The Legal Regime for Protecting Cultural Property During Armed Conflict

Joshua E. Kastenberg
University of New Mexico - School of Law

Follow this and additional works at: https://digitalrepository.unm.edu/law_facultyscholarship

Part of the Law Commons

Recommended Citation
Available at: https://digitalrepository.unm.edu/law_facultyscholarship/421

This Article is brought to you for free and open access by the UNM School of Law at UNM Digital Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sarahrk@unm.edu.
The Legal Regime for Protecting Cultural Property During Armed Conflict

CAPTAIN JOSHUA E. KASTENBERG, USAF*

I. INTRODUCTION

After World War II, codified international law recognized that historic monuments, archaeological sites, and other artwork is considered the property of all mankind, rather than that of a single state. This recognition was codified in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and reaffirmed in article 53 of the 1977 Additional Protocols to the Geneva Conventions of 1949. The viability of the 1954 Hague Convention came into question during the 1991 Gulf War when Iraqi aircraft were intentionally located near the remains of a 3,000 year old Sumerian temple. The United States Air Force was faced with the question of whether to attack these aircraft, thereby risking collateral damage to the ancient monument which the Convention would permit — or to avoid the area and the military targets. The command authority opted for the latter option. As the Middle East, North Korea, and Southern Europe remain areas of political

---

* Captain Joshua E. Kastenberg (B.A., UCLA; J.D., Marquette University Law School) is an assistant staff judge advocate at Whiteman AFB, Missouri. He is a member of the Wisconsin State Bar. The author gratefully acknowledges the help and insight of Lt Col. Dwight K. Keller, Lt. Col Dennis Shepherd, Lt Col. Curtiss R. Petrek, 509th Bomb Wing, Whiteman AFB, and in particular Group Captain Alan M. Hemmingway, Director of Air Force Legal Services, Royal Australian Air Force, Canberra, Australia.


2 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts, June 8, 1977, art. 37(1), 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. There were two additional protocols. Additional Protocol I relates to the protection of victims of international armed conflicts. Additional Protocol II relates to the protection of victims of non-international armed conflicts. For the purposes of the essay, only Protocol I is utilized.


4 DoD Report, supra note 2, at app. O, pg. 3. The report states that, "Coalition forces continued to respect Iraqi cultural property, even where Iraqi forces used such property to shield targets from attack. However, some indirect damage may have occurred to some Iraqi property due to the concussive effect of munitions directed against Iraqi targets some distance away from the cultural sites." Id.
military instability, the likelihood that this type of situation could again arise is great.

The United States is greatly interested in preserving and protecting cultural property. Historically, the United States has been a leader in promoting national laws to protect cultural property. Additionally, the United States, through a number of both federal and state laws has served as an international policeman for protecting cultural property. An attorney need only research through the myriad of federal and state laws, and judicial decisions to see the tremendous emphasis placed on the preservation of historic and cultural sites and objects to confirm this national interest. The military attorney should recognize that from the beginning of this nation, the American military has


7 See, e.g Federal Republic of Germany v. Elicofon, 478 F.2d 231 (2d Cir. 1973), cert denied, 415 U.S. 931 (1974) (allowing German gov’t to recover stolen WWII painting held by U.S. art dealer); United States v. Hollingshead, 494 F.2d 1154 (9th Cir. 1974) (applying National Stolen Properties Act to antiquities taken from foreign countires); United States v. McClain, 593 F.2d 658 (5th Cir. 1979)(holding same as Hollingshead supra); Kunstsammulungen Zu Weimar v. Elicofon, (678 F.2d 1982) (allowing use of foreign law on protection of art to recover painting held by U.S. art dealer); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts Inc, 917 F.2d 278 (7th Cir. 1990)(tolling statute of limitations to recover stolen art until owner discovers location of stolen property); Republic of Turkey v. OKS Partners, 797 F.Supp. 64 (S.D.N.Y. 1990) (applying civil RICO statute to conspiracy theft of stolen antiquities). For a complete law review synopsis of laws and cases affecting cultural property in civilian practice, see Joshua E. Kastenberg, Assessing the Available Actions for Recovery in Cultural Property Cases, 56 DEPAUL J. ART & ENT. LAW 39 (1995).
placed an overarching interest in preserving recognized laws of warfare. These recognized laws include the doctrine of necessity, which envisions that where an enemy places fortifications or other objects of military value near a historic site, the historic site should lose its protected status.

This article examines the depth of customary international law — that is the accepted practices and norms of the international community — with respect to cultural property, the 1954 Hague Convention and Additional Protocol One, and Department of Defense and Air Force policy. In order to properly understand the legal basis for protecting cultural properties under international law, it is essential to review the development of these protections. It is also essential to gain a basic knowledge of the basic principles of the law of armed conflict. Section I will discuss the evolution toward a customary development of an international law of war to protect cultural properties. This section also notes the basic principles of the law of armed conflict. Section II examines the terms of the 1954 Hague Convention, and Additional Protocol

---

8 See Russell F. Weigley, American Strategy from its Beginnings through the First World War, in MAKERS OF MODERN STRATEGY 408, 412, (Paret ed. 1986). [hereinafter Modern Strategy] Weigley writes that Washington feared the "tendency of irregular war, with its violations of the international rules of war, to tear apart the entire social contract, as well as his specific concern to guard the dignity of the American cause as an essential part of the new nation's claim to equality of status among the nations of the world." Id. Moreover, in the Civil War, the Union adopted a code of war named for its founder Professor Francis Lieber to ensure certain wartime conduct. This code was designed to prevent further degeneration of fighting to brutality. See GENERAL ORDER NO. 100 APR. 14, 1863, in 3 U.S. DEPT. OF WAR, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (ser. III) 148, 151 (1902). [hereinafter Lieber Code]

9 The charter to the International Court of Justice defines customary international law as, "the evidence of a general practice accepted as law." I.C.J., art. 38, (Sept. 14 1929). Customary international law has also been defined as, over varying periods of time certain international practices have been found to be reasonable and wise in the conduct of foreign relations, in considerable measure the result of a balancing of interests. Such practices have attained the stature of accepted principles or norms and are recognized as international law or practice. Accordingly, there are in the field of international law, public and private, certain well recognized principles or norms. AFP 110-20, Selected International Agreements (27 July 1981). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 & cmt. b, cmt. c.

10 AFP 110-31, International Law, The Conduct of Armed Conflict and Air Operations, 10 (1976). [hereinafter AFP 110-31] AFP 110-31 notes the basic principles of armed conflict as: Necessity (defined as permitting the application of only that degree of regulated force not otherwise prohibited by the laws of war, required for the partial or complete submission of the enemy with the least expenditure of life and physical resources); Humanity (defined as not permitting the infliction of injury, suffering or destruction not actually necessary to accomplish the mission); Chivalry (defined as the conduct of conflicts within well recognized formalities and courtesies and forbidding treacherous misconduct, the use of poison or the misuse of protective flags or devices). Id.

---

Cultural Property - 279
One to the Geneva Convention. Section II also applies the various provisions of the 1954 Convention into historic perspective for the purpose of reviewing its effectiveness. Section III will analyze current Department of Defense and Air Force policy. This article will conclude that the 1954 Hague Convention is a reflection of customary international law, but has never risen per se to the level of customary international law. Moreover, while the United States and its military allies follow, when possible, the basic framework of the 1954 Hague Convention, they are not bound by it. This article will also discuss the pitfalls of Additional Protocol One. To date, the United States and several of its western allies have not signed the additional protocols. Finally, DoD and Air Force policy is analyzed against the backdrop of customary international law.

II. HISTORIC DEVELOPMENT OF A CUSTOMARY INTERNATIONAL LAW

Since the beginnings of organized society, warfare has encompassed the occupation of land and destruction of property. Indeed, from ancient times, success in war and the subjugation of the conquered populations have often depended on the wholesale destruction of that population's religious and political centers. Despite this character of war, there has been a

---

11 For example, an ancient law of war can be found in the Old Testament. The war code of Deuteronomy states:

> When you draw near a city to fight against it, offer terms of peace to it. And if its answer to you is peace and it opens to you, then all the people who are found in it shall do forced labor for you and shall serve you. But if it makes no peace with you, but makes war against you, then you shall besiege it; and when the Lord your God gives it to your hand you shall put all its males to the sword, but the women, and the little ones, and the cattle, and everything else in the city, all its spoil, you shall take as booty for yourselves; and you shall enjoy the spoil of your enemies, which the Lord your God has given you. Thus you shall do to all the cities which are very far from you.... you shall save nothing alive that breathes, but you shall utterly destroy them, the Hittites and the Amorites, the Canaanites and the Perizittes, the Hivites and the Jebusites, as the Lord your God has commanded; that they may not teach you to do according to all their abominable practices which they have done in the services of their gods, and so to sin against the Lord your God.

Deuteronomy 20.10.

This Deuteronomic tradition, which was more or less a reflection of early civilizations’ views, was to have a profound impact on the Christian view of warfare through the Crusades. The ultimate aim of warfare became the destruction of the enemy’s center of religious beliefs because out of these religious beliefs came societal cohesion. Without societal cohesion, the conquered society would easily be assimilated into the conquering state and lose its identity.
countervailing view that certain properties should be free from pillage and destruction. This view dates back to antiquity. For example, the Greek Historian, Herodotus (ca. 484-430 BC), chastised the Persian king Xerxes for plundering Greek and Egyptian religious and political centers. Thus, by 480 BC, the Greeks clearly believed that cultural or ancient treasures should be, if at all possible, left unmolested in wartime. Thus, the origin of a customary prohibition against the destruction of cultural properties dates to at least as far back as classical Greece and perhaps sometime into prior antiquity. That the Greeks were successful in the Persian Wars ensured a continuance of a European, or at least a Mediterranean development of laws and legal custom. Nowhere was an adherence to this early law of war more pronounced than with Alexander the Great (350-326 BC). Alexander’s view on the protection of historic properties was certainly more enlightened than Xerxes’.

Another ancient example can be found in the annals of the ninth century King Ashurnaisirpal II of Assyria regarding the destruction of an enemy city:

With the masses of my troops and by my furious battle onset, I stormed, I captured the city; 600 of their warriors I put to the sword; 3000 captives I burned with fire; I did not leave a single one of them alive to serve as hostage. Hulai, their governor, I captured alive. Their corpses I formed into pillars; their young men and maidens I burned in the fire. Hulai, their governor, I flayed his skin I spread upon the wall of the city of Damdamusa; the city I destroyed, I devastated, I burned with fire.

Doyne Dawson, The Origins of Western Warfare 41 (1996)

Herodotus writes that Xerxes declared his intention, “to undertake war and not to rest until having conquered and burnt all Athens.” Id. While not a unique form of warfare to the ancient Near East, Herodotus discusses this statement in the context of a violation of a Greek law of war. Xerxes had not limited his anger to Athens and his style of warfare was well known to Herodotus and the Greeks. For example, according to Herodotus, Xerxes ordered one of his more renowned generals, Megabyxus to destroy a Babylonian rebellion through the destruction of its religious and cultural center. “At the end of this successful campaign, Nebuchadnezzer’s fortifications and ziggurat were demolished. Babylon’s great estates carved, looted, and ravaged. As a supreme insult, an eighteen foot statute of the god Bel-Marduk, built almost of solid gold, was taken and melted into bullion. Babylon’s theocratic monarchy was destroyed and the city lost its last vestige of independence.” Id. For a particularly good explanation of Xerxes’ actions see Peter Green, The Greco-Persian Wars 58 (1996). Even by 480 BC, Babylon was a center of antiquity and the destruction of its thousand-year old religious center, was in fact an intentional demolition of what was then considered a world treasure.

E.g., upon Alexander’s conquest of Babylon, he revitalized its historic and religious center which had been devastated by Persian rule. Of all the cities conquered, only the burning of the Persian capitol Persepolis was an exception, and Alexander later regretted this action. See A.B. Bosworth, Conquest and Empire: The Reign of Alexander the Great 87 (1988).
The conquest of Persia was marked by a desire to preserve ancient treasures for the enhancement of a Hellenistic empire. It is probable that Alexander’s early education by such luminaries as Aristotle left a desire to create museums and other centers of education ornamented by other culture’s treasures. The enlightened attitudes of Greek and Macedonian war policy makers left a tradition that prevailed though subsequent European history. The Roman Republic and Empire, with its interest in both economic and political expansion would destroy cities and other cultures as a measure of last resort. However, Roman history is replete with examples of this “last resort” philosophy. The destruction of Carthage after the Third Punic War (149-146 BC) provides a classic example on this point. The Romans adopted the Greek tradition concerning the treatment towards the historic objects of others during periods of conquest and armed conflict. This customary tradition included a propensity for preservation whenever possible. From the fall of Rome through the Renaissance, the attitude of preservation when possible prevailed at least in the minds of theorists and philosophers.

The next significant juncture on the limitations of warfare in regard to centers of cultural property did not occur until over a thousand years after the destruction of the western Roman Empire. In the period of the devastating Thirty Years War (1618-1648) one of the founding scholars of international law, Hugo Grotius (1583-1645) attempted to create a basic framework to limit the destruction in both lives and property that the Europe-wide conflict had produced. The Thirty Years War had been more destructive to Continental

---

14 Id.
16 See Brian Caven, The Punic Wars 273-295 (1980). After Carthage's second revival following the defeat of Hannibal, the Roman Republic's government concluded that the necessity of Carthage's destruction far outweighed any economic gain which Rome could accrue by a continued trade relationship. Id.
17 In the Mediaeval and Renaissance periods, discussion of a doctrine of just war became prevalent. St. Augustine, for example, saw warfare as only just when carried out for motives of charity. See St. Augustine, City of God 27 (Henry Bettenson trans.1971). Machiavelli and Erasmus believed in the limitations of just war, and not warfare for the purpose of annihilating one's enemy.
18 See, e.g. Machiavelli, Arta della Guerra [The Art of War] 48-51 (Bobs-Merrill trans. 1965). Machiavelli felt that wars should be short, but brutal to the soldiers on the field. His considerations on laws of war stemmed from his belief that soldiers should come from the soil for which they fight; that the use of mercenaries in wartime not only undermined the Roman Empire, but also made war a lawless endeavor. See Felix Gilbert, Machiavelli, The Renaissance and the Art of War, in Makers of Modern Strategy 11, 21-31, (Paret ed. 1986).
19 Hugo Grotius, De Jure Belli ac Pacis Libri Tres [Three Books on the Law of War and Peace] 1625 (Francis W. Kelsey trans. 1925). Grotius wrote, “such a work is all the more necessary because in our day, as in former times, there is no lack of men who view this branch
Europe, than any prior conflict, and it would remain unrivaled in that aspect until World War One. Indeed, in the Treaty of Westphalia, the signatory nations conceded that the claims of destruction were so complex as to preclude any recovery. In the 18th Century, Emeric de. Vattel advanced the premise that nations should fight wars with the limited purpose of defeating the enemy’s forces. Vattel argued, “Devastations and destructions and seizures motivated by hatred and passion, however, are clearly unnecessary and wrong: doubly wrong indeed, if they also destroy some of the common property of mankind — its inheritance from the past, or its means of subsistence and enrichment in the present.”

Both Grotius’ and de. Vattel’s philosophy proved appropriate for the limited wars of the 18th century. These wars tended to be brief, isolated, and expensive, thereby limiting their potential for massive destruction. By the close of the 18th century, adherence to the standards of Grotius and de. Vattel became problematic due to the increased scope of military conflict, such as the French Revolutionary wars. Napoleon’s conquests provided ready exceptions of law with contempt as having no reality outside of an empty name.”

According to noted historian Geoffrey Parker, Central Europe, in the period of the Thirty Years War, suffered greater destruction and death than at any period prior to 1939. Grotius and his contemporaries were appalled by what appeared to be limitless suffering and destruction. See GEORGE PARKER, THE THIRTY YEARS WAR 208-218 (1984).

Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies. [hereinafter Treaty of Westphalia], Oct. 24, 1648, art II (Tufts University, Olde English trans. 1997). The Treaty of Westphalia later states in art. XLVII:

from this general restitution shall be exempted things which cannot be restor’d, as things moveable and moving, Fruits gather’d, Things alienated by the authority of the Chiefs of the Party, Things destroy’d, ruined, and converted to other uses for the publick security, as publick and particular buildings, whether Sacred or Profane, publick or private Gages, which have been, by suprize of the Enemys, pillage’d confiscated, lawfully sold, or voluntarily bestow’d.

Id.


See Henry Guerlac, *Vauban: The Impact of Science on War*, in MAKERS OF MODERN STRATEGY 65-97 (PARET ed. 1986). Guerlac writes that, “the enlightened monarchies of the eighteenth century tried to spare their civilian populations, both for humane reasons, and as potential sources of revenue.” Id. at 93.

Cultural Property - 283
to the development of a customary international law of warfare. While his armies generally, attempted to adhere to the principles of both Grotius and E. de. Vattel, historians and legal scholars point out that French armies from Egypt to Moscow absconded with a massive collection of art and antiquities. However, Napoleon's systematic looting of European art was not done for booty, but to propel the Louvre into the civilized world's center of art and antiquities. This theft of art was not a particularly unusual feature of warfare. Napoleon routinely engaged in this practice on a greater scale than anyone since the Roman Empire. In several respects, the wars fought by Napoleon were a watershed for war in the industrial age. This practice would have a direct effect on the growing emphasis to protect cultural properties. Additionally, after Napoleon's final defeat at Waterloo, France was required under the Second Treaty of Paris to restore works of art to their original state. The British Representative to the Congress of Vienna, Viscount Castlereagh had circulated a memorandum which stated that the removal of artwork, "was contrary to every principle of justice and to the usage of modern warfare."

During the Napoleonic period, a concept that cultural property was the property of all humanity, rather than as a prize of plunder, emerged in international law. For example, in the American and British War of 1812, certain American scientific prints and paintings were seized by the Royal Navy from an American Vessel, The Marquis de Somerueles. The petitioners, a Philadelphia science organization challenged this act in a British Admiralty Court. Sir Alexander Croke, Judge of the Vice Admiralty Court in Halifax, Nova Scotia summarized the disposition of law regarding such properties in the admiralty case, The Marquis de Somerueles. Sir Alexander posited that: "The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences admitted amongst all civilisations as forming an exception to the severe rights of warfare, and as entitled to favour and protection. They are considered not as the peculium of this, or that nation, but as belonging to the common interests of the whole species."

See Proctor Patterson Jones, Napoleon: An Intimate Account of the Years of Supremacy 1800-1814, 257 (1992). Moreover, Napoleon saw himself as creating a center in Paris for revolutionary monuments to civilization rather than merely seeking French glory and enrichment. Id.

Lakshmikanth Rao Penna, Protection of Cultural Property During Armed Conflict, in Developments in International Humanitarian Law 258 (Maley ed. 1997).

(1813) Stewarts Vice-Admiralty Reports, 482.

Id.
Interestingly, the next significant development in the laws of war originated in the United States during the Civil War. The War Department and Abraham Lincoln were increasingly concerned with the Confederate's use of guerrilla warfare. In 1862, Henry W. Halleck, General-in-Chief of the Union Armies, sought Professor Francis Lieber's help in drafting a code of laws to govern the conduct of the war. Lieber's code was adopted by the Army as General Order No. 100 in 1863. Several of its provisions remained significant for providing definition to principles underlying the laws of war, as well as by defining war. Lieber defined Necessity as, "those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war." Necessity, according to Lieber's Code, "admits all direct destruction of life and limb or armed enemies, and of other persons whose destruction is incidentally unavoidable in armed contests of the war . . . ." Of particular significance to this essay was the Code's attempts at securing the safety of classical works of art, museums, scientific collections, and libraries. The Code placed on both the defender and the attacker a duty of securing such sites or items, "against all avoidable injury, even when they are contained in fortified places whilst besieged and bombarded." General Order No.100 remained an important law of war reference until the close of the 19th Century when international attempts to codify a law resulted in the first international agreement on the law of war.

One of the many effects of the industrial revolution was to increase a nation-state's capability to conduct war. A corollary to this increased capability was that warfare became more violent and overall destructive. By the close of the 19th Century, an international movement to reduce the destructiveness of war culminated in the two Hague Conventions which were

---

29 Lieber Code, supra note 7, at 148.
30 Id.
31 Id. at 151.
32 Id. at 150.
33 There are a number of outstanding sources on the subject of industrial revolution, technology developments, and war. Several of these sources are listed below, but by no means is this a complete list. See JOHN KEEGAN, THE SECOND WORLD WAR 14-15 (1989); THEODORE ROPP, WAR IN THE MODERN WORLD (1962); MARTIN VAN CREVALD, TECHNOLOGY AND WAR: FROM 2000 B.C. TO THE PRESENT (1989); MARTIN VAN CREVALD SUPPLYING WAR: LOGISTICS FROM WALLENSTEIN TO PATTON (1977); WALTER MILLIS, ARMS AND MEN: A STUDY IN AMERICAN MILITARY HISTORY (1956); RUSSELL F. WIEGLEY, THE AMERICAN WAY OF WAR: A HISTORY OF THE UNITED STATES MILITARY STRATEGY AND POLICY (1984); and, WILLIAM MCELWEE, THE ART OF WAR: WATERLOO TO MONS (1975).
concluded in 1899,\textsuperscript{34} and 1907.\textsuperscript{35} The 1899 and 1907 Hague Conventions produced a codified international law of warfare. Similar provisions in both Conventions prohibited an invading army from pillaging, and required invaders to respect the laws of the conquered territory.\textsuperscript{36} These Conventions also prohibited the confiscation of private property.\textsuperscript{37} Finally, cultural objects and structures were protected under both conventions, and violations of the Conventions were subject to international sanctions.\textsuperscript{38} Military lawyers, however, must make note that both Conventions permitted the destruction of cultural sites and objects, if recognized under the necessities or exigencies of war.\textsuperscript{39}

The rules established under the Hague Conventions were initially tested in the First World War. Regions rich in historic and culturally important sites were affected by widespread combat.\textsuperscript{40} Incidents such as the German razing of Belgium’s Louvain University, and the bombing of the medieval Rheims Cathedral in France, triggered international outrage. So too did the looting of occupied museums and cathedrals. This outrage was manifested in article 245 of the Treaty of Versailles which forced Germany to return all stolen property

\begin{footnotes}
\item[34] Convention with Certain Powers Respecting the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (1903), T.S. No. 403. [hereinafter 1899 Convention].
\item[35] Convention with Other Powers Respecting the Laws and Customs of War on Land, Oct 18, 1907, 36 Stat. 2277, T.S. No. 539.
\item[36] For example, read Article 43 of the 1899 Convention. 1899 Convention, supra note 34.
\item[37] See 1899 Convention, supra note 34.
\item[38] Article 56 states that, “[a]ll seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.” Id.
\item[39] Article 27 reads:

In sieges and bombardments, all necessary steps should be taken to spare, as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided these are not used at the same time for military purposes. The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.

\textit{Id.}
\item[40] Fighting occurred in areas ranging from the “Cradle of Civilization” (Basra - 1915, Kut el Amara -1915-1916, and Baghdad 1917); Palestine, including the capture of Jerusalem which the Turks evacuated intact to spare any damage the that city in 1917 and the Sinai (1915-1917); France (including the shelling of Paris 1914-1918), Macedonia (Salonika 1916-1918), Turkey (Gallipoli), Britain (London bombed by the German Air Force in 1916-1918); China and the Pacific; Belgium; and throughout central and eastern Europe. This is by no means a complete list, but a general scope of events. See generally James Stokesbury, \textit{WORLD WAR I} (1984).
\end{footnotes}
of historic significance. Equally important was the use of airpower during the conflict. For the first time in history, major population centers were bombarded from the air. The capacity of air forces to destroy enemy production and population centers from a distance became a reality. This new feature of modern warfare was recognized in international law tribunals. As a result, in the 1920’s and 1930’s, the United States moved to protect historic sites from destruction by initiating an international agreement known collectively as the Roerich Pact. This Pact was limited in its application and extent, but it did embody the basic tenets of customary international law with respect to cultural properties. Additionally, the United States Department of State, the Japanese Imperial Foreign Office, and certain smaller European nation’s diplomatic agencies attempted to codify the rules of air war into a body of law known as the 1923 Hague Air Rules. The proposed 1923 Hague Air Rules were never adopted by any nation because the draft set of rules proved too strict to be acceptable to all powers. Nonetheless, cultural property was addressed in the proposed Hague Air Rules. Two proposed articles required commanders to spare, whenever possible, buildings dedicated

---

41 Treaty of Versailles, June 28, 1919, art. 245, reprinted in, 2 Bevans 43; 3 Malloy 3229. Article 245 states that:

within six months after coming into force, of the present Treaty, the German Government must restore to the French Government the trophies, archives, historical souvenirs, or works of art carried away from France by the German authorities in the course of the war of 1870-1871, and during this last war, in accordance with a list which will be communicated to it by the French Government.

Id.


43 See Coenca Brothers v. Germany (1927), in Annual Digest of Public International Law Cases 570-72 (McNair and Lauterpacht, eds. London 1931). Coenca Brothers, was a mixed German and Greek tribunal which adjudicated a claim against Germany for damages stemming from the German aerial bombing of Salonica, Greece during the war. The plaintiffs prevailed as a result of the German commander failing to provide proper warning in accordance with article 26 of the Annex to the 1907 Hague Convention. Additionally, at the time of the bombing, Greece was a neutral country in that it was occupied by allied troops, but was not an active participant in the war until a later date.


46 Hays Parks, supra note 28, at 35.
to public worship, monuments and provided for a neutral inspection system to establish safety areas near these sites.\textsuperscript{47}

Despite international outrage caused by the German Army's excesses in World War I, in the immediate aftermath of the war all of the belligerent nations began formulating war doctrine for the next anticipated conflict. In terms of airpower, Great Britain, Germany, and France concentrated on a heavy bomber doctrine.\textsuperscript{48} With the emergence of heavy bombers in the interwar period, the likelihood for the destruction of historic and cultural sites dramatically increased. During World War II, European and Asian cultural landmarks were extremely damaged or destroyed outright. Germany in particular conducted a campaign of widespread looting of Europe's art treasures.\textsuperscript{49} Moreover, as no region was immune from battle, historic sites and

\begin{flushright}
\textsuperscript{47} Id.
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{49} In contravention of the Hague Convention, Hitler's Germany amassed the largest collection of European treasures since Napoleon. According to the Nuremberg indictment, Germany's plunder was a destructive as it was confiscatory; over 500 museums were decimated, including major repositories in Leningrad and Stalingrad. Over 21,000 items of art paintings, furniture, textiles, and similar valuable antiquities were taken. In order to restore artifacts and artwork to the rightful owner, the United States created, a State Department agency, The Commission for the Protection and Salvaging of Artistic and Historic Monuments in Europe. German disregard for cultural monuments led the Soviet Union to evacuate mass numbers of books and artifacts from historic centers and museums. The Leningrad Library alone shipped off over 300,000 of its priceless collection and many of the art museums placed their collections in deep basements for the duration of the war. German behavior can be contrasted with allied leadership which made, in comparison, diligent efforts to preserve ancient treasures. For example, prior to Lt. General Bernard Law Montgomery's 8th Army 1942 El Alamein offensive, the renowned archaeologist Sir Leonard Wooley was consulted in an effort to preserve the existence of known archeologic monuments in North Africa. See LYNN H. NICHOLAS, \textit{THE RAPE OF EUROPE} 215 (1994). Moreover, in 1943, the United Nations issued a declaration calling invalid all forced transfers of art and other properties in enemy controlled territory. \textit{Id}. Finally, the decision to exclude Kyoto as an atom bomb target occurred because of that city's important place in Japanese history. See Air Force Pamphlet 110-34, Commanders Handbook on the Law of Armed Conflict (July 25, 1980). [hereinafter AFP 110-34] Perhaps the best example of Allied doctrine is General Order 65, December 29, 1943, circulated by General Dwight D. Eisenhower, Supreme Commander Headquarters Allied

\textit{The Air Force Law Review}
objects were jeopardized by war across the globe. As an example, during the Italian Campaign, Allied generals deemed it necessary to level the medieval monastery at Monte Cassino which blocked the access to Rome.\textsuperscript{50} The Monte Cassino episode, by no means an isolated event, came to symbolize the need for greater protections of cultural properties in wartime.

What had been achieved through the war crimes trials of World War II as well as the growth of international law analysis after the war, was an acceptance of a customary internal law of war with respect to the protection of cultural properties.\textsuperscript{51} Moreover, the theft and destruction of cultural properties was seen as an internationally unlawful activity.\textsuperscript{52} With this acceptance came a desire for codification of this customary law. In short, the wholesale destruction of Europe’s cities and the widespread looting of Europe’s treasures

Expeditionsary Forces (SHAESF) regarding the protection of historic monuments during the Italian campaign:

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 age illustrate the growth of civilization which is ours. We are bound to respect these 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 buildings must go. But the choice is not always as 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. 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 cloak slackness or indifference.

10 DIGEST OF INTERNATIONAL LAW, 438 (MAJORIE M. WHITEMAN ED. 1968). See also Hays Parks, supra note 28, at 61.

\textsuperscript{50} In March 1944, Lt. General Mark Clark’s Fifth US Army and the British Eighth Army under the command of Lt. General Oliver Leese (with Field Marshal Harold Alexander in overall command) were fighting a ponderous campaign up the Italian Peninsula. Leese, Alexander, Clark, and the ANZAC commander Bernard Freyberg believed that the medieval monastery was being used as an observation post. However, only after allied aircraft bombarded the monastery did the Wehrmacht occupy it. Their occupation forced the campaign to an eventual standstill costing greater numbers of lives and equipment, and creating a veritable propaganda source for the Germans to use on both their own population, but also to win back Italian support for the war. See M. BLUMENSON, U.S. ARMY IN WORLD WAR II, SALERNO TO CASSINO 395-418 (1969). See also III THE ARMY AIR FORCES IN WORLD WAR II, EUROPE - ARGUMENT TO V-E DAY, 362-364 (W. Craven & J. Cate, eds. 1951). Finally, the United States Army pays particular attention to this episode. See DEPT. OF THE ARMY PAM 27-50-127 (1983).


\textsuperscript{52} Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, August 8, 1945, 59 Stat. 1544 E.A.S. No. 472. 82 U.N.T.S. 279.
by German occupying forces accelerated the movement for an effective international legal protection of historic and cultural property. Nonetheless, as the following two sections will illuminate, the 1954 Hague Convention failed to take into account the exigencies of war, and two of the fundamental accepted principles: necessity and proportionality.

III. 1954 HAGUE CONVENTION

A. History

Forty-five countries signed the 1954 Hague Convention at its inception. Currently, seventy-five countries have ratified or acceded to the Hague Convention. The variety of signatory countries, with their diverse cultures and divergent political views, indicates the breadth of support for the underlying principles of the Convention. It does not necessarily raise all the provisions of the Convention to customary international law. Indeed, in the cold war era doctrine of massive retaliation, there could be little application of the Convention to total war. Nonetheless, for the purposes of non-nuclear engagements, the Convention was acceptable to a number of nations and organizations. It was not acceptable to the United States, Great Britain, or Canada, among other nations, because of its restrictiveness and stretch beyond customary international law.

The preamble to the 1954 Convention describes armed conflict as the underlying basis for invoking its rules. The genesis of the 1954 Convention

---

53 Parties to the 1954 Hague Convention include: Albania, Australia, Austria, Belgium, Brazil, Bulgaria, Burkina-Faso, Burma, Cameroon, Cyprus, Cuba, Dominican Republic, Ecuador, Egypt, France, Gabon, Germany, Ghana, Greece, Guatemala, Guinea, Holy See, Hunger, India, Indonesia, Iran, Iraq, Israel, Italy, Ivory Coast, Jordan, Kampuchea, Kuwait, Lebanon, Libya, Liechtenstein, Luxembourg, Madagascar, Malaysia, Mali, Mexico, Monaco, Mongolia, Morocco, Netherlands, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Poland, Qatar, Rumania, Russia, Saudi Arabia, San Marino, Senegal, Spain, Sudan, Sweden, Switzerland, Syria, Tanzania, Thailand, Tunisia, Turkey, Yemen, and Zaire.

54 Indeed, the United States and the other nuclear powers had concerns with the convention because of its impossibility to enforce during a nuclear exchange. In January 1954, in one of the seminal speeches of the nuclear age, U.S. Secretary of State, John Foster Dulles announced that “the United States intended in the future to deter aggression by depending primarily on a great capacity to retaliate, instantly, by means and at places of our own choosing.” John Foster Dulles, The Evolution of Foreign Policy, 30 DEPARTMENT OF STATE BULLETIN, Jan 25, 1954. Dulles’ statement evolved into what became known as the doctrine of massive retaliation. Lawrence Freidman, The First Two Generations of Nuclear Strategists, in MAKERS OF MODERN STRATEGY 740 (Paret ed. 1986).

55 Hague Convention, supra note 1, at 240. The Convention states that its originators were “[g]uided by the principles concerning the protection of cultural property during armed
can be traced to article 56 of the 1907 Convention. Article 56 of the 1907 Convention states that “all seizure or destruction or willful damage done to the institutions of this charter, historic documents, works of art and science, is forbidden, and should be made subject to legal proceedings.”

However, unlike its predecessor conventions, the 1954 Convention introduced the term “cultural property” and gave it definition. Moreover, the 1954 Convention expanded protection for cultural property to all armed conflicts rather than just full-scale wars by eliminating the loopholes of the 1899 and 1907 Conventions. The 1954 Convention also designated an international symbol for nations in order to protect cultural property. The presence of cultural property is to be indicated by a blue and white shield. Finally, the 1954 Convention created an International Register of Cultural Property Under Special Protection (Register). However, to date, the Register is woefully incomplete.

Article 3 places an affirmative duty on signatory parties to protect cultural property situated within their territory. This is reinforced by Article 4 which also places an affirmative duty on all signatory parties to respect cultural property situated both within their own territory and additionally in the territory of other states. Additionally, Article 4 disallows the use of cultural conflict, as established in the Conventions of The Hague of 1899 and 1907 and the Washington Pact of 15 April 1935.”

56 Convention with Other Powers Respecting the Laws and Customs of War on Land, Oct 18, 1907, 36 Stat. 2277, art. 56, T.S. No. 539.
57 Id.
58 Cultural Property is defined as including both moveable and immovable property, but also buildings containing moveable property and centers containing concentrations of monuments. 1954 Hague Convention, supra note 1, art. 1, 249 U.N.T.S. at 242.
60 1954 Hague Convention, supra note 1, art. 16, 249 U.N.T.S. at 244.
61 Regulations for the Execution of the 1954 Hague Convention, supra note 1, art 12, 249 U.N.T.S. at 276.
62 1954 Hague Convention, supra note 1, art. 12, 249 U.N.T.S. at 276.
63 See FRITZ KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 38 (1987); Nahlik, supra note 22, at 1087.
64 1954 Hague Convention, supra note 1, art. 3, 249 U.N.T.S. at 244. This is a continuation of the philosophy encompassed in article 27 of the 1899 Hague Convention. See Convention with Certain Powers Respecting the Laws and Customs of War on Land, July 29, 1899, supra note 20, at art. 27.
65 1954 Hague Convention, supra note 1, art. 4 , 249 U.N.T.S. at 244.
property or the protective insignia to protect military equipment or forces.\textsuperscript{66} Article 4 also disallows the destruction of cultural property for the purposes of reprisal.\textsuperscript{67} Moreover, Article 4 does not permit a violating state to plead a defense of ignorance.\textsuperscript{68}

Protection of cultural property in occupied territories is governed by Article 5.\textsuperscript{69} Article 5 requires an occupying force to allow the "competent authorities" of the occupied territory to ensure preservation and protection of cultural property.\textsuperscript{70} In circumstances where the occupied territory lacks competent authorities, the occupying forces are under a duty to assist in the repair of damaged sites and monuments.\textsuperscript{71} On this point, the 1954 Convention is without clear guidance.\textsuperscript{72} For example, Israeli archaeologic excavations in the occupied territories and in the Golan Heights were made by several of the world's foremost archaeologists, which prompted Arab protests. UNESCO responded to Arab pressure over these excavations and withheld financial assistance for Israeli science and education projects.\textsuperscript{73}

Article 7 delegates the signatories to, "introduce in peacetime into their military regulations or instructions such provisions as may ensure observance of [the 1954 Convention] and to foster in the members of their armed forces a spirit of respect for the culture and property of all peoples."\textsuperscript{74} Moreover, the Convention sets forth as an objective for each signatory to employ specialists whose purpose is to foster respect and security for the principles of cultural property protections.\textsuperscript{75}

The 1954 Convention recognizes the exigencies of war by permitting each state to construct a limited number of refuges for moveable cultural property via Article 8.\textsuperscript{76} As a result, defending nations must situate these refuges at adequate distances from large industrial centers and important

\textsuperscript{66} Id. Article 4 states, "contracting parties shall refrain form 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 or armed conflict." \textit{Id.}
\textsuperscript{67} Id. Article 4(4) states "[parties] shall refrain from any act directed by way of reprisals against cultural property." \textit{Id.}
\textsuperscript{68} Id. Article 4(5) states "[n]o . . . party may evade the obligations incumbent upon it under the present Article, in respect of another . . . party by reason of the fact that the latter has not applied the measures of safeguard referred to in Art 3." \textit{Id.}
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{73} Id.
\textsuperscript{74} 1954 Hague Convention, \textit{supra} note 1, art 7, at 246.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at art. 8.
military objectives. A state may not place such objects at an airdrome or port of entry. The exception to this rule is where the state has constructed “bomb-proof” shelters for moveable objects. Nonetheless, a defending nation’s failure to carry out this affirmative duty to isolate its cultural properties results in the loss of protected status for them.

Articles 9, 10, and 11 create conditional immunity and subsequent withdrawal of immunity for cultural property sites. Article 9 creates an internationally recognized emblem for the protection of cultural properties. The use of this emblem creates a recognized immunity from bombardment or air attack. Where a state engages in an unlawful ruse, or purposefully endangers its cultural property by design, immunity is considered withdrawn. This includes withdrawal of immunity for cultural property listed on the Register. Additionally, where objects of cultural property are being transported, a state may seek the protections of the Convention by labeling the transport vehicles with the emblem and by notifying the opposing state.

Articles 12 and 13 cover the transportation of cultural property. Modes of transportation are generally immune from attack as long as the appropriate symbol is displayed and the other parties have been notified. In cases of urgency, notification can be waived, but under no circumstances may the transporting party display the use of the emblem unless immunity has been expressly granted to it through the Register or some other recognized means.

Articles 14 and 15 encompass basic 20th Century customary laws of warfare. Article 14 prohibits the seizure of cultural property as prizes or trophies of war. While the concerns over the looting and pillaging of artwork and antiquities dates back beyond Alexander the Great, Article 14 was created in direct response to the German Military’s looting during World War II. Individuals such as Herman Goring acquired massive collections of classic artwork during the war. Moreover, several high ranking Nazi officials were tried and convicted of crimes involving the destruction and pillage of cultural property. One of the Nuremberg defendants, Alfred Rosenberg, set up an

77 Id.
78 Id.
79 Id. See also Hays Parks, supra note 28, at 62. Professor Parks correctly asserts that “responsibility for the protection of objects in the main lay with the defender, not with the attacker, in that it is recognized that the former had the greatest control over the persons or objects for whom the protection was sought. Id.
80 1954 Hague Convention, supra note 1, art. 11, at 246.
81 Id.
82 Id.
83 Id. at art. 12, at 250.
84 Id., at art. 13.
85 Id. at art. 14, at 252.
organization titled the 'Hohe Schule' and under Hitler’s orders created the ‘Einsatzstab Rosenberg’ which plundered artwork and cultural property throughout Europe. According to the International Military Tribunal, more than 21,903 art objects were looted by Rosenberg’s group. This practice was condemned in a joint declaration by the victorious powers in 1945.

Neither Article 14, nor the declaration, stopped Iraqi forces from pillaging in Kuwait during their brief occupation. During the conflict, the United Nations Security Council demanded the return of Kuwait’s collections of Islamic Art. The Kuwait National Museum, as well as the Seif Palace Reception Library, were destroyed. Tariq Aziz, then Iraq’s foreign minister, promised to return these items. This return was mostly accomplished by October 1991.

The 1954 Convention views persons involved in the transport, identification, and protection of cultural properties as non-combatants under Article 15. The 1954 Convention never answers the question as to whether uniformed personnel — otherwise viewed as combatants under international law — working in these tasks are also to be considered non-combatants. However, an international identity card is authorized. Each contracting party decides the format of their respective identity card; there is no standard card design. The Convention provided an example as a guideline, but not a requirement (see appendix 2).

Articles 16 and 17 govern the use of the distinctive emblem. A state that willfully and unlawfully uses the emblem engages in perfidy. The

---

87 DECLARATION REGARDING THE FORCED TRANSFER OF PROPERTY IN ENEMY CONTROLLED TERRITORY, DEPARTMENT OF STATE BULLETIN, 21-22 (1949).
88 Penna, supra note 25, at 267.
90 Id.
91 1954 Hague Convention, supra note 1, art. 15, at 252.
93 Article 17 states:

USE OF THE EMBLEM

1. The distinctive emblem repeated three times may be used only as a means of identification of:
   (a) immovable cultural property under special protection;
   (b) the transport of cultural property under the conditions provided for in Articles 12 and 13;
   (c) improvised refuges provided for in the Regulations in the execution of the Convention.

294 - The Air Force Law Review
rationale of this rule is that if protected status or protective emblems are abused, they lose their overall effectiveness and put protected persons and places at additional risk. 95

In the late 1960's and early 1970's, the Convention was invoked to protect cultural properties in both Cambodia and in the Middle East. 96 In 1975, Cambodian loyalist troops (of the Lon Nol regime) attempted to use the thousand-year old temple of Preah Vihear as a stronghold against the Khmer Rouge. The loyalists used the sanctioned emblem, but did so under illicit circumstances. Moreover, ownership over the Preah Vihear temple was already in dispute with Thailand. 97 Because the Lon Nol troops represented a government which had signed the 1954 Convention, there was little support for continued fighting within the temple’s perimeter. Finally, if damage to the

2. The distinctive emblem may be used alone only as a means of identification of:
   (a) cultural property not under special protection
   (b) the persons responsible for the duties of control in accordance with the Regulations for the Execution of the Convention
   (c) the personnel engaged in the protection of cultural property;
   (d) the identity cards mentioned in the Regulations for the Execution of the Convention.

3. During an armed conflict, the use of the distinctive emblem in other cases than those mentioned in the preceding paragraphs of the present Article, and the use for any purpose whatever of a sign resembling the distinctive emblem, shall be forbidden.

4. The distinctive emblem may not be placed on any immovable cultural property unless at the same time there is displayed an authorization duly dated and signed by the competent authority of the High Contracting Party.

Id.

94 Acts of perfidy are defined as exceptions designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts, June 8, 1977, art. 37(1), 1125 U.N.T.S. 3. Again, this philosophy is first codified in the 1899 Hague, article 34 which states that: The envoy loses his rights of inviolability if it is proved beyond doubt that he has taken advantage of his privileged position to provoke or commit an act of treachery. See 1899 Convention, supra note 35, at art. 34.


97 See, e.g. Case Concerning The Temple at Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6 (June 15).
ancient site had occurred, both the Khmer Rouge and the Thai government would have had recourse through the 1954 Convention against the loyalist troops.\(^9\)

In the 1980’s, theNear East and Persia became a locus of concern for protecting cultural properties. In 1982, Israel invaded Lebanon. The neighbor Arab nations submitted a resolution to the United Nations General Assembly requesting that Israel make full restitution for damaged archives and other monuments.\(^9\) The General Assembly Resolution did not cite the 1954 Convention or the additional protocol. Instead, the Resolution relied on customary international law arguments. In all probability, the complex situation in Lebanon, involved Palestinian irregulars, a Syrian sponsored force, and other splinter groups that were already violating the 1954 Convention on their own accord. Additionally, by the time of the Israeli invasion, the Lebanese government had collapsed and no recognized entity was capable of lodging complaints against any of the warring parties. Finally, Israel had not specifically violated the strict letter of the law in the 1954 Convention.

During the Iran-Iraq War of the early 1980’s, the 1954 Convention was given international consideration. Iraqi forces attacked cultural sites in Iran that were not listed on the International Register, but which had been noted to the 1972 World Heritage Convention by Iran.\(^10\) The World Heritage Convention was attended by a variety of nations which sought to register sites of cultural importance for preservation and for reasons environmental endangerment. Both Iraq and Iran signed the 1954 Convention without reservation, but the United Nations was impotent in enforcing its provisions.\(^10\) United Nations impotency in enforcing the 1954 Convention was seen during the Soviet occupation of Afghanistan.\(^13\)

---

\(^9\) The likelihood of the Thai Government pursuing an action against the loyalist government was unlikely. The Khmer Rouge was regarded as a universal enemy by both the loyalists and the Thai government.


\(^10\) The Jome Mosque in the city of Isafhan was attacked by Iraqi forces. Inside the city were a number of ancient monuments, again, not listed on the Register. *See* Balkin, *supra* note 86, at 247.


During the Gulf War, a legal regime was set-up to effectively adhere to the letter and the spirit of the 1954 Convention. This regime did not recognize the 1954 Convention as binding, but rather the regime recognized the Convention as an advisory document. Of the coalition members, the United States, Great Britain, and Canada were not signatories. According to the DoD Report to Congress, military members in the coalition forces received law of armed conflict training. As a result, the 1954 Convention’s provisions were followed during the war.\textsuperscript{104} It is presumptive to state with certainty that the United States accepts the 1954 Hague Convention’s provisions as customary international law. Nonetheless, the United States and the Coalition forces honored the spirit of the Convention. Iraqi forces did not adhere to the Convention and pillaged Kuwait of private property. Finally, the Hague Convention is applicable to the current conflict in the former Yugoslavia. While Yugoslavia existed it had over 9000 registered historic landmarks from the Roman, Byzantine, Renaissance, Islamic, Baroque, and Gothic periods. Many historic structures, such as during the siege of Dubrovnik, suffered extensive damage. Also, artwork was looted by several parties. It may be the case that war crimes trials will indict individuals responsible for the devastation of historic sites.

With the existence of international controls for the protection of civilians or sites in wartime, why aren’t the violator states punished? This question has been debated and explored at length and it is particularly salient because of the customary international law status of the 1954 Hague Convention protections. Whitney R. Harris, both a United States prosecuting attorney at the Nuremberg War Crimes Trials, and an eminent legal scholar in the field, provides a parallel answer. The primary reason the Nuremberg precedent has not been applied following the several military conflicts of the last half century is that they have, for the most part, been terminated by cease-fire agreements which made it impossible to obtain personal jurisdiction over suspected war criminals. In two cases where unconditional surrender could have been imposed upon aggressor nations — Argentina’s seizure of the Falkland Islands, and Iraq’s seizure, by force of Kuwait — the victorious powers elected to permit the leadership that had committed aggression to remain in power, and the aggressors therefore escaped prosecution and punishment.\textsuperscript{105} So to, does the failure of enforcement of the Hague protections.

\textsuperscript{104} DoD Report, \textit{supra} note 2, app. O at 3. The report states that, “Since U.S. military doctrine is prepared consistent with US law of war obligations and policies, the provisions of the 1954 Convention did not have any significant adverse effect on planning or executing military operations. \textit{Id.}

B. Additional Protocol One

Between 1974 and 1977 a number of countries attempted to update the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts. The Conference declared that the 1954 Hague Convention was, "of paramount importance for the international protection of the cultural heritage of mankind." Article 53 of Additional Protocol One reaffirms the tenets of the 1954 Hague Convention, and encourages states — such as the United States — to become a signatory party. Article 16 of Additional Protocol II is substantially similar to Article 53. The fact that as late as 1977, there was an urging of non-signatory parties to sign the 1954 Hague Convention is one indication that the 1954 Hague Convention is a reflection of customary international law, rather than *per se* customary international law.

The greatest departure from customary international law by Additional Protocol One is that the attacker assumes a greater burden than ever before for the protection of cultural properties. Prior to 1977, responsibility for the protection of cultural properties rested with the defender and not the attacker. The 1954 Hague Convention at least recognized that the defender had greater control of the cultural properties within its borders. It also recognized in the inevitability of collateral damage incident to military operations. The Additional Protocol ignores both the exigencies of war, and the principles of necessity and proportionality to an unacceptable degree, and in contrary to

---


107 Additional Protocol, *supra* note 2, at art. 53, at 7. Article 53 provides as follows:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954; and of other relevant international instruments, it is prohibited:

a. to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute cultural or spiritual heritage of peoples;

b. to use such objects in support of the military efforts;

c. to make such objects the object of reprisals.

*Id.*


109 *Hays-Parks, supra* note 24, at 62.

110 *Id.*
customary international law." This philosophy is found in Article 52 of the Additional Protocol which not only defines acceptable military targets but presumes that all peacetime non-military targets remain non-military in wartime. Article 52 is problematic because too many states have shielded lawful military targets on or near sites of cultural property. Article 53 is to be read 'subject to other relevant instruments,' namely Article 52. If the United States and its allies are to act as global policemen, the Additional Protocol places an onerous burden on any operation where the protection of cultural property is an important issue. In sum, the Additional Protocol steps outside of the boundaries of customary international law of war with regard to the protection of cultural property, by shifting the burden to the attacker and ignoring the exigencies of war which would tend to encourage the shielding of legitimate military targets by placing them in or near cultural property sites.

IV. PROTECTION OF CULTURAL PROPERTIES IN OPERATION: DEPARTMENT OF DEFENSE AND UNITED STATES AIR FORCE

Department of Defense Directive 5100.77 requires all branches of the armed forces to comply with the law of war in conducting military operations and related activities of armed conflict regardless of how the operation is characterized. The DoD directive directs that the service branches “institute and implement programs to prevent violations of the law of war.” Training armed services members in the Law of War (often referred to as the law of armed conflict) is requirement of the 1949 Geneva Conventions. The United

111 Id. Professor Hays Parks writes that the traditional burden placed on the defender “was abandoned in the Additional Protocols and the burden essentially shifted to the attacker despite clear evidence that many nations in the intervening years regularly used hospitals, cultural objects, civilian objects, and civilian population to shield lawful targets from attack.” Id.

112 Additional Protocol, supra note 2, at art. 52, at 52. Article 52 reads in pertinent part that legitimate targets are “limited to those 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.” [emphasis added] Id. Article 52 further reads that, in case of doubt, “a place of worship, a house, or other dwelling, or a school . . . shall be presumed not to be so used.” Id. As W Hays Parks correctly asserts, this presumption is tailor made for the defender. Hays Parks, supra note 28, at 136.

113 See DoD Report, supra note 3, app. O, at 3. During the Vietnam conflict as well, the North armed the temple of Ankor Wat.


115 DODD, supra note 114, at paras. D.1 & E.1.a(3).
States Air Force implements the DoD Directive through AFP 110-34, discussed below, as well as requiring annual LOAC training for all of its active duty members.\textsuperscript{116}

United States Air Force policy for protecting cultural objects during armed conflict is found in Air Force Publication 110-34.\textsuperscript{117} The policy speaks to reasonableness but maintains a duty on the defender state to accord to either the 1954 Convention, 1925 Roerich Pact, or a valid custom of protection.\textsuperscript{118} Objects and sites of cultural value may be attacked whenever the enemy uses such objects for the protection and cover of military equipment or other military purposes.\textsuperscript{119} AFP 110-34 also recognizes that while the United States is not a signatory to the 1954 Convention, many of our allies are not also, in particular the United Kingdom, and most of our recent adversaries are signatories.\textsuperscript{120} As such, the United States Air Force recognizes the emblem found in Article 16 of the 1954 Hague Convention.\textsuperscript{121}

A variety of instances make a cultural property object or site a legitimate target. Military targets can include any areas that house or support a military mission.\textsuperscript{122} This is a more realistic interpretation of customary international law than is Additional Protocol One. Thus, an area in which the enemy stores armored vehicles, aircraft, weapons production sites, or other production sites vital to warfare (i.e. petroleum processing plants or energy production centers) are all technically considered valid targets.\textsuperscript{123}

An equally salient provision in AFP 110-34 relates to collateral damage. It is up to the commander in the field, based on the facts known at the time, to determine whether the risk of collateral damage is necessary for the accomplishment of a legitimate mission, or when collateral damage becomes excessive.\textsuperscript{124} This is an eminently more realistic standard than found in Additional Protocol One.

\textsuperscript{116} See AFPD 51-4, Compliance with the Law of Armed Conflict (26 April 1993), at para 1.5.1.
\textsuperscript{117} See AFP 110-34, Commander's Handbook on the Law of Armed Conflict (25 July 1980) at para 1.5.1. (AFP 110-34 to become AFI 51-709).
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 3.
\textsuperscript{124} Id. at 8. AFP 110-34, ch. 3-8(a) states:

No definite rule can be applied to determine if the civilian casualties that might result from the attack are excessive. The commander in each case, must make an honest and reasonable decision, based on all the facts known at the time, as to whether the military advantage from a particular attack is worth the expected civilian casualties. He must make this decision even if

\textit{300 - The Air Force Law Review}
In Operation Desert Storm, the Coalition forces proved that they could adhere to the limits of customary international law and prevail. Coalition forces could have lawfully attacked military threats in and around centers of cultural importance. However, in accordance with the set Rules of Engagement — set by the commanders in charge of the war — they did not strike these areas when cultural objects were likely to suffer collateral damage. This remained so despite Iraq's failure to comport with international law by segregating its military targets from centers of cultural property. For instance, the Sumerian temple, which Iraq found as a welcome location for a few of its fighter aircraft, was a legitimate target. The Rules of Engagement, created by the commanders, would make it so only if it were an absolute necessity. The scenario that played out evidenced that the 1954 Hague Convention, as a reflection of a customary international law of war to protect cultural properties, was an appropriate and practical guide to follow. Had those aircraft been suspected as nuclear ready, an airstrike would have been permissible. Under the regime envisioned by Additional Protocol One, such a strike would not have been permissible. No customary international law of war would permit the utter devastation of an internationally recognized coalition force because of a *de minimis* lingering doubt.

V. CONCLUSION

The protection of cultural properties in armed conflict has long been recognized to be an important consideration for participant states and military forces in these conflicts. For over two millennium, a custom has evolved to force states to recognize and live up to the requirements of customary international law. Additionally, customary international law places requirements on both attacker and aggressor states, as well as occupation:

---

the enemy has deliberately used civilians to shield military objectives.

[emphasis added].

*Id.*

AFP 110-34, ch. 3-8(d) applies ch. 3-8(a) to objects and states:

A similar reasoning process should be used to decide whether excessive damage to these persons or objects would be caused by a particular attack, and whether some alternative form of attack would lessen collateral damage and casualties.

*Id.*


126 *Id.*
forces. Finally, customary international law permits the use of the doctrines of necessity and proportionality to overcome the protections afforded to cultural property sites and objects. The 1954 Hague Convention is a reflection of the development of customary international law, and both the military attorney and commander should see the Convention as such. However, the 1954 Convention Hague is binding law in most of its provisions, and thus is a salient guide to what that law is. The 1977 Additional Protocol is not an accurate assessment on the law of war in regard to the protections which cultural properties should be afforded during armed conflict. Where a defender state harbors items of military value, or has done so previously — and for that matter, when the available intelligence shows so — in or near cultural property, the property loses its legal protections. And, while no commander wishes to create another Monte Cassino, the loss of lives and possibly objectives may very well outweigh the protections for the site or object.
APPENDIX 1

HAGUE SYMBOL

ROERICH PACT SYMBOL
### SUGGESTED CARD

**Front of Card**

<table>
<thead>
<tr>
<th>Field</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.D. Card</td>
<td>For personnel engaged in the protection of cultural property</td>
</tr>
<tr>
<td>Surname</td>
<td></td>
</tr>
<tr>
<td>First names</td>
<td></td>
</tr>
<tr>
<td>Date of Birth</td>
<td></td>
</tr>
<tr>
<td>Title or Rank</td>
<td></td>
</tr>
<tr>
<td>Function</td>
<td></td>
</tr>
<tr>
<td>is the bearer of this card</td>
<td>under the terms of the Convention of The Hague, dated 14 May 1954, for the Protection of Cultural Property in the event of Armed Conflict.</td>
</tr>
<tr>
<td>Date of issue</td>
<td></td>
</tr>
<tr>
<td>Number of Card</td>
<td></td>
</tr>
</tbody>
</table>
Reverse Side of Card

Signature of bearer or fingerprints or both

Embossed stamp of authority issuing card

Height

Eyes

Hair

Other distinguishing marks

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________