

**THE ART OF ARMED CONFLICTS: AN ANALYSIS OF THE UNITED STATES'
LEGAL REQUIREMENTS TOWARDS CULTURAL PROPERTY UNDER THE 1954
HAGUE CONVENTION**

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I. INTRODUCTION

Following the looting of the Iraqi National Museum in 2003 countries and scholars around the world called upon the United States of America to ratify the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict¹ (“1954 Hague Convention” or “Convention”).² Scholars and the media wrote articles indicating the ratification of the 1954 Hague Convention would prevent another looting incident such as the one at the Iraqi National Museum because the United States would have a legal requirement to protect cultural property from third parties, including civilians.³ Still, other scholars claimed customary international law already imparted a legal requirement upon the United States to protect cultural property from third parties.⁴ Some sources, however, indicated that the United States did not have a legal requirement to protect cultural property from third parties under the 1954 Hague Convention. Ambiguities in the 1954 Hague Convention have fostered these inconsistencies in views of the protections afforded to cultural property under the Convention.

On March 13, 2009, the United States Senate ratified the 1954 Hague Convention.⁵ Now that the Senate has ratified the Convention, this discrepancy in views of the United States’ legal

¹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

² See Matthew Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE HUM. RTS. & DEV. L.J. 153, 155 (2005).

³ See *id.* at 155-56. Many scholars started their articles with a "hook" that discussed the devastation and loss from the looting of the Iraqi National Museum and then analyzed the 1954 Hague Convention and how it was applicable under international customary law even though it had not yet been ratified by the United States Senate. As these scholars preceded their discussion of the 1954 Hague Convention with descriptions of the looting of the Iraqi National Museum, it can be presumed these scholars believe the 1954 Hague Convention does bear on third parties and not just State actors. Accordingly, these scholars also probably believe Article 4(3) legally requires the United States to stop theft, pillage, misappropriation, and vandalism of cultural property from third parties because third parties looted the Iraqi National Museum.

⁴ See Wayne Sandholtz, *The Iraqi National Museum and International Law: A Duty to Protect*, 44 COLUM. J. TRANSNAT'L L. 185, 185-88 (2005).

⁵ *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, 14 May 1954*, U.N. EDUC., SCIENTIFIC AND CULTURAL ORG., <http://portal.unesco.org/la/convention.asp?KO=13637&language=E&order=alpha> (last visited Mar. 5, 2011).

requirements under the 1954 Hague Convention has taken on increased relevance.

First, this Introduction outlines the 1954 Hague Convention and defines what is cultural property under the Convention. This section also considers States' legal requirements towards cultural property before armed conflicts. In Part II, this Article reviews military jurisdiction during armed conflicts. Part III then discusses States' legal requirements towards cultural property during armed conflict and illuminates discrepancies in views of the States' legal requirements towards cultural property during armed conflict. In Part IV, this Article reviews military jurisdiction during occupation and defines occupation. In Part V, while analyzing key provisions in the 1954 Hague Convention that impart legal requirements towards cultural property during occupation, this Article highlights discrepancies in views of the States' legal requirements towards cultural property during occupation.⁶ Finally, in Part VI, this Article analyzes if there should be a duty to protect cultural property from third parties during armed conflict and occupation and, in Part VII, if the United States could have a legal requirement outside the 1954 Hague Convention to protect cultural property from third parties during armed conflict and occupation. In Part VIII, this Article concludes with a proposal to better protect cultural property during armed conflict and occupation while considering the different States' interests and practicalities of armed conflict and occupation.⁷

A. 1954 HAGUE CONVENTION

The United States signed the 1954 Hague Convention on April 14, 1954, and the Senate

⁶ This Article does not analyze all of the 1954 Hague Convention provisions, nor does it examine all regimes of protection for cultural property. For an excellent discussion of these issues, please refer to JIRI TOMAN, *THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: COMMENTARY ON THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS PROTOCOL, SIGNED ON 14 MAY, 1954 IN THE HAGUE, AND ON OTHER INSTRUMENTS OF INTERNATIONAL LAW CONCERNING SUCH PROTECTION* (1996) and ROGER O'KEEFE, *THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT* (2006).

⁷ To clarify, this Article is an analysis of the United States' legal requirements towards cultural property under the 1954 Hague Convention, which is different from what many scholars believe the United States should do. The legal requirements discussed in this Article are applicable to those States bound by the 1954 Hague Convention.

ratified the Convention on March 13, 2009.⁸ Upon ratifying the Convention, the United States listed four Understandings⁹ to clarify "minor concerns" regarding ambiguities of the language in the 1954 Hague Convention.¹⁰

The Convention has a Preamble, forty articles, and Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict. Noting that "preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection," the Preamble to the 1954 Hague Convention states the purpose of the Convention is to "take all possible steps to protect cultural property."¹¹

⁸ *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, 14 May 1954*, U.N. EDUC., SCIENTIFIC AND CULTURAL ORG., <http://portal.unesco.org/la/convention.asp?KO=13637&language=E&order=alpha> (last visited Mar. 5, 2011).

⁹ Note that while the United States called the United States' supplemental clauses to the Convention "Understandings" in U.S. documents, UNESCO listed these clauses as "Declarations." *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954*, U.N. EDUC., SCIENTIFIC AND CULTURAL ORG., http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES (last visited May 29, 2011).

¹⁰ The Understandings read:

(1) It is the understanding of the United States of America that "special protection", as defined in Chapter II of the Convention, codifies customary international law in that it, first, prohibits the use of any cultural property to shield any legitimate military targets from attack and, second, allows all property to be attacked using any lawful and proportionate means, if required by military necessity and notwithstanding possible collateral damage to such property.

(2) It is the understanding of the United States of America that any decision by any military commander, military personnel, or any other person responsible for planning, authorizing, or executing military action or other activities covered by this Convention shall only be judged on the basis of that person's assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken.

(3) It is the understanding of the United States of America that the rules established by the Convention apply only to conventional weapons, and are without prejudice to the rules of international law governing other types of weapons, including nuclear weapons.

(4) It is the understanding of the United States of America that, as is true for all civilian objects, the primary responsibility for the protection of cultural objects rests with the Party controlling that property, to ensure that it is properly identified and that it is not used for unlawful purposes.

Id.

¹¹ *Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954*, 249 U.N.T.S. 240.

Within the 1954 Hague Convention, Chapter I, Articles 1-7, explains the regime for the general protection of cultural property.¹² Chapter II, Articles 8-11, outlines the elevated protections and requirements for a very small number of specially protected cultural properties.¹³ Chapter III, Articles 12-14, deals with the transport of cultural property.¹⁴ Chapter IV, Article 15, discusses personnel who protect cultural property.¹⁵ Chapter V, Articles 16-17, describes the emblem that should mark, and thereby notify opposing military forces of the protected status of cultural property, and the use of the emblem.¹⁶ Chapter VI, Articles 18-19, outlines the scope of the application of the Convention.¹⁷ Chapter VII, Articles 20-28, deals with the execution of the Convention.¹⁸ The Final Provisions, Articles 29-40, discuss practical matters such as the signing and ratification of the 1954 Hague Convention and its relation to previous Conventions.¹⁹ The Regulations primarily deal with the procedures used to apply the 1954 Hague Convention.²⁰

The Convention applies before an armed conflict commences, during an armed conflict, and during partial or total occupation.²¹ Moreover, the Convention applies to a Party of the

¹² *Id.* arts. 1-7.

¹³ *Id.* arts. 8-11. There are elevated duties applied to specially protected cultural property. Because of the limited number of these specially protected cultural properties, this Article will not specifically address the elevated duties associated with them.

¹⁴ *Id.* arts. 12-14.

¹⁵ *Id.* art. 15.

¹⁶ *Id.* arts. 16-17.

¹⁷ *Id.* arts. 18-19.

¹⁸ *Id.* arts. 20-28.

¹⁹ *Id.* arts. 29-40.

²⁰ *Id.* art. 20. "The procedure by which the present Convention is to be applied is defined in the Regulations for its execution, which constitute an integral part thereof." *Id.*

²¹ *Id.* art. 18. Article 18 provides the following:

1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by, one or more of them.
2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
3. If one of the Powers in conflict is not a Party to the present Convention, the Powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations. They shall furthermore be bound by the Convention, in relation to the said Power, if the latter has declared, that it accepts the provisions thereof and so long as it applies them.

Convention regardless of whether the other combatants are Parties to the Convention.²²

The 1954 Hague Convention has two Protocols, neither of which the United States has signed or ratified.²³ The First Protocol primarily concerns the prevention of exportation of cultural property and the restitution of cultural property that is illegally exported during armed conflicts.²⁴ The Second Protocol, according to its preamble, "establish[es] an enhanced system of protection for specifically designated cultural property."²⁵

By ratifying the 1954 Hague Convention, the United States has obtained the ability to

Id.

²² *Id.* The United Nations Educational, Scientific and Cultural Organization serves as the depository for the Convention. *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954*, U.N. EDUC., SCIENTIFIC AND CULTURAL ORG., http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html#DEPOSITORY (last visited August 15, 2011).

²³ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 212; Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358.

²⁴ Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 23. The High Contracting Parties are agreed as follows:

I.

1. Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property as defined in Article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May, 1954.

2. Each High Contracting Party undertakes to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory. This shall either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory.

3. Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.

4. 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 in accordance with the preceding paragraph.

II.

5. Cultural property coming from the territory of a High Contracting Party and deposited by it in the territory of another High Contracting Party for the purpose of protecting such property against the dangers of an armed conflict, shall be returned by the latter, at the end of hostilities, to the competent authorities of the territory from which it came.

Id. arts. 1-5.

²⁵ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 23.

influence the development of the 1954 Hague Convention.²⁶ President Clinton, in his Message to the Senate on January 6, 1999, noted, "As only parties may adopt amendments, U.S. ratification would enable us to play an appropriate role in this initiative, as well as the future course of the Convention generally."²⁷ Later, President Clinton elaborated that ratification of the Convention would "help ensure that the United States is in a position to protect its interests in the context of efforts to amend the Convention."²⁸ Under Article 39(5), even one Party can block an amendment to the 1954 Hague Convention as unanimity is required to pass an amendment.²⁹ Thus, by ratifying the 1954 Hague Convention, the United States can unilaterally block any amendment to the Convention.³⁰ Practically, by ratifying the Convention, the United States can stop the Convention from evolving in a direction that the United States does not wish it to develop, whether that is increased or decreased protection for cultural property.³¹

B. WHAT IS CULTURAL PROPERTY?

There are multiple definitions and understandings of the term "cultural property," which has caused discrepancies in views of what the United States is legally required to protect under the 1954 Hague Convention. The 1907 Hague Convention Respecting the Laws and Customs of War on Land³² ("1907 Hague Convention"), which preceded the 1954 Hague Convention, provides protection for broad categories of cultural property, including "buildings dedicated to

²⁶ Message from the President of the United States on the Hague Convention and the Hague Protocol, S. TREATY DOC. NO. 106-1, at X (Jan. 6, 1999), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/GC-message-from-pres-1999.pdf.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 11, art. 39(5).

³⁰ *Id.*; *see also* Message from the President of the United States on the Hague Convention and the Hague Protocol, *supra* note 26.

³¹ Under this system, the United States can prevent any other cultural properties from being added to the special protection list and any further protections from being added to the Convention. Note that the United States recently stated, "The U.S. asserts the special protection regime does not reflect customary international law." LTC JEFF A. BOVARNICK ET AL., LAW OF WAR DESKBOOK 136 (Capt. Brian J. Bill ed., 2010), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf.

³² Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, 36 Stat. 2277.

religion, art, science, or charitable purposes [and] historic monuments."³³ The United States Law of War Deskbook also defines cultural property as including buildings dedicated to religion, art, science, or charitable purposes and historic monuments.³⁴

Under the 1954 Hague Convention, Article 1 gives the legal definition of cultural property. This clause is the threshold requirement for accessing the protections under the 1954 Hague Convention.³⁵ Article 1 of the 1954 Hague Convention defines cultural property as "movable or immovable property of great importance to the cultural heritage of every people" and buildings or centers containing cultural property.³⁶ The legal definition in Article 1 departs

³³ *Id.* art. 27. "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments" *Id.* The drafters of the 1954 Hague Convention wanted a narrower definition or scope of cultural property as many felt that the reason for the "supposed failure of the provisions of the [1907] Hague Rules relevant to cultural property (in the lay sense) stemmed in part from their 'over-ambitious definitions' which, by 'aiming too high', risked 'getting too little.'" ROGER O'KEEFE, *THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT* 101 (2006).

The 1907 Hague Convention is included in this Article because the 1954 Hague Convention supplements the 1907 Hague Convention under Article 36 of the 1954 Hague Convention and the United States is a Party to the 1907 Hague Convention. Article 36 of the 1954 Hague Convention notes that the 1954 Hague Convention is supplementary to the 1907 Hague Convention. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 36, May 14, 1954, 249 U.N.T.S. 240. The United States signed the 1907 Hague Convention on October 18, 1907, and the Senate ratified the 1907 Hague Convention on November 27, 1909. *Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907*, INT'L COMMITTEE OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=195&ps=P> (last visited June 22, 2011).

³⁴ LTC JEFF A. BOVARNICK ET AL., *LAW OF WAR DESKBOOK* 137 (Capt. Brian J. Bill ed., 2010), available at http://www.loc.gov/tr/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf; MAJ. DEREK GRIMES ET AL., *LAW OF WAR HANDBOOK* 175 (Maj. Keith Pulse ed., 2005), available at http://www.loc.gov/tr/frd/Military_Law/pdf/law-war-handbook-2005.pdf.

³⁵ Even if the property does not fit within Article 1, property not protected under the 1954 Hague Convention might still be protected under the 1907 Hague Convention or other international regime. The categories of cultural property protection under the 1907 Hague Convention are broader than Article 1 under the 1954 Hague Convention, such that if property is not determined to be cultural property and afforded protections under the 1954 Hague Convention, the property might still fit within the protections of the 1907 Hague Convention.

³⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 33, art. 1, defining cultural property as follows:

(a) *movable or immovable property of great importance to the cultural heritage of every people*, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural

from a layperson's use of the term cultural property, which causes confusion in understanding what is protected under the 1954 Hague Convention. A layperson's term for cultural property is far broader and more encompassing than Article 1's definition of cultural property.

The vague definition of cultural property in the 1954 Hague Convention causes discrepancies in interpretation even within the parameters of Article 1. The qualifier "of great importance to the cultural heritage of every people" makes the definition ambiguous.³⁷ How is a military force to know what is of great importance to the cultural heritage of every people, especially when entering a foreign State?³⁸

Scholar Roger O'Keefe remarked upon the ambiguity of the term "every people" in Article 1 and noted that this term has two potential meanings: (1) all people in the world or (2) all people in the State where the property is located.³⁹ O'Keefe believed the second meaning was the correct interpretation of "every people."⁴⁰ Thus, under O'Keefe's interpretation each State determines what is "of great importance to the cultural heritage" sufficient to constitute cultural

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

Id. (emphasis added).

³⁷ *Id.* Furthermore, Article 8, in Chapter II of the Convention, grants additional "special protection" to a "limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance." *Id.* art. 8.

³⁸ For example, while President Clinton's Message to the Senate on January 6, 1999, noted that "[t]he definition is thus *restricted* to property of great importance only," the letter to Congress written by fifteen national cultural organizations stated that "Article 1 of the Hague Convention offers a *broad* definition of cultural property as 'movable or immovable property of great importance to the cultural heritage of every people.'" Message from the President of the United States on the Hague Convention and the Hague Protocol, S. TREATY DOC. NO. 106-1, at X (Jan. 6, 1999) (emphasis added), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/GC-message-from-pres-1999.pdf (emphasis added); Statement of the Archaeological Institute of America, Lawyers' Committee for Cultural Heritage Preservation, United States Committee of the Blue Shield, American Anthropological Association, American Association of Museums, American Institute for Conservation of Historic and Artistic Works, American Schools of Oriental Research, Association of Moving Image Archivists, College Art Association, National Trust for Historic Preservation, Society for American Archaeology, Society for Historical Archaeology, Society of American Archivists, United States Committee of the International Council on Monuments and Sites, and the World Monuments Fund Before the Senate Foreign Relations Committee The Honorable Robert P. Casey, Jr. in Support of Ratification of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (Apr. 15, 2008) (emphasis added).

³⁹ O'KEEFE, *supra* note 33, at 104.

⁴⁰ *Id.*

property under Article 1. In practice, however, if the State does not mark what it determines to be cultural property under Articles 3 and 6, the invading or occupying State has to determine what property fits within Article 1. Thus, the invading State would have to determine what property the invaded State would consider of great importance to its cultural heritage.⁴¹

If, the term in Article 1 refers to all people of the world, however, that too causes difficulty. The invaded State might mark the property that it believes is important to its cultural heritage, but who or which entity determines what is of great importance to all people in the world? The military force could ask for cultural property specialists' opinions, but this approach still does not take into account all persons' considerations. Not all cultural property is of great importance simply because of its fiscal or artistic value.

Thus, one cause of discrepancy in views of the United States' legal requirements to protect cultural property is the different views of what is cultural property under the 1954 Hague Convention.

C. LEGAL REQUIREMENTS TOWARDS CULTURAL PROPERTY BEFORE ARMED CONFLICTS

All Parties to the 1954 Hague Convention have legal requirements towards cultural property before an armed conflict arises.⁴² Under Article 7, the future invading State and future invaded State have legal requirements to instill respect for cultural property and provide instructions to ensure compliance with the 1954 Hague Convention before an armed conflict.⁴³

⁴¹ *Id.*

⁴² While the armed conflict in Iraq is frequently discussed in this Article, the legal requirements apply to all Parties to the 1954 Hague Convention. Parties might have further obligations depending on the treaties to which such State is a Party and such State's own laws. Additionally, in this Article, the United States is the invading State and the occupying State. If the United States were invaded or occupied it would have the same legal requirements towards cultural property as the invaded States and occupied States discussed in this Article.

⁴³ Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 7, May 14, 1954, 249 U.N.T.S. 240. Under Article 7, Parties

1. . . . undertake to introduce in time of peace into their military regulations or instructions such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples.

The future invading State and invaded State must install people, programs, and regulations that will ensure respect for cultural property and cooperation with civilians responsible for safeguarding cultural property.⁴⁴

Furthermore, under Article 3, the future invaded State has an additional legal requirement to “undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.”⁴⁵ For example, Corrine Wegener noted that in Iraq, staff had planned for the armed conflict and had

used cement blocks to close up several entrances and storage areas to hinder looters, surrounded dozens of immovable sculptures and friezes with foam to protect against bomb damage, and sandbagged the floor of the Assyrian Gallery to protect the large stone friezes in case they fell during bombing. Finally, well in advance of the invasion, the staff painted the international symbol for the protection of cultural property, the blue shield, on the roof of the museum.⁴⁶

Thus, the invaded State has a legal requirement to prepare for the protection of the cultural property.

One way a State can safeguard its cultural property is to mark the cultural property with an emblem to notify military forces the property is protected cultural property. Under the 1907 Hague Convention, the State under attack has the responsibility of marking cultural buildings

2 . . . undertake to plan or establish in peace-time, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it.

Id.

⁴⁴ *Id.*

⁴⁵ *Id.* art. 3.

⁴⁶ Corine Wegener & Marjan Otter, *Cultural Property at War: Protecting Heritage During Armed Conflict*, THE GETTY CONSERVATION INST., Spring 2008,

http://www.getty.edu/conservation/publications/newsletters/23_1/feature.html. Wegener further noted,

While these precautions were instrumental in saving much of the collection, small oversights proved disastrous. For example, the lack of a key control system allowed keys for secure storage to fall into the hands of the looters, giving them access to areas they might not otherwise have reached. More than four thousand ancient cylinder seals were lost from one storage area alone.

Id.

and monuments.⁴⁷ The State under attack must also notify the aggressors of the presence of the cultural property before the attack.⁴⁸ Article 6 of the 1954 Hague Convention further notes that “cultural property may bear a distinctive emblem so as to facilitate its recognition.”⁴⁹ The United States Law of War Deskbook emphasizes that the opposition must distinctively mark the cultural property pursuant to the 1954 Hague Convention so that the emblem is visible.⁵⁰ Article 16 describes the emblem, which consists of blue and white triangles and squares.⁵¹ Under Article 4(5) of the 1954 Hague Convention, however, a State's failure to safeguard cultural property against foreseeable effects of armed conflict does not relieve the invading State of the duty to respect cultural property under the 1954 Hague Convention.⁵²

Marking cultural property is a basic protective measure that helps notify military forces of the protected status of the property, thereby reducing the possibility of harm from invading States. Cultural property is not always readily identifiable without these markings, especially during an armed conflict. While the United States Military Operational Law Handbook acknowledges that “state adherence to the marking requirement has been limited” such that the United States often uses information it acquires to determine if the site is cultural property,⁵³

⁴⁷ Convention Respecting the Laws and Customs of War on Land art. 27, Oct. 18, 1907, Annex, 36 Stat. 2277. Under Article 27, “[i]t is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.” *Id.*

⁴⁸ *Id.*

⁴⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 43, art. 6.

⁵⁰ LTC JEFF A. BOVARNICK ET AL., LAW OF WAR DESKBOOK 138-39 (Capt. Brian J. Bill ed., 2010), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf; *see also* MAJ. DEREK GRIMES ET AL., LAW OF WAR HANDBOOK 175 (Maj. Keith Pulse ed., 2005), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2005.pdf.

⁵¹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 43, art. 16.

⁵² *Id.* art. 4(5). Under Article 4(5), “[n]o High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3.” *Id.*

⁵³ MAJ. ROBERT BARNSBY ET AL., OPERATIONAL LAW HANDBOOK 23 (Maj. Sean Condron ed., 2011), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2011.pdf; *see also* MAJ. JAMES BARKEI ET AL., OPERATIONAL LAW HANDBOOK 22 (Capt. Brian Bill et al. eds., 2010), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2010.pdf; MAJ. MARIE ANDERSON ET AL., OPERATIONAL LAW HANDBOOK 22 (Capt. Brian Bill et al. eds., 2009), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2009.pdf.

marking the cultural property is a critical safeguarding measure States should implement.

If States do not use such a basic measure to safeguard their own property from invading States, the likelihood that these same States will implement safeguards to protect the cultural property from their very own citizens is not very good. Despite such intermittent adherence, there are multiple legal requirements for all Parties prior to an armed conflict.

II. MILITARY JURISDICTION DURING ARMED CONFLICTS

A. INTRODUCTION

Jurisdiction is important because jurisdiction indicates who has authority over the actor. Moreover, jurisdiction usually indicates what laws will apply. For example, the U.S. military will not apply Iraqi laws to U.S. personnel under U.S. jurisdiction. For a comprehensive analysis of whether a State has a legal requirement to protect cultural property, one must know which State has jurisdiction over the military members and the persons within the armed conflict zone or occupied area.⁵⁴

Upon analysis, the U.S. military retains jurisdiction over its military members and contractors in all territories during armed conflict. Jurisdiction is not dispositive of which laws will apply, but if the United States has jurisdiction over its members, then U.S. laws will apply. The previous sovereign has jurisdiction over the persons in the armed conflict zone until the U.S. military occupies the area. The laws the tribunal will apply are not purely the previous sovereign's laws once the U.S. military has influence.⁵⁵ Using jurisdiction to predict which laws

Does the act of marking the cultural property under the 1907 Hague Convention or the 1954 Hague Convention denote an acceptance of those Conventions such that by availing themselves to the benefits of the Convention they are then bound by its burdens? These treaties—if followed—are equally burdensome on both factions. If marking the cultural property denotes acceptance of the treaties, this might act as a deterrent to mark the cultural property, thereby removing one form of protection.

⁵⁴ In this Article, "persons within the armed conflict zone" means the people who live within the invaded State.

⁵⁵ During a discussion about persons in the armed conflict zone, it is important to keep the active hostiles fighting the U.S. military separate from the persons living within the armed conflict zone. Lawful enemy combatants who violate the law of war can come under the jurisdiction of the U.S. military and thus are subject to the Uniform Code

will apply to persons in the armed conflict zone is not as helpful as using jurisdiction to determine which laws apply to the U.S. military members.

B. JURISDICTION OVER MILITARY SERVICE MEMBERS

The U.S. military retains jurisdiction over U.S. personnel and contractors in all territories. Members of the U.S. military and people who are working with the military during a time of armed conflict are under the jurisdiction of the United States and are subject to the United States Uniform Code of Military Justice⁵⁶ (“UCMJ”).⁵⁷ These persons are subject to the UCMJ in all

of Military Justice. Uniform Code of Military Justice art. 2, 10 U.S.C. § 802 (2011). This Article does not address the different statuses of and jurisdictions over hostiles who actively fight against the United States.

⁵⁶ 10 U.S.C. §§ 801-946 (2011).

⁵⁷ Uniform Code of Military Justice art. 2, 10 U.S.C. § 802. The list of persons subject to the United States Uniform Code of Military Justice includes the following:

- (1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.
- (2) Cadets, aviation cadets, and midshipmen.
- (3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.
- (4) Retired members of a regular component of the armed forces who are entitled to pay.
- (5) Retired members of a reserve component who are receiving hospitalization from an armed force.
- (6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.
- (7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.
- (8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.
- (9) Prisoners of war in custody of the armed forces.
- (10) In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.
- (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.
- (12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.
- (13) Individuals belonging to one of the eight categories enumerated in Article 4 of the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316), who violate the law of war.

Id.

territories inside and outside of the United States.⁵⁸ The relevance of these provisions is that in times of armed conflict and occupation, persons subject to the UCMJ are not subject to the jurisdiction or laws of the State which they are in and where the potential violations will occur.

C. JURISDICTION OVER PERSONS IN THE ARMED CONFLICT ZONE

Jurisdiction over persons in the armed conflict zone is more complicated. The sovereign has jurisdiction over its citizens before the arrival of the invading State. Under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War⁵⁹ and the 1907 Hague Convention Respecting the Laws and Customs of War on Land⁶⁰ ("1907 Hague Convention"), the invading State has a legal requirement to respect and support the laws in place before its invasion.⁶¹ In practice, however, the invading State's military commanders often have influence over the invaded State's judiciary as the invading State's military advances.⁶²

For example, as early as April 2003, United States Army Judge Advocates had entered

⁵⁸ Uniform Code of Military Justice art. 5, 10 U.S.C. § 805.

⁵⁹ Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 64, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Under Article 64,

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.

Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Id. The United States Senate ratified this Convention on February 8, 1955. *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, INT'L COMMITTEE OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited June 22, 2011).

⁶⁰ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, 36 Stat. 2277.

⁶¹ *Id.* art. 43. Under Article 43, "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall 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." *Id.* LTC Craig T. Trebilcock, *Legal Cultures Clash in Iraq*, ARMY LAW., Nov. 2003, 48, 48-51.

⁶² Trebilcock, *supra* note 61, at 48-51.

Iraq to restore the Iraqi judiciary.⁶³ Upon determining there was corruption and bias towards the Baath party within the Iraqi judiciary, the United States Army Judge Advocates interviewed, investigated, and removed the corrupt Iraqi officials.⁶⁴ Thus, the U.S. military reconstructed the Iraqi judiciary as its forces invaded.⁶⁵ As the United States obtained greater control over the area, it obtained greater control over the laws in place.

III. LEGAL REQUIREMENTS TOWARDS CULTURAL PROPERTY DURING ARMED CONFLICT

A. INTRODUCTION

Both the invading State and the invaded State are responsible for cultural property during armed conflict. The invading State and the invaded State have legal requirements to protect cultural property and not harm cultural property unless military necessity exists or, potentially, if the opposition misuses the cultural property.

B. THE UNITED STATES' LEGAL REQUIREMENTS TOWARDS CULTURAL PROPERTY DURING ARMED CONFLICT

1. Offensive Military Action

This Article will first look at the U.S. military's legal requirements towards cultural property in offensive actions during armed conflict. For the purposes of this Article, offensive actions refer to actions in which the United States is the aggressor.⁶⁶ Typically, in an offensive action the cultural property is not the primary consideration. The cultural property can be in the way of the military action or may be used as a shield. Alternatively, a defensive action occurs

⁶³ *Id.* (citing OVERSEAS PROSECUTORIAL DEVELOPMENT & TRAINING OFFICE OF THE U.S. DEP'T OF JUSTICE, REPORT OF THE IRAQ JUDICIAL ASSESSMENT TEAM (2003) (on file with the Center for Law & Military Operations, The Judge Advocate General's Legal Center & School, U.S. Army, Charlottesville, Virginia)).

⁶⁴ *Id.*

⁶⁵ For a review of how the United States reconstructed the judiciary in Germany after World War II, please refer to Karl Loewenstein, *Law and the Legislative Process in Occupied Germany: II*, 47 Yale L.J. 994 (1948).

⁶⁶ For example, an offensive action occurs when U.S. soldiers fire upon a building because hostile persons are in the building or use the building as a shield.

when the U.S. military protects the cultural property.⁶⁷ When the mission is to protect cultural property, the cultural property is the key consideration. There is also a gray area for street-to-street fighting wherein buildings or cultural property are not involved in the soldier's mission—to either attack or defend the cultural property.

U.S. military sources and many of the treaties the United States has ratified primarily address offensive military actions against cultural property.⁶⁸

a. Legal Requirement Not to Harm Cultural Property

During offensive actions, the primary legal requirement the U.S. military has is a legal requirement not to harm the cultural property. Under Article 27 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land⁶⁹ ("1907 Hague Convention"), the U.S. military accepted a responsibility to inter alia not harm religious property, art, historical buildings and monuments "as far as possible."⁷⁰

Moreover, under Article 56 of the 1907 Hague Convention, municipal and State property dedicated to religion, art and science is accorded the same protection as private property.⁷¹ "All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."⁷² The United States Law of War Deskbook reiterates these principles.⁷³

⁶⁷ See *infra* notes 107-34 and accompanying text (discussing defensive actions).

⁶⁸ Matthew Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, YALE HUM. RTS. & DEV. L.J., 153, 168 (2005).

⁶⁹ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, 36 Stat. 2277.

⁷⁰ *Id.* art. 27. The United States signed the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land ("1907 Hague Convention") on October 18, 1907, and the Senate ratified the 1907 Hague Convention on November 27, 1909. *Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907*, INT'L COMMITTEE OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=195&ps=P> (last visited June 22, 2011).

⁷¹ Convention Respecting the Laws and Customs of War on Land, *supra* note 69, art. 56.

⁷² *Id.*

⁷³ LTC JEFF A. BOVARNICK ET AL., LAW OF WAR DESKBOOK 116 (Capt. Brian J. Bill ed., 2010), available at http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf; see also MAJ. ROBERT BARNSBY ET AL.,

U.S. sources further illustrate the U.S. military's views of its legal requirements not to harm cultural property. The Law of War Deskbook references the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict⁷⁴ (“1954 Hague Convention” or “Convention”) and states that the U.S. military should not attack cultural property.⁷⁵ Under Article 4(1), the 1954 Hague Convention requires that its signatories “respect” cultural property by not harming the property.⁷⁶ Thus, the United States has a legal requirement to not harm cultural property.

b. Exceptions

Two primary exceptions limit the legal requirement not to harm cultural property. These exceptions are the military necessity exception and, potentially, the misuse of cultural property exception.⁷⁷

The first exception that limits the legal requirement not to harm cultural property is the military necessity exception. This exception provides flexibility to accommodate the

OPERATIONAL LAW HANDBOOK 15 (Maj. Sean Condrón et al. eds., 2011), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2011.pdf.

⁷⁴ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

⁷⁵ BOVARNICK ET AL., *supra* note 73, 137.

⁷⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 74, arts. 4(1), 9. Under Article 4(1), the signatory States,

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

Id. Under Article 9,

[t]he High Contracting Parties undertake to ensure the immunity of cultural property under special protection by refraining, from the time of entry in the International Register, from any act of hostility directed against such property and, except for the cases provided for in paragraph 5 of Article 8, from any use of such property or its surroundings for military purposes.

Id.

⁷⁷ MAJ. ROBERT BARNSBY ET AL., OPERATIONAL LAW HANDBOOK 15 (Maj. Sean Condrón et al. eds., 2011), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2011.pdf. The United States believes the 1954 Hague Convention permits exceptions to the legal requirement not to harm. “The 1954 Hague Cultural Property Convention . . . sets forth conditions when cultural property may be used by a defender or attacked.” *Id.*

practicalities of armed conflict and applies in a multitude of situations when the necessity of the situation permits a military actor to proceed without fault.⁷⁸

The 1907 Hague Convention notes that, while it is improper to take or destroy the opposition's property, infringement on property is permitted if it is “imperatively demanded by the necessities of war.”⁷⁹ The 1954 Hague Convention further supports this proposition, noting that “any use” that would “expose [the cultural property] to destruction” and any actual harm to the cultural property may be permitted if “military necessity imperatively requires such a waiver.”⁸⁰

⁷⁸ Note as early as 1863, Article 14 of the *Instructions for the Government of Armies of the United States in the Field* ("Lieber Code") provided for the military necessity exception. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 art.14 (1863), *available at* http://avalon.law.yale.edu/19th_century/lieber.asp. Article 14 of the Lieber Code noted "[m]ilitary necessity, as understood by modern civilized nations, consists in the necessity of 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." *Id.* Furthermore, under Article 15, "Military necessity . . . allows of all destruction of property . . ." *Id.* art. 15. The Lieber Code was created by Francis Lieber at the request of President Lincoln. *Id.*

The 2010 Law of War Deskbook further explains military necessity as follows:

Principle of Military Necessity. That principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. It was defined originally in the Lieber Code: “those measures which are indispensable for securing the ends of war, and which are lawful according to the modern laws and usages of war.”

1. These definitions have two common elements:
 - a. A military requirement to undertake the action; and
 - b. The action must not be forbidden by the law of war.

LTC JEFF A. BOVARNICK ET AL., *LAW OF WAR DESKBOOK 130* (Capt. Brian J. Bill ed., 2010), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf.

There are many views on the breadth of the military necessity exception. The military necessity exception could eviscerate many rules, however, including the duty not to harm cultural property. While the military necessity exception is well rooted in military law, the exception must be carefully monitored to prevent misuse.

⁷⁹ Convention Respecting the Laws and Customs of War on Land art. 23(g), Oct. 18, 1907, Annex, 36 Stat. 2277; *see also* BARNSBY ET AL., *supra* note 77, at 10-11; MAJ. JAMES BARKEI ET AL., *OPERATIONAL LAW HANDBOOK 10-11* (Capt. Brian Bill et al. eds., 2010), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2010.pdf; MAJ. MARIE ANDERSON ET AL., *OPERATIONAL LAW HANDBOOK 22* (Capt. Brian Bill et al. eds., 2009), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2009.pdf.

⁸⁰ Convention for the Protection of Cultural Property in the Event of Armed Conflict arts. 4(1)-(2), May 14, 1954, 249 U.N.T.S. 240. In regard to military necessity, President Clinton, when explaining the 1954 Hague Convention stated, "Historically, the United States has recognized special protection for cultural property in armed conflict . . . [and a] waiver of the protection in the event of military necessity." Message from the President of the United States on the Hague Convention and the Hague Protocol, S. TREATY DOC. NO. 106-1, at VIII (Jan. 6, 1999), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/GC-message-from-pres-1999.pdf. He also noted,

The essence of the position historically taken by U.S. military forces is contained in a memorandum issued on December 29, 1943, by General Dwight D. Eisenhower to U.S. forces in

The United States Military Operational Law Handbook further emphasizes that military necessity is not a criminal defense⁸¹ and that the appropriateness of the use of the military necessity exception is to be evaluated based upon the information available to the commanding officer when she or he makes the decision to harm the cultural property, not using information acquired subsequently or with the benefit of hindsight.⁸² One of the U.S. Understandings to the 1954 Hague Convention reiterates this principle noting,

It is the understanding of the United States of America that any decision by any military commander, military personnel, or any other person responsible for planning, authorizing, or executing military action or other activities covered by

Italy:

Today we are fighting in a country which has contributed a great deal to our cultural inheritance, a country rich in monuments which by their creation helped and now in their old age illustrate the growth of the civilization which is ours. We are bound to respect those monuments so far as war allows.

If we have to choose between destroying a famous building and sacrificing our own men, then our men's lives count infinitely more and the building must go. But the choice is not always so clear-cut as that. In many cases the monuments can be spared without any detriment to operational needs. Nothing can stand against the argument of military necessity. That is an accepted principle. But the phrase "military necessity" is sometimes used where it would be more truthful to speak of military convenience or even personal convenience. I do not want it to cloak slackness or indifference.

It is the responsibility of higher commanders to determine ... the locations of historical monuments whether they be immediately ahead of our front lines or in areas occupied by us. This information passed to lower echelons through normal channels places the responsibility on all commanders of complying with the spirit of this letter.

Id. There is a higher burden to invoke military necessity for specially protected cultural property under Article 11. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra*, art. 11.

The Second Protocol to the 1954 Hague Convention further limits the military necessity exception and institutes criminal liability for failure to follow these obligations. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, ch. 4, Mar. 26, 1999, 2253 U.N.T.S. 212. While the United States has not adopted the Second Protocol, certain articles in the Second Protocol should be considered as other countries have adopted the Second Protocol, the Second Protocol is still under consideration by the United States and certain of its provisions could be considered customary international law, which will be discussed later. *Id.* Article 6 of the Second Protocol limits the military necessity exception to

direct[ing] 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. Article 6 requires that the determination of military necessity be made by an officer who is in command of a force the size of a battalion or larger, but there is an exception if the circumstances do not allow for that rank of a commanding officer to do this. *Id.*

⁸¹ BARNSBY ET AL., *supra* note 77, at 10-11; *see also* BARKEI ET AL., *supra* note 79, at 11; ANDERSON ET AL., *supra* note 79, at 10-11.

⁸² BARNSBY ET AL., *supra* note 77, at 10-11; *see also* ANDERSON ET AL., *supra* note 79, at 10-11.

this Convention shall only be judged on the basis of that person's assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken.⁸³

Once military necessity is established, the commander must determine if the cultural property is a legal target, or military objective, under the Military Objective Test.⁸⁴ The Operational Law Handbook notes that military objects are always legal targets and that other objects not "expressly military" can become a lawful target if the object satisfies the Military Objective Test.⁸⁵

The United States Military Objective Test restates the military objective test in Article 52(2) of Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts⁸⁶ ("Protocol I to the Geneva Conventions").⁸⁷ The Military Objective Test in the United States Military Operational Law Handbook is a two-step process that establishes whether military necessity allows the object or building to become a lawful target of the U.S. military.⁸⁸ The first prong in the test requires the commanding officer to

⁸³ *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954*, U.N. EDUC., SCIENTIFIC AND CULTURAL ORG., http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES (last visited May 29, 2011).

⁸⁴ BARNESBY ET AL., *supra* note 77, at 20-21; *see also* BARKEI ET AL., *supra* note 79, at 19, 146; ANDERSON ET AL., *supra* note 79, at 146. The 2010 Law of War Deskbook notes that "a Military objective is a component of military necessity. Once a commander determines he or she has a military necessity to take a certain action or strike a certain target, then he or she must determine that the target is a valid military objective." BOVARNICK ET AL., *supra* note 78, at 131.

⁸⁵ BARNESBY ET AL., *supra* note 77, at 20-21; *see also* BARKEI ET AL., *supra* note 79, at 12, 19; ANDERSON ET AL., *supra* note 79, at 21-22.

⁸⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, 1125 U.N.T.S. 3.

⁸⁷ *Id.* art. 52(2); *see also* BARNESBY ET AL., *supra* note 77, at 20-21; BARKEI ET AL., *supra* note 79, at 19; ANDERSON ET AL., *supra* note 79, at 146. Military Objectives are "objects which by their nature, location, purpose or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." BARNESBY ET AL., *supra* note 77, at 20-21; *see also* BARKEI ET AL., *supra* note 79, at 12, 19.

⁸⁸ BARNESBY ET AL., *supra* note 77, at 20-21; *see also* BARKEI ET AL., *supra* note 79, at 19; ANDERSON ET AL., *supra* note 79, at 21-22. The Operational Law Handbook further reiterates that interpretation of this test does not change

determine if the object or building would "make an effective contribution to military action" by assessing the "nature, location, purpose or use" of the potential target.⁸⁹ The second prong of the test is to determine if destroying the object or building would give a "definite military advantage" in accordance with the circumstances at the time of the decision.⁹⁰

the understanding of the military necessity test in the Lieber Code, which President Lincoln ordered Francis Lieber to write in 1863. BARNESBY ET AL., *supra* note 77, at 20-21; *see also* ANDERSON ET AL., *supra* note 79, at 20-22.

⁸⁹ BARNESBY ET AL., *supra* note 77, at 20-21; *see also* BARKEI ET AL., *supra* note 79, at 19; ANDERSON ET AL., *supra* note 79, at 21-22. The 2010 Law of War Deskbook defines the components in the first prong as follows:

a. "Nature, location, purpose, or use"

i. "Nature" is defined in the Commentary as "all objects used directly by the armed forces," such as weapons, tanks, transports, etc.

ii. "Location" is defined in the Commentary as "a site which is of special importance for military operations in view of its location," such as a bridge or a piece of ground.

iii. "Purpose" is defined in the Commentary as "concerned with the intended future use of an object."

iv. "Use," on the other hand, is defined in the Commentary as "concerned with [the object's] present function," such as a school being used as a military headquarters.

b. "Make an effective contribution to military action." In theory, even if the object is clearly military in nature, such as a tank, if it does not meet this test (e.g., it is sitting out in the desert, abandoned), it is not a military objective. In reality, such a target would be extremely low on the target list anyway as it would not be considered an effective use of limited resources.

BOVARNICK ET AL., *supra* note 78, at 131. The 2011 Operational Law Handbook further explains:

(1) **Nature** refers to the type of object. Examples of enemy military objectives which by their nature make an effective contribution to military action include: combatants, armored fighting vehicles, weapons, fortifications, combat aircraft and helicopters, supply depots of ammunition and petroleum, military transports, command and control centers, communication stations, etc.

(2) **Location** includes areas that are militarily important because they must be captured or denied an enemy, or because the enemy must be made to retreat from them. Examples of enemy military objectives which by their location make an effective contribution to military action include: a narrow mountain pass through which the enemy formation must pass, a bridge over which the enemy's main supply route (MSR) crosses, a key road intersection through which the enemy's reserve will pass, etc. A town, village, or city may become a military objective even if it does not contain military objectives if its seizure is necessary to protect a vital line of communications or for other legitimate military reasons.

(3) **Purpose** means the future intended or possible use. Examples of enemy military objectives which by their purpose make an effective contribution to military action include: civilian buses or trucks which are being transported to the front to move soldiers from point A to B, a factory which is producing ball bearings for the military, the Autobahn in Germany, etc. While the criterion of purpose is concerned with the intended, suspected, or possible future use of an object, the potential military use of a civilian object, such as a civilian airport, may make it a military objective because of its future intended or potential military use.

(4) **Use** refers to how an object is presently being used. Examples of enemy military objectives which by their use make an effective contribution to military action include: an enemy headquarters located in a school, an enemy supply dump located in a residence, or a hotel which is used as billets for enemy troops.

BARNESBY ET AL., *supra* note 77, at 20-21; *see also* BARKEI ET AL., *supra* note 79, at 20.

⁹⁰ BARNESBY ET AL., *supra* note 77, at 20-21; *see also* BARKEI ET AL., *supra* note 79, at 19; ANDERSON ET AL., *supra* note 79, at 20-22. The 2011 Operational Law Handbook clarifies that:

Furthermore, under the principle of proportionality, the damage to property should not exceed the “direct military advantage expected to be gained.”⁹¹ This principle of proportionality

The words “nature, location, purpose or use” allow wide discretion, but are subject to qualifications stated in the definition/test, such as that the object make an “effective contribution to military action” and that its destruction, capture, or neutralization offers a “definite military advantage” under the circumstances. There does not have to be a geographical connection between “effective contribution” and “military advantage.” Attacks on military objectives in the enemy rear, or diversionary attacks away from the area of military operations are lawful.

The phrase “in the circumstances ruling at the time” is important. If, for example, enemy military forces have taken position in a building that otherwise would be regarded as a civilian object, such as a . . . museum, then the building has become a military objective. The circumstances ruling at the time, that is, the military use of the building, permit its attack if its attack would offer a definite military advantage. If the enemy military forces permanently abandon the building, there has been a change of circumstances that precludes its treatment as a military objective.

BARNSEY ET AL., *supra* note 77, at 20-21.

The 2010 Law of War Deskbook further explains “offers a definite military advantage” as follows: The Commentary states that it is not legitimate to launch an attack which only offers potential or indeterminate advantages. This raises interesting questions regarding attacking enemy morale, deception operations, and strategic views of advantage versus tactical advantages of individual attacks.

BOVARNICK ET AL., *supra* note 78, at 131.

The Operational Law Handbook lists a few examples of what type of locations would give a “definite military advantage” under the Military Objective Test sufficient to become a legal military target. BARNSEY ET AL., *supra* note 77, at 131; *see also* BARKEI ET AL., *supra* note 79, at 146. The Handbook notes that a “definite military advantage” will not justify, however, making specially protected areas, which include food centers, a legal military target. *Id.*

⁹¹ LT. GENERAL DAVID PETRAEUS & LT. GENERAL JAMES AMOS, U.S. ARMY/MARINE FIELD MANUAL COUNTERINSURGENCY, 3-24, at 7-6 (2006) [hereinafter FM 3-24], *available at* <http://www.fas.org/irp/doddir/army/fm3-24.pdf>. FM 3-24 states the following:

7-30. The principle of proportionality requires that the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. Proportionality and discrimination require combatants not only to minimize the harm to noncombatants but also to make positive commitments to—

Preserve noncombatant lives by limiting the damage they do.

Assume additional risk to minimize potential harm.

7-31. Proportionality requires that the advantage gained by a military operation not be exceeded by the collateral harm. The law of war principle of proportionality requires collateral damage to civilians and civilian property not be excessive in relation to the military advantage expected to be gained by executing the operation. Soldiers and Marines must take all feasible precautions when choosing means and methods of attack to avoid and minimize loss of civilian life, injury to civilians, and damage to civilian objects.

7-32. In conventional operations, proportionality is usually calculated in simple utilitarian terms: civilian lives and property lost versus enemy destroyed and military advantage gained. But in COIN operations, advantage is best calculated not in terms of how many insurgents are killed or detained, but rather which enemies are killed or detained. If certain key insurgent leaders are essential to the insurgents’ ability to conduct operations, then military leaders need to consider their relative importance when determining how best to pursue them. In COIN environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape. If the target in question is relatively inconsequential, then proportionality requires combatants to forego severe action, or seek noncombative means of engagement.

Id.

is a basic test that balances the value of the property destroyed versus the military advantage and harm to the opposition.⁹² This test only applies when military action would affect civilians.⁹³

The test for proportionality is in Protocol I to the Geneva Conventions, Article 51(5)(b), which states that an "attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"⁹⁴ violates the principle of proportionality. The military evaluates the concrete and direct military advantage anticipated according to the potential harm a person, object, or facility could cause.⁹⁵ Thus, it is relevant to consider who or what is inside, behind, or near the cultural property.

A second, potential exception that limits the legal requirement not to harm is the misuse

⁹² BARKEI ET AL., *supra* note 79, at 12; *see also* ANDERSON ET AL., *supra* note 79, at 20-22.

⁹³ BOVARNICK ET AL., *supra* note 78, at 140; *see also* BARNSBY ET AL., *supra* note 77, at 12.

⁹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 86, art. 51(5)(b); *see also* BOVARNICK ET AL., *supra* note 78, at 140. The Operational Law Handbook explains:

Principle of Proportionality. According to the principle of proportionality, **the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.** Proportionality is not a separate legal standard as such, but provides a means by which military commanders can balance military necessity and unnecessary suffering in circumstances when an attack may cause incidental damage to civilian personnel or property.

1. Incidental Damage. Incidental damage consists of unavoidable and unintentional damage to civilian personnel and property incurred while attacking a military objective. **Incidental damage is not a violation of international law.** While no LOW treaty defines this concept, its inherent lawfulness is implicit in treaties referencing the concept. As stated above, AP I, art. 51(5) describes indiscriminate attacks as those causing "incidental loss of civilian life . . . excessive . . . to . . . the military advantage anticipated."

2. Attacks and Military Advantage. The term "attack" is not well defined with respect to the principle of proportionality, nor is it clear at what level such decisions are to be made. "Military advantage" is not restricted to tactical gains, but is linked to the full context of one's war strategy. Balancing between incidental damage to civilian objects and incidental civilian casualties may be done on a target-by-target basis, but also may be done in an overall sense against campaign objectives. At the time of its ratification of AP I, the United Kingdom declared that "the military advantage anticipated from an attack" is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack."

Proportionality balancing typically involves a variety of considerations, including the security of the attacking force.

BARNSBY ET AL., *supra* note 77, at 12; *see also* BARKEI ET AL., *supra* note 79, at 12.

⁹⁵ ANDERSON ET AL., *supra* note 79, at 20-22.

of cultural property exception.⁹⁶ The United States believes that a misuse of cultural property exception to the legal requirement not to harm cultural property exists. The United States Law of War Deskbook explicitly states this exception noting that misuse of cultural property will permit cultural property to be attacked.⁹⁷

Moreover, the United States believes the 1954 Hague Convention permits the misuse of cultural property exception. President Clinton noted in his Message to the Senate on January 6, 1999, that under the 1954 Hague Convention, "If cultural property is used for military purposes . . . the protection afforded by the Convention is waived, in accordance with the Convention's terms."⁹⁸

The Law of War Deskbook elaborates that misuse can include inappropriate designation of cultural property with the 1954 Hague Convention shield.⁹⁹ Under the 1954 Hague Convention, Article 17(3) forbids the use of the emblem in Article 6 for purposes other than

⁹⁶ See Convention Respecting the Laws and Customs of War on Land, *supra* note 79, art. 27.

⁹⁷ BOVARNICK ET AL., *supra* note 78, at 137; see also MAJ. DEREK GRIMES ET AL., LAW OF WAR HANDBOOK 180 (Maj. Keith Pulse ed., 2005), available at http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2005.pdf; BARNSBY ET AL., *supra* note 77, at 23 (stating "[m]isuse will subject [cultural] property to attack.").

⁹⁸ Message from the President of the United States on the Hague Convention and the Hague Protocol, *supra* note 80, at III. Furthermore, the fourth provision in the U.S. Understandings to the Convention states,

It is the understanding of the United States of America that, as is true for all civilian objects, the primary responsibility for the protection of cultural objects rests with the Party controlling that property, to ensure that it is properly identified and that it is not used for an unlawful purpose.

Id.; see also *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954*, U.N. EDUC., SCIENTIFIC AND CULTURAL ORG.,

<http://portal.unesco.org/en/ev.php->

[URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES) (last visited May 29, 2011).

President Clinton originally suggested this Understanding in 1999 to modify the first clause in Article 4(1), which required Parties to respect cultural property by not using the property in a way that would expose it to harm. Message from the President of the United States on the Hague Convention and the Hague Protocol, *supra* note 80, at III.

The U.S. Understanding has similar language as the 1954 Hague Convention Article 4(1) and Article 6. In the fourth Understanding it is uncertain whether the clauses following the comma, "to ensure that it is properly identified and that it is not used for an unlawful purpose," modify the prior clause, "the primary responsibility for the protection of cultural objects rests with the party controlling that property" or if it is part of the duties listed. Does the fourth Understanding mean that the party controlling the objects has the primary responsibility to protect cultural property or does it mean that the controlling party merely has the primary responsibility to identify the cultural property and not use it for unlawful purposes? If it is the former, it is a further indication that the United States does not believe that they have a duty to protect cultural property from third parties.

⁹⁹ BOVARNICK ET AL., *supra* note 78, at 158-59.

means of identifying cultural property under Article 17(2).¹⁰⁰ Moreover, under Article 17(4), immovable cultural property cannot be marked with the emblem unless the State signs, dates, and displays an authorization.¹⁰¹ Thus, the United States believes there is a misuse of cultural property exception to the legal requirement not to harm cultural property under the 1954 Hague Convention.

While believing there is a misuse exception to the legal requirement not to harm cultural property, the U.S. military has previously balanced the value of destruction of legitimate targets against potential damage to cultural property that was used as a shield. One example from the Gulf War in 1991 that illustrates this balance occurred when hostiles placed two MiG fighter aircrafts next to the temple of Ur in Iraq. The MiG aircrafts were legal targets because they were military objects. Because the hostiles were using the temple of Ur to shield the aircrafts, the legal protections afforded the cultural property were reduced or removed. U.S. commanders, however, did not attack the aircraft out of respect for the temple shielding the aircrafts. The Department of Defense explained,

While the law of war permits the attack of the two fighter aircraft, with Iraq bearing responsibility for any damage to the temple, Commander-in-Chief, Central Command (CINCCENT) elected not to attack the aircraft on the basis of respect for cultural property and the belief that positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple. Other cultural property similarly remained on the Coalition no-attack list, despite Iraqi placement of valuable military equipment in or near those sites.¹⁰²

Even though the aircrafts were legal targets, the cultural property was of sufficient importance and the threat was low enough that the United States did not fire on the legal targets. Thus, the United States believes there is a misuse of cultural property exception to legal requirements not

¹⁰⁰ Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 80, art. 17(3).

¹⁰¹ *Id.* art. 17(4).

¹⁰² U.S. DEP'T OF DEF., FINAL REPORT TO CONGRESS ON CONDUCT PERSIAN GULF WAR 612-15 (1992).

to harm cultural property, but has previously balanced the potential harm to the cultural property against the value of the targets destruction.

However, States' officials, drafters of the 1954 Hague Convention, and some scholars argue that there is not a misuse of cultural property exception in the 1954 Hague Convention. Scholar Kevin Chamberlain does not believe there is a misuse of cultural property exception.¹⁰³ Scholar Roger O'Keefe agreed noting,

[A] Party's use of cultural property and its surroundings in any manner likely to expose it to destruction or damage does not as such make it lawful for an opposing Party to attack it: that is, a Party's breach of the first limb of [A]rticle 4(1) does not *ipso facto* relieve an opposing Party from its obligation under the second limb of the provision.¹⁰⁴

Scholar Jiri Toman also believes there is not a misuse of cultural property exception as it would constitute a reprisal prohibited under Article 4(1).¹⁰⁵ Finally, the 1954 Legal Committee, during the drafting of the 1954 Hague Convention, noted in its minutes that "[t]he obligation to respect an item of cultural property remained even if that item was used by the opposing party for military purposes."¹⁰⁶ Accordingly, there is a strong argument that there is not a misuse of cultural property exception to the legal requirement not to harm cultural property.

Thus, while the U.S. military recognizes a misuse of cultural property exception at the time of this Article's publication, it is unlikely the 1954 Hague Convention permits a misuse of cultural property exception to the legal requirement not to harm cultural property.

¹⁰³ KEVIN CHAMBERLAIN, WAR AND CULTURAL HERITAGE: AN ANALYSIS OF THE 1954 CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS TWO PROTOCOLS 37 (2004) (noting that "where a party to a conflict is in breach of its obligation to respect cultural property, for example, by using the property for military purposes, the opposing party is not thereby relieved of its obligation to respect such property.").

¹⁰⁴ ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 125 (2006).

¹⁰⁵ JIRI TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: COMMENTARY ON THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS PROTOCOL, SIGNED ON 14 MAY, 1954 IN THE HAGUE, AND ON OTHER INSTRUMENTS OF INTERNATIONAL LAW CONCERNING SUCH PROTECTION 72 (1996).

¹⁰⁶ O'KEEFE, *supra* note 104, at 126 (citations omitted); TOMAN, *supra* note 105, at 70.

2. *Defensive Military Action*

Does the United States have a legal requirement to protect other States' cultural property from third parties after ratifying the 1954 Hague Convention? This question is at the core of the discrepancies in views of the United States' legal requirements under the 1954 Hague Convention. Some scholars believe the United States has accepted a legal requirement to protect cultural property from third parties, including civilians.¹⁰⁷ Other scholars have noted that the United States probably does not have a legal requirement to protect cultural property from third parties.¹⁰⁸ It is likely that the United States follows the latter view.¹⁰⁹

The ambiguity in Article 4(3) of the 1954 Hague Convention causes this discrepancy in the views of the United States' legal requirements under the Convention. Article 4(3) does not clarify who the Parties must stop from stealing, pillaging, misappropriating, and vandalizing cultural property or when the legal requirements apply.¹¹⁰

¹⁰⁷ KEVIN CHAMBERLAIN, *WAR AND CULTURAL HERITAGE: AN ANALYSIS OF THE 1954 CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS TWO PROTOCOLS* 39 (2004) (noting this obligation extends not just to prohibiting and preventing theft, pillage etc. on the part of forces under the command of a party to the conflict, but to acts of theft, pillage, etc. committed by the civilian population); Matthew Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 *YALE HUM. RTS. & DEV. L.J.* 153, 155 (2005).

¹⁰⁸ Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 *GEO. J. INT'L L.* 245, 309-10 (2006).

¹⁰⁹ See Col. Dick Jackson, *Cultural Property Protection in Stability Operations*, *ARMY LAW.*, Oct. 2008, 47, 51. Jackson argued,

In the protection of cultural property from looting, the 1954 Hague Convention requires military forces: (1) to refrain from 'theft of pillage' in the conduct of military operations; and (2) in occupation, to 'as far as possible, support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.

Id.

¹¹⁰ Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 4(3), May 14, 1954, 249 U.N.T.S. 240. Article 4 provides the following:

1. The High Contracting Parties undertake to respect cultural property situated *within their own territory as well as within the territory of other High Contracting Parties* by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.
2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.
3. The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against,

The 1954 Hague Convention extends a legal requirement to prevent theft and harm to cultural property under Article 4(3), which states that Parties will "undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property."¹¹¹ Parties to the Convention cannot evade this duty even if the invaded State does not implement the protections for cultural property that Article 3 of the 1954 Hague Convention requires.¹¹²

Some argue that all Parties involved in armed conflict have a legal requirement to protect cultural property from all persons, including third party civilians. Scholar Roger O'Keefe has stated,

The undertaking in [A]rticle 4(3) to prohibit, prevent and, if necessary, put a stop to the various impugned acts is not limited to the commission of such acts by a Party's own armed forces but extends to commission by the local populace and by remnant of the opposing armed forces.¹¹³

Kevin Chamberlain noted, "This obligation extends not just to prohibiting and preventing theft, pillage, etc. on the part of forces under the command of a party to the conflict but to acts of theft, pillage, etc. committed by the civilian population"¹¹⁴

The literal text of Article 4(3) requires the Parties to prevent cultural property from being stolen or harmed without any express limitations on whom the Parties must stop from stealing, pillaging, misappropriating, or vandalizing cultural property.¹¹⁵ Moreover, Article 4(3) uses the

cultural property. They shall refrain from requisitioning movable cultural property situated *in the territory of another High Contracting Party*.

4. They shall refrain from any act directed by way of reprisals against cultural property.

5. No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3.

Id. art. 4 (emphasis added).

¹¹¹ *Id.* art. 4(3).

¹¹² *Id.* art. 4(5).

¹¹³ ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 133 (2006).

¹¹⁴ CHAMBERLAIN, *supra* note 107, at 39.

¹¹⁵ Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 110, art. 4(3).

term "any" in stating that "any form of theft, pillage or misappropriation of, and any acts of vandalism" must be stopped.¹¹⁶ The term "any" suggests that all cultural property covered by Article 1 of the 1954 Hague Convention is to be protected from anyone—including civilians.

O'Keefe argued that if Article 4(3) was just directed at States' military forces and not third parties, the first clause of Article 4(3) would state that the Parties should "refrain" from theft, pillage, misappropriation, and vandalism instead of using the broad wording "prohibit, prevent and, if necessary, put a stop to" the prohibited actions as the term "refrain" is already used in Article 4(1), the second clause of Article 4(3), and Article 4(4).¹¹⁷ Since the drafters used different terms in the same Article, the rules of construction suggest the drafters intended different meanings. Thus, States "refrain[ing]" from state action in Article 4(1), the second clause of Article 4(3), and Article 4(4) has a different meaning from the States "prohibit[ing], prevent[ing] and, if necessary, put[ting] a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property" in the first clause of Article 4(3).¹¹⁸

O'Keefe and Chamberlain further claim that protecting cultural property from third parties is the probable intent under Article 4(3) because it would comply with the obligation under Article 43 of the 1907 Hague Convention to restore public order.¹¹⁹ Thus, there is a strong contingent of scholars who believe the United States has a legal requirement to protect cultural property from third parties during armed conflict.

¹¹⁶ *Id.*

¹¹⁷ O'KEEFE, *supra* note 113, at 133.

¹¹⁸ *Id.*

¹¹⁹ CHAMBERLAIN, *supra* note 107, at 41; O'KEEFE, *supra* note 113, at 133. Article 43 of the 1907 Hague Convention states,

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall 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.

Convention Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907, Annex, 36 Stat. 2277.

Other scholars have argued that the United States does not have a legal requirement to protect cultural property from third parties. For example, Corine Wegener, President of the United States Committee of the Blue Shield, noted that Article 4(3) is typically interpreted to prevent looting by the State's own military forces and not to protect cultural property from third parties.¹²⁰ Moreover, Dr. Patty Gerstenblith has persuasively argued that the United States does not have a legal requirement to protect cultural property from third parties as the other provisions of Article 4 only apply to state actions and "the law of war in general refers to and attempts to constrain only state action."¹²¹ Dick Jackson also argued that Article 4(3) only applies to state actions and has even read the term "refrain" into Article 4(3), arguing that "[i]n the protection of cultural property from looting, the 1954 Hague Convention requires military forces . . . to *refrain* from 'theft of pillage' in the conduct of military operations" even though "refrain" is not included in the official text of that clause as O'Keefe has noted.¹²²

Jiri Toman probably agrees with Wegener and Gerstenblith that the United States has no legal requirement to protect cultural property from third parties. Toman has noted that the term "safeguarding" under Article 3 referred to positive measures a State had to take, while "respect" under Article 4 referred to negative measures a State could not perform.¹²³ As Article 4 details

¹²⁰ Corine Wegener, *The 1954 Hague Convention and Preserving Cultural Heritage*, ARCHAEOLOGICAL INST. OF AM. (Oct. 19, 2010), available at <http://www.archaeological.org/news/hca/3137>.

¹²¹ Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT'L L. 245, 310 (2006).

¹²² Col. Dick Jackson, *Cultural Property Protection in Stability Operations*, ARMY LAW., Oct. 2008, 47, 51 (emphasis added). Compare Jackson, *supra* (arguing that Article 4(3) only applies to State actions because he has read in the term "refrain" into the first clause of Article 4(3) even though it is not in the official text), with O'KEEFE, *supra* note 113, at 133 (arguing the absence of the term "refrain" shows that States do have a duty to protect cultural property from third parties because the first clause of Article 4(3) does not include the term "refrain"). Jackson and O'Keefe are using the same term "refrain." Both are using the term "refrain" to argue that the term "refrain" indicates that a State only has a duty to prevent its soldiers from an action. O'Keefe points to the absence of the term "refrain" to prove that States do have a legal requirement to protect cultural property from third parties. O'KEEFE, *supra* note 113, at 133. Conversely, Jackson reads in the term "refrain" in his argument that States do not have a legal requirement to protect cultural property from third parties even though it is not in the official text. Jackson, *supra*.

¹²³ JIRI TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: COMMENTARY ON THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS

the legal requirements to protect cultural property, Toman would probably not believe the United States had a positive obligation to protect cultural property from third parties under Article 4(3), but merely a negative obligation to not steal, pillage, misappropriate, or vandalize cultural property.¹²⁴ Thus, there is also a strong contingent of scholars who believe the United States does not have a legal requirement to protect cultural property from third parties, leading to a discrepancy in the views of the United States' legal requirements to protect cultural property during an armed conflict.

The United States likely follows the second view and does not believe the 1954 Hague Convention requires protection of cultural property from all persons, including third parties. It does not appear the United States believes Article 4(3) provides a legal requirement to protect cultural property from third parties as seen in the United States' interpretation of the 1954 Hague Convention and the United States' belief that it already complies with the 1954 Hague Convention.

a. The United States' Interpretation of the 1954 Hague Convention

The United States' interpretation of the 1954 Hague Convention in public statements by U.S. officials indicates that the United States probably does not believe it has a legal requirement to protect cultural property from third parties under the 1954 Hague Convention.¹²⁵ When

PROTOCOL, SIGNED ON 14 MAY, 1954 IN THE HAGUE, AND ON OTHER INSTRUMENTS OF INTERNATIONAL LAW CONCERNING SUCH PROTECTION 57 (1996).

¹²⁴ *Id.* In Toman's discussion of Article 4(3), Toman did not address third parties, only State actors, further supporting the supposition that Toman believes that Article 4(3) only applies to State actors. *Id.*

¹²⁵ In 1999, upon submitting the 1954 Hague Convention to Congress to ratify, President Clinton noted, Primarily, the Convention elaborates obligations contained in earlier treaties, including the prohibition on attacks directed against cultural property and against misappropriation of such property. (These principles may be found in Articles 27 and 56, respectively, of the Annex to the 1907 Hague Convention IV.) It also provides expanded protection by establishing a regime for special protection of a highly limited category of cultural property included on an International Register.

Message from the President of the United States on the Hague Convention and the Hague Protocol, S. TREATY DOC. NO. 106-1, at VIII (Jan. 6, 1999). The first sentence addresses the legal requirement not to harm, which the United States has not denied. The third sentence refers to Chapter II of the Hague Convention that addresses the articles for

addressing the United States' legal requirements under the 1954 Hague Convention, U.S. officials have only commented on the United States' legal requirement not to harm cultural property, not any positive obligation to protect cultural property.

John Bellinger, a legal advisor to the State Department, gave a perfunctory explanation of the 1954 Hague Convention, stating that it prohibited "direct attacks upon cultural property, theft, and pillage of cultural property, and reprisals against cultural property."¹²⁶ Charles Allen, the Deputy General Counsel of International Affairs, noted that the 1954 Hague Convention "prohibits the use of cultural property in armed conflict for purposes likely to expose it to destruction or damage."¹²⁷ The United States Military Operational Law Handbook noted that the purpose of the 1954 Hague Convention is to "prohibit[] targeting cultural property"¹²⁸ All of these public declarations merely address the United States' uncontested legal requirement not to harm cultural property.

While U.S. officials have repeatedly stated that the United States has a legal requirement to not harm cultural property under the 1954 Hague Convention, the United States has not officially stated it has a legal requirement to prevent harm to cultural property from third parties. The United States Law of War Deskbook notes that the 1954 Hague Convention merely

specially protected cultural property, of which there are a very limited amount. *See* UNESCO, *International Register of Cultural Property under Special Protection*, U.N. EDUC., SCIENTIFIC AND CULTURAL ORG. (2000), <http://unesdoc.unesco.org/images/0015/001585/158587eb.pdf>.

Even with the specially protected cultural property, President Clinton never stated in the Section-by-Section analysis that there was a duty to protect cultural property from third parties. Message from the President of the United States on the Hague Convention and the Hague Protocol, *supra*, at 7.

Significantly, in his message, President Clinton further explained that during the Gulf War, intelligence officers created a "no strike" list upon which they placed known cultural objects in Iraq. Message from the President of the United States on the Hague Convention and the Hague Protocol, *supra*, at VIII. It is significant because even while stating that the United States complies with the Convention, he cites examples of the United States uncontested legal requirement not to harm, in essence protecting the cultural property from the United States, not third parties.

¹²⁶ S. EXEC. REP. NO. 110-22, at 21 (2008), *available at* http://www.fas.org/irp/congress/2008_rpt/protocols.pdf.

¹²⁷ *Id.* at 26.

¹²⁸ MAJ. ROBERT BARNSBY ET AL., OPERATIONAL LAW HANDBOOK 15 (Maj. Sean Condron ed., 2011), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2011.pdf.

"elaborates, but does not expand, the protections accorded cultural property found in other treaties."¹²⁹ Thus, the U.S. interpretation of the 1954 Hague Convention indicates that the United States does not believe it has a legal requirement to protect cultural property from third parties under the 1954 Hague Convention.

b. The United States' Belief that It Already Complies

The United States' stated belief that it already complies with the 1954 Hague Convention also indicates that it probably does not believe it has a legal requirement to protect cultural property from third parties under the 1954 Hague Convention. In his Message to the Senate on January 6, 1999, President Clinton noted, "United States military policy and the conduct of operations are entirely consistent with the [Hague] Convention's provisions."¹³⁰ President Clinton explained that "[f]or practical purposes, U.S. military operations since the promulgation of the Convention have been entirely consistent with its provisions."¹³¹

Then, in April 2003 the Iraqi National Museum was looted.

Later, on April 15, 2008, the Senate Foreign Relations Committee heard several testimonials about the 1954 Hague Convention, during which prominent U.S. officials advocated ratification of the 1954 Hague Convention, noting again that the United States complied with the 1954 Hague Convention. Senator Robert Casey, Chair of the Senate Foreign Relations Committee, repeatedly remarked that the military supported the Convention and that the

¹²⁹ LTC JEFF A. BOVARNICK ET AL., *LAW OF WAR DESKBOOK 137* (Capt. Brian J. Bill ed., 2010), available at http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf; see also MAJ. DEREK GRIMES ET AL., *LAW OF WAR HANDBOOK 180* (Maj. Keith Pulse ed., 2005), available at http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2005.pdf.

¹³⁰ Message from the President of the United States on the Hague Convention and the Hague Protocol, S. TREATY DOC. NO. 106-1, at VIII (Jan. 6, 1999), available at http://www.loc.gov/rr/frd/Military_Law/pdf/GC-message-from-pres-1999.pdf.

¹³¹ *Id.*

"military already complies" with the Convention.¹³² Bellinger further noted, "U.S. practice is entirely consistent with this Convention and that ratifying it will cause no problems for the United States or for the conduct of U.S. military operations."¹³³ General Brigadier Johnson agreed that the 1954 Hague Convention does not "in anyway limit the flexibility of our military."¹³⁴

President Clinton's 1999 Message to the Senate and the 2008 Hearing of the Senate Foreign Relations Committee on the 1954 Hague Convention were notably similar. Despite the looting of the Iraqi National Museum in the interim, U.S. officials still claimed to comply with the 1954 Hague Convention in 2008 and used almost the exact language from 1999, before the looting. These comments that the United States complied with the 1954 Hague Convention, both before and after third parties looted the Iraqi National Museum, indicate that the United States does not believe it has a legal requirement to protect cultural property from third parties under the 1954 Hague Convention and that its ratification of the 1954 Hague Convention will not stop another incident like the looting of the Iraqi National Museum from happening again.

As there was an international uproar over the looting of the Iraqi National Museum, in response to which several scholars called for ratification of the 1954 Hague Convention, some probably believe that the United States has a legal requirement under the 1954 Hague Convention to protect cultural property from third parties in States the United States invades, as the looting of the Iraqi National Museum was perpetrated by third parties. Many people probably do not believe the United States' response to the looting of the Iraqi National Museum "complied" with the 1954 Hague Convention such that there is probably a discrepancy between

¹³² S. EXEC. REP. NO. 110-22, at 18 (2008), *available at* http://www.fas.org/irp/congress/2008_rpt/protocols.pdf. The stated motivation for passing the 1954 Hague Convention was merely to be able to participate in implementation of the treaty and "to set an example." *Id.*

¹³³ *Id.* at 21.

¹³⁴ *Id.* at 37.

the United States' and others' beliefs of what constitutes compliance with the 1954 Hague Convention. Thus, there is a difference in views of the United States' legal requirements towards cultural property under the 1954 Hague Convention during armed conflicts.

C. LEGAL REQUIREMENTS OF INVADED STATES TOWARDS CULTURAL PROPERTY DURING ARMED CONFLICT

Invaded States that are Parties to the 1954 Hague Convention have legal requirements toward cultural property during armed conflict to (1) not harm cultural property; (2) not use cultural property in a way that would expose it to harm; and (3) stop State actors, and possibly third parties, from stealing, misappropriating, pillaging, and vandalizing cultural property.

First, invaded States have a legal requirement toward cultural property during armed conflict to not harm cultural property. Article 4(1) clearly states that the Parties must respect cultural property "within their own territory as well as within the territory of other [Parties]," thereby indicating both the invading State and the invaded State have a legal requirement to not harm the cultural property in the area of the armed conflict.¹³⁵

Second, invaded States have a legal requirement toward cultural property during armed conflict to not use cultural property in a way that would expose it to harm. Article 4(1) of the 1954 Hague Convention requires cultural property and the area surrounding cultural property to

¹³⁵ Convention for the Protection of Cultural Property in the Event of Armed Conflict, arts. 4(1), 9, May 14, 1954, 249 U.N.T.S. 240. Under Article 4(1), the signatory States,

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

Id. art. 4(1). Under Article 9,

[t]he High Contracting Parties undertake to ensure the immunity of cultural property under special protection by refraining, from the time of entry in the International Register, from any act of hostility directed against such property and, except for the cases provided for in paragraph 5 of Article 8, from any use of such property or its surroundings for military purposes.

Id. art. 9.

not be used for purposes that would subject the cultural property to harm in armed conflicts.¹³⁶ Invaded States can, however, avail themselves to the military necessity exception to these legal requirements under the 1954 Hague Convention, which states "any use" that would "expose [the cultural property] to destruction" and any actual harm to the cultural property may be permitted if "military necessity imperatively requires such a waiver."¹³⁷

Finally, invaded States have a legal requirement during armed conflict to stop theft, misappropriation, looting, and vandalizing of cultural property. Article 4(3) applies to the Parties to the Convention, not to either the invaded State or the invading State such that the invaded State must also comply with Article 4(3).¹³⁸ If Article 4(3) applies only to State conduct, the State has a legal requirement to stop its own military forces from stealing, pillaging, misappropriating, and vandalizing cultural property in its own territory.¹³⁹ If Article 4(3) also requires Parties to protect cultural property from third parties, the invaded State will have a legal requirement to stop third parties from stealing, pillaging, misappropriating, and vandalizing cultural property.¹⁴⁰ Accordingly, invaded States have legal requirements towards cultural property during an armed conflict.

IV. MILITARY JURISDICTION DURING OCCUPATION

A. INTRODUCTION

During occupation, jurisdiction is once again at issue as the territory is in a state of flux. The U.S. military will retain jurisdiction over its personnel. The occupied State will, in theory,

¹³⁶ *Id.* art. 4(1).

¹³⁷ *Id.* art. 4(2). Note that there is a higher burden to invoke military necessity for specially protected cultural property under Article 11. *Id.* art. 11.

¹³⁸ *Id.* art. 4(3). Notably, Iraq was a High Contracting Party in 2003, at the time of the looting, while the United States was not. *Convention for the Protection of Cultural Property in the Event of the Armed Conflict with Regulations for the Execution of the Convention 1954*, U.N. EDUC., SCIENTIFIC AND CULTURAL ORG., <http://erc.unesco.org/cp/convention.asp?KO=13637&language=E&order=alpha> (last visited Mar. 6, 2011)

¹³⁹ *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, *supra* note 135, art. 4(3).

¹⁴⁰ *See supra* notes 113-19 and accompanying text.

retain jurisdiction over its own citizens. However, in reality, the process that started during the invasion will solidify such that the U.S. military will restore the judiciary under the auspices of a transitional government that issues its own binding rules which supersede any conflicting provisions in the occupied area.

B. WHAT CONSTITUTES OCCUPATION?

The term Occupation is a word of art that triggers a different set of legal requirements. As such, the establishment of the time of Occupation is controversial. The demarcation between active conduct of military operations and Occupation by military forces can be difficult to establish. Dick Jackson, a retired Judge Advocate in the Army noted "there is still considerable controversy to this day about when U.S. forces established effective control over the area of Baghdad near the museum, which would trigger the protection of an occupying force."¹⁴¹

The 1907 Hague Convention Respecting the Laws and Customs of War on Land¹⁴² ("1907 Hague Convention") deems that an area is occupied when it is under the authority of the invading force.¹⁴³ The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict¹⁴⁴ ("1954 Hague Convention" or "Convention") does not define Occupation, however.¹⁴⁵ As the 1954 Hague Convention supplements the 1907 Hague Convention per Article 36, the 1907 Hague Convention's definition for Occupation controls in the application of the 1954 Hague Convention.¹⁴⁶

The United States Law of War Deskbook states the U.S. military's definition of

¹⁴¹ Col. Dick Jackson, *Cultural Property Protection in Stability Operations*, ARMY LAW., Oct. 2008, 47, 51.

¹⁴² Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, 36 Stat. 2277.

¹⁴³ *Id.* art. 42. Under Article 42, "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." *Id.*

¹⁴⁴ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

¹⁴⁵ Note that the 1954 Hague Convention does not define Occupation despite addressing the legal requirements during Occupation in Article 5. *Id.* art. 5.

¹⁴⁶ *Id.* art. 36.

Occupation noting:

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

1. Commencement of Occupation is a **Question of Fact**. A state of occupation exists when two conditions are satisfied: first, the invader has rendered the invaded government incapable of publicly exercising its authority; and second, the invader has successfully substituted its own authority for that of the legitimate government.

2. **Occupation = Invasion + Firm Control**. The radius of occupation is determined by the effectiveness of control; occupation must be actual and effective.¹⁴⁷

The United States Law of War Handbook lists factors that determine actual and effective Occupation including:

- (a) Organized resistance has been overcome, but the existence of resistance groups does not render the occupation ineffective;

¹⁴⁷ LTC JEFF A. BOVARNICK ET AL., LAW OF WAR DESKBOOK 106 (Capt. Brian J. Bill, ed., 2010) (citations omitted), available at http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf. Note the differences between the 2010 Law of War Deskbook's and the 2005 Law of War Handbook's definition of Occupation. The 2005 Law of War Handbook states the following:

Occupation: Territory is occupied "when it is actually placed under the authority of the hostile army."

a. Occupation = Invasion plus taking firm possession of the enemy territory for the purpose of holding it.

(1) Invasion: Invasion continues for as long as resistance is met. If no resistance is met, the state of invasion continues only until the invader takes firm control of the area, with an intention of holding it. Invasion is not necessarily occupation, but invasion usually precedes occupation. Invasion may be either resisted or unresisted.

(a) Resisted v. Unresisted Invasion. Occupation "presupposes" a hostile invasion -- However, a "hostile" invasion may be either resisted or unresisted.

3. Commencement of Occupation.

a. Proclamation of occupation not necessary but advisable. General Eisenhower issued a powerful proclamation in World War II.

b. Without such a proclamation, occupation is a de facto standard. It is based on the following elements:

(1) Invader has rendered the invaded government incapable of exercising its authority;

(2) Invader has substituted its own authority;

(3) Must be Actual & Effective:

(a) Organized resistance has been overcome, but the existence of resistance groups does not render the occupation ineffective;

(b) Invader has taken measures to establish authority;

(c) The existence of a fort or defended place does not render the occupation of the remaining territory ineffective.

Termination of Occupation. Occupation terminates when the occupying power either loses control of the territory (displacement) or asserts sovereignty over the territory (subjugation).

MAJ. DEREK GRIMES ET AL., LAW OF WAR HANDBOOK 148-49 (Maj. Keith Pulse ed., 2005), available at http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2005.pdf (citations omitted).

(b) Invader has taken measures to establish authority.¹⁴⁸

C. JURISDICTION OVER MILITARY SERVICE MEMBERS

The United States retains jurisdiction over its members and contractors in all territories.¹⁴⁹ In Iraq, the Coalition Provisional Authority (“CPA”) provided immunity for military members and contractors, which removed U.S. military members and contractors from the purview of the Iraqi judiciary such that they were only subject to the United States Uniform Code of Military Justice¹⁵⁰ (“UCMJ”).¹⁵¹ Under Section 2(1) of Revised CPA Order Number 17, multinational forces, which include the U.S. military and CPA personnel, are “immune from Iraqi legal process[es].”¹⁵² Instead, under Section 2(4), the occupying State has the authority to exercise its laws over “all persons subject to the military law of that [occupying] State.”¹⁵³ Thus, the United States has jurisdiction over all U.S. military members and contractors in all territories.¹⁵⁴

D. JURISDICTION OVER PERSONS IN THE OCCUPIED STATE

The laws of the occupied State govern persons in the occupied State only to a point. Under the 1907 Hague Convention, an occupying State has a duty to “take all the measures in [its] 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.”¹⁵⁵ The Geneva Convention

¹⁴⁸ GRIMES ET AL., *supra* note 147, at 148.

¹⁴⁹ LTC JEFF A. BOVARNICK ET AL., LAW OF WAR DESKBOOK 110 (Capt. Brian J. Bill, ed., 2010), available at http://www.loc.gov/r/r/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf. The 2010 Law of War Deskbook states that occupying States are “exempt from local law and jurisdiction of local courts.” *Id.*

¹⁵⁰ 10 U.S.C. §§ 801-946 (2011).

¹⁵¹ *Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, CPA/ORD/27 JUNE 2004/17*, available at http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf.

¹⁵² *Id.* §2(1).

¹⁵³ *Id.* §2(4).

¹⁵⁴ Uniform Code of Military Justice arts. 2, 5, 10 U.S.C. §§ 802, 805 (2011).

¹⁵⁵ Convention Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907, Annex, 36 Stat. 2277. Under Article 43,

Relative to the Protection of Civilian Persons¹⁵⁶ ("Geneva Convention") notes that the penal laws of the occupied State shall remain in force, unless the occupying State needs to suspend application of the occupied State's laws for security purposes or if the occupied State's rules violate the Geneva Convention.¹⁵⁷ The United States Law of War Deskbook elaborates stating that the "laws of [the] occupied country continue in force and courts continue to sit and try criminal cases not of a military nature."¹⁵⁸

However, the occupied State does not have the same discretion that it enjoyed prior to Occupation.¹⁵⁹ The Law of War Deskbook notes that the occupying State's force is supreme, constrained only by "[t]he doctrine of military necessity; and . . . [l]imitations imposed by binding international law, including customs and treaties"¹⁶⁰

According to the Law of War Deskbook, the functions of the occupied State's government will cease except to the extent that the occupying State permits¹⁶¹ and the occupying State can alter or create new laws that will bind occupants of the occupied State.¹⁶² Moreover,

[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall 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.

Id.

¹⁵⁶ Geneva Convention Relative to the Protection of Civilian Persons, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

¹⁵⁷ *Id.* art. 64.

¹⁵⁸ LTC JEFF A. BOVARNICK ET AL., LAW OF WAR DESKBOOK 109 (Capt. Brian J. Bill, ed., 2010), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf.

¹⁵⁹ On May 16, 2003, Paul Bremer, Administrator of the CPA, claimed authority over the CPA and signed CPA Regulation Number 1, which defined the scope of the CPA's authority in Iraq. CPA/REG/16 MAY 2003/01 § 1 (Iraq), *available at*

http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf.

The United Nations recognized the authority of the Coalition Provisional Authority ("CPA") in Resolution 1483. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003). The UN "recogniz[ed] the specific authorities, responsibilities and obligations" of the United States of America, the United Kingdom of Great Britain, and Northern Ireland in Iraq. *Id.* While the UN later reaffirmed the sovereignty of Iraq, the UN also reiterated the authority of the CPA even while noting that the authority was temporary until an Iraqi government could assume the responsibilities of the CPA in Resolution 1511. S.C. Res. 1511, U.N. Doc. S/RES/1511 (Oct. 16, 2003).

¹⁶⁰ BOVARNICK ET AL., *supra* note 158, at 108.

¹⁶¹ *Id.* ("All functions of legitimate government cease upon commencement of occupation; functions of government continue only to extent Occupant allows.")

¹⁶² *Id.* at 109-10. The Deskbook states the following:

while noting that occupied States' courts should continue to try cases if feasible, the Law of War Deskbook notes that the United States can suspend local courts and create courts.¹⁶³

For example, in Iraq the CPA set up judiciary tribunals, removed judges aligned with Baath policy, created laws, and suspended Iraqi laws conflicting with CPA policy such that the people within the occupied territory were, in effect, under the jurisdiction and laws of the CPA.¹⁶⁴ Thus, while the occupied State technically has jurisdiction over citizens of the occupied territory, this authority can be superficial and might not extend to allow the occupied State's judiciary to apply whatever law it deems appropriate.

V. LEGAL REQUIREMENTS TOWARDS CULTURAL PROPERTY DURING OCCUPATION

4. Occupant may suspend, repeal, or alter existing laws, or promulgate new laws, if required by military necessity, maintenance of order, or welfare of the population.
5. Suspension or repeal of local laws should be related to security of the force, mission accomplishment, or compliance with international law. Examples:
 - a. Suspension of the right to bear arms;
 - b. Suspension of the rights of assembly and protest;
 - c. Suspension of freedom of movement; or
 - d. Suspension of discriminatory laws;
6. Issuing New Laws.
 - a. Must publish and provide notice to inhabitants in their own language;
 - b. Must be published in writing; and
 - c. Must not be retroactive.
 - d. Occupant has no obligation to comply with the constitutional or procedural rules of the occupied country.

Id.

¹⁶³ *Id.* at 109. The Deskbook also states the following:

1. Occupant does not bring its own jurisdiction and civil and criminal laws; ordinarily, laws of occupied country continue in force and courts continue to sit and try criminal cases not of a military nature.
2. Local courts should be used when feasible, but may be suspended if:
 - a. Judicial personnel will not perform their duties;
 - b. Courts are corrupt or unfairly constituted;
 - c. Local courts have ceased to function; or
 - d. Judicial process does not comply with fundamental human rights.
3. Occupant may establish military courts or provost courts.
 - a. May be used to try violations of occupation provisions or regulations.
 - b. May be used if properly constituted, non-political, and located in occupied territory.

Id.

¹⁶⁴ The CPA had authority over the Iraqi judicial system and declared that laws of Iraq continued to the extent that it did not conflict with declarations of the CPA or impede the CPA. *See Penal Code*, CPA/ORD/9 JUNE 2003/07 §§ 1, 2 (Iraq), available at http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf; CPA/REG/16 MAY 2003/01 § 3 (Iraq) (proclaiming that the CPA's Orders are binding and supersede all other inconsistent laws).

A. THE UNITED STATES' LEGAL REQUIREMENTS TOWARDS CULTURAL PROPERTY DURING OCCUPATION

All Parties have legal requirements towards cultural property during Occupation under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict¹⁶⁵ ("1954 Hague Convention" or "Convention"). However, there is a discrepancy in the views of the United States' legal requirements to protect cultural property during Occupation. Several scholars have argued that the United States has a legal requirement under the 1954 Hague Convention to protect cultural property from third parties in occupied States.¹⁶⁶ However, others have argued the United States does not have a legal requirement to protect cultural property from third parties during Occupation, but merely a legal requirement of the occupying State to support the occupied State in safeguarding and preserving cultural property under Article 5.¹⁶⁷ Thus, there are discrepancies in the views of the United States' legal requirements to protect cultural property during Occupation.

Article 5 of the 1954 Hague Convention, which is entitled "Occupation,"¹⁶⁸ states:

1. Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall *as far as possible* support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.

2. Should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent national authorities be unable to take such measures, the Occupying

¹⁶⁵ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

¹⁶⁶ See Matthew Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE HUM. RTS. & DEV. L.J. 153, 153, 168 (2005).

¹⁶⁷ Col. Dick Jackson, *Cultural Property Protection in Stability Operations*, ARMY LAW., Oct. 2008, 47, 51.

¹⁶⁸ Under the 1907 Hague Convention, the occupier is in charge of protecting and administering the public buildings of the occupied State. Convention Respecting the Laws and Customs of War on Land art. 55, Oct. 18, 1907, Annex, 36 Stat. 2277. Under Article 55, "[t]he occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." *Id.*

Power shall, *as far as possible*, and in close co-operation with such authorities, take the most necessary measures of preservation.¹⁶⁹

Under Article 5 of the Convention, the United States has a legal requirement to support competent national authorities of an occupied State in safeguarding and preserving cultural property as much as possible and to take necessary measures of preservation as much as possible if the competent national authorities cannot do so. The Operational Law Handbook states the U.S. military's understanding of Article 5 noting that the "Occupying powers also assume the obligations of protection just as the party State had prior to the armed conflict."¹⁷⁰ Within Article 5, the United States' obligations are not absolute, however, as the clause "as far as possible" is included.¹⁷¹ For example, Kevin Chamberlain noted that "a commanding officer would not be expected to take action that would put his troops at a military disadvantage or endanger the lives of his soldiers."¹⁷²

Some claim that the United States also has a legal requirement to comply with Article 4

¹⁶⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 165, art. 5.

¹⁷⁰ MAJ. ROBERT BARNSBY ET AL., OPERATIONAL LAW HANDBOOK 339 (Maj. Sean Condron ed., 2011), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2011.pdf (citing Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 165, art. 5). While the Operational Law Handbook cites Article 5 of the 1954 Hague Convention for the requirement of the occupying State "to assume the obligations of protection [of cultural property] just as the party State had prior to the armed conflict," Article 5 merely requires the occupying State to "support the competent national authorities of the occupied country in safeguarding and preserving its cultural property." *Compare* BARNSBY ET AL., *supra* (claiming occupying State has a duty "to assume the obligations of protection [of cultural property] just as the party State had prior to the armed conflict"), *with* Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 165, art. 5 (requiring the occupying State to "support the competent national authorities of the occupied country in safeguarding and preserving its cultural property"). It appears that the United States may have assumed a greater level of responsibility to protect cultural property than that required by Article 5 and has potentially assumed a primary obligation to protect cultural property during Occupation.

¹⁷¹ Note that in his Section-by-Section Analysis of the 1954 Hague Convention, President Clinton pointed out the limitations of this provision as indicated by the "as far as possible" clause in Article 5. Message from the President of the United States on the Hague Convention and the Hague Protocol, S. TREATY DOC. NO. 106-1, at IV (Jan. 6, 1999), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/GC-message-from-pres-1999.pdf.

¹⁷² KEVIN CHAMBERLAIN, WAR AND CULTURAL HERITAGE: AN ANALYSIS OF THE 1954 CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS TWO PROTOCOLS 42 (2004).

during Occupation.¹⁷³ These scholars argue that Article 5 adds another layer of legal requirements in addition to the general protections afforded under the other articles in the 1954 Hague Convention such that Article 4 also applies during Occupation. Article 4 does not indicate whether these duties apply during armed conflict, Occupation, or both. Furthermore, advocates of this position argue that Article 4 does not contain any language limiting Article 4 to armed conflicts that would preclude application of Article 4 during Occupation.¹⁷⁴

For example, Roger O'Keefe noted that Article 4

appl[ies] as much to belligerent occupation as to active hostilities: nothing in the wording of the various provisions displaces the Convention's usual scope of application, as laid down, in the case of belligerent occupation, in article 18(2); and while article 5 is headed "Occupation", any implication from this *a contrario* is insufficiently unambiguous, since there is no reason why the obligations the latter provision imposes, which clearly apply only to belligerent occupation and which relate specifically to the relations between the Occupying Power and the competent national authorities, cannot be treated as additional to those posited in article 4.¹⁷⁵

Moreover, Article 5(3) supports the claim that Article 4 also applies during Occupation stating

¹⁷³ It seems that the U.S. military has accepted an obligation to protect cultural property to some extent during Occupation as the 2011 Operational Law Handbook states, "Occupying powers also assume the obligations of protection just as the party State had prior to the armed conflict." BARNESBY ET AL., *supra* note 170, at 339.

What level of protection does the occupying power assume? What if the occupied State, prior to the armed conflict, was not able to adequately protect cultural property within its State? Is the level of protection afforded the occupied States' cultural property dependent on the occupied States' previous levels of protection? If not, and the United States has committed to providing a standard level of protection for cultural property, is the United States obligated to provide greater protection for cultural property in some occupied States than was in place before the armed conflict?

When Occupation occurs in the future, the geographic boundaries of the occupied area will be heavily debated as it is a threshold requirement for "the obligations of protection just as the party State had prior to the armed conflict." *Id.* Dick Jackson, a retired Judge Advocate in the Army noted "there is still considerable controversy to this day about when U.S. forces established effective control over the area of Baghdad near the museum, which would trigger the protection of an occupying force." Col. Dick Jackson, *Cultural Property Protection in Stability Operations*, ARMY LAW., Oct. 2008, 47, 51.

The 1907 Hague Convention merely requires the area to be under the authority of the invading force for Occupation. Convention Respecting the Laws and Customs of War on Land, *supra* note 168, art. 42. The United States Law of War Deskbook notes, however, that the U.S. military does not consider an area to be occupied until: (1) "it is actually placed under the authority of the hostile army . . . only to the territory where such authority has been established and can be exercised"; (2) "the invader has rendered the invaded government incapable of publicly exercising its authority" and "has successfully substituted its own authority for that of the legitimate government"; and (3) "occupation must be actual and effective." LTC JEFF A. BOVARNICK ET AL., LAW OF WAR DESKBOOK 106 (Capt. Brian J. Bill, ed., 2010), available at http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf.

¹⁷⁴ Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 165, art. 4(3).

¹⁷⁵ ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 120 (2006).

that the Parties to the Convention, "shall, if possible, draw their attention to the obligation to comply with those provisions of the Conventions dealing with respect for cultural property."¹⁷⁶

Article 4, entitled "Respect for Cultural Property," is the provision referred to in Article 5(3) such that the Convention appears to explicitly require Article 4 to be applied during Occupation in conjunction with Article 5.¹⁷⁷

Within this category of people who believe Articles 4 and 5 apply during Occupation, some believe that, under Article 4, the United States has a legal requirement to protect cultural property from third parties during Occupation, in addition to State actors.¹⁷⁸ Advocates of this position believe the United States has this legal requirement because they take the view that Article 4(3) requires the United States to protect cultural property from third parties.¹⁷⁹

Article 4(3) of the Hague Convention requires Parties to the Convention to "prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any

¹⁷⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 165, art. 5(3). Under Article 5(3), "[a]ny High Contracting Party whose government is considered their legitimate government by members of a resistance movement, shall, if possible, draw their attention to the obligation to comply with those provisions of the Conventions dealing with respect for cultural property." *Id.*

¹⁷⁷ *Id.* arts. 4, 5(3); O'KEEFE, *supra* note 175, at 120-21. Article 19 of the Regulations also refers to application of Article 4 during Occupation. Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 19, May 14, 1954, 249 U.N.T.S. 539. Article 19 states,

Whenever a High Contracting Party occupying territory of another High Contracting Party transfers cultural property to a refuge situated elsewhere in that territory, without being able to follow the procedure provided for in Article 17 of the Regulations, the transfer in question shall not be regarded as misappropriation within the meaning of Article 4 of the Convention, provided that the Commissioner-General for Cultural Property certifies in writing, after having consulted the usual custodians, that such transfer was rendered necessary by circumstances.

Id.

¹⁷⁸ It is unclear whether the United States believes it has a duty to protect cultural property from third parties during Occupation. The Operational Law Handbook merely notes that the "[o]ccupying powers also assume the obligations of protection just as the party State had prior to the armed conflict." BARNSEY ET AL., *supra* note 170, at 339. There are a plethora of arguments for and against a requirement to protect cultural property from third parties. *See supra* notes 108-25 and accompanying text. The occupied State probably did protect the cultural property from third parties before the armed conflict, however, suggesting that the United States might have assumed a duty to protect cultural property from third parties during Occupation.

¹⁷⁹ *See supra* notes 108-20 and accompanying text. Others who believe that Articles 4 and 5 apply during Occupation have the alternative view of Article 4(3) such that they believe occupying and occupied States only have the legal requirement to protect cultural property from their own State's military forces.

acts of vandalism directed against, cultural property."¹⁸⁰ Some have interpreted this clause as a legal requirement for the United States to affirmatively stop State actors and third parties from stealing, misappropriating, looting, and vandalizing cultural property, while others believe Article 4(3) only applies to State actors.¹⁸¹

Conversely, there is another contingent that believes the United States does not have a legal requirement to comply with Article 4 during Occupation, much less to protect cultural property from third parties during Occupation. Instead, this contingent asserts the United States merely has to comply with Article 5 and not Article 4(3).

Advocates of this position argue that Article 5's title "Occupation" indicates that Article 5 is the controlling article during Occupation. For example, Retired Colonel Dick Jackson, a former Judge Advocate, noted Article 4(3) only applied during armed conflicts and Article 5 only applied during Occupation.¹⁸² Thus, there is a discrepancy in views of the United States' legal requirements to protect cultural property during Occupation.

B. OCCUPIED STATE'S LEGAL REQUIREMENTS TOWARDS CULTURAL PROPERTY DURING OCCUPATION

Occupied States have legal requirements towards cultural property during Occupation. Since the occupying State should support the occupied State "in safeguarding and preserving its cultural property" under Article 5(1) of the 1954 Hague Convention, the occupied State has the

¹⁸⁰ Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 165, art. 4(3).

¹⁸¹ See *supra* notes 107-24 and accompanying text.

¹⁸² Jackson, *supra* note 173, at 51. Additionally, Major John Johnson stated that Article 5 would require the occupier to act if . . . the competition national authorities either require or request the occupier's support in safeguarding cultural property, or the national authorities cannot act and the cultural property in question has been damaged by military action; and . . . the occupying forces have the means to safeguard the property.

Maj. John Johnson, *Under New Management: The Obligation to Protect Cultural Property During Military Occupation*, 190/191 MIL. L. REV. 111, 147-48 (Winter 2006/Spring 2007).

primary duty to "safeguard and preserve its cultural property."¹⁸³ Article 5(2) mitigates the difficulty of this legal requirement by stating that the occupying State has a duty to preserve cultural property, "as far as possible," if the occupied State is unable to preserve its cultural property.¹⁸⁴ The occupied State should work closely with the occupying State to carry out this legal requirement. Thus, occupied States have a responsibility towards cultural property during Occupation. Accordingly, all Parties have legal requirements toward cultural property during Occupation, but there is a discrepancy in views of the United States' legal requirements to protect cultural property during Occupation.

VI. SHOULD THERE BE A DUTY TO PROTECT CULTURAL PROPERTY FROM THIRD PARTIES?

A. INTRODUCTION

While some argue that the United States does not have a legal requirement to protect cultural property from third parties under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict¹⁸⁵ ("1954 Hague Convention" or "Convention"), many of the same sources suggest that it is a good idea for the United States to protect cultural property from third parties. If it is determined that Article 4(3) does not impart a legal requirement under the 1954 Hague Convention to protect cultural property from third parties, should the United States have a duty to protect cultural property from third parties?

B. SHOULD THE UNITED STATES HAVE A DUTY TO PROTECT CULTURAL PROPERTY FROM THIRD PARTIES DURING ARMED CONFLICT?

Should there be a duty for the United States to protect cultural property from third parties during armed conflict? On one hand, practically, how can the U.S. military have a duty to protect

¹⁸³ Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 5(1), May 14, 1954, 249 U.N.T.S. 240.

¹⁸⁴ *Id.* art. 5(2).

¹⁸⁵ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

cultural property during armed conflict when it might not even have control over the area? Moreover, the military might have to employ deadly force to protect cultural property. The United States Military Operational Law Handbook does not permit deadly force to protect property that is not essential to the mission, however.¹⁸⁶ The use of deadly force would also conflict with Article 2 of the European Convention on Human Rights¹⁸⁷ ("ECHR").¹⁸⁸ Article 2 of the ECHR protects every person's life unless that person is sentenced to execution in a proper trial.¹⁸⁹ As such, an English court in *R v. Clegg*¹⁹⁰ has already held that the use of deadly force to protect property violates Article 2.¹⁹¹

This argument, however, is rebuttable. First, the military could use non-deadly force,

¹⁸⁶ MAJ. MARIE ANDERSON ET AL., OPERATIONAL LAW HANDBOOK 79-80 (Capt. Brian Bill et al. eds., 2009), available at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2009.pdf. Soldiers can use deadly force to protect some property. The CFLCC ROE used during Armed Conflict (Major Combat Operations) Operation Iraqi Freedom, 2003 stated, "The use of force, including deadly force, is authorized to protect the following: . . . Designated civilians and/or property, such as personnel of the Red Cross/Red Crescent, UN, and U.S./UN supported organizations." MAJ. ROBERT BARNSBY ET AL., OPERATIONAL LAW HANDBOOK 101 (Maj. Sean Condron et al. eds., 2011), available at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2011.pdf; see also MAJ. JAMES BARKEI ET AL., OPERATIONAL LAW HANDBOOK 101 (Capt. Brian Bill et al. eds., 2010), available at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2010.pdf. MNC-1 ROE Card Armed Conflict (Stability Operations): Operation Iraqi Freedom, used in 2005, states, "**The use of force, including deadly force, is authorized to protect . . . personnel or property designated by the OSC** when such actions are necessary to restore order and security." BARNSBY ET AL., *supra*, at 102; see also BARKEI ET AL., *supra*, at 102.

¹⁸⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

¹⁸⁸ *Id.* art. 2.

¹⁸⁹ *Id.* Article 2, Right to Life, provides the following:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;
 - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Id.

¹⁹⁰ [1995] 1 A.C. 482 (H.L.) (appeal taken from N. Ir.).

¹⁹¹ Col. Dick Jackson, *Cultural Property Protection in Stability Operations*, ARMY LAW., Oct. 2008, 47, 49. Only members of the Council of Europe are members to this Convention. The United States is not a member to this Convention and not bound to the Convention. Moreover, there is a move towards a "displacement" theory where U.N. sanctioned missions "displace" the law of the ECHR such that European forces might not be regulated by the ECHR in U.N. sanctioned missions like the Iraq armed conflict per S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003). Jackson, *supra*, at 49-50.

which would increase protection to cultural property.¹⁹² Moreover, non-deadly means are effective. For example, the *New York Times* reported that a staff member of the Iraqi National Museum was able to persuade U.S. soldiers to temporarily go to the Museum and fire over the head of the looters, which dispersed the looters.¹⁹³ Thus, non-deadly force could help protect cultural property from third parties.

There are multiple non-deadly means by which the military can protect cultural property. The Operational Law Handbook specifies that "[s]oldiers should attempt to use lesser means of force" when possible.¹⁹⁴ An illustrative list of methods that can be used to protect cultural property, ranked in order of elevating force, includes the following:

- (1) Verbal persuasion.
- (2) Unarmed defense techniques.
- (3) Chemical aerosol irritant projectors (subject to host nation or local restrictions).
- (4) MP club.
- (5) Military working dogs (military working dogs will be used per AR 190–12).
- (6) Presentation of deadly force capability.

¹⁹² BARNSBY ET AL., *supra* note 186, at 80 (noting that "[e]ven where deadly force is not authorized, [soldiers] may use force short of deadly force to defend themselves and property.").

¹⁹³ John Burns, *A Nation at War: Looting; Pillagers Strip the Iraqi Museum of its Treasure*, N.Y. TIMES, Apr. 13, 2003, <http://www.nytimes.com/2003/04/13/world/a-nation-at-war-looting-pillagers-strip-iraqi-museum-of-its-treasure.html?src=pm>. The looters later returned, however, after the tank and soldiers left. *Id.*

¹⁹⁴ BARNSBY ET AL., *supra* note 186, at 81; *see also* BARKEI ET AL., *supra* note 186, at 81 n.4 ("Arguably, EOF is inherent in the principle of proportionality."). The Operational Law Handbook states the following:

Escalation of Force (EOF). Currently, one of the most important topics related to ROE is the concept of Escalations of Force (EOF). EOF is not integral to the SROE, and has been developed and emphasized during recent operations, most notably in Iraq. EOF can take several different forms.

1. On one level, EOF is simply the modern variant of what used to be called "graduated force measures." When time and circumstances permit, Soldiers should attempt to use lesser means of force.
2. Properly used, EOF measures are a "threat assessment process" that provide Soldiers better information on whether an approaching person or vehicle presents hostile intent. For example, the proper configuration of a Traffic Control Point (TCP) will allow Soldiers to slow vehicles down using warnings (e.g., visual signs, loudspeakers, barricades, tire strips, laser pointers, laser dazzlers, warning shots, etc.). An approaching vehicle's response to both the physical layout of the TCP and the Soldiers' actions can yield valuable clues as to the driver's intent, such that Soldiers can make more accurate determinations of whether hostile acts or hostile intent are present.

Id.

(7) Deadly force.¹⁹⁵

Thus, the U.S. military has several levels of force it can employ to protect cultural property before deadly force is used.

Second, despite the desirability of using non-deadly force, ultimately, the military might be able to employ deadly force for the protection of the soldiers safeguarding the cultural property, such that the ultimate result is stronger protection for cultural property than just the appearance of soldiers at the site.¹⁹⁶ The United States Military Operational Law Handbook permits deadly force to defend a U.S. soldier if the person trying to remove the property under the soldier's protection uses deadly force against the soldier.¹⁹⁷ If the opposing person "suddenly threatens the Soldier with deadly force to take the non-essential property deadly force would be authorized in response, not to prevent theft, but to defend him from the threat by the role player."¹⁹⁸ Thus, while deadly force would not be justifiable to protect the cultural property, deadly force might be employed to protect the soldiers safeguarding the cultural property, which would grant a stronger level of protection for the cultural property.

The United States should protect cultural property from third parties during armed conflict to the extent that it can. The U.S. military was sharply criticized around the world during and following the looting of the Iraqi National Museum. If the United States does not protect cultural property from third parties in the future, the United States can expect the same, or

¹⁹⁵ Carrying of Firearms and Use of Force for Law Enforcement and Security Duties, Army Reg. 190-14, at 3-1 (Mar. 12, 1993), *available at* http://www.apd.army.mil/pdffiles/r190_14.pdf. This list is intended for illustrative purposes to show non-deadly force that could be employed. These means are in addition to securing the cultural property through physical barriers. Thus, these means would be better suited for large repositories of cultural property and outdoor cultural property such as monuments and buildings.

¹⁹⁶ *See* BARNSEY ET AL., *supra* note 186, at 80; *see also* BARKEI ET AL., *supra* note 186, at 80; Army Reg. 190-14, *supra* note 195, at 3-2. A soldier can defend the property and is able to use escalating force, which is primarily non-deadly force, to protect the property and ultimately herself. If the thief does not use force then there will be no deadly force employed and the cultural property will be protected. If, however, the soldier's means of escalating force to protect the property are unsuccessful and the thief fights back, then the soldier can employ deadly force to protect herself.

¹⁹⁷ BARNSEY ET AL., *supra* note 186, at 80; *see also* ANDERSON ET AL., *supra* note 186, at 80.

¹⁹⁸ BARNSEY ET AL., *supra* note 186, at 80; *see also* ANDERSON ET AL., *supra* note 186, at 80.

greater, criticism.

C. SHOULD INVADED STATES HAVE A DUTY TO PROTECT THEIR CULTURAL PROPERTY FROM THIRD PARTIES DURING ARMED CONFLICT?

Should invaded States have a duty to protect their cultural property from third parties?

Invaded States should protect their property because the property is theirs. While many museums do not have the resources to provide adequate protection for their cultural property, especially against a hoard of looters for days, States should provide for safekeeping of cultural property before an armed conflict occurs, and should also have a contingent of forces whose mission is to protect the cultural property. There are a variety of methods States can use to protect cultural property including inventorying cultural property, documenting cultural property so there will be a record of the property if it is lost or destroyed, relocating movable property to storage, and installing antitheft devices.¹⁹⁹

Moreover, under Article 15 of the 1954 Hague Convention, personnel, before or during armed conflict, can protect the cultural property as Article 15 states,

As far as is 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 duties whenever the cultural property for which they are responsible has also fallen into the hands of the opposing Party.²⁰⁰

¹⁹⁹ JIRI TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: COMMENTARY ON THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS PROTOCOL, SIGNED ON 14 MAY, 1954 IN THE HAGUE, AND ON OTHER INSTRUMENTS OF INTERNATIONAL LAW CONCERNING SUCH PROTECTION 64-65 (1996).

²⁰⁰ Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 15, May 14, 1954, 249 U.N.T.S. 240. The Operational Law Handbook states the following:

Article 17 of the 1954 Hague Cultural Property Convention established a duty to respect (not directly attack) persons engaged in the protection of cultural property. The regulations attached to the Convention provide for specific positions as cultural protectors and for their identification. As these individuals in all likelihood would be civilians, they are entitled to protection from intentional attack because of their civilian status.

MAJ. ROBERT BARNSBY ET AL., OPERATIONAL LAW HANDBOOK 30 (Maj. Sean Condron ed., 2011), available at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2011.pdf.

Article 17 states the permissible uses of the 1954 Hague Convention emblem, one of which is "as a means of identification of . . . the personnel engaged in the protection of cultural property . . ." Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra*, art. 17(2)(c).

However, Kevin Chamberlain remarked that under this provision "requirements of security will override the obligation to 'respect' such personnel,"²⁰¹ meaning that it will not always be practical or possible for the invaded State's personnel to protect cultural property. Furthermore, the protection that the invaded State could potentially afford cultural property is inversely proportional to the success of the invaded State in repelling the invading States. The invaded State will probably eventually pit all of its available manpower against the invading State if the invaded State starts to lose territory to the invading State, thereby removing manpower from protecting cultural property. However, the other methods to protect cultural property would still remain.

D. SHOULD THE UNITED STATES HAVE A DUTY TO PROTECT CULTURAL PROPERTY FROM THIRD PARTIES DURING OCCUPATION?

Should the United States have a duty to protect cultural property from third parties during Occupation? Yes.²⁰² By debilitating the occupied State's enforcement structure the occupying State creates a special relationship with the occupied State such that the occupying State has a duty to protect the occupied State's cultural property. Before the State's invasion, an enforcement structure protecting the cultural property existed. By removing that enforcement structure, the occupying State should have a duty to assume the enforcement duties, since the occupying State prevents the prior enforcers from performing their duty.

Note that if the invaded States' military force protected cultural property they would probably not be granted "respect (not directly attacked)" under the United States' military interpretation of Articles 15 and 17. See BARNSBY ET AL., *supra*, at 30.

²⁰¹ KEVIN CHAMBERLAIN, WAR AND CULTURAL HERITAGE: AN ANALYSIS OF THE 1954 CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS TWO PROTOCOLS 59 (2004).

²⁰² The United States has accepted an obligation to provide some level of protection for cultural property during Occupation as "Occupying powers also assume the obligations of protection just as the party State had prior to the armed conflict." MAJ. ROBERT BARNSBY ET AL., OPERATIONAL LAW HANDBOOK 339 (Maj. Sean Condron ed., 2011), available at http://www.loc.gov/tr/frd/Military_Law/pdf/operational-law-handbook_2011.pdf (citing Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 5, May 14, 1954, 249 U.N.T.S. 240). It is not clear, however, whether the United States has accepted an obligation to protect cultural property from States or third parties.

Occupying States have a duty to provide food and electricity to the occupants of the State; why should cultural property that defines the State's identity be different? United States Army Field Manual 3-0 notes that the Army "frequently secure[s] public and private property" following a disaster or civil disturbance.²⁰³ Could this policy be extended to situations when the military is the cause of the disturbance?²⁰⁴

E. SHOULD OCCUPIED STATES PROTECT CULTURAL PROPERTY FROM THIRD PARTIES DURING OCCUPATION?

Should an occupied State be required to protect cultural property during Occupation? Probably not. The area is occupied, and the occupying States have control over the area, so the occupied State cannot effectively protect the cultural property. While the occupied States do have legal requirements towards cultural property under Article 5 of the 1954 Hague Convention, Jiri Toman noted that "the possibility of the efforts of the responsible national authorities being hampered by the occupant was not conceded."²⁰⁵ The occupying States have removed the previous military or police force that typically protected these works.²⁰⁶ While personnel, during Occupation, can protect the cultural property under Article 15 of the 1954 Hague Convention,²⁰⁷ security concerns will override the legal requirement to respect personnel.

²⁰³ U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS 3-18 (2008), available at [http://usacac.army.mil/cac2/F3-0/FM_3-0_C1\(WEB\)1.pdf](http://usacac.army.mil/cac2/F3-0/FM_3-0_C1(WEB)1.pdf).

²⁰⁴ Colonel Jackson noted that "[t]he protection of cultural property should serve as a key focal point in stability operations and counter-insurgency efforts by the U.S. military." Col. Dick Jackson, *Cultural Property Protection in Stability Operations*, ARMY LAW., Oct. 2008, 47, 51. The same argument that the United States can use force to protect cultural property during armed conflict is applicable during Occupation. See *supra* notes 192-98 and accompanying text.

²⁰⁵ JIRI TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: COMMENTARY ON THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS PROTOCOL, SIGNED ON 14 MAY, 1954 IN THE HAGUE, AND ON OTHER INSTRUMENTS OF INTERNATIONAL LAW CONCERNING SUCH PROTECTION 84 (1996).

²⁰⁶ If occupied citizens did attempt to actively protect cultural property with an armed force, the occupied citizens would be at risk from the occupying soldiers.

²⁰⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 15, May 14, 1954, 249 U.N.T.S. 240; MAJ. ROBERT BARNSBY ET AL., OPERATIONAL LAW HANDBOOK 30 (Maj. Sean Condrón ed., 2011).

Thus, the occupied State can offer little protection to the cultural property.²⁰⁸

The occupied State should closely work with any restoration or preservation efforts so the occupied State's cultural heritage is not further altered beyond the damage that already occurred, which precipitated the restoration or preservation.

Thus, the occupied State can protect its cultural property somewhat, but practically it is limited in its ability to do so.

VII. COULD THE UNITED STATES HAVE A LEGAL REQUIREMENT TO PROTECT CULTURAL PROPERTY FROM THIRD PARTIES OUTSIDE OF THE 1954 HAGUE CONVENTION?

A. INTRODUCTION

The United States might have a legal requirement to protect cultural property from third parties in the future outside of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict²⁰⁹ ("1954 Hague Convention" or "Convention") if the duty to protect cultural property from third parties is or becomes customary international law as some scholars claim that it might.

B. WHAT IS CUSTOMARY INTERNATIONAL LAW?

While the term customary international law is frequently employed, scholars and practitioners have had difficulty determining what provisions constitute customary international law. There are two elements to customary international law: "(1) a general practice of States and (2) the acceptance by States of the general practice as law."²¹⁰ The International Court of Justice

²⁰⁸ The United States' acceptance of the obligation to protect cultural property "just as the party State had prior to the armed conflict" seems to acknowledge this practicality. BARNESBY ET AL., *supra* note 207, at 339.

²⁰⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

²¹⁰ H.W.A. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 46 (1972) (citing SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 32 (1967)); *see also* BRIAN LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 6 (2010). Scholar Lepard noted that "commentators generally agree on this basic definition: A customary practice among states can evolve into a

(“ICJ”) has stated that "the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them."²¹¹ States’ actual practice generally is not difficult to determine unless the conduct rarely occurs. Acts or omissions can determine State practice.²¹² The *opinio juris*, or the State's acceptance that its general practice is law, is more difficult to determine.

The United States Law of War Deskbook explains the United States' view of customary international law. The Deskbook notes that customary international law is "unwritten rules" that bind all States and are developed by "consistent practice of States followed from a sense of legal obligation" unless the State is a persistent objector.²¹³

customary legal norm binding on all states if 1) the practice is consistent among states and endures over some period of time, and 2) states believe that the practice is legally mandated." LEPARD, *supra*, at 6.

²¹¹ Continental Shelf (Libya/Malta) 1985 I.C.J. 13, 20, ¶ 27 (June 3), *available at* <http://www.icj-cij.org/docket/files/68/6415.pdf>. The leading international tribunal on international customary law appears to be the ICJ, which was formed by the UN in 1945. *The Court*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/court/index.php?p1=1> (last visited Nov. 11, 2009).

Some have argued that treaties create customary international law, which is relevant as it could serve to bind non-signatories to a treaty, or potentially to the Second Protocol. Under this theory, multilateral treaties can in fact generate customary international law upon coming into force when three basic conditions are met:

- 1) A sufficient number of states in the international system accept the treaty.
- 2) A significant number of states whose interests are substantially affected by the treaty . . . are parties to the treaty.
- 3) The treaty does not allow reservations on the part of the parties.

Craig Carr, *Multilateral Treaties and the Environment: A Case Study in the Formation of Customary International Law*, 27 DENV. J. INT'L L. & POL'Y 313, 314 (1999).

This theory finds support in that treaties are laws accepted by many States. *Id.* The number of States and the international importance of the States, however, are also relevant to determine if the treaty should be customary international law. *Id.* The requirement that the treaty is not subject to reservations limits the formation of customary international law. This provision acknowledges that when a treaty is subject to reservations, it is not fair to not allow non-signatories the same opportunity to reject that provision as signatories can do. *Id.*

²¹² THIRLWAY, *supra* note 210.

²¹³ LTC JEFF A. BOVARNICK ET AL., LAW OF WAR DESKBOOK 3 (Capt. Brian J. Bill, ed., 2010), *available at* http://www.loc.gov/r/r/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf. The United States defines customary international law as follows:

International custom (i.e., customary international law).

- a. That law resulting from the general and consistent practice of States followed from a sense of legal obligation (*opinio juris*).
- b. Best understood as the “unwritten” rules that bind **all** members of the community of States.
- c. A practice does not require acceptance by 100% of States to amount to customary international law. However, the argument that a norm exists is enhanced proportionally in relation to the number

C. APPLICATION OF CUSTOMARY INTERNATIONAL LAW

Despite the United States' interpretation of the 1954 Hague Convention, the United States might have a duty to protect cultural property from third parties in the future if the duty to protect cultural property from third parties is, or becomes, customary international law, as some scholars have claimed.

The United States agrees that customary international law is binding and that "[c]ustomary international law and treaty law are equal in stature, with the later in time controlling."²¹⁴ Thus, if the 1954 Hague Convention does not require the United States to protect cultural property from third parties, or is interpreted to not require the United States to protect cultural property from third parties, customary international law may still require the United States to protect cultural property from third parties in the future.²¹⁵

of States that recognize and adhere to the norm. There is also a correlation between the length of time a practice is followed and the persuasiveness that the practice amounts to customary international law. While this factor is not dispositive, developing law is more suspect than established custom.

Id.; MAJ. DEREK GRIMES ET AL., LAW OF WAR HANDBOOK 20-21 (Maj. Keith Pulse ed., 2005), available at http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2005.pdf. Note that the United States also recognizes persistent objector status:

It is possible for a State not to be bound by a rule of customary international law if that State persistently and openly objects to the rule as it develops, and continues to declare that it is not bound by the rule. The U.S. may act in accordance with principles that other States assert amount to customary international law, but expressly state it does not consider itself legally obligated to do so. This is motivated by a concern that our conduct not be considered evidence of a customary norm.

BOVARNICK ET AL., *supra*, at 3-4.

²¹⁴ LTC JEFF A. BOVARNICK ET AL., LAW OF WAR DESKBOOK 2-4 (Capt. Brian J. Bill, ed., 2010), available at http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2010.pdf.

²¹⁵ Moreover, if a treaty provision is also customary international law, a State may not be able to circumvent customary international law by their reservation to that provision. A relevant case involving the effect of treaties on customary international law in which the United States was a participant was *Military and Paramilitary Activities in and Against Nicaragua* in 1986. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.), 1986 I.C.J. 14 (June 27). The ICJ court looked to the "attitude" of the Parties and States to the treaty, in this case the United Nations Charter, to determine the *opinio juris* towards acts of aggression towards another territory. *Id.* In this case before the ICJ, the United States defended their actions against Nicaragua and stated that customary international law could not trump the U.S. reservations in an existing treaty, which were contrary to the claimed international law. *Id.* The ICJ found the following:

It does not consider that it can be claimed, as the United States does, that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States reservation. Even if a treaty norm and a

Some scholars, such as Roger O'Keefe, believe customary international law already requires occupying States to stop theft, pillage, misappropriation, and vandalism of cultural property under Article 43 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land²¹⁶ ("1907 Hague Convention").²¹⁷ O'Keefe considered the 1907 Hague Convention to have transcended into customary international law as part of the occupying State's obligations to restore and maintain order.²¹⁸

customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Consequently, the Court is in no way bound to uphold customary rules only in so far as they differ from the treaty rules which it is prevented by the United States reservation from applying.

Id.

This shows that customary international law can potentially trump the U.S. Understandings or interpretations of the 1954 Hague Convention if the United States argues that the United States does not have a legal requirement to protect cultural property from third parties and customary international law requires this duty.

²¹⁶ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, 36 Stat. 2277.

²¹⁷ *Id.* art. 43; ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 342 (2006).

²¹⁸ O'KEEFE, *supra* note 217, at 342. O'Keefe also believes that occupying States are probably obligated under customary international law to prevent illegal exportation of cultural property. *Id.*

The International Committee of the Red Cross' ("ICRC") study on customary international law also claims that occupying States have a duty under customary international law to prevent cultural property from being illegally exported from the occupied State and are responsible for seeing that cultural property that is illegally exported from the occupied State is returned. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. OF THE RED CROSS 175, 201-02 (2005). In 2005, the ICRC completed a study on what it believed had become customary international law. In a series of rules that the ICRC promulgated, Rule 41 established an affirmative duty to "prevent the illicit export of cultural property from occupied territory" and noted that the occupying power "must return illicitly exported property to the competent authorities of the occupied territory." *Id.* Notably, Rule 41 is very similar to Rule 9 of the Second Protocol to the 1954 Hague Convention, which requires an occupier to prevent "any illicit export, other removal or transfer of ownership of cultural property." Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 9, Mar. 26, 1999, 2253 U.N.T.S. 212.

The ICRC believes that this duty exists because two protocols and a treaty have required prevention of illegally exported cultural property and restitution of cultural property illegally removed from the occupied State. 1 INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 135 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (citing Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property arts. 2(2), 11, Nov. 14, 1970; Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358). The ICRC study cited the Islamic Summit Conference, which noted that "where an armed conflict erupts, the states undertake to prevent the smuggling of valuable cultural items from the territories under occupation." 2 INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 806 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (citing Islamic Summit Conference, Session of Peace and Development, Doha, Qatar, Nov. 12-14, 2000, *Al-Aqsa Intifada*, U.N. Doc. A/55/716 (Dec. 21, 2000)). The ICRC noted that over 125 different States have ratified a treaty that requires an obligation to stop illegal exportation and restitution of illegally exported cultural property. 1 INT'L COMM. OF THE RED CROSS, *supra*, at 135.

The study also stated that many treaties after World War II required restoration of cultural property

If the United States does not accept a duty to protect cultural property against third parties under the 1954 Hague Convention, a duty to protect cultural property through customary international law might be the next battlefield.

VIII. CONCLUSION

A. INTRODUCTION

A discrepancy exists in the views of the United States' legal requirements to protect cultural property from third parties during armed conflicts and Occupation. Some scholars believe legal requirements to protect cultural property from third parties exist under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict²¹⁹ (“1954 Hague Convention” or “Convention”). Others do not believe the United States has a legal requirement to protect cultural property from third parties. However, many of the cultural property specialists who believe the United States does not have legal requirements under the 1954 Hague Convention to protect cultural property from third parties believe that it would be a good idea for the U.S. military to protect cultural property from third parties. These different views of the legal requirements and desirability of the United States protecting cultural property from third parties will cause difficulties when U.S. military action or inaction involving cultural property is in the media spotlight again.

These discrepancies in views of the requirements and desirability of the United States

exported during Occupation including the Treaty of Peace in 1947 and the Convention on the Settlement of Matters Arising out of the War in 1952. *Id.* at 136; 2 INT’L COMM. OF THE RED CROSS, *supra*, at 806 (citing Convention on the Settlement of Matters Arising Out of the War and the Occupation, with Annex, art. 1, Oct. 23, 1954, 6 U.S.T. 441, 332 U.N.T.S. 219; Treaty of Peace with Italy arts. 12, 37, Feb. 10, 1947, 61 Stat. 1245, 49 U.N.T.S. 3).

While not specifically citing Rule 41, the United States refused, however, to accept the ICRC study, citing concerns with methodology to formulate what was customary international law and the lack of sufficient evidence to support the ICRC’s findings. John B. Bellinger, III & William J. Haynes, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT’L REV. OF THE RED CROSS 443, 443-44 (2007). One problem that the United States had with the methodology was that the ICRC used military manuals to evaluate customary practices and military manuals were not binding. *Id.* The ICRC study also looked to negative State practices. *Id.*

²¹⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

protecting cultural property from third parties emerge from conflicting concerns of traditional invading States versus States that potentially may be invaded, and the practicalities of armed conflict versus the ideal way people wish armed conflict to be conducted. Neither the invading States nor the invaded States are blameless. If all States accepted more responsibility, then cultural property might be better protected. The suggested measures would provide greater protection, while not imposing an unreasonable burden on States.

B. CONFLICTS OF INTERESTS

1. *Traditional Invading States Versus Potential Invaded States*

Traditional invading States generally want less obligations or limitations to hamper their invasion. Frequently potential invaded States desire more protection than traditional invading States want to extend to protect its cultural property and to restrict invading forces. Potential invaded States have the most to lose if there is a low burden to protect cultural property, while traditional invading States have the most to lose if there is a high burden to protect cultural property.²²⁰ Whose interest should trump?

2. *Practicality of Armed Conflict and Occupation Versus Ideal Means and Methods of Armed Conflict and Occupation*

While an inherent desire to protect cultural property exists, as seen by the scholars who argue that the 1954 Hague Convention protects or should protect cultural property from third parties, it is fundamentally impractical to require ideals of protection for cultural property in the less than ideal circumstances of armed conflicts and Occupation. The scholars who do not think there should be protection of cultural property from third parties have focused on those practicalities of armed conflicts and Occupation.

In constructing rules for protecting cultural property, due consideration must be had of

²²⁰ This analysis also applies to occupying States versus occupied States.

these practicalities. These practicalities, however, must not become an excuse for not trying to provide more protection for cultural property.

C. SUGGESTIONS

There will always be multiple viewpoints in regard to the protection of cultural property in armed conflicts and Occupation. Invading and occupying States want unrestrained access to win and exert authority over the territory while the invaded and occupied States want their cultural property protected. While armed conflict is obviously less than ideal, and there is no doubt that damage to cultural property will occur in the future, it would be better to have a legal requirement to protect cultural property from third parties. Cultural property would be better protected and the discussion on the best way to protect the cultural property would progress.

Both the invading State and the invaded State should make an effort to protect cultural property and plan for the cultural properties' protection before the invasion occurs. Neither State should be excused just because the other did not protect the cultural property.

The United States has the capacity and wherewithal to better plan for cultural property protection before invasions. The U.S. military created a "no strike" list of monuments and cultural buildings that were not to be targeted in Iraq. The U.S. military also had a plan before going into Iraq to remedy and support the Iraqi judiciary. Perhaps the U.S. military could provide as much planning to protect key cultural properties from third parties before the invasion and Occupation occurs.²²¹

Under this proposal, the U.S. military would review what the future invaded State had

²²¹ See Convention Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907, Annex, 36 Stat. 2277. Under Article 43,

[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall 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.

Id.

designated as cultural property under the 1954 Hague Convention and confer with cultural property specialists to confirm what property constitutes cultural property under the 1954 Hague Convention. The U.S. military should plan to protect those cultural properties. While the United States would not be able to protect all cultural property, it could provide greater protection to key cultural properties and repositories.

An exception would have to be included to accommodate the practicalities of armed conflict. While advocating that the United States should protect cultural property from third parties, it is impractical to expect the United States to protect cultural property from behind enemy lines. Moreover, this exception would have to accommodate the reality that battle lines are not set, but ever changing with the tides of battle.

The invaded State also should protect its cultural property. Certainly this would not prevent all harm to cultural property, but it would ameliorate the effect of looting. While many museums cannot afford protective measures, if the object rises to the level of cultural property under the 1954 Hague Convention, the museum or State should protect it even if they cannot provide protection for other property.

No matter how much one advocates that invading States have a duty to protect cultural property from States and third parties, there will be a point at which the previous regime is leaving and the invading State is entering such that there will be no structured authority to protect the cultural property. It is at this point that the invaded State should have already provided basic protection to the cultural property so that the cultural property will survive for the invading State to enter and protect it.

Occupying States should protect cultural property from States and third parties as the occupying State removed the prior enforcement structure that protected the cultural property and

the occupied State is limited in its ability to do so. The occupied State should help protect and preserve its cultural property to the greatest extent that it can, however. By requiring all States to protect cultural property from States and third parties, States will proactively plan for cultural properties' protection more comprehensively before armed conflict or Occupation occurs and will actively incorporate cultural property protection into its actions, thereby better protecting cultural property.