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War or Peace: It's Time to Ratify the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts

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ARTICLES

WAR OR PEACE: IT IS TIME FOR THE UNITED STATES TO RATIFY THE 1954 HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICTS

*Juliana V. Campagna**

I.	INTRODUCTION	272
II.	STUFF HAPPENS	274
III.	THE 1954 HAGUE CONVENTION AS AN INTERNATIONAL INSTRUMENT OF WAR	293
	A. <i>Middle Ages and Renaissance</i>	298
	B. <i>Early Europe: The Foundation of International Law</i>	301
	C. <i>Enlightenment: Cultural Property as our Common Inheritance</i>	309
	D. <i>Nineteenth Century</i>	310
	1. Napoleon	310
	2. Lieber Code	311
	E. <i>The Twentieth Century</i>	314
	1. World War I	314
	2. World War II	316
IV.	1954 HAGUE CONVENTION AS AN INSTRUMENT FOR PEACE	318
	A. <i>Post World War II Legal Framework</i>	319
	B. <i>The Institutional Legal Framework of UNESCO</i>	323

* J.D., Chicago-Kent College of Law. The author dedicates this Article to her beloved nieces and nephews: Benjamin, Isabella, Colette, Nicholas, Antonio, Arianna, and Silvia.

C. Reframing the Legal Question in the United States	330
D. Rights and Duties of Belligerents: Terms of the 1954 Hague Convention	333
V. CONCLUSION: COMING TO TERMS WITH OUR INTERNATIONAL DUTIES	340

I. INTRODUCTION

For three entire days after the United States had overturned the Baathist regime, looters overran the Baghdad museum and stripped it of five thousand years of cultural heritage.¹ Fires consumed forty thousand manuscripts dating back as far as classical Roman times.² The American army attempted neither to protect the museum, one of the world's finest,³ nor to extinguish the flames.⁴

This was a dramatic demonstration of the effects of nonadherence to the Convention for the Protection of Cultural Property in the Event of Armed Conflicts, known worldwide as the 1954 Hague Convention.⁵ The two arguments made by the United States against ratifying the convention, which the United States signed fifty years ago, center around the nonadherence of other English-speaking nations and the Convention's stretch beyond customary international law.⁶ Military necessity, the United States argues, is an excuse for derogation.⁷

1. Louise Witt, *The End of Civilization*, SALON.COM, Apr. 17, 2003.

2. Michael Patrick O'Connor & Sidney H. Griffith, *The Lost Heritage of Iraq: Baghdad Looting Destroys Archaeological Connection to Cradle of Civilization, Old Testament and Early Christian History*, NAT'L CATHOLIC REP., May 9, 2003, available at http://www.natcath.com/NCR_Online/archives2/2003b/050903/050903a.php (last visited Apr. 8, 2005).

3. See, e.g., Elise Labott & Jim Clancy, *U.S.: We Didn't Anticipate Looting*, CNN.COM, Apr. 15, 2003, at World, interviewing Robert Springhorn, Director of the London Middle East Institute in the School of Oriental and African Studies at the University of London. The National Museum of Iraq, stated Springhorn, is one of the five greatest museums in the world. *Id.*

4. Philip Hensher, *Crimes Against Culture are Remembered Forever: The Muslim World Will Ask Us Why U.S. Forces Let the Looting Happen*, INDEPENDENT (London), Apr. 22, 2003, at 17.

5. Convention for the Protection of Cultural Property in the Event of Armed Conflicts, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention] For a list of the nations who have ratified, acceded or succeeded to the 1954 Hague Convention, see UNESCO Legal Instruments, available at <http://erc.unesco.org/cp/convention.asp?KO=13637&language=E> (last visited Oct. 5, 2004).

6. Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277, 285 (1997).

7. *Id.* at 286.

Canada and Australia ratified the 1954 Hague Convention years ago.⁸ Britain has announced it will ratify both the Convention and its supporting protocols.⁹

The U.S. legal assertions lack factual, legal and moral bases. Assuming the consent theory behind customary international law had legal basis in a convention that recognizes collective human rights,¹⁰ the United States has failed to show it considers its own belligerent conduct to be lawful.¹¹ It has not, therefore, under its own theory, demonstrated *opinio juris*.¹² Assuming the United States met its evidentiary burden of *opinio juris*, customary international law is the least morally persuasive argument for rules governing people in battle.

The custom, since time immemorial, has been slaughter, pillage, and rapine.¹³ Over millennia, laws were developed to rein in the scourge of war.¹⁴ Law and savagery, nonetheless, competed for millennia. Along with the wounds and wrongs of lost life and home some of the saddest and most serious consequences that human societies have suffered from the relentless wars pervading human history have been the destruction and dispossession of their cultural artifacts.¹⁵

Then, in 1945, the law of nations was rewritten.¹⁶ Peace is now the rule, and all other conduct, though still pervasive,¹⁷ is outside the law.¹⁸ The international community of states, on behalf of the world's peoples,

8. Australia ratified on Sept. 19, 1984, and Canada acceded on Dec. 11, 1998. UNESCO Legal Instruments, *supra* note 5.

9. Kevin Chamberlain, *The Protection of Cultural Property in Armed Conflict*, 37 ART ANTIQUITY & L. 209, 240 (2003).

10. John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L.J. 433 (1997).

11. Kastenberg, *supra* note 6, at 301.

12. "The general practice of States should be recognized as prima facie evidence that it is accepted as law." *North Sea Continental Shelf Cases* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20); *see also* concept of *opinio juris* present in art. 38(1(b)) of ICJ Statute, where international custom is evidenced by general practice and accepted as law. Statute of the International Court of Justice (ICJ Statute), June 26, 1945, art. 38(1)(b), 59 Stat. 1055, 1060; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS (1987) (emphasis added) (defining customary international law as resulting from general and consistent practice of states followed by them from a sense of legal obligation).

13. Kastenberg, *supra* note 6, at 282.

14. *See infra* Part III.

15. *Id.*

16. U.N. CHARTER, 59 Stat. 1031; TS 993; 3 Bevans 1153, *signed at* San Francisco June 26, 1945, *entered into force* Oct. 24, 1945.

17. *See, e.g.,* Roméo Dallaire, *Looking at Darfur, Seeing Rwanda*, N.Y. TIMES, Oct. 4, 2004, at A25.

18. U.N. CHARTER art. 2(4).

undertook “to establish conditions under which justice and respect for” international legal obligations could be maintained.¹⁹ The “fundamental human rights” and “dignity and worth of the human person” require all nations to recognize and respect their “obligations arising from treaties and other sources of international law.”²⁰ “Nations large and small” are legally bound to recognize the collective rights of present and future generations to be free from war and all its scourges.²¹

It is time for the United States to reaffirm its recognition of the equal rights of all world people to their cultural inheritance.²² Our reputation depends on it.

In this Article, I will first discuss the rampant looting and destruction of civilization’s cultural property occurring in Iraq since the American-led occupation. The U.S. Department of Defense’s response to this violation of international law is: “stuff happens.” In arguing that the United States must ratify and adhere to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, I then will consider the historical development of the concepts articulated in this treaty. The 1954 Hague Convention is a Janus-faced instrument: it is simultaneously the last Hague convention on the laws of war, and the first United Nations Educational, Scientific and Cultural Organization (UNESCO) convention on the laws of peace. In the next section, I will demonstrate that our claims against the terms of the convention are outside the current legal understanding of the duties of nations toward the peoples and civilizations of the world. I will conclude with the reminder that while we act alone, we are, nonetheless, not alone.

II. STUFF HAPPENS

The Baathist Regime collapsed on April 9, 2003.²³ Two days later, after the guns had fallen silent,²⁴ looters broke into the Iraqi Museum in Baghdad²⁵ and stripped its 120 rooms of five millennia of cultural

19. *Id.* pmbl.

20. *Id.*

21. *Id.*

22. 1954 Hague Convention, *supra* note 5, pmbl.

23. *FBI to Hunt Museum’s Stolen Art*, CHI. TRIB., Apr. 18, 2003, at C1.

24. Labott & Clancy, *supra* note 3.

25. *Id.*

treasures²⁶ that belonged to the Iraqi people²⁷ and to all mankind.²⁸ Neil MacGregor, director of the British Museum, called the plunder of the museum "the greatest catastrophe to afflict any major institution since the Second World War."²⁹ McGuire Gibson, of the Oriental Institute at the University of Chicago has called it a "lobotomy."³⁰ "The deep memory of an entire culture, a culture that has continued for thousands of years, has been removed. There was 5,000 years of written records, even Egyptian records don't go back that far. It's an incredible crime."³¹

All human culture, the essential ingredients defining what it is to be civilized, sprang from within the borders of Iraq.³² While the cultural heritage of modern Iraq is primarily Islamic, it is the home of the three monotheistic faiths: Judaism, Christianity, and Islam.³³ Christianity spread throughout the Middle East at the same time as the early church spread throughout Europe and North Africa.³⁴ The Syriac (Aramaic speaking) and Nestorian (known today as the "Assyrian Church of the East") and the Chaldean Christian traditions all flourished in the area that today includes Iraq.³⁵ The "earliest stages of the Hebrew people [are] tied to Babylon.

26. Witt, *supra* note 1.

27. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, art. 2(1). [hereinafter UNESCO 1970]. There were 103 states parties as of March 2004. U.S. Department of State International Cultural Property Database, available at <http://exchanges.state.gov/culprop/database.htm> (last visited Apr. 8, 2005).

28. 1954 Hague Convention, *supra* note 5, art. 1(a).

29. Fiachra Gibbons, *Experts Mourn the Lion of Nimrud, Looted as Troops Stood By*, GUARDIAN, Apr. 30, 2003, available at <http://www.guardian.co.uk/print/0,3858,4658238-110427,00.html> (last visited Apr. 8, 2005).

30. Witt, *supra* note 1.

31. *Id.*

32. The words of Gary Vikan, Director of the Walters Art Museum in Baltimore, and one of three members of the White House Cultural Property Advisory Committee who resigned under protest due to the pillage of the Baghdad Museum. Foster Klug, *Former Arts Commissioner Advocates Iraqi Art Buyback*, DESERET NEWS, Apr. 18, 2003, Web; see also Alan Riding, *A Nation at War: Artworks; Art Experts Mobilize Team to Recover Stolen Treasure and Salvage Iraqi Museums*, N.Y. TIMES, Apr. 18, 2003, at B2 (explaining that Vikan, along with Cultural Property Committee members Martin Sullivan and Richard Lanier, resigned because the U.S. military totally failed to protect Iraq's historical artifacts despite extensive and repeated warnings). Martin, the former Committee Chairman who heads a historic commission in St. Mary's, Maryland, wrote in his letter of resignation that "the tragedy was not prevented due to our nation's inaction." *FBI to Hunt Museum's Stolen Art*, *supra* note 23.

33. *Iraq, The Cradle of Civilization at Risk*, H-MUSEUM, Mar. 21, 2003, available at <http://www.h-net.org/~museum/iraq.html> (last visited Apr. 8, 2005).

34. O'Connor & Griffith, *supra* note 2. O'Connor and Griffith teach in the Department of Semitic and Egyptian Languages and Literatures at the Catholic University of America in Washington, D.C. *Id.*

35. *Id.*

Abraham, their ancestor, emigrated from Ur of the Chaldeans," which is modern day Uruk.³⁶

Babylon, the world's first metropolis,³⁷ is the capital of the King Hammurabi dynasty of the early second millennium B.C.³⁸ Hammurabi (r. 1795-1750) is the first known ruler to have "proclaim[ed] publicly to his people an entire body of laws, arranged in orderly groups, so that all men might read and know what was required of them."³⁹ The Hammurabi Code, carved upon an eight-foot black stone monument found in 1901,⁴⁰ had "remained in force, even through the Persian, Greek and Parthian conquests, which affected private life in Babylonia very little, and it survived to influence Syrio-Roman and later Mahomedan law in Mesopotamia."⁴¹ Babylon is the site of the Hanging Gardens, built by King Nebuchadnezzar (605-562 B.C.), and one of the Seven Wonders of the World.⁴²

It is well known that writing, the wheel, and the 24-hour day were invented in Iraq.⁴³ Fewer people may be aware, however, that "irrigation schemes and other systems crucial to large-scale food production" were also invented there.⁴⁴ From the southern city of Sumer, where history begins, we have, or had, the earliest extant copies of written records, receipts, diplomatic letters, poetry, and even notes home to mother.⁴⁵ Mesopotamia is home to the "earliest artistic tradition in the world, where

36. *Id.*

37. Charles F. Horne, *The Code of Hammurabi: Introduction*, in THE AVALON PROJECT AT YALE LAW SCHOOL, available at <http://www.yale.edu/lawweb/avalon/medieval/hammint.htm> (last visited Apr. 8, 2005).

38. O'Connor & Griffith, *supra* note 2.

39. Horne, *The Code of Hammurabi: Introduction*, in THE AVALON PROJECT AT YALE LAW SCHOOL, *supra* note 37.

40. *Id.*

41. Claude Hermann Walter Johns, *Babylonian Law — The Code of Hammurabi*, in THE AVALON PROJECT AT YALE LAW SCHOOL, *supra* note 37.

42. *Iraq's 'Saviours' Guilty of Vandalism*, TORONTO STAR, Jan. 19, 2005, at A22; see also Zainab Bahrani, *Days of Plunder*, GUARDIAN, Aug. 31, 2004, available at <http://www.guardian.co.uk/comment/story/0,1293931,00.html> (last visited Apr. 8, 2005). Bahrani, who teaches ancient near eastern art history and archaeology at Columbia University, discusses how "the coalition forces can now claim, among other things, the destruction of the legendary city of Babylon." *Id.*

43. Francis Deblauwe, *Melee at the Museum*, National Catholic Reporter, NCRonline.org, Oct. 17, 2003, available at http://www.natcath.com/NCR_Online/archives2/2003d/101730/101703n.htm (last visited Apr. 8, 2005). Deblauwe is a Mesopotamian archaeologist who maintains the 2003 Iraq War and Archaeology web site. It is amongst the most informative, least ideological, and best kept web sites on this topic. 2003 — Iraq War & Archaeology Web Site, available at cctr.umkc.edu/user/fdeblauwe/iraq.html (last visited Apr. 8, 2005).

44. O'Connor & Griffith, *supra* note 2.

45. *Id.*

every artistic medium was represented.⁴⁶ The Uruk vase, displayed at the Baghdad museum, portrays a procession entering a temple, and is the earliest known depiction of a ritual.⁴⁷ The White Lady, also from Uruk, and also formerly at the Baghdad museum, is one of the earliest known examples of representational sculpture, and is approximately 5,500 years old.⁴⁸ The Bust of an Akkadian king, a former Baghdad museum exhibit, is dated to 2300 B.C. and is (or was) the earliest copper casting ever found.⁴⁹

For good reason scholars consider the U.S. attack on Baghdad to be as culturally devastating as the Mongul's attack in 1258.⁵⁰ U.S. President George W. Bush's name "will live in on in infamy with those of Henry VIII (who sacked the monasteries), Savonarola (who burned the vanities), and Caliph Umar (who torched the library at Alexandria)."⁵¹ Unlike Napoleon,⁵² Hitler,⁵³ Pol Pot,⁵⁴ or the warring factions in the breakup of

46. *Id.*

47. Guy Gugliotta, *Pentagon Was Told of Risk To Museums*, WASH. POST, Apr. 14, 2003, at A19.

48. *Id.* See also Deblauwe, *supra* note 43 (discussing this highly cherished Iraqi antiquity, which is also referred to as the "Sumerian Mona Lisa.").

49. Deblauwe, *supra* note 43.

50. O'Connor & Griffith, *supra* note 2. "The U.S. administration has refused to take responsibility, but history will judge the policy chiefs of the Bush administration to have been as reckless as those who actually robbed the art objects and burned the books." *Id.*

51. John Sutherland, *Britain Must Take Responsibility for Destruction of Iraq's Antiquities*, GUARDIAN, May 5, 2003, available at <http://education.guardian.co.uk/Guardian/arts/features/story/0,11710,949626,00.html> (last visited Apr. 8, 2005).

52. See, e.g., Kastenbergh, *supra* note 6, at 284 (discussing Napoleon's systematic looting of European art, an activity in which he "routinely engaged . . . on a greater scale than anyone since the Roman Empire."). Kastenbergh argues that Napoleon did not loot European art for booty, but stole it instead "to propel the Louvre into the civilized world's center of art and antiquities." *Id.* See Gael M. Graham, *Protection and Reversion of Cultural Property: Issues of Definition and Justification*, 21 INT'L LAW. 755, 757 (1987) (noting that Napoleon's conduct was particularly criticized within France by scholars such as Quatrième de Quincy).

53. See Howard N. Spiegler, *Recovering Nazi-Looted Art: Report from the Front Lines*, 16 CONN. J. INT'L L. 297, 298 (2001) (explaining that the Nazi art confiscation program was probably "the greatest displacement of art in history."). According to U.S. government estimates, "German forces and other Nazi agents before and during World War II had seized or coerced the sale of one fifth of all Western art then in existence," comprising an estimated 250,000 pieces of art. *Id.* Books, manuscripts and other cultural artifacts, bring the numbers into the millions. *Id.* "To this day, some tens of thousands of artworks stolen by the Nazis have still not been located." *Id.* at 299. "Raphael's *Portrait of a Young Gentleman*, widely considered to be the most important loss of World War II" was stolen in Krakow in 1940 and has never been seen again. *Tracking the Stolen Art Trade*, STORY FROM THE BBC NEWS, May 7, 2003, available at <http://news.bbc.co.uk/2/hi/entertainment/3005283.stm>. See, e.g., Graham, *supra* note 52, at 765-66 (discussing the Nuremberg Tribunal indictments of Frank, Seyss-Inquart, Rosenberg, and von Ribentrop). These top Nazi officers were criminally prosecuted for executing Hitler's orders of January 1940, pursuant to which "paintings, rare books, tapestries, furniture and jewelry" were seized. *Id.* at 766 n.45. The

Yugoslavia,⁵⁵ however, there have been no reports or allegations that coalition forces intentionally damaged major cultural sites.⁵⁶ Instead, U.S. troops did nothing, absolutely nothing, to stop the plunder.⁵⁷ Nor did U.S. troops attempt to stop the destruction of the Saddam Manuscripts Library, part of the National Library founded in 1988 to hold the 40,000 manuscripts previously held at the National Iraqi Museum. The library, which held manuscripts from the ancient Christian communities of Iraq as well as an immense collection of Qurans and vast administrative records from the Ottoman empire, was burned.⁵⁸ Over the weekend of April 12, 2003, “the National Library and Archives and the library at the Ministry

Tribunal found all four guilty of “plunder[ing] . . . both public and private property throughout the invaded countries of Europe,” and they were hanged. *Id.* at 766.

54. See Neil Brodie, *Focus on Iraq: Spoils of War*, 56 *ARCHAEOLOGY* 4 (2003) (discussing the extensive looting and vandalizing of the Angkor Temples by the Khmer Rouge), available at <http://www.archaeology.org/0307/etc/war.html> (last visited Apr. 8, 2005). In Cambodia, “[t]he Dépôt de la Conservation d’Angkor [had] housed probably the finest collection of Khmer antiquities in the world.” *Id.* Angkor Wat is not only the most famous temple in Cambodia, but it is also the single largest religious monument ever built. MICROSOFT 98 *ENCYCLOPEDIA*, ENCARTA. King Suryavaman II ordered its construction in the 12th century. *Id.* Its bas-relief, the longest in the world, depicts historical episodes of this king’s life, along with scenes from Hindu epics and feats of Hindu gods. It also portrays scenes from the daily life of the Khmer (Cambodian) people at the time the complex was built. *Id.* Today it is a shrine for Buddhist pilgrims. *Id.* During the 1970s, not only did a large part of the collection disappear, but some 150 statues were decapitated. Brodie, *supra*. The Dépôt remained under attack into the early 1990s. *Id.* “To date, only seven objects have been recovered.” *Id.*

55. See Kastenbergh, *supra* note 6, at 297 (explaining how there were “over 9000 (UNESCO) registered historic landmarks from the Roman, Byzantine, Renaissance, Islamic, Baroque, and Gothic periods” in the former Yugoslavia). During the siege of Dubrovnik, as throughout that civil war, many historical monuments suffered extensive and intentional damage. *Id.* Parties on all sides looted artwork as well. *Id.* at 298; see also Jennifer N. Lehman, Note, *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, 537 (1997) (reporting how, according to Radovan Ivancevic, President of the Association of Art Historians of Croatia and a professor at Zagreb, there had not been such destruction in Europe since World War II); see, e.g., Chamberlain, *supra* note 9, at 209-10 (discussing the reasons why invaders destroy cultural property). One of the main reasons for destroying and pillaging the adversary’s nonrenewable cultural resources is to demoralize the adversary and even eradicate their identity. *Id.* at 210. Cultural property destruction becomes a tool or weapon in a scorched earth campaign. Both rape and damage to cultural property represent forms of ethnic cleansing and “have been used to that end in conflicts such as the conflict in the former Yugoslavia.” *Id.*

56. *FBI to Hunt Museum’s Stolen Art*, *supra* note 23.

57. Ted Schmidt, *What Next in Iraq*, *CATH. NEW TIMES*, May 4, 2003, at 1; see also Hensher, *supra* note 4. “Even though the Americans did not carry out the looting and burning themselves,” the *Independent* reported, “they stood aside with complete indifference and allowed it to happen.” *Id.*

58. O’Connor & Griffith, *supra* note 2.

of Religious Endowment were set on fire, and a whole nation's history disappeared in a few hours."⁵⁹ Despite repeated forewarning, the United States "could not find two tanks and four marines to prevent the looting of the Iraqi museum."⁶⁰ When Raid Abdel-rida Mohammed, an archaeologist and member of the museum staff, approached an American tank, located fifty or sixty meters from the museum, and implored the soldiers "to protect [the museum] from looters gathering outside," the troops replied that they had no orders to do so, "and the tanks did not move."⁶¹ The assistant director of the Baghdad museum, Nabhal Amine, was in tears and denounced the American army for not having responded to requests for protection.⁶² "The Americans were supposed to protect the museum," said Amine. "If they'd only assigned a tank and two soldiers to it, none of this would have happened. I hold the American troops responsible for what happened to the museum."⁶³ "This is the crime of the century," said Dr. Donny George, a curator at the Baghdad museum.⁶⁴ Three days after the looting had begun, Dr. George went to U.S. Marines' headquarters to plead with commanders to send troops to the museum. Soldiers did not appear until three days later.⁶⁵

Why were coalition soldiers not given orders to protect the land they were occupying, as is required under both the Hague and Geneva Conventions?⁶⁶ Rules have been in place for close to a century "to ensure that even in defeat, a vanquished state's sovereignty, safety and security are not obliterated or ignored."⁶⁷

Brigadier General Vincent Brooks encapsulated the insouciance and arrogance of the entire Bush administration when he told reporters that neither he nor anyone else that he knew ever anticipated that "the Iraqi

59. Hensher, *supra* note 4.

60. Schmidt, *supra* note 57.

61. Stephen Fidler, "The Looters Knew What They Wanted," *FIN. TIMES*, May 23, 2003, at 19.

62. Hassan Hafidh, *Les pillards s'emparent des trésors de Babylone*, *LIBÉRATION*, Apr. 14, 2003, available at <http://www.Liberation.fr/page.php?Article=103464&AG> (last visited Apr. 8, 2005). All citations translated by author.

63. See *id.* (discussing how the National Museum at Baghdad had escaped relatively unharmed from the 1991 Gulf War, having closed at the beginning of the conflict. The museum only reopened in 2000. The museum had managed to survive the 1991 air raids over Baghdad as well as those of the three weeks leading up to the 2003 invasion.).

64. Deblauwe, *supra* note 43.

65. *Id.*

66. Chamberlain, *supra* note 9, at 237.

67. Tony Mauro, *U.S. Fights Unfairly in Legal Battles*, *USA TODAY*, Apr. 15, 2003, at 13A. In addition to writing for *USA TODAY*, Mauro is also Supreme Court correspondent for *American Lawyer Media and Legal Times*.

people” would loot their very own riches.⁶⁸ General Tommy Franks, the commander of the U.S. forces in the Persian Gulf region, told the Associated Press that in his view, people had decided “to take some of the antiquities and save them for a rainy day.”⁶⁹ When asked why U.S. troops carefully defended the Ministries of Oil and the Interior, but did not raise a finger to protect cultural property,⁷⁰ the Secretary of Defense did not hesitate to offend. “Stuff happens,” he told reporters.⁷¹ He brushed it off as “a little local ‘untidiness.’”⁷² Furthermore, the U.S. Secretary of Defense mockingly maintained that the media were showing the same news clip over and over again.⁷³ “Is it possible that there are that many vases in the whole country?” he sneered.⁷⁴ Reporters pointed out that Iraqi museum officials claimed that they had asked the U.S. military to protect the museum, and that the military had refused.⁷⁵ Undaunted, Secretary of Defense Rumsfeld came back with: “[o]h my goodness. Look, I have no idea. Looting isn’t something that someone allows or doesn’t allow. It’s something that happens.”⁷⁶

General Brooks’s factual assertions are as wrong as Secretary of Defense Rumsfeld’s legal claims. The Pentagon had been well informed of both the factual likelihood of pillage and the legal obligations to protect the Baghdad museum and other cultural property sites.⁷⁷ As early as

68. Labott & Clancy, *supra* note 3.

69. Martin Gottlieb, *Aftereffects: The Loot; Ashcroft says U.S. will Aid Effort to Save Iraq Treasures*, N.Y. TIMES, May 7, 2003, at A14.

70. O’Connor & Griffith, *supra* note 2.

71. *Mitch, Slapped*, NEW REPUBLIC, May 19, 2003, at 8. “Whereas the U.S. had a clear plan to secure the Iraqi oil ministry, it had no plan to secure peace.” See also, *The Big Question: Is There Life on Mars?* INDEPENDENT (London), June 3, 2003, at 3 (calling Rumsfeld’s remarks “racist and beneath contempt.”). See also Thomas L. Friedman, *America’s Skeleton Crew Fails Iraq; The Fog of Peace*, INT’L HERALD TRIB., May 15, 2003, at 6 (calling Rumsfeld’s remark a “shameful toss-off line.”).

72. Sutherland, *supra* note 51.

73. Marie Cocco, *Bush Presents U.S. with No Fault Presidency*, NEWSDAY, June 5, 2003, at A39; see also O’Connor & Griffith, *supra* note 2.

74. Jed Perl, *Raping Beauty*, NEW REPUBLIC, June 2, 2003, at 26.

75. *Id.*

76. Chamberlain, *supra* note 9, at 238 (emphasis added).

77. “Art historians, archaeologists and other scholars had informed the proper authorities that this could happen,” stated Robert Springhorn in an interview for CNN. Labott & Clancy, *supra* note 3. UNESCO had urged the United States to protect Iraq’s cultural treasures. *Id.* In early January, scholars had warned of possible destruction of Iraqi cultural property in a statement from the Archaeological Institute of America (AIA). Gugliotta, *supra* note 47. Hundreds of scholars from around the world signed the AIA’s “Open Declaration on Cultural Heritage at Risk in Iraq.” Kenneth Baker, *At a Loss over Theft of Artifacts, Calamity Should have been Foreseen*, S.F. CHRON., Apr. 17, 2003, available at <http://www.artsjournal.com/visualarts/redir/20030417-21214.html> (last

November 2002, Ashton Hawkins, the President of the American Council for Cultural Property, and Maxwell Anderson, the President of the American Association of Art Museum Directors, were describing the cultural significance of Iraqi cultural property and explaining its importance for all mankind as well as for the Muslim people.⁷⁸ The holy cities of Kerbala and Najaf, they warned, were not only places of ancient importance, but were further “endowed with a religious significance that resonates throughout the Shiite and broader Islamic world. Damage to these centers could severely affect the trust of Iraq’s Shiite population and would impair our ability to retain the support of others in the region.”⁷⁹ Messrs Hawkins and Anderson warned the Bush administration in 2002 to take measures to “ensure absolute respect for the integrity of Iraq’s sites and monuments and to prevent looting of any kind.”⁸⁰ They urged the Bush administration to form a plan right then — “and not later” — with the specific objective of ensuring the protection of Iraq’s material culture.⁸¹ They invoked the words of General Eisenhower on the eve of the Norman

visited Apr. 8, 2005). Moreover, coalition planners were aware that nearly four thousand objects had been looted from regional Iraqi museums during the chaos that ensued following the 1991 Gulf War. *Id.*; see Gugliotta, *supra* note 47 (interviewing Gibson, an Iraq specialist at the Oriental Institute of the University of Chicago). Late in January, a mix of scholars, museum directors, art collectors and antiquities dealers asked for and were given a meeting at the Pentagon to discuss their misgivings. *Id.* Gibson attended this Pentagon meeting and went back two more times. “We told (Pentagon officials charged with target selection and protection of cultural sites) that looting was the biggest danger, and I felt they understood that the National Museum was the most important archaeological site in the country. *Id.* It has everything from every other site,” Gibson told the Washington Post. *Id.* He and his colleagues also sent repeated e-mails to Department of Defense officials in the weeks before the war started. Gibson felt that DOD officials had assured him that sites and museums would be protected. *Id.*; see, e.g., Maggie McDonald, *Past Master*, NEW SCIENTIST, June 28, 2003, at 44 (interviewing Sir Colin Renfrew, the renowned archaeologist and director of the McDonald Institute for Archaeological Research at the University of Cambridge). Sir Renfrew is also a member of the British Parliament. *Id.* Sir Renfrew warned the British authorities of the extreme likelihood of pillaging, but was ignored. “What has been clear from the start is that the museum was left unprotected, and that the looting was foreseeable and foreseen,” he stated. *Id.* “The International Council on Monuments and Sites (ICOMOS) had urged the U.S. and British governments early in March to ‘act in the spirit and the letter . . . of the Hague Convention for the Protection of Cultural Properties [sic] in the Event of Armed Conflict.’” Julio Godoy, *Iraq: Worldwide Movement Needed to Stop Sale of Loot*, IPS-INTER PRESS SERVICE, Apr. 15, 2003. The International Federation of Library Associations and Institutions (IFLA) Acting Director Ross Shimmom had warned that “looting of Iraq museums and archaeological sites was looming with the war,” as early as March 26. *Id.*

78. Ashton Hawkins & Maxwell L. Anderson, *Preserving Iraq’s Past*, WASH. POST, Nov. 29, 2002.

79. *Id.*

80. *Id.*

81. *Id.*

invasion when he warned his commanders to uphold their duty to protect and respect the “historical monuments and cultural centers that symbolize to the world what we are fighting for.”⁸² The world would judge us, wrote Hawkins and Anderson in the *Washington Post*, by how we behaved toward Iraqi cultural patrimony if we invaded and occupied that country.⁸³

Mesopotamian archaeologists and Islamic historians from the American academic community were already anxious in the fall of 2002 and offered to help the administration designate “sites and locations of special cultural and religious importance.”⁸⁴ They asked publicly to whom they should speak.⁸⁵ Weeks before the 2003 invasion, “the Archaeological Institute of America published an ‘Open Declaration on Cultural Heritage at Risk in Iraq’ signed by hundreds of scholars from around the world.”⁸⁶ Although the Bush administration did not heed any of these scholars’ advice, it did move quickly, after the Baghdad library had been burned to the ground under its watch, to deny the visa of Jean-Marie Arnoult. Arnoult is a librarian from the Bibliothèque Nationale de Paris and was a senior member of the UNESCO team assembled to visit the site and to start reconstructing Iraq’s cultural losses.⁸⁷ U.S. forces in Iraq denied Arnoult a visa “because he is French, and because France opposed the war on Iraq.”⁸⁸

Three members of the White House Cultural Property Advisory Committee,⁸⁹ Martin E. Sullivan, Richard S. Lanier, and Gary Vikan, resigned to protest the looting.⁹⁰ Sullivan, the head of the historic commission of St. Mary’s, Maryland and then chairman of the Committee, stated in his resignation letter that “the tragedy was not prevented due to our nation’s inaction.”⁹¹ Lanier, director of the Trust for Mutual

82. *Id.*

83. Hawkins & Anderson, *supra* note 78.

84. *Id.*

85. *Id.*

86. Baker, *supra* note 77.

87. Julio Godoy, *U.S. Bars French Librarian from Tour of Iraq*, IPS-INTER PRESS SERVICE, May 27, 2003.

88. *Id.*

89. The Cultural Property Advisory Committee (CPAC) is established under 19 U.S.C. § 2605. Convention on Cultural Property Implementation Act of 1983, 19 U.S.C. § 2601 (1983) (implementing legislation of the UNESCO 1970); Gibbons, *supra* note 29; *see infra* Part IV.B. The CPAC is made up of eleven presidential appointees. 19 U.S.C. § 2605(b)(1). Two are representatives of museum interests. *Id.* § (A). Three are academics from relevant fields such as archaeology, anthropology and ethnology. *Id.* § (B). Three are dealers. *Id.* § (C). Three members “represent the interest of the general public.” *Id.* § (D).

90. Hartman, *supra* note 32.

91. *Id.*

Understanding, a New York foundation dealing with U.S.-Eastern European relations, criticized the Bush Administration's "total lack of sensitivity and forethought" regarding the Iraq invasion and the loss of cultural treasures.⁹² Vikan, director of the Walters Art Museum in Baltimore, called the Departments' of State and Defense lack of heed to the repeated warnings a failure "to interdict what is now an open floodgate."⁹³

Pop journalists, like the Bush administration, would have none of the claims of scholars and experts. Gloria Borger, a CNBC co-host, dismissingly told her audience that only thirty-three items had actually been looted, and that the original story, she guessed, had "lost something in the translation."⁹⁴ As to the allegations that U.S. troops had stood by without defending Iraq's "past treasures," Borger's jocular comment was: "[w]ell, that's ancient history, too."⁹⁵

Even the *Army Times* told a different story from CNBC's. Colonel Matthew Bogdanos of the Marines, an attorney with a classics background and the leader of the American team investigating antiquity losses in Iraq,⁹⁶ confirmed the theft of 4,795 cylinder seals formerly on display at the Baghdad museum.⁹⁷ The seals are usually made of stone such as "lapis lazuli, agate, hematite, white marble, rock crystal."⁹⁸ They date from as early as the fifth millennium B.C. to the second century A.D.⁹⁹

The seals are small, typically one and a half to four inches tall and usually less than two inches in diameter. Figures and inscriptions are carved or cut, so that when the cylinders are rolled on clay, miniature scenes scroll out: ceremonies at temples, feasts at palaces, battles between gods and beasts. Impressions were made on clay used to seal goods and official documents, even to secure rooms. Seals were worn and passed from one generation to the next.¹⁰⁰

92. *Id.*

93. *Id.*

94. Gloria Borger, *Number of Pieces of Ancient Art Looted from Baghdad Museum is Actually 33, not 170,000 as had been Reported*, CNBC NEWS TRANSCRIPTS, June 10, 2003.

95. *Id.*

96. Vince Crawley, *Tracking down Missing Iraqi Artifacts to 'Likely Take Years,'* ARMY TIMES, Oct. 6, 2003, at 34.

97. *Id.*

98. Suzanne Charlé, *Tiny Treasures Leave Big Void in Looted Iraq*, N.Y. TIMES, July 18, 2003, at E34.

99. *Id.*

100. *Id.*

"McGuire Gibson, professor of Mesopotamian archaeology at the Oriental Institute of the University of Chicago, who worked at Iraqi sites from 1964 to 1990, described the theft as 'a major loss.'"¹⁰¹ "This is, or was, one of the world's really superb collections," Gibson stated.¹⁰² The seals are ranked as the third most endangered collection in the world on the Emergency Red List of the International Council of Museums.¹⁰³ These seals are the most commonly sold Iraqi antiquity in the United States.¹⁰⁴

The value to the cultural heritage of mankind lay in the stories the seals tell. The value to the market lay in the price of willing buyers and sellers. "One seal sold at Christie's in New York in 2001 for \$424,000."¹⁰⁵ Despite the enormity of the problem, experts still cannot put a price tag on the total destruction.¹⁰⁶ According to Philippe Delanghe, UNESCO's program specialist for Iraq, "[w]hat can be sold for \$200 on the local market could go for 10 times that if it ends up in the U.S.," the largest market for stolen Iraqi antiquities.¹⁰⁷

Over the last few decades, art dealers and auctioneers have been awash in "works of art from regions of the world affected by internal wars."¹⁰⁸ Even before the 1991 Gulf War, when approximately 4,000 pieces were looted from regional Iraqi museums during the internal disorder that immediately followed,¹⁰⁹ the United States had been one of the largest markets for stolen Iraqi antiquities.¹¹⁰ Before the current Gulf War,

101. *Id.*

102. *Id.*

103. The International Council of Museums Web Site, available at <http://www.icom.org> (last visited Apr. 8, 2005).

104. Karin E. Borke, *Legislative Update: Searching for a Solution: An Analysis of the Legislative Response to the Iraqi Antiquities Crisis of 2003*, 13 DEPAUL-LCAJ. ART & ENT. L. 381, 396 (2003).

105. *Id.*

106. *Iraqi Antiquities Theft a Customs Headache - Jordan*, JORDAN TIMES, Aug. 13, 2004, available at <http://www.artsjournal.com/visualarts/redir/20040816-50471.html> (last visited Apr. 8, 2005).

107. *Id.*

108. Victoria A. Birov, Note, *Prize or Plunder?: The Pillage of Works of Art and the International Law of War*, 30 N.Y.U. J. INT'L L. & POL. 201, 238 (1998).

109. See, e.g., Baker, *supra* note 77. "It wouldn't have taken a prophet to foresee a similar fate befalling the capital's central museum." *Id.*

110. *Iraqi Antiquities Theft a Customs Headache - Jordan*, *supra* note 106; see, e.g., Hugh Eakin & Kelly Devine Thomas, *Debating "Illegal Archaeology: Europeans Charge that the Collecting Policies of some U.S. Museums Encourage the Plundering of Ancient Sites,"* ARTNEWS, Sept. 2003, at 56. At an international conference held in Berlin in May 2003 and organized by Wolf-Dieter Heilmeyer, the director of Berlin's Museum of Classical Antiquities, "[t]he collecting policies of several major American museums came under renewed criticism." *Id.* American private museums prefer a "'greatest hits' approach to antiquities," stated Daniel Graepler, a University of

artifacts were being looted and smuggled out of the country,¹¹¹ despite Saddam Hussein's extensive, and severely enforced cultural patrimony laws.¹¹² This was due in large part to the relentless poverty of the Iraqi people under a decade of U.N. Sanctions.¹¹³ Basra history professor Hamid Ahmed Hamdan explained that under the sanctions, "it was easy to find impoverished peasants to excavate sites."¹¹⁴ Although antiquities are looted due to the spiraling prices in the market,¹¹⁵ the looters themselves often receive a mere pittance for the goods they pillage.¹¹⁶ The looting and loss of cultural property, however, no differently from its illicit trade, causes irreparable loss and impoverishment to the nation and inhabitants

Göttingen archaeologist. *Id.* at 58. In the same vein, American collectors and institutions continue to seek "'spectacular single pieces' out of their archaeological context," instead of collaborating in the "war against the illegal market." *Id.* But see William C. Smith, *Law Versus Looters: United States is Part of International Effort to Block Illegal Sales of Antiquities*, 89 A.B.A. J. 18 (2003). "Museum curators go beyond bare legal requirements to assure that they do not support the illicit antiquities trade," says Daniel W. Eck, counsel to Chicago's Field Museum of Natural History and a vice-chair of the International Law Section's Cultural Property Committee." *Id.*

111. *Iraqi Antiquities Theft a Customs Headache — Jordan*, *supra* note 106; see also Ted Bowen, *Caught in the Line of Fire*, FIN. TIMES, Feb. 5, 2003, at 12.

112. See, e.g., *Preservation of Cultural Heritage Left in Too Hard Basket*, CANBERRA TIMES, July 13, 2004, at A13. "Until 1990, Iraq had a good record for the laws of its cultural heritage. Its legislation dated back to 1936 and it had control over looting. Talented professionals ran museums." See also Fidler, *supra* note 61 (discussing the draconian cultural heritage laws imposed by Saddam Hussein). Ten looters who cut off the head of an Assyrian winged bull discovered at a site in Khorsabad, North of Mosul, were executed in 2000. *Id.* Saddam Hussein personally ordered that their heads be cut off the same way they had decapitated the bull. *Id.*

113. See, e.g., Alan Riding, *Aftereffects: Museum; Experts Despair of Iraq's Stopping Loss of Relics*, N.Y. TIMES, May 5, 2003, at A13.

114. *Id.*; see also O'Connor & Griffith, *supra* note 2 (discussing the "desperate situation of the Iraqi population, outside the Baathist elite," during "the years following the Gulf War, when Iraqi access to food and medical supplies was limited by the sanctions imposed on Iraq by the international community."). The combined sanctions and Baathist corruption so exacerbated their already impoverished condition, that the vast majority of Iraqis "had little money and few legal ways of making any." *Id.*

115. Paul M. Bator, *An Essay on Trade in Art*, 34 STAN. L. REV. 277, 301 (1985); see also Borke, *supra* note 104, at 396 (discussing how the international market for art, artifacts and antiquities is over a \$1 billion business, annually). These figures are based on the known revenues and profits of auction houses such as Sotheby's and Christie's, and do not include the clandestine sales made worldwide. *Id.*; see also Timothy L. O'Brien, *The Castro Collection, A Painting from Cuba Offers a Glimpse into the World of Art Smuggling*, N.Y. TIMES, Nov. 21, 2004, Sunday Business, at 1 (describing the "hush-hush business of art smuggling, a crime that is carried out at a very untidy intersection of art and commerce.").

116. See, e.g., Borke, *supra* note 104. "The original finder of an antiquity that is traded on the illicit market receives less than 2% of the price paid by the final purchaser." *Id.* at 394.

from which it is pillaged.¹¹⁷ It also “constitutes a harmful impoverishment of the heritage of *all* nations of the world.”¹¹⁸ As sad as all this is, it is more painful still to know that a poor Iraqi peasant who digs up a few cuneiform tablets, just to “try to add to his meager income, is exploited twice: [h]is own culture and history are destroyed, and he gets paid only peanuts by the middlemen.”¹¹⁹

In less than a month after the ransacking of the National Museum of Iraq in Baghdad, “Iraqi and American officials conceded that it [would] be almost impossible to prevent the continued illegal export of treasures from ancient Mesopotamian sites.”¹²⁰ Secretary of State Colin Powell warned Iraqis, coalition forces, and Americans in particular not to handle the artifacts.¹²¹ Secretary Powell promised to track down and prosecute looters,¹²² giving expanded meaning to “too little, too late.” Eventually, the National Stolen Property Act (NSPA),¹²³ as interpreted under *United States v. McClain*,¹²⁴ and recently reiterated in *United States v. Schultz*,¹²⁵ may

117. UNESCO 1970, *supra* note 27, art. 2(1).

118. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, T.I.A.S. 8226, pmbl. ¶ 2 [hereinafter UNESCO 1972], *available at* <http://whc.unesco.org/pg.cfm?cid=182> (last visited Apr. 8, 2005). The United States is one of 178 states parties to this international legal instrument.

119. Deblauwe, *supra* note 43; *see also* Jodi Pratt, *The Need to Revamp Current Domestic Protection for Cultural Property*, 96 NW. U. L. REV. 1207, 1208 (2002) (explaining that “[i]llicit art trade is second only to narcotics trafficking as the largest and most profitable type of illegal trade worldwide.”). Illicit cultural property trading, like terrorism and narcotics dealing, have a critical element in common: a structure that requires the use of middlemen. *Id.* at 1208-09.

120. Riding, *supra* note 113. Indeed, the pillage has increased uncontrollably since the American-led occupation. Columbia University archaeology professor Zainab Bahrani told the *New York Times* in February 2005: “[t]ens of thousands of objects have just gone completely missing in the past two years. It’s a cultural disaster of massive proportions.” David Johnston, *Picking Up the Stolen Pieces of Iraq’s Cultural Heritage*, N.Y. TIMES, Feb. 14, 2005, at A10. As this article goes to press, wholesale looting continues across Iraq, and cultural sites remain unprotected. Sheila Farr, *Ancient Art Lost*, SEATTLE TIMES, Aug. 21, 2005, at L1. “This is where we learned to be civilized humans and it is going away in uncivilized ways,” reported Angela Schuster, editor of the preservation quarterly *Icon*, published by the World Monument Fund. *Id.*

121. Fidler, *supra* note 61.

122. Labott & Clancy, *supra* note 3.

123. National Stolen Property Act, 18 U.S.C. §§ 2314, 2315 (2000) [hereinafter NSPA].

124. 93 F.2d 658 (5th Cir. 1979).

125. *See* 333 F.3d 393 (2d Cir. 2003) (interpreting the NSPA). The issue was whether defendant art dealer was dealing in stolen goods when he smuggled Egyptian antiquities out of Egypt in violation of the Egyptian cultural patrimony laws which prohibited both private ownership of and trade in antiquities. *Id.* at 399. The pertinent language under the NSPA was:

Whoever receives, possesses, conceals, stores, barter[s], sell[s], or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more

... which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to be have been stolen, unlawfully converted, or taken ... shall be fined under this title, or imprisoned not more than ten years, or both.

18 U.S.C. § 2315 (2000). Schultz argued that antiquities were not owned by anyone, and could not, therefore be stolen. *Schultz*, 333 F.3d at 396. The Egyptian law in question, he argued, was not an ownership law (and therefore enforceable) but was merely an export law, and therefore unenforceable in a U.S. court. *Id.* at 401. The *Schultz* court disagreed, finding that the Egyptian patrimony law was “a true ownership law.” *Id.* at 408. The *Schultz* court did not see any “reason that property stolen from a foreign sovereign should be treated any differently from property stolen from a foreign museum or private home.” *Id.* at 410. Schultz’s actions violated the NSPA because the antiquities he conspired to receive in the United States belonged to someone who did not give consent for Schultz (or his agent) to take them. That someone, the *Schultz* court found, “is the nation of Egypt.” *Id.* at 399. See Daniel W. Eck & Patty Gerstenblith, *Cultural Property*, 38 INTL. LAW. 469, 476 (2004) (explaining the importance of this decision because “it establishes the law on this issue for the Second Circuit, the heart of the antiquities trade in the United States.”). Furthermore, this is the third influential appellate circuit to interpret foreign nation patrimony laws as ownership laws, thus bringing them within the scope of the NSPA. *Id.*; see e.g. Cynthia Ericson, Note, *United States of America v. Frederick Schultz: The National Stolen Property Act Revives the Curse of the Pharaohs*, 12 TUL. J. INT’L COMP. L. 509 (2004) (analyzing the NSPA, the *Schultz* case, and *United States v. McClain*, (593 F.2d 658 (5th Cir. 1979)). *Shultz* upheld and expanded *McClain*. *Id.* at 515. *Schultz* was particularly important as defendant Frederick Schultz had been the immediate past president of the National Association of Dealers in Ancient, Oriental, and Primitive Art, the most respected trade association for U.S. antiquities dealers. *Id.* at 521. To demonstrate the vast breadth of competing financial and intellectual interests in the cultural property field, consider the entities filing amicus curiae briefs for both parties. *Schultz*, 333 F.3d at 398. For defendant: the National Association of Dealers in Ancient, Oriental and Primitive Art, Inc.; The Art Dealers Association of America; The Antique Tribal Art Dealers Association; The Professional Numismatics Guild; The American Society of Appraisers; as well as “an ad hoc group” of politicians, academics and art collectors. Their “briefs argued primarily that allowing Schultz’s conviction to stand would threaten the ability of legitimate American collectors and sellers of antiquities to do business.” *Id.* In support of the United States: The Archaeological Institute of America; The American Anthropological Association; The Society for American Archaeology; The International Council on Monuments and Sites, filed “briefs argu[ing] primarily that sustaining Schultz’s conviction and applying the NSPA to cases such as this one will help to protect archaeological and cultural sites around the world.” *Id.* For a very interesting look at the underworld of antiquities trading in general, and Schultz’s participation in it in particular, see Peter Watson, *The Investigation of Frederick Schultz*, 10 CULTURE WITHOUT CONTEXT (2002), available at <http://www.mcdonald.cam.ac.uk/IARC/cwoc/issue10/investigation.htm> (last visited Apr. 8, 2005). For a succinct description of the “cast of characters” involved in the art and antiquities world, see, e.g., Chauncey V. Steele IV, Note, *The Morgantina Treasure: Italy’s Quest for Repatriation of Looted Artifacts*, 23 SUFFOLK TRANSNAT’L L. REV. 667 (2000). This well-written and engaging article provides an interesting and informative overview of the facts and law as they pertain to: tomb robbers; middlemen and smugglers; auction houses, dealers and collectors; and museums. *Id.* at 679-86. Stuart E. Eizenstat, former deputy treasury secretary during the Clinton administration, and a member of the Presidential Advisory Commission on Holocaust Assets in the United States described the art and antiquities business as follows: “What I found out [when

very well wind up “provid[ing] a powerful disincentive to market demand, which in turn will discourage the looting of archaeological sites.”¹²⁶ In the chaotic world of the Iraq under the Coalition Provisional Authority, however, where the average looter is simply seeking to transfer possession to the next middle man making his way to the Jordanian border,¹²⁷ the NSPA is only remotely relevant and not nearly sufficient. There are entirely too many objects.¹²⁸ Moreover, many objects are headed to other market nations.¹²⁹ Finally, many items do not meet the statutory requirement of \$5,000 in value.¹³⁰

The international community reacted quickly to the massive looting.¹³¹ On May 22, 2003, U.N. Security Council passed Resolution 1483,¹³² which simultaneously eased multilateral economic sanctions imposed on Iraq¹³³ and required member states to “take appropriate steps to facilitate the safe return” of Iraqi cultural property which had been illegally removed since

working to recover art stolen by the Nazis] was that the art world is a secretive world. As a dealer, you rely on information from your immediate sellers and you don’t ask questions.” Witt, *supra* note 1.

126. Patty Gerstenblith, *The McClain/Schultz Doctrine: Another Step Against Trade in Stolen Antiquities*, 13 CULTURE WITHOUT CONTEXT (2004).

127. See, e.g., *Iraqi Antiquities Theft a Customs Headache — Jordan*, *supra* note 106 (reporting that Jordanian customs officials seized two boxes of suspected Iraqi relics, containing eighteen statues, during a routine search of a private car at the Al Karam border crossing).

128. Deblauwe’s conservative estimate is that approximately 8750 pieces were still missing from the Baghdad museum as of Nov. 1, 2004, 2003-Iraq War & Archaeology Web Site, *supra* note 43.

129. See, e.g., Brodie, *supra* note 54. In “Europe, dealers were circulating photographs of relief fragments from palaces at Nineveh and Nimrod. Cuneiform tablets, cylinder seals, and other small antiquities — more difficult to trace — were sold openly.” *Id.* Brodie is the coordinator of the Illicit Antiquities Research Center of the McDonald Institute for Archaeological Research at the University of Cambridge. Archaeology Magazine Web Site, available at <http://www.archaeology.org> (last visited Apr. 8, 2005); see, e.g., *Iraqi Antiquities Theft a Customs Headache — Jordan*, *supra* note 106 (stating that the driver of a private car with two boxes of suspected Iraqi relics hidden in the vehicle’s boot [sic] told Jordanian customs that the items “were to be mailed to an exhibition in France.”).

130. NSPA, *supra* note 123. In Britain, for example, the vast majority of the members of the International Association of Dealers in Ancient Art “deal in objects that are worth between £1 and £500.” Neil Brodie, *Editorial*, 13 CULTURE WITHOUT CONTEXT (2003) (citing James Ede, speaking on behalf of the British Art Market Federation), available at <http://www.mcdonald.cam.ac.uk/IARC/cwoc/issue13/editorial.htm> (last visited Apr. 8, 2005).

131. Eck & Gerstenblith, *supra* note 125, at 476.

132. S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483/2003 [hereinafter Resolution 1483].

133. *Both U.S. and EU Ease Iraq Sanctions*, 9 INT’L LAW UPDATE (2003).

it had adopted Resolution 661 (1990) on August 6, 1990.¹³⁴ U.N. member states have to implement legislation prohibiting trade or transfer of items of cultural property where there is a reasonable suspicion that the property has been illegally removed.¹³⁵

The United States implemented Resolution 1483 via a Presidential Proclamation.¹³⁶ This proclamation, though necessary to implement our obligation vis-à-vis Resolution 661, is not remotely sufficient to carry out our legal duty toward the Iraqi people, nor to honor our obligation to our fellow members of the international community. This hemorrhage of mankind's inheritance is not just one more reified event in the spurious spirit of "mistakes were made," or "stuff happens."¹³⁷ The world accuses

134. "Stressing the need for respect for the archaeological, historical, cultural, and religious heritage of Iraq, and for the continued protection of archaeological, historical, cultural, and religious sites, museums, libraries and monuments." Resolution 1483, *supra* note 132, pmb. ¶ 12.

Decides that 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* the U.N. Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph.

Id. art. 7.

135. *Id.* art. 9.

136. *Letter to Congressional Leaders Transmitting the Executive Order on Termination of the National Emergency Declared in Executive Order 12722 with Respect to Iraq and Modification of Related Executive Orders*, Public Papers of the Presidents, Aug. 2, 2004. See *Termination of Emergency Declared in Executive Order 12722 with Respect to Iraq and Modification of Executive Order 13290, Executive Order 13303, and Executive Order 13315*, Effective July 30, 2004, Exec. Order No. 13,350, 69 Fed. Reg. 46,055 (July 30, 2004). Under section 4 thereof, the relevant language is:

Unless licensed or otherwise authorized pursuant to this order or otherwise consistent with U.S. law, the trade in or transfer of ownership or possession of Iraqi cultural property or other items of archaeological, historical, cultural, rare scientific, and religious importance that were illegally removed, or for which a reasonable suspicion exists that they were illegally removed, from the Iraq

National Museum, the National Library, and other locations in Iraq since August 6, 1990, is prohibited.

Id.

137. *Mitch, Slapped*, *supra* note 71.

us, and the world is right. The United States is responsible for mankind's disinheritorship. "The indictments for cultural war crimes by the Yugoslav Tribunal [further] demonstrate that the international community is not willing to tolerate the destruction of cultural property."¹³⁸

Unphased, the U.S. Army has constructed a military base in the ancient ruins of Babylon.¹³⁹ Dr. John Curtis of the British Museum observed the site, and the substantial damage done by flattening and cementing over 300,000 square meters to build parking lots for heavy vehicles and landing strips for helicopters.¹⁴⁰ Noting that U.S. authorities had ignored the repeated advice of archaeologists, Curtis reported: "[t]his is tantamount to establishing a military camp around the Great Pyramid in Egypt or around Stonehenge in Britain."¹⁴¹

There are people who manage to believe the U.S. account that this war is "all about liberation, not occupation."¹⁴² Even if that tale were factually true, the legal assessment cannot stand. Article 43 of the 1907 Hague Regulations imposes a clear obligation on an occupying power "to take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."¹⁴³ Moreover, "the obligation to maintain law and order is not to be taken lightly."¹⁴⁴ The obligation to prevent pillage and looting of cultural property is clearly included as a component duty therein.¹⁴⁵

There should be no need today to look to the 1907 Hague Convention. It is time the United States ratified the 1954 Hague Convention, the first treaty ever adopted that treated cultural property as its primary subject,¹⁴⁶ and the principal international instrument devoted specifically to the protection of cultural property in armed conflict.¹⁴⁷ "The scope of the Convention application mirrors the Geneva Conventions in that it applies

138. Birov, *supra* note 108, at 226-27.

139. *Iraq's 'Saviours' Guilty of Vandalism*, *supra* note 42.

140. *Id.*

141. *U.S.-Led Troops Have Damaged Babylon, British Museum Says*, N.Y. TIMES, Jan. 16, 2005, § 1, at 11.

142. Mauro, *supra* note 67.

143. Chamberlain, *supra* note 9, at 237-38 (citing in part, *Regulations Respecting the Laws and Customs of War on Land*, Annex to *Convention Respecting the Laws and Customs of War on Land*, Oct. 15, 1907, U.S.T.S. 539, 3 Martens (3d) 461, art. 43.) [hereinafter 1907 Hague Regulations].

144. *Id.* at 217.

145. *Id.* at 216.

146. Graham, *supra* note 52, at 768.

147. Chamberlain, *supra* note 9, at 207.

to armed conflicts of an international character (whether or not a formal state of war exists between the Parties concerned) and to cases of partial or total occupation.”¹⁴⁸

The United States, however, claims that the 1954 Hague Convention restricts the rights of belligerents and stretches the normative boundaries of customary international law.¹⁴⁹ This Article argues that it is irrelevant, if not immoral, to argue customary international law of war as a reason not to ratify the 1954 Hague Convention. It is not enough to state that “the 1954 Hague Convention is binding law in *most* of its provisions, and thus is a salient *guide* to what that law is.”¹⁵⁰ Politically, a state is much more likely to put forth statements about rules of customary international law “in situations of conflict and doubt about those rules than when customary rules are well accepted.”¹⁵¹

Two criteria must be established to determine that customary state conduct is binding law: (a) consistent state practice, and (b) the belief, or behavioral motive, that the engaged-in conduct is required by law.¹⁵² The International Court of Justice has held that “state practice, including *that of States whose interests are specially affected*, should have been both extensive and virtually uniform in the sense of the provision invoked; — and should, moreover, have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”¹⁵³

All states’ interests are specially affected in the protection of cultural property. “Books, works of art and monuments of history and science,” are the world’s inheritance.¹⁵⁴ This principle, declared by states collectively fifty years ago, is both eminently reasonable and positive international

148. *Id.* at 219.

149. Kastenberg, *supra* note 6, at 290.

150. *Id.* at 302 (emphasis added).

151. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 47 (3d ed. 1999).

152. “International custom, as evidence of general practice accepted as law.” I.C.J. Statute art. 38(1(b)). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2) (1987) (defining customary international law as resulting from general and consistent practice of states followed by them from a sense of legal obligation).

153. *North Sea Continental Shelf Cases* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20) (emphasis added).

154. UNESCO CONSTITUTION, signed on Nov. 16, 1945, entered into force on Nov. 4, 1946; see UNESCO Legal Instruments, *supra* note 5 (explaining that the UNESCO Constitution required the ratification of twenty countries in order to come into force). Brazil, China, Czechoslovakia, India, Norway, Saudi Arabia, and South Africa were amongst them, showing the worldwide support for UNESCO. *Id.* Interestingly, Greece and Turkey were both amongst the original twenty. *Id.* It is notable that the so-called Anglo-Saxon countries — Australia, Canada, the United Kingdom and the United States — were also amongst these first 20 states. *Id.* Today there are 190 states parties and six associate members to the UNESCO Convention, essentially, the entire world. *Id.*

law.¹⁵⁵ Nonetheless, it has no expectation of regulating the conduct of many warring states at present.

In war, state conduct today consists of torture, genocide, and cultural property annihilation of previously inconceivable scale. The United Nations reported that 24.2 million people on the planet, in 2004, were IDPs, or internally displaced persons.¹⁵⁶ One million Colombians have fled their homes, pursued by paramilitaries, and are consequently displaced in other parts of the nation whose duty it is to protect them. In the Sudan, 1.45 million people are IDPs, and another 200,000 are refugees in neighboring Chad, all fleeing the fighting between Sudanese Government forces and two local rebel groups.¹⁵⁷ Armed militias known as Janjaweed rape and kill women, burn crops, livestock and homes, and generally conduct themselves the same way as Hutu forces in Rwanda and Serbian militia in the former Yugoslavia.¹⁵⁸ The *custom*, in other words, is extermination and obliteration. Moreover, the *states* conducting war are "failing states characterized by lawlessness and corruption," not viable free states traditionally "defined by their capacity for self-government."¹⁵⁹

In response to the "widespread lawlessness, looting and anarchy racing throughout Iraq,"¹⁶⁰ the U.S. Department of Defense told the world that "freedom's untidy and free people are free to make mistakes and commit crimes and do bad things."¹⁶¹ This untenable assertion has no basis in law. "As the preeminent military power, the United States has an interest in clear and universal rules of warfare,"¹⁶² lest we regress to the most primitive standards of behavior and become mere outlaws.

155. Treaties are a primary source of international law. ICJ Statute, art. 38(1(a)). "A rule of international law is one that has been accepted as such by the international community of states by international agreement." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(1(b)).

156. U.N. News Service, Sept. 25, 2004, available at <http://www.UNNews@un.org>.

157. U.N. News Service, Sept. 27, 2004, available at <http://www.UNNews@un.org>.

158. Dallaire, *supra* note 17.

159. PETER ØREBECH ET AL., THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT (forthcoming 2006).

160. Mauro, *supra* note 67.

161. *Id.*

162. Theodore Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L. L. 678, 686 (1994).

III. THE 1954 HAGUE CONVENTION AS AN INTERNATIONAL INSTRUMENT OF WAR

*Delenda est Carthago.*¹⁶³ Scorched earth, as demonstrated by Rome when it planned and brought about the utter destruction and extinction of its enemy in the Third Punic Wars (149-146 B.C.), has been the entrenched standard of war since antiquity.¹⁶⁴

This norm was espoused by pagans and monotheists alike. In the Deuteronomic tradition,¹⁶⁵ “the ultimate aim of warfare became the destruction of the enemy’s center of religious beliefs because out of these religious beliefs came societal cohesion.”¹⁶⁶ Adherents to this tradition understood that “the forms, vehicles, and objects of worship are suffused with an aura of deep moral seriousness.”¹⁶⁷ Through collective ritual involving recognized and authorized religious or cultural objects, “the powerfully coercive ‘ought’ is felt to grow out of a comprehensive factual ‘is.’”¹⁶⁸ Sacred symbols “identify fact with value at the most fundamental level, to give to what is otherwise merely actual, a comprehensive normative import.”¹⁶⁹

Cultural artifacts, whether religious or secular, work to standardize group behavior in their role as informants and interpreters of cultural norms.¹⁷⁰ By design, they speak to and are meant to influence the conduct of the people who create them. These objects tell group members who they are and order their place in the universe. Their value is intrinsic.¹⁷¹

163. “Carthage must be destroyed.” Attributed to Cato the Elder (239-149 B.C.), *reprinted in THE OXFORD DICTIONARY OF QUOTATIONS* 138:18 (3d ed. 1979).

164. Kastenber *supra* note 6, at 282.

165. “Put all (the enemy’s) males to the sword, but the women and the little ones, and the cattle and everything else in the city, all its spoil, you shall take as booty for yourselves; and you shall enjoy the spoil of your enemies, which the Lord has given you.” *Deuteronomy* 20:10.

166. Kastenber *supra* note 6, n.12.

167. John Henry Merryman, *Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 346-47 (1989).

168. *Id.* at 347.

169. *Id.*

170. Peter Ørebech, Lecture in International Law at the Chicago-Kent College of Law, Feb. 3, 2003.

171. The intrinsic value of cultural property objects was legally recognized by the 1954 Hague Convention. The 1954 Hague Convention defines cultural property as “movable or immovable property of great importance to the cultural heritage of every people.” 1954 Hague Convention, *supra* note 5, art. 1(a). This definition covers all cultural property “irrespective of origin or ownership.” *Id.* art. 1; see Stanislaw E. Nahlick, *International Law and the Protection of Cultural Property in Armed Conflicts*, 27 HASTINGS L.J. 1069, 1078-79 (1976) (arguing that the language, “irrespective of ownership,” was specifically included to demonstrate the intrinsic value held by cultural property). For a very interesting discussion on the intrinsic existence of grouphood rights,

Like language and law, the other defining attributes of human civilization, cultural property objects simultaneously describe and prescribe a set of rules.¹⁷² They translate the brute facts of every day experience into a coded, meaning-giving order.¹⁷³ At the same time, they symbolize and convey the code or norms to which group members must adhere. Though static or stationary as objects, their interpretive function is dynamic.¹⁷⁴ Cultural property creations provide evidence of group identity.¹⁷⁵ Destroying those objects that give meaning and value to the enemy's group identity becomes the means of extinguishing the moral and legal duties driving their conduct. The vanquished state can then be "easily assimilated into the conquering state."¹⁷⁶

The destruction of memory is key to scorched earth warfare. Memory is the mother of the Muses.¹⁷⁷ To destroy a people's memory as well as the memory of a people, you must destroy everything they have created that defines or personifies their group identity.

Even in ancient times, there was a competing view. In his *Persian Wars*, the Greek historian, Heroditus (ca. 484-430 B.C.), criticized the widespread practice of looting and plunder.¹⁷⁸ When he conquered Persia, Alexander the Great (350-326 B.C.) sought to preserve ancient treasures and thus aggrandize the Hellenic empire.¹⁷⁹ "The enlightened attitudes of Greek and Macedonian war policy makers left a tradition that prevailed through subsequent European history."¹⁸⁰ The Romans, always a more pragmatic group, adopted the Greek treatment of historic objects during armed conflict, but did so for the express purpose of carrying them off

and the relationship of these rights to cultural property rights as recognized in two U.S. Supreme Court cases, see John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1190-96 (1989).

172. Ivan Bernier, *La Préservation de la Diversité Linguistique à L'Heure de la Mondialisation*, 42 C. de D. 913, 915 (2001).

173. Ørebech, *supra* note 170.

174. *Id.*

175. Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559 (1995).

176. Kastenberg, *supra* note 6, n.12.

177. See PIERRE GRIMAL, *THE DICTIONARY OF CLASSICAL MYTHOLOGY* 293 (A.R. Maxwell-Hyslop trans., 1987) (discussing the attributes and origins of Mnemosyne, the personification of memory). The nine muses were the daughters of Mnemosyne and Zeus. *Id.*

178. Steele, *supra* note 125, at 672-73.

179. *Id.* at 673; see also Kastenberg, *supra* note 6, at 281.

180. Kastenberg, *supra* note 6, at 282.

intact.¹⁸¹ “The Roman tradition ranked art objects first among the spoils of the vanquished and the trophies of the victor.”¹⁸²

Today, “the right of belligerents to adopt means of injuring the enemy is not unlimited.”¹⁸³ The international legal right of war,¹⁸⁴ or armed conflict, is rule governed.¹⁸⁵ Two distinct, though related bodies of law govern armed combat. The law of going to war, often referred to as *jus ad bellum*, addresses and governs the justification for the use of force and resort to war.¹⁸⁶ Law in wartime, *jus in bello*, concerns “efforts to mitigate the devastation of war through restraints on weapons and on the conduct of warfare.”¹⁸⁷

The Code of Professional Conduct of the U.S. Army, which is representative of the codes of all U.S. military branches,¹⁸⁸ provides that “whether the use of armed force in a particular circumstance is prohibited by the United Nations Charter (and therefore unlawful), the manner in which the resulting armed conflict is conducted continues to be regulated by the law of armed conflict,” still widely referred to as the law of war.¹⁸⁹ In addition, the 1949 Geneva Conventions require all armed services members to be trained in the law of war.¹⁹⁰ The Hague and Geneva

181. *Id.*

182. Charles de Visscher, *International Protection of Works of Art and Historic Monuments*, U.S. Dept. of State, *Documents & State Papers*, 821, 823 (June 1949), reprinted in JOHN HENRY MERRYMAN & ALBERT E. ELSSEN, *LAW, ETHICS AND THE VISUAL ARTS* 2 (4th ed. 2002).

183. 1907 Hague Regulations, *supra* note 143, art. 22.

184. Although acts of aggression against sovereign states are illegal under international law, armed defense to aggression or invasion is not. The U.N. Charter requires all member states to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of *any* state, or in any other manner inconsistent with the Purpose of the United Nations.” U.N. CHARTER art. 2(4) (emphasis added) Under Chapter VII of the U.N. Charter, member states are prohibited from using force *except as a measure* taken by or on behalf of the United Nations (U.N. CHARTER art. 42). Or, as a means of “individual or collective self-defense if an armed attack occurs.” U.N. CHARTER art. 51 (emphasis added).

185. U.N. CHARTER, ch. VII, *Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*, arts. 39-51.

186. LORI R. DAMROSCH ET AL., *INTERNATIONAL LAW CASES AND MATERIALS* 920 (4th ed. 2001).

187. *Id.*

188. Department of Defense Directive 5100.77.

189. Code of Professional Conduct of the U.S. Naval Forces, Principles and Sources of the Law of Armed Conflict, § 5.1 War and the Law, available at <http://www.cpf.navy.mil/pages/legal/NWP%201-14/NPCH5.htm>.

190. Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, Aug. 12, 1949, entered into force on Oct. 21, 1950 [hereinafter Geneva Convention IV].

Conventions are the principal international agreements addressing human rights and civility during armed conflict.¹⁹¹

The U.S. Department of Defense recognizes that the principal sources of the law of armed conflict are the same as those of international law generally.¹⁹² The principal sources of international law are positive law as set forth in treaties and other international agreements,¹⁹³ and customary law, evidenced by general state practice or conduct accepted as law.¹⁹⁴ "The general principles of law recognized by civilized nations,"¹⁹⁵ as well as the more circumscribed weight given to judicial decisions and the writings or teachings of great legal scholars,¹⁹⁶ are also sources of international law. Customary international law, as demonstrated throughout history, is the least desirable, and the least morally tenable source of law to govern the rules of conduct of invading forces. Unwritten rules of armed conflict, based on the old international order, where the "scourge of war"¹⁹⁷ was the relentless, but internationally recognized lawful custom of states, are irreconcilable with the new and wholly positive legal order of peace.¹⁹⁸

Peace has neither tradition nor legal custom.¹⁹⁹ The customary or traditional notion of universal peace, in the West, is based on religious

191. *Id.*

192. Code of Professional Conduct of the U.S. Naval Forces, Principles and Sources of the Law of Armed Conflict, *supra* note 189, § 5.4 Sources of the Law of Armed Conflict.

193. "[I]nternational conventions, whether general or particular, establishing rules expressly recognized by the contesting states." ICJ Statute, art. 38(1)(a); *see also* RESTATEMENT THIRD OF FOREIGN RELATIONS § 102 (1987) (adopting the definitions found in the ICJ Statute).

194. "International custom, as evidence of general practice accepted by law." ICJ Statute, art. 38(1)(b)).

195. *Id.* art. 38(1)(c)).

196. *Id.* art. 38(1)(d)).

197. U.N. CHARTER pmb1.

198. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of *any* state, or in any other manner inconsistent with the Purposes of the United Nations. U.N. CHARTER art. 2(4) (emphasis added). The prohibition against the use of force or threat thereof is universal, and binds member states' conduct in their capacity as U.N. states parties. The membership status of any third states is not relevant for purposes of the legal duties binding upon member state conduct.

199. There is no Blackstonian requirement of ancient usage for a custom to be accepted as internationally binding. ØREBECH ET AL., *supra* note 159. The 1945 Truman Proclamation of exclusive jurisdiction over the adjacent continental shelf, for example, was a novel position unsupported by existing law or ancient usage. *Id.* It became international law when other coastal states followed the custom and none objected. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 n.2 (1987). Instant legal custom is possible, therefore. There is absolutely *no* evidence, however, that peace has "broken out" amongst one or more states, and that all others have either actively acknowledged it or acquiesced.

belief, not on law.²⁰⁰ Its mere expression, *pax romana* (latin for “the Roman peace”), demonstrates the oxymoron at its core.

It is only with the U.N. Charter that the entire world agreed upon a law of peace.²⁰¹ Peace, as law, is brand new. The only universally recognized rules of peace are written. They start with the three founding documents of the United Nations: the U.N. Charter, the Universal Declaration of Human Rights,²⁰² and the Statute of the International Court of Justice.²⁰³

The U.N. Charter defines the law of war, *jus ad bellum* (latin for “Law to War” or the Just War Theory), by outlawing it, in essence.²⁰⁴ The U.N. Charter codifies the only remaining legal recourse to justify war, or armed conflict: self defense.²⁰⁵ Self-defense is both an inherent state right, and an affirmative defense for breaking the law of peace as set forth in the charter.²⁰⁶

200. “The general practice of States should be recognized as *prima facie* evidence that it is accepted as law.” *North Sea Continental Shelf Cases* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20). The practice may, however, be contraverted if it “shows much uncertainty and contradiction. Request for Interpretation of Judgment of Nov. 20, 1950 in the *Asylum Case* (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 27). This belief has not attained the status of a legal norm because the parties involved have neither practiced peace nor conducted themselves as though they believed peaceful behavior were truly the law. *Id.*; see also ICJ Statute art. 38 (1(b)) (where international custom is evidenced by general practice and accepted as law); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 (2) (defining customary international law as resulting from general and consistent practice of states followed by them from a sense of legal obligation).

201. With the additions of Switzerland and East Timor, there are now 191 member states in the United Nations. United Nations, List of Member States, available at <http://www.un.org/Overview/unmember.html> (last visited Apr. 11, 2005).

202. G.A. Res. 217A, Dec. 10, 1948, U.N. GAOR (III 1948) [hereinafter Universal Declaration]. Although not considered binding international law by strict positivists, the Universal Declaration has been codified and confirmed by the twin international human rights covenants. Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 1717.

203. DAMROSCH ET AL., *supra* note 186, at 588-89.

204. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. U.N. CHARTER art. 2(4).

205. “Nothing in the present Charter shall impair the inherent right of the individual or collective self-defence if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security.” U.N. CHARTER art. 51; see also *Legality of the Threat or Use of Nuclear Weapons* 1996 I.C.J. 226 (July 8) (discussing in dicta, “the fundamental right of every State to survival, and thus to resort to self-defence in accordance with Article 51 of the Charter, when its survival is at stake.”).

206. Treaties are a primary source of international law. ICJ Statute, art. 38(1(a)). “A rule of international law is one that has been accepted as such by the international community of states by international agreement.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(1(b)) (1987).

Prior to this positive legal definition of war, there were competing legal customs of *jus ad bellum*.²⁰⁷ None of the others are legal today. Like all defenses to illegal conduct, the self-defense exception must be narrowly construed. Like all modern rights based on limited state sovereignty, this right is neither divine nor absolute.²⁰⁸ It took ages and inconceivable, irretrievable loss before international law finally established that "armed force shall not be used, save in the common interest."²⁰⁹

A. Middle Ages and Renaissance

The move to an international law of war started in the Middle Ages, when international law merged with ecclesiastical law.²¹⁰ The Holy Roman Empire conceived of war instrumentally. It was first a necessary tool to protect God's kingdom, the Christian states, from surrounding pagan and infidel lands.²¹¹ War was also a papal instrument used to spread the Gospel.²¹²

Two competing codes of belligerent conduct, still surviving, co-existed during the Middle Ages. The first was the chivalric code to which Christian warriors were expected to adhere when fighting each other.²¹³ The 990 papal decree, *Pax ecclesiae*, "outlawed attack on monastic buildings, civilian persons and women."²¹⁴ Given both the universal culture of Catholicism and the recurrent temporal power of the Catholic Church in medieval Europe, monastic buildings clearly constituted the cultural property of all Christian mankind. Nonetheless, churches, abbeys

207. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633-35 (1984) (discussing whether self-defense requires an armed attack or whether it is permissible to use armed force in anticipation of an attack.); *id.* at 1633-35 *passim* (showing conflicting Webster formulation, which uses a much broader notion of "threat" than Caroline, a formulation much closer to the doctrine of "pre-emptive" war. The Webster formulation, Schachter concludes, is outside the law of self-defense.).

208. See, e.g., PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* 416-19 (1990), reprinted in DAMROSCH ET AL., *supra* note 186, at 5-6 (discussing how "in an international society which knows itself as a society, state societies have no natural and inherent and unlimited powers."). Instead, states have legal relations consisting of the powers and duties conferred by the U.N. Charter and by international law. *Id.*

209. U.N. CHARTER pmbl.

210. Harold Hongju Koh, *Why do Nations Obey International Law?*, 106 YALE L.J. 2599, 2604 (1997).

211. Antje Mays, (The Citadel) War and Peace: Of Law, Lawlessness, and Sovereignty, Paper Prepared for Presentation to the Joint Services Conference on Professional Ethics XIX Washington, D.C., Jan. 30-31, 1997, at 3.

212. *Id.*

213. *Id.* at 4.

214. *Id.*

and monasteries were routinely ransacked and relics looted during or pursuant to armed conflict.²¹⁵ Amongst powerful monarchs or suzerains, “Charlemagne, practically alone, acknowledged the exceptional character of cultural property situated on subdued territory.”²¹⁶

An alternative medieval view of war, the scorched earth view, propelled Crusader acts against heretic and infidel alike. “Kill them all, God will recognize his own,” charged Arnald-Amalric, the papal legate.²¹⁷ Amalric, the Abbot of Cîteaux and spiritual leader of the Albigensian crusade,²¹⁸ together with Simon de Montfort, its temporal commander,²¹⁹ destroyed the brilliant civilization of the Languedoc in a campaign that started in 1198,²²⁰ included the deaths of 20,000 Biterrois (inhabitants of Béziers) in 1208, and culminated in the horrific massacre of Montségur (1248) so that Pope Innocent III might “cut the cancerous sore of Catharism²²¹ out of the body politic of Christendom.”²²²

215. See NORMAN F. CANTOR, *THE CIVILIZATION OF THE MIDDLE AGES* 202-212 (1993).

216. Graham, *supra* note 52, n.2 (citing Body of Canon Law, *quoted in* Stanislaw E. Nahlik, *Biens Culturels et Conflict Armé*, *ACADÉMIE DE DROIT INT’L* 65, 66, 68 (1967)).

217. *THE MIDDLE AGES: A CONCISE ENCYCLOPEDIA* 37 (H.R. Loyn ed., 1989) [hereinafter *THE MIDDLE AGES*].

218. This crusade, preached by Pope Innocent III in 1208, was directed against a heretical group of Christians known as Cathars. Although the Cathars had existed in more limited numbers in northern France and other parts of Europe, large numbers of converts sprung up and gathered in the Languedoc region of southeastern France in the late twelfth and thirteenth centuries. The spiritual capital of the Cathars was the town Albi, hence the name Albigensian. See, e.g., CANTOR, *supra* note 215, at 384, 389-93, 424-28, 461-63.

219. *THE MIDDLE AGES*, *supra* note 217, at 302.

220. See *id.* at 18 (discussing the envoys sent by Innocent III to the Languedoc to preach to the heretical Cathars in an effort to reconvert them to the one true faith). Interestingly, a Spanish priest named Dominic was amongst the preachers who sought, unsuccessfully, to bring the Cathari heretics back into the fold of (Latin) Christendom. CANTOR, *supra* note 215, at 424. Dominic eventually established the *Ordo Praedicatorum*, more widely known as the Dominican Order, the jurists of the Roman Catholic Church. *Ordo Praedicatorum* Web Site, <http://www.op.org>; see also B. NETANYAHU, *THE ORIGINS OF THE INQUISITION IN 15TH CENTURY SPAIN* (2001) (discussing how the Dominicans and their Procurator, Torquemada, influenced and defended the legal positions taken by the Spanish crown in instituting the Inquisition). This led, through expulsion and extermination, to the effective annihilation of Sephardic Jewry in its home nation, Spain. *Id.* at 262-65 *passim*. “The vanished land of Sepharad provides one of the great themes of Jewish history, somewhat analogous to the destruction of the Temple and the Babylonian Exile.” JANE S. GERBER, *THE JEWS OF SPAIN* xi (1992).

221. See CANTOR, *supra* note 215, at 300-02 (summarizing certain effects of earlier crusades against the “infidel” (whence many of the heretical ideas were brought back) on the rise of the Cathari heresy, which led to the first intra-confessional crusade in Christendom, the Albigensian Crusade); see *THE MIDDLE AGES*, *supra* note 217, at 74-75 (discussing the foundations of the Cathari faith). The Cathari heretics were ascetics and spiritual dualists who rejected some of the major tenants of Orthodox Christianity, such as the notion of Christ’s humanity (the Incarnation)

The medieval “scorched earth” stance on the law of war clearly tied the genocidal Deuteronomic view to the Augustinian view espoused in the *City of God*. All men, wrote St. Augustine, lived in one of two cities.²²³ In the city of God dwell the believers. All others live outside.²²⁴

The Church-Father doctrine of *bello jus*, or just war, first compellingly articulated by St. Augustine (354-430), averred that a state had both the moral “right and the obligation to enforce human rights and punish crimes beyond its own territorial boundaries.”²²⁵ *Bello jus* also continues as a widely-held moral and legal doctrine. The current U.S. administration sought regime change in Iraq under several theories, one of which was the doctrine of just war. Peacekeeping missions are also justified by the theory of just war,²²⁶ as expressed in Article 42 of the U.N. Charter.²²⁷

Whereas St. Augustine could justify war only when conducted for motives of charity,²²⁸ “Machiavelli believed that the state had an inherent right and need to protect itself from the surrounding chaos of other, disorderly, civilizations.”²²⁹ Machiavelli claimed that war, like peace, should be ruled by law. In his famous *Arte della Guerra* (*Art of War*),²³⁰ Machiavelli rejected warfare for the purpose of annihilating the enemy, believing instead in the limitations of a just war.²³¹

Sadly, Machiavelli’s claim that wars should not include looting or pillage fell on the deaf ears of Charles VIII (1483-98) and Louis XII (1498-1515)²³² who “confiscat[ed] great numbers of manuscripts, statues,

and the resurrection of the body. *Id.* Interestingly, their interpretation of Christianity was influenced by Mani, the founder of Manicheanism, a holy man from the great cultural center of Mesopotamia, in present day Iraq. *Id.* at 217.

222. CANTOR, *supra* note 215, at 425.

223. SAINT AUGUSTINE, CITY OF GOD, BOOK II, ch. 29, *An Exhortation to the Romans to Renounce Paganism*, 207, 413-26 (Marcus Dods trans., Encyclopaedia Britannica, Inc. 2d ed. 1990).

224. *Id.* at 208.

225. Mays, *supra* note 211, at 4; *see also* Kastenber, *supra* note 6, n.17.

226. Mays, *supra* note 211, at 3.

227. If the U.N. Security Council decides that sanctions and diplomatic isolation have not convinced a threatening or aggressive state to conform its conduct to a peaceful standard, “it may take such action by air, sea, or land forces as may be necessary to restore international peace and security.” U.N. CHARTER art. 42.

228. Kastenber, *supra* note 6, n.17 (citing CITY OF GOD 27, Henry Bettenson trans., 1971).

229. Mays, *supra* note 211, at 2.

230. *See* Kastenber, *supra* note 6, nn.17-18 (discussing Machiavelli’s fundamental views on the laws of war).

231. *Id.* n.17.

232. Machiavelli (1469-1527) was the contemporary of both these French monarchs, and was writing during the lifetime of both. Moreover, his first diplomatic mission as head of the second chancery of Florence was to the French court in 1500. Encyclopaedia Britannica 2004 Ultimate Reference Suite CD-ROM.

tapestries, and paintings” and stipulated their transfer via treaties following the Italian Wars (1494-1559).²³³

B. Early Europe: The Foundation of International Law

Hugo Grotius (1583-1645), a Dutch jurist and author of *De jure belli ac pacis* (*On the Law of War and Peace*), (1623-1624), the classic treatise generally held to be the foundation of modern international law,²³⁴ was appalled by the limitless suffering and destruction of the Thirty Years War (1618-1648),²³⁵ the most destructive war in European history until World War I.²³⁶ German casualties alone were estimated at thirty percent of their entire population.²³⁷ A legendary occasion of cultural property plundering during the Thirty Years War “was the removal, in 1622, of the famed Palatine Library at Heidelberg, which subsequently was offered by Maximilian of Bavaria to Pope Gregory XV.”²³⁸

Unlike Machiavelli, Grotius saw war as a function of international law, and argued that it should be waged for the purpose of regulating international conduct and “the standards by which the international society exists.”²³⁹ Grotius first posited that an international society did, indeed, exist, as “a community of those participating in the international legal order, whose fabric was interwoven with international law.”²⁴⁰ He further asserted “a paramount moral duty” to regulate the community’s conduct.²⁴¹

233. De Visscher, *supra* note 182, at 2.

234. DAMROSCH ET AL., *supra* note 186, at 920.

235. Kastenbergh, *supra* note 6, n.19 (discussing HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBERI TRES* [Three Books on the Law of War and Peace] 1625 (Francis W. Kelsey trans., 1925).

236. *Id.* at 282-83. For the classic work on The Thirty Years War, see GEOFFREY PARKER, *THE THIRTY YEARS WAR* 192-93 (2d ed. 1997).

Until 1939, the Thirty Years’ War remained by far the most traumatic period in the history of Germany. The loss of people was proportionally greater than in World War II; the displacement of people and the material devastation caused were almost as great; the cultural and economic dislocation persisted for substantially longer.

Id.

237. PARKER, *supra* note 236, at 194.

238. De Visscher, *supra* note 182, at 3.

239. Mays, *supra* note 211, at 2.

240. Koh, *supra* note 210, at 2606.

241. Mays, *supra* note 211, at 5.

"At the international level, war-related legislation follows the Grotian spirit of international law: regulation of behavior across lines of state, respect for the natural human rights of the individual, insistence upon humanity in instances of armed conflict, enforceable mandates prescribing the treatment of various groups."²⁴²

The Treaty of Westphalia ended the Thirty Years War, a period "during which diplomatic stakes (had come) to be reinforced by religious stakes."²⁴³ The most important principle that the Treaty of Westphalia established was the primacy or sovereignty of states.²⁴⁴ Although Cromwell's Puritan Revolution (1649) and the Revocation of the Edict of Nantes (1685) demonstrate the undeniable strength of religion within the state, it is with Westphalia that "*raison d'état* became absolute and progressively broke away from religious considerations."²⁴⁵ Princes, whether Catholic or Protestant, were now sovereign in their states.²⁴⁶

The Grotian view of war as serving an international legal purpose, however, should not be confused with the historical and political foundations of *raison d'état*. The sovereignty of states proclaimed by Westphalia is strictly one in which "each state is left unfettered by anything but the judgment of self interest."²⁴⁷ War was a mere synonym of politics, "the continuation of politics by other means."²⁴⁸ Under the individualist regime of absolute sovereignty, often called the "old law,"²⁴⁹ war was a legally recognized political instrument used to challenge and effect change.²⁵⁰ "In the absence of an international legislature, it fulfilled the function of adapting the law to changed conditions."²⁵¹ International law was much more akin to a "code under which a duel between nations

242. *Id.* at 12.

243. THE REFORMATION 232 (Pierre Chanunu ed., 1990).

244. JOHN KEEGAN, THE FIRST WORLD WAR 17 (Alfred A. Knopf ed., 1999); *see also* STEPHEN C. SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS 18 (2003) (discussing the historical impact of the Treaty of Westphalia). "The pact represented an entirely new kind of diplomatic agreement and helped to make possible peaceful relations on a regional scale. It was the model for emerging global organizations." *Id.*

245. THE REFORMATION, *supra* note 243, at 232 (emphasis added).

246. Koh, *supra* note 210, at 2606. As for the persistence of religion within the nation-state, *see* Treaty of Westphalia, Oct. 24, 1648, 1 Parry 271, 1 Parry 119. Its opening words are: "In the name of the most holy and individual trinity." *Id.* pmbl. ¶ 1, available at <http://fletcher.tufts.edu/multi/texts/historical/westphalia.txt>.

247. KEEGAN, *supra* note 244, at 17.

248. KARL VON CLAUSEWITZ, ON WAR, Preface (1832).

249. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 9 (Apr. 9).

250. DAMROSCH ET AL., *supra* note 186, at 923-24 (citing OPPENHEIM, INTERNATIONAL LAW, vol. 2, 177-78 (7th ed. Lauterpacht, 1952)).

251. *Id.*

could be carried on.”²⁵² Both its dandified theory and its savage practice harkened back to the medieval chivalric code. It is only with the renunciation of war as a legal instrument of a nation’s foreign policy that the framework for the new legal regime, governed by the rule of peace, could be established.²⁵³

The incalculable damage done to cultural property²⁵⁴ during the Thirty Years War was one of the main reasons why the signatory nations to Westphalia conceded that the claims of destruction were so complex as to preclude any recovery.²⁵⁵ Nonetheless, or perhaps as a consequence of this incalculable destruction, the two most important principles in the Grotian system of the law of nations are the requirement of restitution and the legal concept of *pacta sunt servanda*, the rule that parties must obey the treaties or agreements into which they enter.²⁵⁶ States parties exercise their sovereign legal powers to create law between or amongst themselves. Having done so, they are bound. There is an obvious tension in the competing notions that sovereigns are not above the law (*pacta sunt servanda*), while their sovereign power, as agents of global political change, cannot be legally checked. Small wonder it did not work. It still does not.

252. Frank B. Kellogg, U.S. Secretary of State, Address delivered over the Columbia Broadcasting System (Oct. 30, 1935), in THE AVALON PROJECT AT YALE LAW SCHOOL, *supra* note 37.

253. General Treaty for the Renunciation of War (Kellogg-Briand Pact), proclaimed Aug. 27, 1928, *entered into force* July 24, 1929, 46 Stat. 2343, 94 L.N.T.S. 57. [hereinafter Kellogg-Briand Pact]. Article 1 of Kellogg-Briand “condemn[s] recourse to war for the solution of international controversies and renounce[s] it as an instrument of national policy” in the relations of states parties with one another. *Id.* art. 1. The states parties agree to settle or solve all “disputes or conflicts of whatever nature or whatever origin” exclusively through pacific means. *Id.* art. 2. Kellogg-Briand is still in force, and had seventy states parties as of 2000. DAMROSCH ET AL., *supra* note 186, at 929. Moreover, many Latin American nations that are not states parties to Kellogg-Briand, are states parties to the Saavedra Lamas Treaty, which “condemns wars of aggression.” Anti-War Treaty of Non-Aggression and Conciliation (Saavedra Lamas Treaty), *opened for signature*, Oct. 10, 1933, *entered into force* Nov. 13, 1935, 49 Stat. 3363, T.S. 906, in THE AVALON PROJECT AT YALE LAW SCHOOL, *supra* note 37. The United States is a state party to both treaties. DAMROSCH ET AL., *supra* note 186, at 932.

254. The use of the term “cultural property” in the context of the Thirty Years War anticipates its coinage. The 1954 Hague Convention actually introduced the term “cultural property,” providing a clear, broadly inclusive and widely accepted definition. David A. Meyer, Note, *The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law*, 11 B.U. INT’L L.J. 349, 355 (1993).

255. Kastenber, *supra* note 6, at 283.

256. DAMROSCH ET AL., *supra* note 186, at 920.

The Vienna Convention on the Law of Treaties²⁵⁷ codified the rule of *pacta sunt servanda* and provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith."²⁵⁸ Restitution exists, along with indemnity and satisfaction, as one of the means by which a "[s]tate discharges the responsibility incumbent upon it for breach of international obligation by making reparation for the injury caused."²⁵⁹

Today international law recognizes that states are responsible for intentionally wrongful acts.²⁶⁰ Both acts and omissions establish internationally wrongful state action when the state conduct is attributable to a state under international law²⁶¹ and that conduct constitutes a breach of an international obligation of the state.²⁶² Moreover, *international law*

257. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *see, e.g.*, JANIS, *supra* note 151, at 17 (explaining that the Vienna Convention is "largely, though not entirely, a codification of the existing customary international law of treaties"). The International Law Commission sees the Vienna Convention as "both a codification and a progressive development of international law." *Id.* (citing 2 Y.B. INT'L L. COMM'N 177 (1996)). The repeated position of the International Court of Justice is that the Vienna Convention "may in many respects be considered as a codification of existing customary law" on the interpretation of treaties. *Id.* at 17 (citing Hugh Thirlway, *The Law and Procedure of the International Court of Justice, 1960-1989 (Part Three)*, 62 BRIT. Y.B. INT'L L. 1, 3 (1991)). The United States is not a party to the Vienna Convention, but the U.S. State Department does recognize it as "the authoritative guide to current treaty law and practice." *Id.* (citing S. EXEC. DOC., 92-L, at 1 (1991)). The Restatement (Third) of Foreign Relations Law of the United States "accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements." *Id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS 145 (1987)).

258. Vienna Convention, *supra* note 257, art. 26.

259. Jimenez de Aréchaga, *International Law in the Past Third of a Century*, 159 REC. DES COURS 285-87 (1987); DAMROSCH ET AL., *supra* note 186, at 729.

260. The I.C.J. confirmed the duty of reparation in *Corfu Channel*. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 9 (Apr. 9); *see* Draft Articles on Responsibility of States for Internationally Wrongful Acts, Text Available in Official Records of the General Assembly, Fifty-Sixth Sess., Supp. No. 10 (A/56/10), ch. V. Article 1 therein provides that "[e]very internationally wrongful act of a State entails the international responsibility of that State." Extract from the Report of the International Law Commission on its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10 (A/56/10), art. 1 [hereinafter ILC Draft Articles]. The ILC Draft Articles are a source of international law as "teachings of the most highly qualified publicists of the various nations." ICJ Statute, art. 38(1(d)). They can, therefore, be a reference for treaty interpretation under the Vienna Convention. The general rule of interpretation thereunder "take[s] into account, together with the context, any relevant rules of international law applicable to the relations between the parties." Vienna Convention, *supra* note 257, art. 31(3(c)).

261. ILC Draft Articles, *supra* note 260, art. 2(a).

262. *Id.* art. 2(b).

(Article 43 of the 1907 Hague Convention,²⁶³ and Article 53 of the Geneva Convention²⁶⁴), not internal law (“stuff happens”), characterizes the act as *reus*, or wrongful.²⁶⁵ None of the available defenses — consent,²⁶⁶ self-defense,²⁶⁷ countermeasures,²⁶⁸ force majeure,²⁶⁹ or distress²⁷⁰ — apply to the complete U.S. failure to establish order in Iraq.²⁷¹ The remaining defense — necessity²⁷² — is reserved for exceptional circumstances, and requires a balance of the essential interests of the parties.²⁷³ In any event, the defendant state is precluded from raising the defense if it “has contributed to the situation of necessity.”²⁷⁴

Violations of the laws and customs of war, as set forth in the Hague Conventions, are war crimes.²⁷⁵ The United States acknowledges it is a

263. 1907 Hague Regulations, *supra* note 143, art. 43; *see, e.g.*, Pieter H.F. Bekker, *The Legal Status of Foreign Economic Interests in Occupied Iraq*, ASIL INSIGHTS, July 2000 (explaining that article 43 imposes a requirement on the Coalition Provisional Authority (CPA) to respect all laws of Iraq (including, for the purposes of Bekker’s article, the law of contracts), *available at* <http://www.asil.org/insights/insigh114.htm> (last visited Apr. 11, 2005); *see* Riding, *supra* note 113 (pointing out that Iraqi law has prohibited all export of cultural property since 1974). Nonetheless, the CPA is not protecting cultural sites, “despite fresh promises . . . about recovering and safeguarding Iraq’s treasures.” *Id.* Iraq has over 10,000 registered archaeological sites throughout the country. Borke, *supra* note 104, at 398. “In effect, the entire country is an archaeological site.” Bowen, *supra* note 111. As Hanna A. Khaliq, general director of Iraqi excavations, told the New York Times: “[b]efore the war, we had 1,600 guards protecting various sites. Now we have nothing, no cars, no people. The sites are not safe. The looting will continue.” Riding, *supra* note 113.

264. “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.” Geneva Convention IV, *supra* note 190, art. 53.

265. ILC Draft Articles, *supra* note 260, art. 3.

266. *Id.* art. 20.

267. *Id.* art. 21.

268. *Id.* art. 22.

269. *Id.* art. 23.

270. ILC Draft Articles, *supra* note 260, art. 24.

271. *See* Chamberlain, *supra* note 9, at 237 (discussing how the coalition forces breached their legal duties to prevent the widespread looting and pillaging of private and public property following the collapse of the Iraqi regime). This breach was all the more egregious because it was foreseeable. *Id.* The 1907 Hague Convention requires occupying forces to take all measures, as far as possible, to restore public order and safety. 1907 Hague Regulations, *supra* note 143, art. 43. No measures taken, under the “stuff happens” defense, is not sufficient under this language.

272. ILC Draft Articles, *supra* note 260, art. 25.

273. Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Czech Rep.), 1997 I.C.J. 7 (Sept. 25).

274. ILC Draft Articles, *supra* note 260, art. 25(2(b)).

275. Mays, *supra* note 211, at 11; *see id.* (summarizing the three areas of international criminal law over which the Allied Tribunal in Nuremberg had subject matter jurisdiction). In addition to war crimes, these included crimes against peace, by waging a war of aggression, and crimes against humanity, such as genocide, murder, humiliation, and encroachment on the dignity of civilians. *Id.*

party to, and bound by the 1907 Hague Convention.²⁷⁶ The 1907 Hague Convention introduced duty of compensation into the international law of war.²⁷⁷ One of the alternatives for making restitution to the Iraqi people is to set up a claims tribunal. Article 57 of the 1907 Hague Convention provides a legal basis for doing so.²⁷⁸

The 1954 Hague Convention embodies both the Grotian concept of restitution and the Hague principle of compensation and provides for the restitution of cultural property at the close of hostilities.²⁷⁹ Under Article 28 of the 54 Convention, states parties have a duty to criminalize, "within the framework of their ordinary criminal jurisdiction," persons or parties who breach the legal duties arising under it.²⁸⁰ The First Protocol to the 54 Convention imposes a duty on the occupying party to prevent the exportation of cultural property from the territory of the occupied party.²⁸¹ The Second Protocol to the 54 Convention requires the occupying party to prohibit and prevent the export of cultural property from the occupied territory in any manner that violates the country's domestic law, and specifically requires the occupying forces to prohibit and prevent archaeological excavations.²⁸² Because the United States is not a party to the 1954 Hague Convention, nor to its First or Second Protocols, its conduct cannot be reached under the indemnity provisions.

As it happens, in the past fifty years, the 1954 indemnity provisions have been invoked only once.²⁸³ Ironically, the international community successfully pressured Iraq into returning the vast majority of the art it had

276. Code of Conduct of the U.S. Navy, Principles and Sources of the Law of Armed Conflict, *supra* note 189, ch. 5.

277. American Society of International Law Web Site, available at <http://www.eisil.org/index.php?sid> (last visited Apr. 11, 2005).

278. "All seizure or destruction or willful damage done to the institutions of this charter, historic documents, works of art and science, is forbidden, and should be made subject to legal proceedings." 1907 Hague Regulations, *supra* note 143, art. 56.

279. The High Contracting Party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any cultural property which has to be returned. First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflicts, May 14, 1954, 249 U.N.T.S. 358, art. 4. [hereinafter First Protocol to the 1954 Hague Convention].

280. 1954 Hague Convention, *supra* note 5, art. 28.

281. First Protocol to the 1954 Hague Convention, *supra* note 279, art. 1.

282. Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflicts, Mar. 26, 1999, entered into force Mar. 9, 2004, art. 9 (1(b)) [hereinafter Second Additional Protocol]; UNESCO Legal Instruments, *supra* note 5.

283. Birov, *supra* note 108, at 239.

pillaged from the Kuwaiti Museum during the First Gulf War under the 1954 Hague Convention.²⁸⁴

In addition to calling for the return of looted cultural property, the United Nations also resolved that Iraq should pay restitution for damages it had caused during the First Gulf War.²⁸⁵ In 1991 the U.N. Compensation Commission (UNCC) was created as a subsidiary organ of the U.N. Security Council.²⁸⁶ The UNCC's "mandate is to process claims and pay compensation for losses and damage suffered as a direct result of *Iraq's unlawful invasion and occupation of Kuwait*."²⁸⁷ The mandate's legal authority derives from Security Council Resolution 687.²⁸⁸ Under Section E of the Resolution, Iraq is "liable under international law" for direct loss to, damage to the environment of, and depletion of the natural resources of foreign governments as well as foreign nationals and corporations.²⁸⁹

As of September 23, 2004, total damages imposed upon Iraq reached \$48.9 billion, with \$18.6 billion of that amount dispersed to governments and international organizations.²⁹⁰ Until 2003, payments were made from funds set aside from the "Oil-for-Food" Program, a U.N.-created program from which everyone seems to have benefited except the Iraqi people.²⁹¹ As of February 2004, all but 46,000 of the 2.6 million claims filed with the UNCC had been resolved.²⁹²

Everything appears to be on the up and up, if excruciatingly unjust. Though still disputed, it is nonetheless indisputable that justice can only exist as fairness "in a society in which everyone accepts and knows that the others accept the same principles of justice, and the basic social institutions satisfy and are known to satisfy these principles."²⁹³ What is more, "capacity for moral personality is a sufficient condition for being entitled to equal justice."²⁹⁴

284. *Id.* at 203-04.

285. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/2981/1991 [hereinafter Security Council Resolution 687].

286. The U.N. Compensation Commission [hereinafter UNCC Web Site], *available at* <http://www2.unog.ch/uncc> (last visited Apr. 11, 2005).

287. *Id.* (emphasis added).

288. *Id.* Introduction.

289. Security Council Resolution 687, *supra* note 285, art. E (16).

290. E-mail from U.N. News Service, to Juliana V. Campagna (Sept. 23, 2004, 03:00 CST) (on file with author) [hereinafter U.N. E-Mail].

291. UNCC Web Site, *supra* note 286.

292. *Id.*

293. JOHN RAWLS, A THEORY OF JUSTICE 453-54 (1971).

294. *Id.* at 505.

In setting up the UNCC, the Security Council acted under Chapter VII of the U.N. Charter,²⁹⁵ Action with Respect to Threats to the Peace, Breaches to the Peace, and Acts of Aggression, the internationally agreed to *jus ad bellum*.²⁹⁶ Under the first article of Chapter VII, Article 39, the U.N. Security Council has the sole legal authority to “determine the existence of any breach of the peace or act of aggression.”²⁹⁷ Under Article 24 of the Charter, the Security Council has the “primary responsibility for the maintenance of international peace and security.”²⁹⁸ The Security Council is treaty-bound to carry out its duties on behalf of all U.N. member states, essentially the world.²⁹⁹

Not only was Iraq punished for violating Chapter VII, but the cease-fire between Iraq and Allied Coalition forces “was made dependent upon Iraq’s acceptance of all the provisions” of Resolution 687.³⁰⁰ Iraq accepted the terms of the resolution, and, consequently, the legal responsibility for the damages to be determined by the UNCC, three days after the Security Council adopted Resolution 687.

It is undisputed that the United States and Britain invaded Iraq in 2003 without the approval of the U.N. Security Council. The invasion was indisputably unlawful. These two nations, however, are permanent members of the Security Council,³⁰¹ and in the opinion of this Author, clearly above the law. It is small wonder that many of the world’s states and people feel that Security Council enforcement “is not always used fairly or effectively.”³⁰²

Nearly half of Iraq’s population is under eighteen years of age.³⁰³ Iraqi children “have gone through three wars, [twelve] years of sanctions, and live in extraordinarily difficult circumstances.”³⁰⁴ Like all the Iraqi people, these children “are equal before the law and are entitled without any

295. Security Council Resolution 687, *supra* note 285, res. 13.

296. U.N. CHARTER ch. VII, arts. 39-51.

297. U.N. CHARTER art. 39.

298. U.N. CHARTER art. 24(1).

299. U.N. CHARTER art. 24(1); *see* United Nations, *supra* note 201 (stating that 191 nations are U.N. member states).

300. UNCC Web Site, *supra* note 286, Introduction.

301. U.N. CHARTER art. 23(1).

302. Kofi Annan, U.N. Secretary General. Opening Address to the 59th Annual Session of the U.N. General Assembly (Sept. 21, 2004), *available at* <http://www.un.org/apps/sg/sgstats.asp?nid=1088> (last visited Apr. 11 2005).

303. *Amid Rising Toll, UNICEF Struggles to Create Better Future for Iraq's Young*, U.N. NEWS SERVICE, Aug. 18, 2004 [hereinafter *Amid Rising Toll*], *available at* http://www.amanjordan.org/english/daily_news/wmview.php?ArtID=4777 (last visited Apr. 11, 2005).

304. *Id.*

discrimination to equal protection of the law.”³⁰⁵ Furthermore, international law has guaranteed each one of them “equal protection against any discrimination in violation of” the Universal Declaration of Human Rights.³⁰⁶ In addition to the international ban on discrimination of any kind, “such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” it is prohibited to distinguish between people “on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty.”³⁰⁷

Unless or until the UNCC establishes a Commission to process claims and pay for losses resulting from cultural property pillage and looting caused by the unlawful U.S. failure to establish order under the Hague Convention, the U.N. organization, and most certainly the institution of the U.N. Security Council will deny the Iraqi people, young and old, equal justice before the law and are violating those Iraqi people’s fundamental international human rights.

C. Enlightenment: Cultural Property as our Common Inheritance

Emmerich de Vattel, a Swiss jurist and author of *The Law of Nations*, “the principal international law text of the late 18th and early 19th centuries”³⁰⁸ argued that nations should only wage war to defeat their enemy’s force, not to lay waste to their property or seize it out of hatred or passion.³⁰⁹ “Temples, tombs, public buildings and all works of remarkable beauty,” were to be spared, regardless of the nature or origin of the armed dispute because “they do honour to human society.”³¹⁰ It was Vattel’s claim that whoever destroyed “the *common property of mankind* — its inheritance from the past, or its means of subsistence and enrichment

305. Universal Declaration, *supra* note 202, art. 7.

306. *Id.*

307. *Id.* art. 2.

308. JANIS, *supra* note 151, at 42.

309. Kastenbergh, *supra* note 6, at 283.

310. Josh Stuart, *Is All “Pharaoh” in Love and War? The British Museum’s Title to the Rosetta Stone and the Sphinx’s Beard*, 52 KAN. L. REV. 667, 694 (2004).

in the present,³¹¹ declared themselves to be the common enemy of mankind,³¹² or outlaws.

This language, common property of mankind, is echoed in the 1954 Hague Convention, which defines cultural property as the “*cultural heritage of all people*.”³¹³ The UNESCO Constitution, for its part, describes cultural property as the world’s inheritance. This is consistent with the Janus-faced nature of the 1954 Hague Convention. It is the last of the Hague instruments, the conventions that govern the international law of war.³¹⁴ It is simultaneously the first UNESCO legal instrument,³¹⁵ the conventions that govern the international law of peace.

D. Nineteenth Century

1. Napoleon

Even before the Enlightenment, but certainly by the time of the Napoleonic Wars, general opinion no longer accepted plunder and pillage of cultural property as a right of the conqueror.³¹⁶ For this reason, Napoleon’s systematic pillage of the most valuable works of art of Europe came as a shock.³¹⁷ Europe, is the operative word here, however. Napoleon’s 1798 expedition to Egypt caused no outrage, but rather “sparked a European obsession with all things Egyptian, fueling an intense Anglo-French competition as to which foreign intruder could strip the desert of the most antiquities.”³¹⁸

At the Congress of Vienna, Castlereagh insisted that Napoleon return the artwork he had looted throughout the continent.³¹⁹ Lord Castlereagh put forth the then novel claim that restoration was required due to the

311. Kastenber, *supra* note 6, at 283 (citing EMMERICH DE Vattel, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE APPLIQUÉ A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINES* [THE LAW OF MEN OR PRINCIPLES OF NATIONAL LAW APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS] (Charles G. Fenwick trans., *reprinted as* THE LAW OF NATIONS (Wash D.C. 1916) (1758))) (emphasis added).

312. Stuart, *supra* note 310, at 694.

313. 1954 Hague Convention, *supra* note 5, art. 1(a) (emphasis added).

314. Mays, *supra* note 211, at 11. “Violations of the laws and customs of war as set forth in the Hague Conventions constitute war crimes.” *Id.*

315. Graham, *supra* note 52, at 768.

316. Steele, *supra* note 125, at 674. *See id.* (explaining that the treaties concluding the Napoleonic Wars “represent some of the first written examples of international cultural property law aimed at preventing plunder.”).

317. Nahlick, *supra* note 171, at 1071.

318. Stuart, *supra* note 310, at 667.

319. Graham, *supra* note 52, at 757.

territorial connection between cultural objects and the people to whom they belonged.³²⁰ The sovereign legal right of nations to their cultural property was evidently held solely by those states whose boundaries were located within the religious and geopolitical matrix of European Christendom, however.³²¹ After the surrender of Cairo, a few years earlier, France had also had to surrender cultural property items gained as trophy or conquest.³²² Under the Capitulation of Alexandria, France had to “forfeit to *England* ‘all the curiosities, natural and artificial, collected [in Egypt] by the French Institute.’”³²³ The French and English parties executed the treaty without recourse to or even mention of the Egyptian government.³²⁴

Thus, a double standard on the international law of war as it relates to cultural property emerged from the Napoleonic wars. For countries and regions such as Egypt, and later Africa, which Europeans considered *terra nullius*, or no man’s land, because their civilizations were different from, and consequently inferior to, their European colonizers’, the custom of pillage continued. As is evident in the *terra nullius* view embraced by the Department of Defense and its top generals, racism and cultural xenophobia continue to drive the custom of cultural plunder practiced by colonizing and belligerent states today.

2. Lieber Code

“The first attempt to state a comprehensive body of principles governing the conduct of belligerents in enemy territory” came out of the American Civil War.³²⁵ In 1862, Henry W. Halleck, General-in-Chief of the Union Armies, commissioned Francis Lieber, a German-born legal scholar and professor of history at Columbia University, to draft the rules of war to be followed during the American Civil War.³²⁶ In 1863, the Union Army adopted Lieber’s Code as General Order No. 100.³²⁷ The Lieber Code is the first set of laws of war to include rules devoted exclusively to cultural property protection.³²⁸ Three of its one hundred and

320. *Id.*

321. Stuart, *supra* note 310, at 691-92.

322. *Id.* at 681.

323. *Id.* (emphasis added).

324. *Id.*

325. John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT’L L. 831, 834 (1986).

326. Sarah Eagan, *Preserving Cultural Property: Our Duty: A Look at How and Why We Must Create International Laws that Support International Action*, 13 PACE INT’L L. REV. 407, 407 (2001).

327. Kastenberg, *supra* note 6, at 285.

328. Steele, *supra* note 125, at 675.

fifty-seven articles deal specifically with cultural property.³²⁹ Many of these rules are key sources of international cultural property law today.³³⁰ John Henry Merryman has called the 1954 Hague Convention “a direct descendant of the work of Francis Lieber.”³³¹

Numerous Lieber Code provisions remain important because they have provided “definition[s] underlying the laws of war, as well as defining war.”³³² Important for purposes of cultural property protection, Lieber defined *necessity* as “those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”³³³

Lieber, of course, was defining *necessity* during a time when armed combat was still the internationally recognized rule, rather than the international legal exception, to solving disputes and breaches of the peace. The Second Protocol to the 1954 Hague Convention clarifies military *necessity*,³³⁴ which is and remains an exception, or waiver, to the otherwise legally binding duty to protect the cultural heritage of all mankind.³³⁵

American military lawyers point to Lieber’s definition of military necessity so as to distinguish it from and thereby invalidate the definition provided in the 1954 Hague Convention and its Second Additional

329. Merryman, *supra* note 325, at 833.

330. *Id.*

331. *Id.*

332. Kastenberg, *supra* note 6, at 285.

333. *Id.*

334. Second Additional Protocol, *supra* note 282, art. 6.

335. 1954 Hague Convention, *supra* note 5, pmbl. ¶ 2. The Second Additional Protocol supplements, but does not supplant, the 1954 Hague Convention. Second Additional Protocol, *supra* note 282, art. 2.

A waiver . . . may only be invoked to direct an act of hostility against cultural property when and for as long as: (i) that cultural property has, by its function, been made into a military objective; and (ii) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.

Id. art. 6(a). Moreover,

a waiver . . . may only be invoked to use cultural property for the purposes which are likely to expose it to destruction or damage *when and for as long as* no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage.

Id. art. 6(b).

Protocol.³³⁶ Captain Kastenberg warns military lawyers that the 1907 Hague Convention allowed for destruction of cultural property “if recognized by the exigencies or necessities of war.”³³⁷ Most of the 1907 concepts and much of the exact language is taken from the Lieber Code.³³⁸

These military lawyers err, however, because they fail to consider the completely new interpretative context for the concept of military necessity since the adoption of the U.N. Charter. It is irrelevant that military necessity is more broadly construed in the 1863 Lieber Code, where it “admits all destruction of life and limb or armed enemies, and of other persons whose destruction is incidentally unavoidable in armed contests of war.”³³⁹ What is relevant, instead, is the rest of the definition, which requires that military necessity “be lawful according to the modern law and usages of war.”³⁴⁰ This definition provides for an evolving concept of the norms of war. Throughout international law, terms and concepts are given an evolving, not a static interpretation in order to account for changes and development in international society, so that rules are construed in their context: the evolved and ever-evolving present.³⁴¹ Although the Lieber Code is not a treaty, its subject matter, *jus in bello*, regulates, by definition, the conduct of belligerent and competing sovereigns.

The prohibition of the use or threat of force between states, found in Article 2(4) of the U.N. Charter,³⁴² is the most important norm of twentieth century international law.³⁴³ All international acts of aggression, therefore, are interpreted within the context of this norm.

The United States chose to breach its international obligations in invading Iraq in 2003. Due to politics, that is, brute facts, the United States was able to carry out this attack unconstrained by the self-defense exception as required by law.³⁴⁴ Nonetheless, the United States is still bound to the “modern usages of war” (*jus in bello*) under its own military

336. Kastenberg, *supra* note 6, at 285.

337. *Id.* at 286.

338. Mays, *supra* note 211, at 7.

339. Kastenberg, *supra* note 6, at 285.

340. *Id.*

341. Legal Consequences for States of the Continued Presence of S. Africa in Namibia (S.W. Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J. 12 (June 21); *see also* Gabcikovo-Nagymaros (Hung. v. Czech Rep.), 1997 I.C.J. 7 (Sept. 25).

342. “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. CHARTER at art. 2(4).

343. DAMROSCH ET AL., *supra* note 186, at 27.

344. U.N. CHARTER art. 51.

codes of conduct.³⁴⁵ If the United States is going to contravene the universal law of armed force and defend its conduct based on its own interpretation of the law of just war, it cannot possibly continue to adhere to the *customary jus in bello* of modern warlord states: pillage, destroy, and slaughter.

E. *The Twentieth Century*

1. World War I

World War I, “a tragic and unnecessary conflict” in which more than ten million people died and millions more were emotionally and physically tortured, “left a legacy of political rancour and racial hatred so intense that no explanation of the causes of World War Two can stand without references to those roots.”³⁴⁶

The ghastly roots of World War II cultural property destruction can also be traced to World War I. Probably the best known of these painful examples are the burning of the magnificent Louvain library and the bombardment of Rheims Cathedral in 1914.³⁴⁷ The Germans committed these acts to terrorize their enemies, knowing full well that both the “library and cathedral represented the national genius of Belgium and France.”³⁴⁸

“It is fair to say that the Germans sought to destroy the spirit of both nations by these barbaric acts. It is equally fair to say that the memory of the consequences of this destruction had not been forgotten by World War II.”³⁴⁹ The rancours of war “are quick to bite and slow to heal.”³⁵⁰ History neither forgives nor forgets those who provoke or those who preside over vast cultural destruction.³⁵¹

345. “Regardless of whether the use of armed force in a particular circumstance is prohibited by the United Nations Charter (and therefore unlawful), the manner in which the resulting armed conflict is conducted continues to be regulated by the law of armed conflict.” Code of Conduct of the U.S. Navy, Principles and Sources of the Law of Armed Conflict, *supra* note 189, § 5.1 War and the Law.

346. KEEGAN, *supra* note 244, at 3.

347. JOHN HENRY MERRYMAN & ALBERT E. ELSER, LAW, ETHICS AND THE VISUAL ARTS 74 (4th ed. 2002).

348. *Id.*

349. *See id.* at 64-69 (discussing cultural reparations and certain troubling requirements that Germany restore items held prior to the commencement of hostilities as well as items of German origin). As argued by Douglas Rigby, “clipping away those symbols of peaceful aspiration which identify a nation with its past, rehabilitation becomes a word without meaning.” *Id.* at 66-68.

350. KEEGAN, *supra* note 244, at 6.

351. Hensher, *supra* note 4.

It bears stating that under the cultural reparation provisions of the Treaty of Versailles, the Germans had to return cultural property that they had taken from France not only during World War I, but also during the Franco-Prussian War (1870-1871).³⁵² Germany was also required to restore cultural property items to non-parties to the war.³⁵³ Germany had to restore the Louvain library with "manuscripts, incunabula, printed books, maps, and objects of collection corresponding in number and value to those destroyed in the burning by Germany of the Library of Louvain."³⁵⁴ Germany further had to provide like-kind satisfaction of reparation claims by delivering two great artistic works, a Van Eyck and a Bouts, "to Belgium, through the Reparation Commission, within six months of coming into force of the [Versailles] Treaty."³⁵⁵ Merryman and Elsen ask the very important question whether it is "proper or desirable to denude the loser of artworks and cultural monuments, to turn it into a cultural desert."³⁵⁶

Outrage at cultural losses also shifted, or expanded, during and following the First World War. People now felt dispossessed by the destruction of cultural property worldwide.³⁵⁷ In denouncing the outrages, scholars cited the "principle of common cultural heritage, . . . a conviction that the landmarks destroyed belonged not to a particular state, but to the world."³⁵⁸ This position harkened back to Vattel's stance that those who destroyed "temples, tombs, public buildings, and all works of remarkable beauty," were the self-declared enemies of mankind, outlaws who had "wantonly" deprived all others of "these monuments of art and models of taste."³⁵⁹

The *terra nullius* view embodied the Capitulation of Alexandria reared its racist head yet again in the terms of the Treaty of Versailles, which, "in divesting Germany of its colonial holdings in East Africa in favor of England, called for Berlin to surrender a prized sultan's skull to London as a trophy of war rather than to its original tribe."³⁶⁰

352. Versailles Treaty, June 28, 1919, 225 Parry 188, 2 Bevens 235, 13 AM. J. INT'L L. Supp. 151, art. 245.

353. *Id.* art. 246.

354. *Id.* art. 247.

355. *Id.*

356. MERRYMAN & ELSÉN, *supra* note 347, at 64.

357. Graham, *supra* note 52, at 759-60.

358. *Id.*

359. Stuart, *supra* note 310, at 694 (citing EMMERICH DE VATTEL, THE LAW OF NATIONS 368 (Abraham Small 1817) (1758)).

360. *Id.* at 695.

Despite catastrophic destruction, both the international law of war and the international law of treaties remained a weak notion at the end of World War I. It could not be otherwise as long as "its most important concept, established by the Treaty of Westphalia in 1648, the 'sovereignty of states,' left each state unfettered by anything but the judgment of self-interest."³⁶¹

2. World War II

"You ask did they kill, yes they killed. They killed for art, when it suited them."³⁶²

World War II, described by the eminent scholar and historian of war, John Keegan, as the "largest single event in human history," was "fought across six of the world's seven continents and all its oceans."³⁶³ The Second World War killed 50 million human beings, wounded hundreds of millions more, and "materially devastated much of the heartland of civilization."³⁶⁴ "The Holocaust was not only the greatest murder, it was the greatest theft in history."³⁶⁵

The Nazis stole an estimated 220,000 pieces of art from both museums and private collections throughout Europe. It took 29,984 railroad cars, according to records from the Nuremberg trials, to transport all the Nazi-stolen art back to Germany. The value of this plundered art exceeded the total value of all artwork in the United States in 1945. The value of the art stolen by the Nazis is astounding: \$ 2.5 billion in 1945 prices, or \$ 20.5 billion today.³⁶⁶

Even worse than the plunder and pillage that had relentlessly and mercilessly ravaged so many cultures over the ages, is the fact the Nazis

361. KEEGAN, *supra* note 244, at 17.

362. Robert Schwartz, *The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II*, 32 COLUM. J.L. & SOC. PROBS. 1, 2 (1998) (citing Howard Kissel, *Making Sure Their Art is in the Right Place A Half Century After the Nazis Looted Paintings, Efforts are Under Way to Reclaim Spoils of War*, N.Y. DAILY NEWS, Mar. 3, 1998, at 31 (discussing works stolen from Fritz Gutmann, a wealthy German Jewish banker, who was beaten to death because he would not sign papers ceding his art collection to the Reich.)).

363. JOHN KEEGAN, *THE SECOND WORLD WAR Forward* (1989).

364. *Id.*

365. Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 1 (2000) (citing Deborah Senn, Washington State Commissioner of Insurance and former chair of the Working Group on Holocaust and Insurance Issues of the National Association of Insurance Commissioners).

366. *Id.* at 161-64 (noting that so much looted Nazi-era art is at stake today, "that a large-scale return of such World War II looted art could disrupt the art market, especially for French impressionist paintings, which were a favorite target of Nazi looters").

did not loot and steal just to get rich. "Their looting was part of the Final Solution."³⁶⁷ The Nazi goal was to eradicate an entire society by exterminating its people and extinguishing its culture.³⁶⁸

On January 29, 1940 Hitler named (later Nuremberg defendant) Alfred Rosenberg head of the Center for National Socialist Ideological and Educational Research, better known as "Einsatzstab Rosenberg."³⁶⁹ Although apparently created to found a research library, the Einsatzstab Rosenberg soon turned to pillaging libraries, as well as seizing cultural treasures en masse.³⁷⁰ "Aktion-M," a storm trooper division created by Rosenberg, plundered 69,619 Jewish homes, in the West, "38,000 of them in Paris alone."³⁷¹

The level of organization curdles the blood. The Einsatzstab Rosenberg assiduously catalogued 39 volumes of looted paintings, textiles, candelabra and inventoried each item according to its worth.³⁷² In the period from "March 1941 to July 1944 the special staff for Pictorial Art brought into the Reich 29 large shipments, including 137 freight cars with 4,174 cases of art works."³⁷³

Alfred Rosenberg's fate demonstrates how seriously the world now views violations against groups and their cultural property. The International Military Tribunal found Rosenberg, as well as Frank, Seyss-Inquart and von Ribbentrop guilty of war crimes, and sentenced them to death by hanging.³⁷⁴

The 1954 Hague Convention was specifically adopted in response to reprehensible Nazi conduct during World War II.³⁷⁵ It is unmistakably crafted in the spirit of "Never Again."

367. *Id.* at 165.

368. *Id.*

369. MERRYMAN & ELSEN, *supra* note 347, at 30.

370. *Id.*

371. *Id.* (citing 22 Trial of Major War Criminals before the International Military Tribunal 469-70, 484-86, 539-41, 588 (Nuremberg 1948)).

372. *Id.* at 30-31.

373. *Id.* (citing the report of Robert Scholz, Chief of the special staff for Pictorial Art). The Einsatzstab Rosenberg was not the only Nazi special force dedicated to the specific task of plundering Jewish cultural items. Von Ribbentrop's special "Battalion," the Reichskommissaire, and special representatives of the Military Command also systematically looted museums, palaces, and libraries in the occupied territories of the U.S.S.R. *Id.* at 31. The items were then shipped to Germany. *Id.* "During the month of October 1943 alone, about forty box cars loaded with objects of cultural value were transported [from the occupied territories of the U.S.S.R.] to the Reich." *Id.* (quoting a letter dated Oct. 31, 1941 from Reichskommissar Kube to Rosenberg).

374. MERRYMAN & ELSEN, *supra* note 347, at 32.

375. Eagen, *supra* note 326, at 421.

IV. 1954 HAGUE CONVENTION AS AN INSTRUMENT FOR PEACE

The 1954 Hague Convention is the first international agreement to deal with cultural property as its main subject, and not merely as “an element in an otherwise comprehensive instrument regulating conduct under the law of war.”³⁷⁶

The principles concerning the protection of cultural property established in the 1899 and 1907 Hague Conventions, and in the Washington Pact of April 15, 1935, known as the Roerich Pact,³⁷⁷ were incorporated into the 1954 Hague Convention.³⁷⁸ The Roerich Pact establishes a state’s duty to protect its cultural patrimony, whether tangible or immovable,³⁷⁹ and extends that duty to property held in private hands as well as by the state.³⁸⁰ The Pact justifies cultural property regimes as necessary to protect the “cultural treasures of all people.”³⁸¹ Moreover, it “requires *unconditional* respect (for) and protection of cultural property and contains *no exemption* based on military necessity.”³⁸² The United States is a party to all three of these international agreements.³⁸³

Finally, the Roerich Pact firmly establishes the principle that international involvement in the protection and preservation of a common cultural heritage gives rise to a simultaneous national right of a state to demand respect for its cultural heritage and cultural property and a national duty “to protect and preserve its heritage for the benefit of all

376. Graham, *supra* note 52, at 768.

377. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 167 L.N.T.S. 279, T.S. 899, 49 Stat. 3267 [hereinafter Roerich Pact]. The parties to the Roerich Pact were Brazil, Chile, Colombia, Cuba, Dominican Republic, El Salvador, Guatemala, Mexico, the United States, and Venezuela.

378. 1954 Hague Convention, *supra* note 5, pmbl. ¶ 4.

379. Potentially protected cultural property included “extensive ensembles of buildings — even whole districts — of historic interest.” Graham *supra* note 52, at 762; *see id.* (emphasis added) (explaining how the Roerich Pact came out of a series of inter-war legal projects which sought to “adapt the Hague Conventions to new forms of warfare, extend their protection to integrated districts of cultural importance, and *ultimately to break culture property issues free from exclusive attachment to the law of war.*”) (emphasis added). Moreover, each one of these projects, or efforts, “incorporated the terms of its predecessors.” *Id.* The Roerich Pact and its predecessors, in turn, served as a model and guide for the Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Times of War, which the International Museums Office drafted at the request of the League of Nations. *Id.* at 763.

380. *Id.*

381. *Id.* at 762 (citing Roerich Pact, *supra* note 377, art. 1).

382. Birov, *supra* note 108, at 242 (emphasis added).

383. Code of Conduct of the U.S. Navy, Principles and Sources of the Law of Armed Conflict, *supra* note 189, § 5.4.2 International Agreements.

mankind.”³⁸⁴ The 1954 Hague Convention embodies these same rights and obligations.

A. Post World War II Legal Framework

The 1954 Hague Convention, the last of the Hague Conventions governing the international law of war,³⁸⁵ was adopted in an entirely different legal framework from any of its predecessors.³⁸⁶ In 1945, the international community of states had engaged in their customary legal activity of regulating their mutual relations by treaty,³⁸⁷ in order to establish an entirely new global legal order. Each of the high contracting parties to the U.N. charter exercised its sovereign state power to form and agree to be bound to an international legal regime that effectively overturned the millennia-old customary legal status of war.

Absolute sovereignty had actually been checked under Kellogg-Briand.³⁸⁸ Like the League of Nations and other inter-war efforts, however, the Kellogg-Briand Agreement had been either insufficient or ineffective at preventing World War II.³⁸⁹ “It took the devastation of World War II to convince the world powers that limits had to be imposed for the security, even the survival, of all states in a nuclear age.”³⁹⁰

When they signed the U.N. Charter, the governments of the world instituted and consented to the doctrine of limited state sovereignty. The new law of nations prohibited the use or threat of force between states.³⁹¹ The burden now shifted to the belligerent state to show the international community that it had no other choice or means than to breach the world’s peace.³⁹²

Following World War I, the Agreement Establishing the League of Nations had been included in and made a part of the Treaty of Versailles, a conventional international instrument of war.³⁹³ The United States, one

384. Graham, *supra* note 52, at 763.

385. Mays, *supra* note 211, at 9.

386. DAMROSCH ET AL., *supra* note 186, at 27.

387. HANS Kelsen, *Pure Theory of Law* 216 (Knight trans., 1967).

388. See *supra* text accompanying note 255 (discussing the background and significance of the Kellogg-Briand Agreement).

389. KEEGAN, *supra* note 363, at 30-31.

390. Barbara Stark, *Conceptions of International Peace and Environmental Rights: The Remains of the Day*, 59 TENN. L. REV. 651, 658 (1992).

391. “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. CHARTER art. 2(4).

392. U.N. CHARTER art. 51.

393. Versailles Treaty, *supra* note 352, arts. 1-26 & Annex.

of the chief negotiating parties to the Treaty, had also been the architect of the League.³⁹⁴ In the end, however, then U.S. President Woodrow Wilson was unable to convince the U.S. Senate to ratify the League of Nations Covenant.³⁹⁵ The most powerful military nation in the world never joined the League nor was the League able to prevent World War II.³⁹⁶

The U.N. Charter, by contrast, was not included within, nor in any way annexed to an international instrument of war. Instead, it was the constitutive instrument that established both the normative structure of peace and an organizational structure to implement it. The new legal order was both aspirational and instrumental from the start.

While the U.N. Charter proclaims that it has been created and adopted to end the scourge of war,³⁹⁷ it does not require any of the contracting states parties to the U.N. Charter to recognize guilt for their actions in the prior war.³⁹⁸ The Treaty of Versailles, by contrast, had imposed ten different categories of damage compensation on Germany³⁹⁹ and had even required the Germans to make good on earlier treaties that were outside the scope of World War I.⁴⁰⁰

"The architects of the postwar system replaced the state-centric rules with an ambitious positivist order, built on institutions and constitutions."⁴⁰¹ Elaborate, painstakingly detailed, systemic hate had almost razed the world.⁴⁰² The United Nations offered the world's peoples and nations a *tabula rasa* (latin for "scraped tablet," though often translated "blank slate") founded in peace. It took a systemic and

394. MARGARET MACMILLAN, PARIS 1919, at 8 (2001).

395. *Id.* at 6.

396. SCHLESINGER, *supra* note 244, at 263. "Roosevelt . . . learned from Wilson's errors." *Id.*

397. U.N. CHARTER pmbl. ¶ 1.

398. "The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies." Versailles Treaty, *supra* note 352, art. 231.

399. *Id.* Annex I to Part VIII, Reparation.

400. *See id.* art. 232 (requiring compensation to Belgium for violations of the Treaty of 1839, in addition to compensation for damages caused during World War I); *see also id.* art. 245 (requiring compensation and damages be paid to France for damages arising under the Franco-Prussian War).

401. Koh, *supra* note 210, at 2614.

402. From the point of view of cultural property specifically, see *infra*, Part III.G. To learn about the detailed level of data and census gathering carried out by the Nazis to identify and categorize their victims as well as the knowing complicity of IBM and its founder, Thomas J. Watson, in presenting and "enchancing" the value of the Hollerith punch card used to organize and mechanize the Nazi death machine, see EDWIN BLACK, IBM AND THE HOLOCAUST (2001).

pragmatic approach to reconstructing world order. The world's best concepts and practices were retained and codified to the extent possible.

By the time the 1954 Hague Convention was drafted and adopted, the Treaty establishing the European Coal and Steel Community (ECSC Treaty), also known as the Treaty of Paris, had been in existence for three years.⁴⁰³ The Versailles Treaty had required Germany to "directly apply her economic resources to the reparation relating to," amongst other resources, "coal and directives of coal."⁴⁰⁴ Germany was treaty-bound to deliver seven million tons of coal to France per year for ten years.⁴⁰⁵ While the Treaty of Versailles had set up specific coal and coal derivative options binding Germany to sell specified amounts of coal to France,⁴⁰⁶ Belgium,⁴⁰⁷ Italy,⁴⁰⁸ and Luxembourg,⁴⁰⁹ at specified prices, under the auspices and control of the Allied Commission,⁴¹⁰ the ECSC Treaty was instead a trade agreement that "place[d] the entire coal and steel production of France (the winner of the war) and Germany (the loser) under the control of an independent High Authority."⁴¹¹ France, Italy, the Federal Republic of Germany, and the Benelux countries all drafted and adopted the ECSC Treaty, which constitutes the first of the three European Economic Community treaties.⁴¹²

The Convention for European Economic Cooperation had been in operation for six years when the 1954 Hague Convention was adopted.⁴¹³ This Convention set up the Organization for European Economic Cooperation, the precursor to the Organization for Economic Co-operation and Development (OECD).⁴¹⁴ The European Convention for Human

403. Treaty Establishing the European Coal and Steel Community, signed in Paris on Apr. 18, 1951, 261 U.N.T.S. 140.

404. Versailles Treaty, *supra* note 352, art. 236.

405. *Id.* Annex V, art. 2.

406. *Id.*

407. *Id.* art. 3.

408. *Id.* art. 4.

409. Versailles Treaty, *supra* note 352, art. 5.

410. *Id.* art. 6.

411. Mark L. Jones, *Treaty Establishing the Treaty of Rome, Introduction and Bibliography*, 2 BASIC DOCUMENTS INT'L ECON. L. (1989).

412. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2405 (1991). The other two constitutive treaties are the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11; Treaty Establishing the European Atomic Energy Community (EURATOM Treaty), Mar. 25, 1957, 298 U.N.T.S. 259.

413. Convention for European Economic Cooperation, signed at Paris Apr. 1948.

414. *Id.* art. 1.

Rights, which founded the Council of Europe, had been in force for nearly four years.⁴¹⁵

At the time the 1954 Hague Convention was drafted and adopted, the international institutional machinery dedicated to building the legal structures and bureaucratic organisms, though still relatively new, was well in place. The same was true of new legal rights and duties arising under international law.

Once the Allied powers signed the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers⁴¹⁶ and the Charter of the International Military Tribunal,⁴¹⁷ it was clear that individuals had legal duties to the international community that preempted their duties to their nation-state.⁴¹⁸ Responding to the defense of having acted on behalf of the state, the Nuremberg court told Nazi government officials that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁴¹⁹ Furthermore, the defense of following orders of one’s government would not excuse defendants from their individual responsibility under international law, but might “be considered in mitigation of punishment.”⁴²⁰

The Universal Declaration had proclaimed a panoply of civil, political, economic, and social rights held by individuals under international law.⁴²¹ The Universal Declaration, often called the “Magna Carta of Human

415. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

416. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

417. Charter of the International Military Tribunal, Oct. 8, 1945, 59 Stat. 1545, 82 U.N.T.S. 282.

418. Perkins, *supra* note 10, at 442-43.

419. The Nuremberg Trial, 6 F.R.D. 69, 110 (1946).

420. *Id.*

421. See Universal Declaration, *supra* note 202 (noting the asserted status of the Universal Declaration according to the strongest adherents to the doctrine of state consent); *but see* Filartiga v. Peña-Irala, 630 F.2d 876, 883 (2d Cir. 1980) (noting that “the Universal Declaration of Human Rights ‘no longer fits into the dichotomy of ‘binding treaty’ against ‘non-binding pronouncement,’ but is rather an authoritative statement of the international community’”) (citing E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 70 (1964)). The circuit court went on to observe that not only the Universal Declaration, but all U.N. declarations “create an expectation of adherence, and ‘insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States.’” *Id.*

Rights”⁴²² put it in writing that human beings do not hold their human rights and fundamental freedoms as citizens of nation-states.⁴²³ Individuals hold these rights as “members of society” and are entitled to have these rights realized through *both* national effort and international cooperation.⁴²⁴

The rights held by nation-states were at least as strong, if not stronger than they had been since Grotius or Richilieu. States had just used their sovereign rights to found an entirely new legal and political order and to create an institution to implement and regulate it. What was arguably less clear were the duties owed by nation-states toward the international community. Clearly the limited role of any one state’s ability to act legally toward and within the international community of states entailed an *erga omnes* (latin for “toward all”) duty from the start.

In the half century since the 1954 Hague Convention was adopted, the legal duties of nation-states toward the international society of states have clearly evolved and are now critical to the continued protection and sustainable development of all our nonrenewable resources.⁴²⁵ “Asset stripping the finite resource of cultural heritage is, by definition, unsustainable in economic terms,”⁴²⁶ as well as prohibited in legal terms.⁴²⁷

B. *The Institutional Legal Framework of UNESCO*

On November 16, 1945, the High Contracting Parties to the UNESCO Constitution proclaimed ignorance to be incompatible with the “democratic principles of the dignity, equality and mutual respect of men.”⁴²⁸ Because people were “ignorant of each other’s ways and lives,” and knew only “suspicion and mistrust,” they had been receptive to the Nazi “doctrine of the inequality of men and races.”⁴²⁹ In the view of the United States and all the UNESCO states parties, only the “wide diffusion of culture and the education of humanity for justice and liberty and peace”

422. See generally Office of the U.N. High Comm’r for Human Rights, The International Bill of Human Rights, Fact Sheet No. 2 (Rev. 1), available at <http://www.unhcr.ch/html/menu6/2/fs2.htm> (last visited Apr. 11, 2005).

423. Universal Declaration, *supra* note 202, art. 22.

424. *Id.*

425. See Perkins, *supra* note 10, at 433-81.

426. Borke, *supra* note 104, n.12 (citing NEIL BRODIE ET AL., *STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL* 1, 13-14 (The McDonald Institute for Archaeological Research, Cambridge 2000)).

427. See, e.g., UNESCO 1970, *supra* note 27; UNESCO 1972, *supra* note 118.

428. UNESCO CONST. pmbl. ¶ 3.

429. *Id.*

could ensure the international recognition of “the dignity of man.”⁴³⁰ Since the end of World War II, ignorance and tyranny have been synonymous with cultural dispossession.

The 1954 Hague Convention, the last international instrument of war, is simultaneously UNESCO’s first international instrument of peace. The International Conference of States convened at the Hague in 1954 was the first cold-war era UNESCO convention attended by representatives of both the West and the Communist bloc.⁴³¹ Forty-five countries signed the convention right there.⁴³²

UNESCO has since adopted many legal instruments governing cultural property protection. All UNESCO’s standard-setting instruments are “specifically designed to enable states to better protect all forms of culture.”⁴³³ One third of UNESCO’s Recommendations concern culture, its protection and its dissemination.⁴³⁴ UNESCO recommendations do not have an adjudicative character,⁴³⁵ but are instead, practical, means-end documents intended to function within very specific contexts. UNESCO describes them as legal instruments, and rightly so.⁴³⁶

430. *Id.* pmbl. ¶ 4.

431. Meyer, *supra* note 254, at 353.

432. Kastenber, *supra* note 6, at 290.

433. UNESCO — CULTURE: *Normative Action* [hereinafter UNESCO Cultural Norms], available at http://portal.unesco.org/culture/en/ev.php-URL_ID=11471&URL_DO=DO_TOPIC&URL_SECTION=201.html.

434. (i) Recommendation on International Principles Applicable to Archaeological Excavations, adopted by the General Conference, Dec. 5, 1956. UNESCO Doc. 9C/Res. (1956); (ii) Recommendation concerning International Competitions in Architecture and Town Planning, adopted by the General Conference, Dec. 5, 1956; (iii) Recommendation concerning the Most Effective Means of Rendering Museums Accessible to Everyone, adopted by the General Conference, Dec. 14, 1960; (iv) Recommendation concerning Safeguarding of Beauty and Character of Landscapes and Sites, adopted by the General Conference, Dec. 11, 1962; (v) Recommendation on the Means of Prohibiting and Preventing Illicit Export, Import and Transfer of Ownership of Cultural Property, adopted by the General Conference, Nov. 19, 1964. UNESCO Doc. 13C/Res; (vi) Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, adopted by the General Conference, Nov. 19, 1968; (vii) Recommendation concerning the Protection, at the National Level, of Cultural and Natural Heritage, adopted by the General Conference, Nov. 16, 1972; (viii) Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas, adopted by the General Conference, Nov. 26, 1976; (ix) Recommendation concerning the International Exchange of Cultural Property, adopted by the General Conference, Nov. 26, 1976; and (x) Recommendation for the Protection of Movable Cultural Property, adopted by the General Conference, Nov. 28, 1978; UNESCO Cultural Norms, *supra* note 433.

435. Oscar Schachter, *United Nations Law*, 88 AM. J. INT’L L. 1, 6 (1994). This highly informative essay divides U.N. law into four sections: (i) Lawmaking in the U.N. System; (ii) Interpreting and Applying Law; (iii) Compliance and Enforcement; and (iv) *Patterns and Politics*.

436. UNESCO Cultural Norms, *supra* note 433.

Each one of the instruments is a “how to” on carrying out the purpose of the UNESCO Organization, which is “to contribute to peace and security by promoting collaboration among the nations through education, science and culture.”⁴³⁷ Ignorant men do not respect justice, rule of law, human rights, or fundamental freedoms⁴³⁸ because they do not respect themselves.⁴³⁹ Thus the UNESCO member states impose a legal duty on UNESCO to cure this threat to global peace by “maintain[ing], increas[ing], and diffus[ing] knowledge.”⁴⁴⁰ Conserving and protecting “the world’s inheritance of books, works of art and monuments of history and science” is a specific constitutional mandate given to UNESCO by world governments.⁴⁴¹

Having blamed their peoples’ ignorance for the continued wars of human history,⁴⁴² the governments of the UNESCO contracting states parties had the grace to bind themselves and each other to a constitutionally proclaimed sacred duty to cure it.⁴⁴³ UNESCO’s job is to collaborate⁴⁴⁴ with its member states by recommending to them the international agreements necessary to fulfill their legal duty.⁴⁴⁵ Since UNESCO is performing its chartered mandate in drawing up these standards,⁴⁴⁶ it is not surprising that they “have as much effect as formal

437. UNESCO CONST. art. 1.

438. *Id.*

439. “The widespread diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man.” UNESCO CONST. pmbl. ¶ 4.

440. *Id.* art. 2(c).

441. *Id.*

442. *Id.*

The Governments of the States Parties to this Constitution on behalf of their peoples declare: That ignorance of each other’s ways and lives has been a common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war.

Id. pmbl. ¶ 2.

443. “The wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil [sic] in a spirit of mutual assistance and concern.” *Id.* pmbl. ¶ 4.

444. *Id.* art. 2. Whereas Article 1 sets forth the purpose of the UNESCO organization, article 2 sets forth the means to attain the Article 1 goals. The key means to do so appears in nearly all its grammatical forms in this Article: *collaborate*, *collaborating*, and *collaboration*.

445. *Id.* art. 2(a).

446. The UNESCO Organization, like all the fourteen specialized agencies established by the U.N. Charter, is part of the “harmonizing administration” granted “wide international responsibilities in *social, cultural, educational*, health and related fields.” U.N. CHARTER art. 57.

rules in channeling state conduct.”⁴⁴⁷ The appropriate principle of interpretation governing their terms, therefore, is “the principle of effectiveness.”⁴⁴⁸

Old dogma dies hard, and its stalwarts still call recommendations *soft law*, because they are not, in principle, binding. These individuals are tied to the antiquated assertion that “any form of social structure that is not reducible to orders backed by threats can only be a form of ‘morality.’”⁴⁴⁹ Moreover,

Just as we expect a municipal legal system, but not morality, to tell us how many witnesses a validly executed will must have, so we expect international law, but not morality, to tell us such things as the number of days a belligerent vessel may stay for refueling or repairs in a neutral port; the width of territorial waters; the methods to be used in their measurement.⁴⁵⁰

The threats addressed by the UNESCO instruments are much more urgent and much more compelling than the tunnel vision fixation on law as enforcement or the narrow obsession over sovereignty and consent, a doctrine that is unilateralist at its core. Like the law/morality paradigm, the sovereignty and consent canon is not a functional paradigm for issues involving the nonrenewable resources or assets belonging to the peoples and states of the international community. Cultural property protection, like environmental protection, is a collective right.⁴⁵¹ So is peace.⁴⁵² Like international global environmental protection, international cultural property protection has been widely recognized⁴⁵³ as “a zone of common

447. Schachter, *supra* note 435, at 5.

448. *Id.*

449. H.L.A. HART, *THE CONCEPT OF LAW* 222 (1961). “Us[ing] the word ‘morality,’ in this very comprehensive way,” Hart so rightly argued, “provides a conceptual wastepaper basket in which will go the rules of games, clubs, etiquette, the fundamental provisions of constitutional law and international law, together with rules and principles which we ordinarily think of as moral ones, such as the common prohibitions of cruelty, dishonesty, or lying.” *Id.*

450. *Id.* at 225.

451. Louis Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1, 48 (1982).

452. *Id.* at 57; *see also* U.N. CHARTER.

453. *See, e.g.*, UNESCO 1970, *supra* note 27; UNESCO 1972, *supra* note 118; UNESCO Convention on Protection of Underwater Cultural Heritage, Nov. 2, 2001; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, signed at Rome, June 24, 1995; Parliamentary Assembly of the Council of Europe, Resolution 1205 of Nov. 4, 1999 on Jewish Cultural Property; Vilnius Forum Declaration (1998); *see also* European Union Directive on the Return of Cultural Objects, 93/7/EEC, Mar. 15, 1993, O.J. L74 of 27.03.1999, *as amended by* Council Directive

concern.”⁴⁵⁴ “Success in addressing threats” to these zones of common concern requires “not merely restrictions on actions, but acceptance of affirmative obligations.”⁴⁵⁵ What this number of recommendations actually points to is an urgent concern, amongst the community of states, to preserve and protect the cultural heritage of mankind. In the words Sohn, “it is not the law that is soft, but the governments.”⁴⁵⁶

The two key UNESCO treaty instruments relevant to the arguments of this Article are the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO 1970),⁴⁵⁷ and the Convention Concerning the Protection of the World Cultural and Natural Heritage (UNESCO 1972).⁴⁵⁸

UNESCO 1970 was “the first major instrument to mandate active, continuous, interstate cooperation to protect cultural property.”⁴⁵⁹ With UNESCO 1970, the international community of states extended its protection of cultural property from armed conflict to illicit traffic.⁴⁶⁰ The United States is one of 103 states parties that have ratified or acceded to UNESCO 1970.⁴⁶¹ UNESCO 1972 is “the principal, modern international instrument for the protection of cultural monuments and sites.”⁴⁶² In addition to manmade creations, UNESCO 1972 protects sites of great

2001/38/EC of June 5, 2001, O.J. L87 of 10.07.2001; European Council Regulation (EEC) No. 3911/92 of Dec. 9, 1992 on the Export of Cultural Goods, *as amended by* Council Reg. No. 2469/96 of Dec. 16, 1996; *see, e.g.*, Treaty of Cooperation between the United States of American and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, 22 U.S.T.S. 494, T.I.A.S. No. 7088. For sources other than treaties and legislation of national and supra-national constituencies, *see, e.g.*, Art Loss Register, *available at* <http://www.artloss.com> (last visited Apr. 11, 2005). “Art Loss Register is the world’s largest private international database of lost and stolen art, antiquities and collectibles.” *Id.*; *see also* Red List of Cultural Objects at Risk provided by the International Council of Museums, *available at* <http://icom.museum/redlist> (last visited Apr. 11, 2005). The Red List “appeals to museums, auction houses, art dealers and collectors not to buy” items of cultural property from those categories and geographical regions listed as suffering from or threatened by illicit trade, looting, and pillaging. Its other goal is to “help officials, police officers, and art dealers to identify them.” *Id.*

454. Roger W. Mastalir, *A Proposal for Protecting the “Cultural” and “Property” Aspects of Cultural Property under International Law*, 16 FORDHAM INT’L L.J. 1033, 1074 (1993).

455. Perkins, *supra* note 10, at 451.

456. Sohn, *supra* note 451, at 13.

457. UNESCO 1970, *supra* note 27.

458. UNESCO 1972, *supra* note 118.

459. Graham, *supra* note 52, at 771.

460. *Id.*; *see* UNESCO 1970, *supra* note 27, art. 2(1).

461. U.N. Educational, Scientific, and Cultural Organization World Heritage Web Site, *at* <http://whc.unesco.org/pg.cfm?cid=169> (last visited Apr. 11, 2005).

462. Meyer, *supra* note 254, at 358.

natural beauty, extending protection against threats posed to the world's heritage by both environmental and war-related damage.⁴⁶³ This treaty supplements, but does not supplant the 1954 Hague Convention.

The obvious focus when under siege is on response, not consent. The global threat to cultural property is so acute that UNESCO and Italy have just formed an Agreement on Emergency Actions to Protect Heritage in order to "intervene quickly in emergency situations and to facilitate coordination in countries . . . confronted by crises" which threaten to destroy protected environmental sites or cultural property.⁴⁶⁴ The "blue berets," as the press has dubbed them,⁴⁶⁵ "will provide expertise in damage and needs assessment," and will draw up action plans "to respond to specific exigencies."⁴⁶⁶

Including the United States, there are 178 states parties to UNESCO 1972.⁴⁶⁷ Together, UNESCO 1970, which covers largely movable cultural property and archaeological sites, and UNESCO 1972, which seeks to protect immovable cultural property, impose a legal duty to protect the same cultural property objects as those protected under the 1954 Hague Convention. Monuments of art, architecture and history,⁴⁶⁸ whether religious or secular;⁴⁶⁹ archaeological sites and excavations, as well as

463. Mastalir, *supra* note 454, at 1049.

464. Joint Declaration for the Safeguarding, Rehabilitation and Protection of Cultural and Natural Heritage, dated Oct. 28, 2004. Signed by UNESCO Director-General Koïchiro Matsuura, Italian Culture Minister Giuliano Urbani, and Francesco Caruso, Italy's Ambassador and Permanent Delegate to UNESCO. UNESCO, Press Release No. 2004-97, UNESCO-Italy Agreement on Emergency Actions to Protect Heritage (Oct. 28, 2004) [hereinafter UNESCO Press Release], available at http://portal.unesco.org/en/ev.php-URL_ID=23378&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Apr. 11, 2005).

465. See, e.g., John Hooper, *UNESCO's "Blue Berets" to Rescue Cultural Treasures*, GUARDIAN (UK), Oct. 28, 2004, available at <http://www.guardian.co.uk/italy/story/0,12576,1337648,00.html> (last visited Apr. 11, 2005). The creation of this special intervention force of ad hoc experts "followed international outrage over looting of priceless antiques during the U.S.-led coalition's invasion of Iraq last year." *Id.*

466. UNESCO Press Release, *supra* note 464; see *id.* (describing an emergency intervention project drawn up and successfully completed within weeks by Giorgio Macchi, a scientific advisor to UNESCO). In October 2003 Macchi successfully stabilized the fifth minaret of Heart in Afghanistan, "which would have collapsed within weeks" without UNESCO's and Italy's intervention. *Id.* Macchi is a member of the scientific committee that safeguards the Leaning Tower of Pisa. *Id.*

467. U.N. Educational, Scientific and Cultural Organization, World Heritage, Brief History, available at <http://whc.unesco.org/pg.cfm?cid=169> (last visited Apr. 11, 2005).

468. 1954 Hague Convention, *supra* note 5, art. 1; UNESCO 1972, *supra* note 118, art. 1.

469. This is the specific language of the 1954 Hague Convention. The UNESCO 1972, however, also seeks to cover monuments of science, which would bring it under the full breadth of historical as well as secular.

objects found there;⁴⁷⁰ and original works of art⁴⁷¹ all have the international legal right to protection. Museums, libraries and depositories are covered as “buildings whose main purpose is to preserve or exhibit movable cultural property,”⁴⁷² and “works of man with outstanding value from the historical, aesthetic, ethnological, and anthropological point of view.”⁴⁷³ Manuscripts and items of historical, archaeological and scientific interest are covered,⁴⁷⁴ as are scientific collections.⁴⁷⁵ All three conventions recognize the need for systemically designed joint national and international protection.⁴⁷⁶ The systems set forth carry out the purpose of the UNESCO organization, which is to “assur[e] the conservation and protection of the world’s inheritance of books, works of art and monuments of history and science.”⁴⁷⁷ Collaboration is UNESCO’s charter-based definition of protection.⁴⁷⁸ The way it assures that nations collaborate in protecting the world’s cultural heritage is by “recommending to the nations concerned the necessary international conventions.”⁴⁷⁹

Nearly every author cited in this Article has argued that because the United States protects these same items under all other international instruments of peace, it should offer them the same protection under the 1954 Hague Convention. The objects, their intrinsic value to all mankind, and their status as original,⁴⁸⁰ and therefore irreplaceable objects of universal value,⁴⁸¹ of great importance to both the “cultural heritage of all mankind” and the cultural identity of the groups who created them,⁴⁸² these authors rightly argue, should make them worthy of protection. The greater the threat of harm or destruction, the greater the duty, making our adherence to the 1954 Hague Convention all the more important. Nevertheless, none of the cogent arguments put forth in these exceptional

470. 1954 Hague Convention, *supra* note 5, art. 1; UNESCO 1970, *supra* note 27, art. 1; UNESCO 1972, *supra* note 118, art. 1.

471. 1954 Hague Convention, *supra* note 5, art. 1; UNESCO 1970, *supra* note 27, art. 1.

472. 1954 Hague Convention, *supra* note 5, art. 1.

473. UNESCO 1972, *supra* note 118, art. 1.

474. 1954 Hague Convention, *supra* note 5, art. 1; UNESCO 1970, *supra* note 27, art. 1.

475. 1954 Hague Convention, *supra* note 5, art. 1; 1970 UNESCO Convention, *supra* note 27, art. 1.

476. 1954 Hague Convention, *supra* note 5, art. 2; UNESCO 1970, *supra* note 27, pmbl. ¶ 8 & art. 5; UNESCO 1972, *supra* note 118, pmbl. ¶ 3 & art. 7.

477. UNESCO CONST. art. 1(2(c)).

478. *Id.* art. 1(2).

479. *Id.* art. 1(2(c)).

480. UNESCO 1970, *supra* note 27, art. 1.

481. UNESCO 1972, *supra* note 118, art. 1.

482. UNESCO 1970, *supra* note 27, art. 1.

articles, written over a span of more than twenty years, has moved the United States to ratify the 1954 Hague Convention.

C. Reframing the Legal Question in the United States

Essentially, the United States has not understood that as a member state of the international community of states, it has duties, and not just rights. Its assertions regarding customary international law, which do not even carry their evidentiary burden under the traditional canon, as I explain later, demonstrate that the United States is still locked into the unilateralist model grounded in the state consent doctrine. Instead, the United States needs to understand that it is “time for a reformulation” of how it participates in the international society of states.⁴⁸³

In his excellent article entitled *The Changing Foundations of International Law: From State Consent to State Responsibility*, John A. Perkins argues that “a change in the premises by which we understand the validity of international law,”⁴⁸⁴ has occurred due to the “new realities” posed by developments in the areas of at least four areas of law: (i) use of force limitations; (ii) international human rights law; (iii) acceptance of the concept of peremptory norms; and (iv) international environmental law.⁴⁸⁵ The rights arising out of these new realities are all third-generation human rights, or collective rights, as set forth by Sohn over twenty years ago.⁴⁸⁶

The premises validating international law in the seventeenth, eighteenth, and nineteenth centuries were natural law premises.⁴⁸⁷ *Pacta sunt servanda* and the duty to make restitution for harm done are clear examples of *jus rationale*, a natural law doctrine. In the twentieth century, natural law premises gave way to the *traditional canon*, which holds that “by virtue of the sovereignty vested in independent states, binding law can

483. Perkins, *supra* note 10, at 434.

484. *Id.* at 435.

485. *Id.* at 442-43.

486. Sohn, *supra* note 451, at 48-64. Collective rights are the international human right to self-determination, development, peace, and environment. The first generation human rights, explained Sohn, were the civil and political rights expressed in the International Covenant on Civil and Political Rights. *Id.* at 21-32. The second generation human rights are those guaranteed in the International Covenant on Economic, Social and Cultural Rights, the twin covenant to the International Covenant on Civil and Political Rights. *Id.* at 32-48. Sohn further notes that President Roosevelt discussed the freedoms set forth in these twin covenants in his “Four Freedoms” speech to Congress in 1941. *Id.* at 33. Because the United States is not one of the 148 nations that have ratified the International Covenant on Economic, Social, and Cultural Rights, we are more than a generation behind.

487. Perkins, *supra* note 10, at 435.

arise only by the consent of states to be bound.”⁴⁸⁸ The new realities, however, “challenge the traditional canon not by standing as exceptions to the general rule but in presenting a new core reality — the recognition and acceptance by the international community that states have obligations to the international community as a whole, obligations that may transcend state sovereignty.”⁴⁸⁹ “The increasing connectedness and interdependence of the international community” demonstrates that “being a part of that community involves limits and responsibilities.”⁴⁹⁰ Clearly, the state consent model, though still necessary, is no longer sufficient.

In 1951, the International Court of Justice concluded that contracting parties to a convention on international human rights law “[did] not have any interests of their own; they merely had, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention.”⁴⁹¹ States recognize human rights in human rights conventions, they do not bargain for them.⁴⁹² The benefit of the bargain lies in the protection accorded to all.

The negotiation process, therefore, serves an entirely different function where the zone of interest is our common human experience. A human rights instrument cannot fall within the state consent model driven by contract law.⁴⁹³ Although the states parties have “freedom to” contract, that is, to negotiate, their greater duty toward individuals and the international community of states actually prohibits the contractual notion of “freedom from.”⁴⁹⁴

Cultural property protection has clearly come into the zone of common concern and evolved into one of the new international legal realities. Like the environment, the irreparable injury of this fragile and inherently valuable asset has an irreversible impact on nonrenewable resources and concerns the rights of future generations.⁴⁹⁵ The role for the United States, like all states parties to international conventions on collective rights, is one of negotiation.⁴⁹⁶ In the same way that “no state can have the right to

488. *Id.*

489. *Id.* at 452.

490. *Id.*

491. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (*Advisory Opinion*), 1951 I.C.J. 15 (May 28) [hereinafter *Genocide Advisory Opinion*].

492. *Id.*

493. *Id.*

494. *Id.*

495. Patty Gerstenblith, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT’L L. 197, 198-99 (2001).

496. Perkins, *supra* note 10, at 452.

take or to provide immunity for actions creating an unacceptable risk of irreversible jeopardy to our common environment," the United States can "accord no veto" on the right of all people to their cultural inheritance.⁴⁹⁷

UNESCO, "like all bodies in the United Nations system, is governed by a written instrument."⁴⁹⁸ The UNESCO Constitution imposes a duty on its members to cure "the ignorance, suspicion and mistrust" aiding and abetting wars throughout history⁴⁹⁹ and to replace these furtive notions with "the intellectual and moral solidarity" necessary for peace to triumph.⁵⁰⁰

The concept of "solidarity" with "one's fellow states," was an idea put forth in between World War I and II in which Oxford law professor James Brierly gave a lecture at the Hague in 1928 entitled "The Basis of Obligation in International Law."⁵⁰¹ The notion of *solidarity*, argued Brierly, was closely linked to a state's *reputation* amongst its fellow states.⁵⁰²

Solidarity and reputation are key elements in the process-based approach to international law. Process posits an answer to why nation-states comply with international law,⁵⁰³ and also answers the question of how state-asserted foreign policy driven principles become international law.⁵⁰⁴ Through the interaction of claims and counterclaims, states must

497. *Id.* at 451-52.

498. Schachter, *supra* note 435, at 6; *see also* U.N. CHARTER art. 57(1) (providing that the specialized agencies are to be "established by intergovernmental agreement and hav[e] wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational and health fields.").

499. UNESCO CONST. pmbl. ¶ 2.

500. *Id.* pmbl. ¶ 5.

501. Koh, *supra* note 210, at 2614.

502. *Id.*

503. *Id.* at 2611; *see id.* at 2611-14 (discussing the four stands, or schools of thought responding to the question why nation-states comply with international law). *Id.* at 2611. Austin and the positivist realists asserted that states never comply with international law because "it is not law." *Id.* The Hobbesian utilitarian/rationalist strand, maintained by the Bush administration, espouses that nations sometimes obey international law, but only when it serves their purpose. Koh, *supra* note 210, at 2611. Under the Kantian view, which permeates the aspirational documents of the United Nations, nations generally obey international law "guided by a sense of moral and ethical obligation derived from considerations of natural law and justice." *Id.* The fourth, or process-based strand, explains Koh, came out of the international law writings of Jeremy Bentham, who believed that nations complied "under the encouragement and prodding of other nations with whom [they are] engaged in discursive legal process." *Id.* at 2611-12. Brierly "eschewed strict reliance on either natural law or positivist consent as sources of legal obligation, suggesting instead the need to preserve 'solidarity' with one's fellow states as an explanation for compliance." *Id.* at 2613. The UNESCO standard-setting instruments clearly demonstrate the process view.

504. Perkins, *supra* note 10, at 457.

invoke principles to back up the validity of their claims.⁵⁰⁵ “The input of this dynamic gives the contention of states a more principle-oriented course than might result from the raw process by which conflicting power seeks an equilibrium of force.”⁵⁰⁶ In short, under this pragmatic process model, states have to convince the international community of the conduct or policy they propose, rather than grant or withhold consent to a set of dickered terms. The most powerful military nation in the world has utterly failed to convince the international community of the validity of its claims that seek to justify the use of force in Iraq.⁵⁰⁷

If peace is “not to fail,”⁵⁰⁸ it is evident that law, both normative and regulatory, has to prevail over might. Where the legal subject involves the zones of common concern or the new realities, withholding consent is nothing more than a demonstration of might.

D. Rights and Duties of Belligerents: Terms of the 1954 Hague Convention

The opening declaration made by the governments of the states parties to the UNESCO Constitution, on behalf of their peoples is: “that since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed.”⁵⁰⁹ This is precisely what the 1954 Hague Convention seeks to do. It recognizes the possibility of future armed conflict, and asks states parties to organize measures “in time of peace”⁵¹⁰ to protect the “contribution to the culture of the world” made by each of the world’s peoples.⁵¹¹ The only effective way to protect mankind’s cultural property is if both national and international procedures are put in place.⁵¹²

The lofty goal of the 1954 Hague Convention is to preserve the cultural heritage of all mankind. It aims at that goal, however, by setting up specific, almost mundane steps, and measurable tasks as way-points in accomplishing its objective. Risk management or damage avoidance mechanisms, such as distinctive emblems⁵¹³ to be affixed to cultural

505. *Id.* at 457-58.

506. *Id.* at 458.

507. Jack Snyder, *One World, Rival Theories*, FOREIGN POL’Y (Nov./Dec. 2004) at 53, 58.

508. UNESCO CONST. pmb. ¶ 5.

509. *Id.*

510. 1954 Hague Convention, *supra* note 5, pmb. ¶ 5.

511. *Id.* pmb. ¶ 2.

512. *Id.*

513. *Id.*

property “so as to facilitate its recognition,”⁵¹⁴ set a universal standard that all member states then employ. The Convention provides for a registry where states parties may enter and inventory their cultural property items during peacetime.⁵¹⁵

Protection of mankind’s cultural heritage entails two duties: safeguarding and respect.⁵¹⁶ In safeguarding “the cultural property, situated within their own territory against the foreseeable effects of an armed conflict,”⁵¹⁷ states fulfill one of the tasks required to perform their duty, and achieve their goal, of *protecting* cultural property.⁵¹⁸ Although 1954 Hague Convention is generally understood as holding the internationalist view of cultural property rooted in the ideas of Vattel,⁵¹⁹ the rights and

below, per saltire blue and white (a shield consisting of a royal blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle.

Id. art. 16(1).

514. *Id.* art. 6.

515. “Special protection is granted to cultural property by its entry in the ‘International Register of Cultural Property under Special Protection.’” 1954 Hague Convention, *supra* note 5, art. 8(6).

516. *Id.* art. 2.

517. *Id.* art. 3.

518. *Id.* art. 2. For purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property.

519. See, e.g., Merryman, *supra* note 325. In this classic essay, *Two Ways of Thinking about Cultural Property*, Merryman contrasts two ways of thinking about cultural property. One way is to see these objects as “components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.” *Id.* at 831. The other way to think about cultural property is “as part of a national cultural heritage. This gives nations a special interest, implies the attribution of national character to objects, independently of their location or ownership, and legitimizes national export controls and demands for the ‘repatriation’ of cultural property.” *Id.* at 832. The 1954 Hague Convention takes the first view. *Id.* at 831-32. Merryman is the recognized proponent of the “cultural internationalist” view. Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291 n.39 (1999); see, e.g., Gerstenblith, *supra* note 175. In her seminal article, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, Gerstenblith explains why archaeologists and anthropologists support the nationalist view of cultural property. Gerstenblith distinguishes “art objects” from “cultural objects.” *Id.* at 569. Art objects, she asserts, are “examples of a human creative ability that transcend the limitations of time and place to speak to us about the human condition.” *Id.* Cultural objects, or cultural property, are “that specific form of property that enhances understanding, and appreciation for the culture that produced the particular property,” and are not to be confused with art objects. *Id.* Because they are “authentic works of a distinct collectivity” they are also incomprehensible outside their cultural context. *Id.* Cultural context is the mantra of the nationalist proponents. Gerstenblith is both an archaeologist and a law professor, and is one of the best known

advocates of the nationalist view. She is also the Co-Chair of the International Cultural Property

duties relative to protecting cultural heritage items actually recognize the cultural significance of these objects to both a specific (native group) culture, and the international community.⁵²⁰

Respect for cultural property is a duty owed by armed forces whether that property is "situated within their own territory [or] within the territory of other High Contracting Parties."⁵²¹ It is our "sense of obligation" toward cultural property that "marks our relationship with it."⁵²² The human rights and fundamental freedoms whose furtherance is the very purpose of the UNESCO Organization⁵²³ and the U.N. Charter⁵²⁴ belong to all people, "without distinction of race, sex, language or religion."⁵²⁵ This universal duty to conserve and protect "the world's inheritance of books, works of art and monuments of history and science"⁵²⁶ marks our relationship with "the cultural heritage of every people"⁵²⁷ and requires belligerent states to respect the rights and freedoms of all people to their inheritance.

Attacking forces have a duty to collaborate and protect cultural property by granting immunity from direct attack⁵²⁸ to the registered items as well as to any refuges that shelter them, or centers that contain them (if immovable).⁵²⁹ This obligation is qualified by the condition that these items and their shelters be situated "at an adequate distance" from industrial centers or major military objectives,⁵³⁰ and not used for military purposes.⁵³¹ While it is the duty of the attacking forces to refrain from attacking designated cultural property during combat, it is the duty of the besieged to mark the previously registered cultural property items with the special emblem during armed conflict.⁵³² Both parties must permit third-party international groups to verify the procedures.⁵³³ Rules regarding the transfer of cultural property during armed conflict,⁵³⁴ the requirement of

Committee of the Section of International Law and Practice of the American Bar Association.

520. Mastalir, *supra* note 454, at 1050.

521. 1954 Hague Convention, *supra* note 5, art. 4(1).

522. Harding, *supra* note 519, at 295.

523. UNESCO CONST. art. 1.

524. U.N. CHARTER art. 1(3).

525. U.N. CHARTER art. 1(3); UNESCO CONST. art. 1.

526. UNESCO CONST. art. 2(c) (emphasis added).

527. 1954 Hague Convention, *supra* note 5, art. 1(a) (emphasis added).

528. *Id.* art. 9.

529. *Id.* art. 8(1).

530. *Id.* art. 8(1(a)).

531. *Id.* art. 8(1(b)).

532. 1954 Hague Convention, *supra* note 5, art. 10.

533. *Id.*

534. *Id.* arts. 12 & 13.

international supervision thereof,⁵³⁵ and the prohibition against acts of hostility against transporting vehicles are set forth very clearly.⁵³⁶ The customary international law prohibitions against seizure, capture or prize of enemy cultural property are included,⁵³⁷ as is immunity for "personnel engaged in the protection of cultural property,"⁵³⁸ similar to customary international diplomatic immunity.

Member states, particularly belligerent states, need to collaborate if "universal respect for justice, for the rule of law and for the human rights and fundamental freedoms" affirmed by the member states of the United Nations is to be maintained in times of chaos, uncertainty, and violence.⁵³⁹ The destruction of a people's cultural patrimony "is so powerful a symbol of barbarism that the stench of it hangs in the air long afterwards: it is something impossible to forgive, impossible to forget."⁵⁴⁰

Security and exigencies of war are recognized throughout the Convention. Immunity is granted to cultural property personnel, but not if inconsistent with "the interests of security."⁵⁴¹ Invading forces may visit and search all vehicles transporting cultural property.⁵⁴² No soldier is expected to give his life for a Trojan horse.

Finally, cultural property immunity is still subject to military necessity, though "only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues."⁵⁴³ Even then, parties are required to collaborate, to the extent possible. "Whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity."⁵⁴⁴

The United States acknowledges that articles 14 and 15 of the Convention reflect the twentieth century customary laws of warfare by prohibiting the seizure of cultural property as war prize or treaty and by protecting personnel engaged in protecting cultural property as noncombatants and consents to be bound thereto under customary international law.⁵⁴⁵

535. *Id.* art. 12(2).

536. *Id.* art. 12(3).

537. 1954 Hague Convention, *supra* note 5, art. 14.

538. *Id.* art. 15.

539. UNESCO CONST. art. 1.

540. Hensher, *supra* note 4.

541. 1954 Hague Convention, *supra* note 5, art. 15.

542. *Id.* art. 14.

543. *Id.* art. 11(2).

544. *Id.*

545. Kastenbergh, *supra* note 6, at 293; 154 Hague Convention, *supra* note 5, art. 15.

The United States argues, however, that the 1954 Hague Convention has failed to consider the wartime exigencies of military necessity and proportionality.⁵⁴⁶ The United States refuses to ratify the 1954 Hague Convention on the grounds that both military necessity and proportionality are exceptions, recognized under customary international law, to the otherwise customarily binding protection due to cultural property sites and objects.⁵⁴⁷

Nahlick argues that the United States and the United Kingdom erred in using the 1907 Hague Convention as a basis for insisting upon a military necessity exception in the 1954 Hague Convention.⁵⁴⁸ The military necessity exemption, explains Nahlick, was actually an anachronism at the time the 1954 Hague Convention was drafted.⁵⁴⁹ At the 1954 Conference, the United States, Canada, Britain, and Australia all insisted that a military

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

1954 Hague Convention, *supra* note 5, art. 15.

546. *Id.* at 290.

547. *Id.* at 301-02.

548. Nahlick, *supra* note 171, at 1084.

In 1899, the German delegation insisted on inserting not only a 'necessary of war' [sic] clause into the provision dealing with destruction or seizure of enemy property, but also a general clause concerning 'military necessity' into the preamble of the convention. Both these clauses, which the other states reluctantly adopted, in order not to discourage Germany from becoming a party to the convention, passed almost automatically into the 1907 Convention as well.

Id. It is unclear how the United States and the United Kingdom, as victors in the Second World War, could logically, or morally, argue that their situation was analogous to the Bismark Reich in Germany. The only consistent conclusion to that argument is that the other nations of the world were in analogous positions to those parties defeated in the Franco-Prussian War. *See, e.g.,* HENRY KISSINGER, DIPLOMACY 169 (1994) (explaining how "Bismark's Reich was an artifice," and nothing more than "a greater Prussia whose principal purpose was to increase its own power."). "None of the ideals which had shaped the modern-nation state—not Great Britain's emphasis on traditional liberties, the French Revolution's appeal to universal freedom, or even the benign universalist imperialism of Austria." *Id.* It was precisely because Germany lacked an "integrating philosophical framework" asserts Dr. Kissinger, that its "statesmen were obsessed with naked power." *Id.*

549. Nahlick, *supra* note 171, at 1085; *see also* Birov, *supra* note 108, at 242. "By including the exception in the Convention," argues Birov, "the parties took a step backward in the development of international humanitarian law." Birov, *supra* note 108, at 242.

necessity exemption be included in the original draft of the 1954 Hague Convention.⁵⁵⁰ “The delegates of the Anglo-Saxon countries made it perfectly clear that unless [such an exemption] was included, they would not accept the convention as a whole.”⁵⁵¹ Therefore, in order to bring the so-called Anglo-Americans into the fold, and over the objections of delegates from different parts of the world, the Convention drafters added military necessity clauses.⁵⁵²

The imprecise explanation of military necessity in the 1954 Hague Convention, along with the international reaction to the destruction of cultural heritage during the conflict in the former Yugoslavia, actually drove the re-examination of the concept of military necessity.⁵⁵³ The re-examination process led, in turn, to the adoption of the Second Protocol to the Convention.⁵⁵⁴ Article 6 of the Second Protocol, Respect for Cultural Property, clarifies the military necessity waiver.⁵⁵⁵ Where cultural property has been turned into a military objective, as it was during the 1991 Gulf War when Iraq placed its fighter aircraft next to the Sumerian Temple,⁵⁵⁶ the attacking party is excused from its duty not to direct an act of hostility

550. See, e.g., Nahlick, *supra* note 171, at 1084-85 (describing a lengthy discussion on military necessity, initiated by Colonel Perham of the U.S. delegation, which took place on the 3d, 4th, 5th, 9th, and 13th meetings of the Main Commission, and at the 5th and 9th plenary meetings). *Id.* n.101 (citing INTERGOVERNMENTAL CONFERENCE ON THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT, RECORDS OF THE CONFERENCE CONVENED BY THE U.N. EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION HELD AT THE HAGUE FROM APR. 21 TO MAY 14, 1954, at 140-54, 176-80, 207-10, 214-19, 281-82 (1961)).

551. *Id.* at 1085.

552. Meyer, *supra* note 254, at 353; *see id.* (explaining that their concessions were to no avail). Even though San Marino had strongly objected to including the military necessity clause, it was still one of the first five countries to ratify the 1954 Hague Convention and thus bring it into force on August 7, 1956. *Id.* at 352. The other four were Burma, Egypt, Mexico, and Yugoslavia. *Id.*

553. See Chamberlain, *supra* note 9, at 223-24 (summarizing the impetus for the Second Additional Protocol of the 1954 Hague Convention, including the Boylan Report and the Lauswolt Doctrine).

554. Second Additional Protocol, *supra* note 282. Costa Rica was the twentieth adhering state required to bring the Protocol into force. Slovakia, Slovenia, and Switzerland followed Costa Rica, and all became party states to the Protocol during 2004. UNESCO Legal Instruments, *supra* note 5.

555. Second Additional Protocol, *supra* note 282, art. 6 (permitting the military necessity exemption, which is referred to as imperative military necessity, where the cultural property has, by its function, been made into a military objective, and where there is no feasible alternative to obtain similar military advantage offered by directing an act of hostility against that objective).

556. Kastenbergh, *supra* note 6, at 301.

against it,⁵⁵⁷ provided there is “no feasible alternative available to obtain similar military advantage.”⁵⁵⁸

The Second Additional Protocol also cures the other U.S.-asserted defect, that is, proportionality. Article 7, *Precautions in Attack*, sets forth a basic framework of proportionality as the term is understood throughout international law, i.e., nothing unreasonable or excessive.⁵⁵⁹ Parties must “do everything feasible to verify” that they are not targeting cultural property⁵⁶⁰ and “take all feasible precautions in the choice of means and methods of attack” so as to avoid, or at least minimize incidental damage to cultural property.⁵⁶¹

Under the Rules of Engagement established by the U.S. military, the waiver standard is one of *absolute* necessity.⁵⁶² The Second Additional Protocol calls this waiver *imperative* military necessity.⁵⁶³ Although it is [factually] laudable that the Coalition forces did not attack the Sumerian Temple during Operation Desert Storm, their assertion that the temple was, nevertheless, a “legitimate target,”⁵⁶⁴ leaves the legal interpretation of their actions unclear.

Military lawyers point to these actions as proof that the United States can “adhere to the limits of customary international law and prevail.”⁵⁶⁵ They err in these assertions, because the actions prove nothing of the kind. Such conduct does not indicate any recognition at all that the military action was governed by rule of law or legal obligation, as is required to find *opinio juris*, the subjective criterion necessary to assert binding customary international law.⁵⁶⁶ Nowhere has the United States

557. Second Additional Protocol, *supra* note 282, art. 6(a(i)).

558. *Id.* art. 6(a(ii)).

559. Each Party to the Conflict shall refrain from launching an attack likely to cause incidental damage to cultural property “*excessive* in relation to the concrete and direct military damage anticipated,” and must cancel or suspend an attack if it becomes apparent that the attack may be expected to cause incidental damage to cultural property which would be “*excessive* in relation to the concrete and direct military advantage anticipated.” *Id.* arts. 7(c), 7(d(ii)) (emphasis added); see ILC Draft Articles, *supra* note 260, art. 51 (defining proportionality as follows: “Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”).

560. Second Additional Protocol, *supra* note 282, art. 7(a).

561. *Id.* at 7(b).

562. Kastenberg, *supra* note 6, at 301.

563. Second Additional Protocol, *supra* note 282, art. 6(a).

564. Kastenberg, *supra* note 6, at 301.

565. *Id.*

566. ICJ Statute, art. 38(1(b)); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2) (1987) (defining customary international law as resulting from general and consistent practice of states followed by them from a sense of legal obligation); see also North Sea

acknowledged that it refrained from attacking the Iraqi aircraft because its position did not meet the standard of absolute necessity required to attack the Temple. Instead, seemingly, the Coalition forces “gave the temple a break.”⁵⁶⁷ Lack of clarity permeates the U.S. failure to act to protect Iraq’s cultural property and to limit the damage of the cultural heritage of all mankind during the Second Gulf War. Moreover, under established international law “it is not likely to be presumed that a State which has not carried out the formalities [of ratification or accession], though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way.”⁵⁶⁸

Even though we have not consented to be legally bound, whether through *opinio juris* or through positive ratification, we have condemned other nations for violating the terms of the 1954 Hague Convention. In 1987, the U.S. Department of State Bulletin accused the Soviet Union of having acted in contravention of international humanitarian law in Afghanistan.⁵⁶⁹ The five specific allegations included breaches of the Geneva Convention as well as the 1954 Hague Convention.⁵⁷⁰ In 1990, at a meeting of the U.N. Security Council, the United States “called for strict observance of the Kampuchean *legal* obligations with respect to the Angkor Wat temple complex.”⁵⁷¹ This “on-again, off-again attitude toward international legal obligations,”⁵⁷² more aptly described as hypocrisy, fails to impress. “Parties to armed conflict cannot be expected to show much sympathy for the invocation of a treaty by a state that considers it unworthy of ratification.”⁵⁷³

V. CONCLUSION: COMING TO TERMS WITH OUR INTERNATIONAL DUTIES

It is time for the United States to abandon its position outside the law of nations. We need to re-orient ourselves to law and make a firm

Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20) (emphasis added) (holding that “state practice . . . should [] have occurred in such a way as to show a *general recognition that a rule of law or legal obligation is involved*”). Without a sense of legal obligation, the conduct at issue is clearly not consensual.

567. Kastenberg, *supra* note 6.

568. *North Sea Continental Shelf Cases*, 1969 I.C.J. at 3.

569. Meyer, *supra* note 254, at 367.

570. *Id.* at 367-68.

571. *Id.* n.96 (emphasis added).

572. Mauro, *supra* note 67.

573. Meron, *supra* note 162, at 686. Meron is the President of the International Criminal Tribunal of the former Yugoslavia.

statement of what we consider to be the measure of our obligations. There are 111 states parties to the 1954 Hague Convention.⁵⁷⁴ Moreover, the United Kingdom recently announced its intention to ratify both the 1954 Hague Convention and the Second Additional Protocol.⁵⁷⁵ Even if the United States were able to meet its evidentiary burden of proving customary international law, "the occasion to invoke customary international law arises precisely where consensual agreements are lacking, or fall short, and precisely because perceived unmet needs of the international community call for invoking a concept of binding law."⁵⁷⁶

With the ratification of Britain, the United States will become the sole permanent member of the U.N. Security Council that is not a state party to the 1954 Hague Convention.⁵⁷⁷ All the OECD countries, all the EU countries with the exception of Malta, and all the so-called English-speaking countries have also ratified, acceded, or succeeded to the Convention.⁵⁷⁸ The states parties to the Helsinki Accords, again, except Malta, are also states parties to the 1954 Hague Convention.⁵⁷⁹ Although the island states of Bahamas and St. Kitts and Nevis are not states parties to the Convention, nearly all the larger OAS countries with significant military forces are.⁵⁸⁰

With all due respect to Malta and St. Kitts and Nevis, how can the United States morally argue that there is no general consensus among nations that these laws bind belligerent parties? It cannot. The only available argument the United States has is immoral: that the conduct of actively belligerent states somehow demonstrates nonconformity. Like the averred right of "free nations to do bad things and commit crimes,"⁵⁸¹ this claim is as valid as the claim expressed by the U.S. Department of Justice when its Legal Counsel concluded that customary international law prohibiting torture could not bind the Executive Branch under the U.S.

574. UNESCO Legal Instruments, *supra* note 5.

575. Chamberlain, *supra* note 9, at 240.

576. Perkins, *supra* note 10, at 472-73.

577. The Russian Federation, as successor state to the Union of Soviet Socialist Republics, ratified on Jan. 4, 1957. France ratified on June 7, 1957. China ratified on Jan. 5, 2000. UNESCO Legal Instruments, *supra* note 5.

578. *Id.*

579. *Id.* See Conference on Security and Co-operation in Europe, Final Act (Helsinki Accords), concluded Aug. 1, 1975, 14 I.L.M. 1292.

580. UNESCO Legal Instruments, *supra* note 5; see Charter of the Organization of American States, OAS, Treaty Series, Nos. 1-C and 61, Signed at Bogota on Apr. 30, 1948. The notable exception amongst OAS countries is Chile. Chile is a state party to the Roerich Pact. Roerich Pact, *supra* note 377; see *infra* Part IV; Birov, *supra* note 108, at 242 (providing no military exemption to the international legal duty to protect and preserve our common cultural heritage).

581. Mauro, *supra* note 67.

Constitution, and that any decision the U.S. President might make regarding the detention and trial of Al-Quaida or Taliban prisoners was a "controlling" executive act immediately overriding any customary international law.⁵⁸² White House Counsel Alberto R. Gonzales called the Geneva Conventions "quaint" and unsuitable to conduct the war on terrorism.⁵⁸³ These are not legal assertions. They lack all rule orientation.⁵⁸⁴

The United States was one of the original twenty ratifying countries who brought the UNESCO Constitution into force.⁵⁸⁵ All UNESCO states parties proclaimed their belief "in full and equal opportunities for education for all, in the unrestricted pursuit of objective truth, and in the free exchange of ideas and knowledge."⁵⁸⁶ All states parties recognized that widespread knowledge was inseparable from international peace and the common welfare of mankind.⁵⁸⁷ To this end, the states parties imposed a legal duty on UNESCO to "maintain, increase and diffuse knowledge."⁵⁸⁸ The United States and all states parties agreed that UNESCO would fulfill that duty "by assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science."⁵⁸⁹ This is exactly what UNESCO has attempted to do in the 1954 Hague Convention.

Under international law,⁵⁹⁰ UNESCO has a further duty to "recommend to the nations concerned the necessary international conventions" to assure the conservation and protection of the world's inherited knowledge and creation.⁵⁹¹ The United States returned to UNESCO on October 1, 2003 after a nineteen-year boycott.⁵⁹² Representative James A. Leach (R-IA), a member of the House International Relations Committee, recently

582. Memorandum from Jay S. Bybee, to Alberto R. Gonzales, Counsel to President, U.S. Dept. of Justice, Office of Legal Counsel (Aug. 1, 2002) (on file with author).

583. Neil A. Lewis, *Broad Use of Harsh Tactics is Described at Cuba Base*, NY TIMES, Oct. 17, 2004, at 1.

584. In response to the memo, a senior military attorney told the Washington Post that "once you start telling people it's okay to break the law, there's no telling where they might stop." Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for the Use of Torture: Justice Dept. Gave Advice in 2002*, Wash. Post, June 8, 2004, at A01.

585. UNESCO CONST.

586. *Id.* pmbl. ¶ 6.

587. *Id.* pmbl. ¶ 7.

588. *Id.* art. 2(c).

589. *Id.*

590. Treaties and "international conventions, whether general or particular," are a primary source of international law. I.C.J. Statute, art. 38 (1(a)).

591. UNESCO CONST. art. 2(c).

592. *Laura Bush Marks End of 19-Year UNESCO Boycott; Washington Briefs*, AM. LIBR., Nov. 1, 2003, at 12.

described our absence as “one of the least responsible circumstances that I know of for one of the least dangerous international organizations ever developed.”⁵⁹³ Testifying before the International Relations Committee, James W. Swigert, Principal Deputy Assistant Secretary of State for International Organization Affairs, stated that his group, in order to “achieve multilateral action on counterterrorism,” plans to work with UNESCO on long-term challenges of terrorist prevention.⁵⁹⁴ Mentioning that UNESCO had revived educational curricula in both Iraq and Afghanistan, Swigert agreed this was a “very effective way of making sure you do not create an environment of hatred that could later lead to people turning in the direction of extremism.”⁵⁹⁵ During the same hearing, Representative Brad Sherman (D-CA), ranking member of the House International Relations Subcommittee on International Terrorism and Non-Proliferation, expressed the hope that the International Relations Committee would consider authorizing billions of dollars to provide textbooks to countries where Al-Qaeda is gaining adherents.⁵⁹⁶

On its web site, UNESCO has posted the “return of the United States” as one of the highlights of the organization’s history.⁵⁹⁷ UNESCO has also posted the following statement on its “Culture” sectional web site:

It is abundantly clear that the use of legal instruments created some 50 years ago, such as the 1954 Hague Convention, which provides a legal framework for the protection of cultural property in the event of armed conflict, is justified as never before in view of the

593. *Diplomacy in the Age of Terrorism: The State Department’s Strategy: Hearing Before the House Comm. of Int’l Relations*, 108th Cong. § 2 (2004) (statement of James A. Leach, member), reprinted in FED. NEWS SERV., Aug. 19, 2004.

594. *Diplomacy in the Age of Terrorism: The State Department’s Strategy: Hearing Before the House Comm. of Int’l Relations*, 108th Cong. § 2 (2004) (statement of James W. Swigert, Principal Deputy Assistant Secretary of State for Int’l Org. Affairs), reprinted in FED. NEWS SERV., Aug. 19, 2004. The conference, as Asst. Secretary Swigert commented, was held on a particularly important date — the one year anniversary of the bombings in Baghdad that killed 22 U.N. personnel. *Id.*

595. *Id.* For a stunning example of the possibilities of breeding hate and extremism in young children, through the educational system, see *How Can There Be Peace in the Middle East if Israel Isn’t Even on the Map Today?*, N.Y. TIMES, Sept. 21, 2004 (full page ad taken out by the Am. Jewish Cmty.). Fifth and sixth grade schoolbooks in Syria, Saudi Arabia, and the Palestine Authority do not even show Israel on the map. American Jewish Committee Web Site, available at <http://www.ajc.org> (last visited Apr. 11, 2005).

596. *Diplomacy in the Age of Terrorism: The State Department’s Strategy: Hearing Before the House Comm. of Int’l Relations*, 108th Cong. § 2 (2004) (statement of Brad Sherman, ranking member), reprinted in FED. NEWS SERV., Aug. 19, 2004.

597. UNESCO.Org Web Site, available at <http://portal.unesco.org> (last visited Apr. 11, 2005).

recent destruction of such monuments as the Mostar Bridge in Bosnia-Herzegovina, the Buddhas at Bamiyan in Afghanistan, and more recently, the Baghdad Museum in Irak.⁵⁹⁸

“For most of our millennium, reputation has been worth more than objectively measured wealth.”⁵⁹⁹ It is time to ratify.

598. UNESCO Cultural Norms, *supra* note 433.

599. FELIPE FERNANDEZ-ARMESTO, *MILLENNIUM: A HISTORY OF THE LAST THOUSAND YEARS* 366 (1995).