is that looters destroy the

thing else. In the process, everything of real value about these objects, is destroyed, their stories lost forever.

Id. Atwood also describes the widespread looting at archaeological sites he witnessed:

Every ancient site I saw in Iraq last year was under assault. At the biblical city of Nimrud, I saw where professional looters had chiseled out carvings decorating the imposing stone walls of the palace of King Ashurnasirpal II. Those pieces have disappeared, sold into the illicit antiquities market and presumably now sitting in some collector's room.

Atwood, *supra* note 5.

132. *Id.* ("Reports suggest the pillaging has since grown much worse. The buried remains of the 4,000 year old Sumerian City of Isin have been turned upside down by hundreds of illegal diggers.")

133. An article from Australia, *Iraq's Invaders Accused of Crimes Against Antiquities*, WEEKEND AUSTRALIAN, Aug. 7, 2004, at 25, details complaints made by Iraqi officials:

Interim cultural minister Mofeed al-Jazeeri, fed up with Polish forces stationed at Babylon . . . renewed accusations that they were causing irreparable harm to valuable sites and urged them to leave . . . "We have received information that damage has been done to several archaeological sites . . . Just their presence, with their heavy equipment, is harmful in and of itself."

134. *Id.*

135. *Id.* (quoting Al-Jazeera: "Large parts of [ancient Babylon] were reconstructed and restored to its former glory by Iraq's former president Saddam Hussein in an attempt to restore ancient historical sites preserving Iraq's rich and diverse history."). See also Eagar, *supra* note 12 (quoting Sarah Collins, a curator with the Ancient Near East Department of the British Museum who worked with the Baghdad Museum for several months during the amnesty program, "Looting wasn't a problem under Saddam. He beheaded a couple of looters and that put a stop to it."). But see Daniszewski, *supra* note 114 (describing widespread looting and plundering throughout Iraq after the Gulf War and the inability of the government to control such pillaging).

ability of scientists to gain contextualized archaeological information.¹³⁶ Iraq's oldest cities—Nineveh, Uruk, Isin—are being robbed, and, unlike catalogued items at the National Museum, there are no inventories to determine what priceless treasures have been stolen.¹³⁷

IV. UNESCO AND INTERPOL RESPOND TO THE LOOTING

Immediately after the major looting occurred in April 2003, UNESCO, Interpol, and the United States took action to prevent the illicit trafficking of the stolen goods and to prevent further looting.¹³⁸ The plan included embargoing sales of Iraqi artifacts, encouraging their return, creating an inventory of lost artifacts, locating the stolen objects and attempting to repair the damaged ones.¹³⁹ A significant impediment to the recovery and return of stolen Iraqi cultural property is the uncertainty about what was stolen and what remains.¹⁴⁰ Realizing this, the United States, UNESCO, and other international organizations began creating an inventory of the artifacts at the museum.¹⁴¹ However, because a great deal of the artifacts which were stolen were not previously catalogued, it is virtually impossible to make a definitive list.¹⁴² Of course, this problem does not take into account the massive looting that occurred, and continues to occur, at countless archaeological sites through Iraq, where artifacts are also not catalogued.

136. Borke, *supra* note 83, at 403.

137. Eagar, *supra* note 12, at 4.

138. Rose, *supra* note 40 (“Scholars, curators, UNESCO, Interpol and U.S. investigators, among others, immediately scrambled to launch perhaps the largest treasure hunt the world has ever known.”).

139. Lawler, *supra* note 108.

140. The Bogdanos Investigation discusses the importance of addressing this difficulty:

Foremost among the challenges has been identifying exactly what is missing. In part, this is because of the sheer size of the museum's collection and because the museum's storage rooms contained not only catalogued items, but also items from various excavation sites that had not yet been catalogued.

Bogdanos Investigation, *supra* note 6.

141. UNESCO and Interpol reinforced their cooperation in the fight against illicit traffic in Iraqi cultural properties by signing an amendment to their Cooperation Agreement of 1999. The amendment laid the groundwork for establishing and compiling a database on cultural property stolen in Iraq. UNESCO.org, UNESCO and Interpol Reinforce Cooperation in Fight Against Traffic in Iraqi Cultural Goods, http://portal.unesco.org/en/ev.phpURL_ID=13501&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Sept. 29, 2005).

142. Bogdanos Investigation, *supra* note 6.

UNESCO also attempted to implement immediate legislation that would help recover stolen cultural property from Iraq.¹⁴³ Realizing that there are many countries that are not parties to the UNESCO Convention, it pressed the Secretary General and the Security Council to pass a resolution binding all states to its provisions.¹⁴⁴ On May 22, 2003, the United Nations Security Council passed Resolution 1483.¹⁴⁵ Since the Resolution was adopted under Chapter VII of the United Nations Charter, it is binding on all member states. There are two significant aspects of Resolution 1483. The first is that it extends to all objects stolen from Iraq since 1990, not only those stolen during 2003. The second is that Resolution 1483 calls upon member states to establish a prohibition not just on stolen items, but also those that are reasonably suspected of being stolen.¹⁴⁶

UNESCO has also sent missions to Iraq to assess the situation¹⁴⁷ and has created the International Coordination Committee for the Safeguarding of the Cultural Heritage in Iraq (ICC).¹⁴⁸ The ICC met over a two day

143. Phuong, *supra* note 3, at 992.

144. *Id.* Phuong translates a speech by Mounir Bachenaki, the Assistant Director-General for Culture of UNESCO:

There are many countries that are not parties to the 1970 Convention and this is the reason why we thought that, even for a temporary period, a decision that is taken for all States, even those that have not signed the 1970 Convention, would allow us to fight more efficiently against the import of objects from Iraq.

Id.

145. S.C. Res. 1483, ¶ 7, U.N. Doc. S/RES/1483 (May 22, 2003) (“All Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of Resolution 661 (1990), including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon UNESCO, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph.”).

146. This was done to cast a wider net in catching all artifacts looted from Iraq and to stifle trade even further.

147. UNESCO sent two missions in May and June of 2003 to examine the situation in Iraq. UNESCO.org, Iraqi Cultural Heritage: Second Mission to Iraq, http://portal.unesco.org/en/ev.php-URL_ID=13199&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Sept. 29, 2005).

148. UNESCO.org, International Coordination Committee for the Safeguarding of the Cultural Heritage in Iraq: Seven Recommendations, http://portal.unesco.org/en/ev.php-URL_ID=20649&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Sept. 29, 2005) (“Established under the joint auspices of the Iraqi authorities and UNESCO,

period in late May of 2004, and issued a series of seven recommendations.¹⁴⁹ The most important of these recommendations was to “[c]oordinate international action and channel international aid—both bilateral and multilateral—with a view to ensure the implementation of the strategy for the safeguarding of the cultural heritage in Iraq and assess its overall monitoring.”¹⁵⁰

Interpol has also made significant efforts to recover cultural property looted from Iraq. Interpol has created the Interpol Tracking Task Force to Fight Illicit Trafficking in Cultural Property Stolen in Iraq (ITTF).¹⁵¹ The ITTF’s main focus is on the dissemination and centralization of information relating to the Iraqi cultural property crisis in order to more effectively pursue law enforcement.¹⁵² Interpol has also held a Regional Meeting to Fight the Illicit Trafficking of Cultural Property Stolen From Iraq in Amman, Jordan on June 1–2, 2004.¹⁵³ The meeting was well attended by delegates from the Middle East, Europe, and the United States.¹⁵⁴ The Regional Meeting proposed a series of recommendations, perhaps the most important of which was the recommendation that countries that have not yet signed the UNESCO Convention and the UNIDROIT Convention should do so as soon as possible.¹⁵⁵

Progress toward recovering stolen Iraqi cultural property has been made. At a conference in June 2004, Iraq’s General of Museums, Donny George, stated that through coordinated efforts by government and law enforcement agencies in the sixteen months following the looting of the National Museum some 5,200 pieces out of 13,000 had been recovered in six countries.¹⁵⁶ In Iraq itself, more than 3,000 objects have been seized or returned to the museum.¹⁵⁷ Additionally, in the United States,

the Committee aims to provide appropriate coordination for all activities to protect the Iraqi cultural heritage . . . it is composed of 25 international experts.”).

149. *Id.*

150. *Id.*

151. UNESCO.org, Iraq Task Force—Recommendations, <http://www.interpol.org/public/WorkOfArt/Iraq/Iraqtaskforce/1stmeetingrecommand.asp> (last visited Sept. 29, 2005). The ITTF has held two meetings. The first was held in Lyon, France on November 12–13, 2003. The second was held in Amman, Jordan, May 30–31, 2004.

152. *Id.*

153. Regional Meeting to Fight the Illicit Trafficking of Cultural Property Stolen from Iraq, Minutes, <http://www.interpol.int/Public/WorkofArt/Iraq/meetings/Minutes200406.asp> (last visited Sept. 29, 2005).

154. *Id.*

155. *Id.*

156. Atwood, *supra* note 5.

157. *Id.*

roughly 600 antiquities known or suspected of being from Iraq have been recovered in airports.¹⁵⁸

V. ANALYSIS OF CURRENT CONVENTIONS AND THEIR APPLICABILITY TO IRAQ

A. 1954 Hague Convention and Iraq

Immediately following the looting of the Iraqi National Museum, the United States forces were heavily criticized for failing to prevent the incident.¹⁵⁹ Warnings had been given to the U.S. military and past experiences indicated that such looting was likely.¹⁶⁰ To what extent, however, can the United States be held legally responsible for the wide-scale looting? What were its obligations under international law to prevent the looting of the Museum and the subsequent looting of archeological sites throughout Iraq?

The United States is a party to the 1907 Hague Convention which provides that damage to cultural or historical property should be avoided during military campaigns.¹⁶¹ Since the United States did not damage any of the Museums directly, it cannot be held responsible under this convention.¹⁶² The 1954 Hague Convention, the most significant treaty relating to cultural property during an armed conflict, is also inapplicable to the present conflict. Unfortunately, the United States, along with the United Kingdom, are not parties to the Convention.¹⁶³ Some scholars argue, however, that the 1954 Hague Convention has become a part of international customary law.¹⁶⁴ One commentator argues that Article 4(3) of the 1954 Hague Convention has reached customary status because it is “es-

158. *Id.*

159. See Paul Richard, *Bush Panel Members Quit Over Looting: Cultural Advisors Say U.S. Military Could Have Prevented Museum Losses*, WASH. POST, Apr. 17, 2003, at C1.

160. Many museums and archaeological sites were extensively looted during the first Gulf War. *Id.* Richard Moe, president of the National Trust for Historic Preservation wrote to Secretary of State Colin. L. Powell to urge the United States to safeguard the collections at the Iraqi National Museum. *Id.*

161. See List of 114 State Parties to the Hague Convention, *supra* note 56.

162. There have been no claims to date that the United States military, or any member of its Coalition, has directly damaged any museums in Iraq.

163. See List of 114 State Parties to the Hague Convention, *supra* note 56. The United Kingdom, however, is taking steps to become a party to the Convention. Phuong, *supra* note 3, at 988 (“The Secretary of State for Culture, Media and Sport recently announced to the House of Commons Select Committee on Culture, Media and Sport that the UK intends to become a party to the Convention and its second Protocol.”).

164. See Phuong, *supra* note 3, at 987; see also Keane, *supra* note 23, at 21–22.

sentially an elaboration of the general obligation under international law for an occupying force to maintain law and order in the territory it occupies, as provided in Article 43 of the 1907 Hague Regulations.¹⁶⁵ Additionally, the United States itself, during the 1991 Gulf War, acted in accordance with the general principles of the 1954 Hague Convention when they avoided attacking any cultural sites.¹⁶⁶ The most significant indicator that at least part of the 1954 Hague Convention may be a part of customary international law came out of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which explicitly ruled that Article 19 of the 1954 Hague Convention had been incorporated into the customary law of war.¹⁶⁷

The United States, however, would not be in violation of international law regardless of whether the 1954 Hague Convention has attained customary status. Colonel Bogdanos'¹⁶⁸ report reveals that United States

165. Phuong, *supra* note 3, at 987.

166. Cuning describes how the United States, through its actions, complied with the 1954 Hague Convention:

In the Gulf War, the United States and Coalition forces were faced with the decision of whether to attack an Iraqi military target which was intentionally situated by the Sumerian temple, a historic building. The decision was made that the target should only be attacked if it was an absolute necessity so the temple would not suffer any collateral damage. Although the Coalition forces were not bound by the obligations of the 1954 Hague Convention, they acted in accordance with it, and they recognized the Convention as "an advisory document."

Cuning, *supra* note 26, at 228.

167. 1954 Hague Convention, *supra* note 13, art. 19 ("In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property."); Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 98 (Oct. 2, 1995) ("The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and that of treaty law. Two bodies of rules have thus crystallized, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Convention, as was authoritatively held by the International Court of Justice (Nicaragua Case, at 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954.").

168. Colonel Matthew Bogdanos was the head of a fourteen man task force to investigate the looting at the Iraq Museum in April 2003. Paul Sullivan, *Lunch with FT*, FIN. TIMES, Nov. 27, 2004, at 14.

forces were unable to secure the Museum because these forces “became engaged in intense combat with Iraqi forces fighting from the museum grounds and from a nearby Special Republican Guard compound.”¹⁶⁹ That U.S. forces were under fire from the Museum vicinity justifies their alleged inaction with regard to the prevention of looting. Additionally, since Iraq is a party to the 1954 Hague Convention, its military was under an obligation not to use the Museum or any other culturally significant site for military purposes.¹⁷⁰

The United States, as well as the United Kingdom and other allies, should sign and become parties to the 1954 Hague Convention and its Second Protocol. Although it is clear from past actions that United States military forces generally follow the provisions of the Convention,¹⁷¹ it will still be beneficial to both the United States and the world if the United States was to ratify it. Unfortunately, it is unlikely that the invasion of Iraq will be the last military intervention exercised by the United States and its allies. The United States may bring further military action in the Middle East, where virtually all nations have a large amount of ancient cultural property. Ratifying the 1954 Hague Convention and complying with its provisions will go a long way in preventing future incidents of damage to cultural property and help the United States win popular support for its actions.

B. UNESCO Convention, UNIDROIT Convention and Iraq

The UNESCO Convention, providing for the restitution of stolen cultural property not only during armed conflict but also during times of peace,¹⁷² would be the most applicable instrument for the recovery of the stolen Iraqi items. Many countries and organizations cite the UNESCO Convention as a means of recovering the cultural property from Iraq.¹⁷³ The need for more states to join the UNESCO Convention is based on

169. See Bogdanos Investigation, *supra* note 6; see also Trofimov, *supra* note 3 (reporting that U.S. forces were unable to secure the Museum until April 16 because there was an Iraqi army trench in the Museum’s front lawn).

170. See Hague Convention, *supra* note 13, art. 4(1) (“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.”).

171. See Cuning, *supra* note 26, at 228.

172. UNESCO Convention, *supra* note 14, pmbl.

173. See Regional Meeting to Fight the Illicit Trafficking of Cultural Property Stolen from Iraq, *supra* note 153.

the premise that restitution of cultural property is not considered to be a part of customary international law.¹⁷⁴ Western nations have been reluctant to incorporate such restitution into customary law because these states have removed many items from countries which they have colonized or occupied and do not want to return them.¹⁷⁵ Therefore, the only way to require states to participate in the restitution process is if they are State Parties to the UNESCO Convention.

The United States, United Kingdom, and Iraq are all parties to the UNESCO Convention.¹⁷⁶ After initial reservations, the United States became a State Party to the UNESCO Convention in 1983 with the adoption of the Convention on Cultural Property Implementation Act (CPIA).¹⁷⁷ The United Kingdom became a State Party only recently in 2002.¹⁷⁸ The late ratification allowed the United Kingdom to become a very attractive place for smugglers to sell stolen art items because there was no requirement for a British art dealer to see a valid exportation certificate.¹⁷⁹ Iraq, however, became a State Party very early on, ratifying the UNESCO Convention in 1973.¹⁸⁰

174. Because the restitution of cultural property is not recognized under customary international law, the only way for such restitution to be enforced is through the creation and enforcement of treaties.

175. Phuong discusses the reluctance of Western nations to join the UNESCO Convention:

There is no general obligation of restitution of cultural property in customary international law, mainly because Western countries have removed a high number of items from the countries which they had colonized and/or temporarily occupied and do not wish to return them. Instead, international obligations to return cultural property can be found in treaties which often cover only certain items and are subject to some conditions.

Phuong, *supra* note 3, at 989.

176. List of states that are parties to the UNESCO Convention, *supra* note 75.

177. Borke, *supra* note 83, at 407–08 (“The United States has historically resisted international pressure to broaden restrictions on the importation of art from foreign countries.” After lobbying for a change in language from the original 1969 draft of the Convention, “[t]he Senate approved the revised UNESCO Convention. . . . The United States ratified [i]t in 1972 and formally implemented it through legislation in 1983, becoming the first market nation to do so.”). The legislation that implemented the Convention was the Convention on Cultural Property Implementation Act (CPIA) signed on January 12, 1983. The Act codified Articles 7(b) and 9 of the UNESCO Convention into U.S. law. *Id.* at 410.

178. List of states that are parties to the UNESCO Convention, *supra* note 75.

179. Phuong, *supra* note 3, at 991.

180. List of states that are parties to the UNESCO Convention, *supra* note 75.

Unfortunately, regardless of membership, the UNESCO Convention is inadequate to properly deal with the current crisis in Iraq. The Convention may have been helpful considering Iraq is a State party. However, there is confusion over whether the Coalition Provisional Authority had power to act under that capacity or whether the newly installed Iraqi government is still able to act as a State Party.¹⁸¹ A determination of the new government's status with relation to international treaties and conventions must be made. Even assuming that the Iraqi government could act as a State Party to the Convention, there are limits and glaring deficiencies within the Convention itself that make its application here problematic. The most significant problem involves the identification of the items that were stolen from the National Museum,¹⁸² and the further difficulties of identifying those unmarked items taken from countless archaeological sites. Article 7(b) of the UNESCO Convention provides that State Parties must prohibit the importation of cultural property stolen from museums in other State Parties provided that such cultural property is documented as belonging to that institution.¹⁸³ Therefore, it will be difficult to recover the thousands of undocumented items that were stolen from the storage rooms at the Museum, and virtually impossible to recover the cultural property taken from the archaeological sites. Additionally, there are enormous procedural steps that are imposed by the Convention that will be difficult for the new government in Iraq to implement.¹⁸⁴

The UNIDROIT Convention, created to address some of the shortcomings of the UNESCO Convention,¹⁸⁵ is unfortunately inapplicable to the present situation. Neither Iraq, the United Kingdom, the United States,

181. If Iraq is not considered to be a State Party to the Convention then it will be unable to seek restitution of stolen cultural items in the United States. Without a formal government, Iraq is unable to meet the first requirement of the CPIA, that the government of a State Party must make a formal request for the imposition of import restrictions. See Borke, *supra* note 83, at 426. Borke also writes that “[i]t is also debatable whether Iraq, absent a formal government, legally remains a State Party to the Convention. Furthermore, Iraq will not be able to satisfy the CPIA requirement that it ‘has taken measures consistent with the Convention to protect its cultural property.’” *Id.*

182. See Bogdanos Investigation, *supra* note 6 (“Foremost among the challenges has been identifying exactly what has been missing.”).

183. UNESCO Convention, *supra* note 14, art. 7(b).

184. Phuong, *supra* note 3, at 991 (“The Convention itself has some shortcomings because it mainly relies on cumbersome procedures which require the setting up of new administrative structures in order, for instance, to implement the certification system.”).

185. Lehman, *supra* note 42, at 543.

nor any other Western free-market nation is a party to the UNIDROIT Convention.¹⁸⁶

V. RESOLUTION 1483 AND DOMESTIC LEGISLATIVE RESPONSES

The United Nations Security Council Resolution 1483, passed on May 22, 2003,¹⁸⁷ may be the most hopeful prospect for the restitution of Iraqi cultural property. The Resolution states that “all Member States shall take appropriate steps to facilitate the safe return . . . of Iraqi cultural property” which includes “establishing a prohibition on trade in or transfer of such items.”¹⁸⁸ Resolution 1483 essentially requires all Member States to implement legislation in order to curb the illicit trade of stolen cultural property from Iraq.¹⁸⁹

In the United Kingdom, the Iraq Order 2003, adopted to implement Resolution 1483, prohibits the import or export of any item illegally removed from Iraq.¹⁹⁰ Switzerland, notoriously known as a market for illicit sales of artifacts,¹⁹¹ feeling pressured by Resolution 1483, finally ratified the UNESCO Convention in October 2003.¹⁹² The United States has proposed legislation in an attempt to close loopholes and remedy inadequacies in its domestic law even before the Security Council passed Resolution 1483.¹⁹³ The Iraq Cultural Heritage Protection Act was intro-

186. List of countries that are parties to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 106.

187. S.C. Resolution 1483, *supra* note 145.

188. *Id.* para. 7.

189. *Id.*

190. Phoung describes how the Iraq Order 2003 operates:

It creates two offenses with regard to stolen Iraqi cultural property. First, anyone who holds or controls a stolen Iraqi cultural item must transfer it to the police. If he does not, he is guilty of an offense of omission under Article 8(2). Secondly, anyone dealing with a stolen Iraqi item is also guilty of an offense under Article 8(3).

Phuong, *supra* note 3, at 993. *See also* Atwood, *supra* note 5 (“[The British] enacted legislation, that for the first time, made it a crime to buy or sell illegally excavated or removed antiquities in that country, whatever the origin. Officials in [the United Kingdom] had talked about these changes for years, but the “Baghdad disaster proved the impetus” to making them a reality.”).

191. The civil laws in Switzerland, which favor innocent purchasers, have created a legal loophole, allowing for the “laundering” of large quantities of stolen cultural property. Borke, *supra* note 83, at 390 (“Switzerland, in particular has a thriving market in cultural material and objects bought there can be sold legitimately in the U.K. or U.S.”).

192. Atwood, *supra* note 5.

193. *See* Borke, *supra* note 83.

duced on May 7, 2003, in the House of Representatives.¹⁹⁴ The bill proposes to “provide for the recovery, restitution, and protection of the cultural heritage of Iraq” by imposing a restriction on all “archaeological” and “cultural” material removed from Iraq after August 2, 1990.¹⁹⁵ The Senate proposed its own piece of legislation on June 19, 2003, the Emergency Protection for Iraqi Cultural Antiquities Act of 2003,¹⁹⁶ allowing the President to impose importation restrictions on all archaeological and cultural property from Iraq without Iraq having to make a formal request.¹⁹⁷ Thus, the bill circumvents the problem of whether Iraq has retained its rights and capabilities under the UNESCO Convention and the CPIA.¹⁹⁸ Additionally, the bill defines the materials that may be protected more broadly than the CPIA does, and includes all materials of “archaeological, historical, cultural, rare scientific or religious importance.”¹⁹⁹ The House and Senate eventually passed a bill, the Emergency Protection for Iraqi Cultural Antiquities Act of 2004,²⁰⁰ on November 19, 2004 and it was signed into law by President George W. Bush.²⁰¹ The passage of this bill will undoubtedly make it easier to stop trafficking of illegally seized cultural property from Iraq by heightening the standards at the borders and allowing for the CPIA to be enacted without a formal Iraqi request. More States must recognize the importance of passing new legislation that allows them to tighten borders and waive certain stringent requirements of the UNESCO Convention.

194. Iraqi Cultural Heritage Protection Act, H.R. 2009, 108th Cong. (2003).

195. *Id.*

196. The Emergency Protection for Iraqi Cultural Antiquities Act of 2003, S. 1291, 108th Cong. (2003).

197. *Id.*

198. By waiving the requirement that Iraq make a formal request before the President can impose import restrictions pursuant to his authority under section 2603 of the CPIA, the proposed legislation effectively eliminates the question of whether Iraq has a functioning recognizable government for the purposes of international interaction.

199. S. 1291, *supra note* 196.

200. The Emergency Protection for Iraqi Cultural Antiquities Act of 2004, H.R. 1047, 108th Cong. (2004).

201. Press Release, Archaeological Institute of America, President Signs Emergency Protection Act for Iraqi Antiquities Act (Dec. 7, 2004), *available at* http://www.archaeology.org/pdfs/archaeologywatch/Iraq/AIAPR_Iraqi_Antiquities_Act.pdf?page=10248 (“With this legislation the President may exercise his authority under the Cultural Property Implementation Act . . . without the need for Iraq to bring a request to the U.S. for import restrictions. . . . The legislation tracks the United Nations Security Council Resolution 1483, which requires all members . . . to prevent trade in cultural materials illegally removed from museums and other locations in Iraq.”).

VI. CONCLUSION

Cultural heritage is the hallmark of humanity, the identity of civilizations, and the one thing common to all peoples. The continued looting and destruction of cultural property in Iraq is an all too common tragedy. Although the effects of armed conflict have destroyed cultural property for centuries, the international community has not been successful in preventing such incidents.

The current conventions in place to protect cultural property are inadequate to deal with the situation in Iraq. This inadequacy stems from a lack of commitment from States to become part of these agreements and make serious efforts to protect cultural property. Countries such as the United States and United Kingdom should sign and become State Parties to the 1954 Hague Convention because they are, unfortunately, likely to engage in future military interventions. These military operations may occur in the Middle East where, similar to Iraq, many nations are rich in cultural property. The realities of armed conflict, however, require military commanders to place a premium on lives above property. Minimum standards can still be observed during armed conflict; ratifying the 1954 Hague Convention and acting within its provisions will help to ensure that future incidents do not occur. Showing the world that they are serious about the protection of cultural property and sensitive to cultural heritage overall will help the United States and United Kingdom gain much needed global support.

The end of looting in Iraq and the return of pillaged goods will take time. Fortunately, UNESCO, Interpol, and most countries throughout the world have recognized the problem and are doing all they can to return the items and develop ways to prevent future incidents.²⁰² The most important thing that must be done is to ensure that all States have implemented the necessary domestic legislation to comply with Security Council Resolution 1483. The problem of illicit trafficking can best be addressed at the domestic level, particularly at the borders. There has

202. The United Nations announced on October 27, 2004, the creation of a new rapid reaction task force to step in wherever cultural property is threatened during times of armed conflict and national disaster. The group, called "the cultural blue berets," will initially be formed entirely of Italians, because of their artistic expertise. Under the terms of the plan, the government of the affected country will first contact UNESCO. If officials in Paris judge the case to be sufficiently serious and urgent, they will then contact Rome who will set up an ad-hoc team to be dispatched to the location. John Hooper, *UNESCO's 'Blue Berets' to Rescue Cultural Treasures*, *GUARDIAN* (London), Oct. 28, 2004.

already been a great deal of success,²⁰³ particularly in the United States, where roughly six hundred antiquities known or suspected of being smuggled from Iraq have been recovered.²⁰⁴ The media attention and worldwide outrage over the looting at the National Museum in Baghdad provides an unprecedented opportunity for the nations of the world to address the problem in a constructive manner. Hopefully, the world can learn from the tragedy in Iraq and strive to promote respect and protection for the cultural heritage of all mankind.

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203. Atwood, *supra* note 5 (“[G]overnments have adopted the kinds of measures that advocates of cultural patrimony have been urging for years—and they got results. Italy has confiscated on its soil more than 300 pieces looted from the Baghdad museum. Syria has confiscated 200.”). Jordan has also confiscated a large number of pieces. *Id.*

204. One high profile case involving an American expert on Iraq’s postwar reconstruction, Joseph Braude, settled in U.S. District Court in New York on November 22, 2004. Braude was sentenced to six months for trying to smuggle into the United States 4,000-year-old artifacts stolen from Iraq’s National Museum. Braude was stopped by customs agents at John F. Kennedy Airport after he failed to declare that he was carrying three ancient marble and alabaster seals. *Scholar Sentenced in Artifact Smuggling*, CHI. TRIB., Nov. 23, 2004, at 9.

* B.A. University of Pennsylvania, J.D. Brooklyn Law School (expected 2006). I would like to thank my parents, Steven and Jamie Zelig, for their unending love and support throughout my education. I would also like to thank Peri Schultz for her constant encouragement and inspiration. Finally, I would like to thank Professor Timothy S. Driscoll and the *Brooklyn Journal of International Law* for giving me this opportunity and helping me write this note.