5

Targeting Cultural Property: The Role of International Law

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Oftentimes the exigencies of war necessarily take primacy over the preservation of cultural property, but emerging norms and sentiments within the international community have signaled an increased desire on the part of states to preserve, for posterity, the cultural heritage of mankind. Thus, the critical question becomes: how do states balance these seemingly irreconcilable ends, and to what extent is the current state of the international legal regime able to facilitate an adequate response to the protection of cultural property during an armed conflict? This paper will examine current examples drawn from conflicts in Iraq, the Balkans, and Afghanistan in order to expound these questions and discuss in greater detail some of the factors that underpin the decisions made by states when they either deliberately target or are required out of military necessity, to use cultural property in armed conflict. This article will assess the ability of international law to address and mitigate the deleterious effect of these motivations before making several recommendations for international policy.

Introduction

The targeting, destruction, and plunder of cultural property during armed conflict – either as incidental to the exigencies of war or as deliberate acts in and of themselves – has an extremely long history. Damage and looting during the Crusades represent some of the earliest accounts of the vulner-

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ability of cultural property during warfare (Boylan 2002, 43), while the destruction of politically potent reminders of the Royalist regime in the French Revolution demonstrates the symbolic value inherent in such objects. During the late 17th and early 18th centuries, Napoleon was renowned for his theft of art and antiquities in conquered lands, returning to France with his "spoils of war." These examples serve to highlight the contentious role cultural property plays in armed conflict, and that the conquest and of an enemy can rest on more than just military defeat.

Although the legal implications of some of these issues began to be articulated throughout the 19th century, it was not until the widespread destruction and looting of art during World War II that serious consideration of the inadequacies in international law were brought to the fore. Since then, the protection of cultural property during armed conflict has emerged as a specialized legal regime with increasing relevance, as recent conflicts and rampant destruction of cultural property in Iraq, the Balkans, and Afghanistan have demonstrated. Indeed, the breakdown of order that results from war places cultural property in a particularly vulnerable position, and has directly led to the codification of these legal norms in numerous treaties, as well as the general recognition that many of these principles exist concomitantly in customary international law. Nonetheless, the destruction and loss of cultural property has inevitably remained a pervasive feature of armed conflict, despite the best intentions by some states and international organizations to mitigate these effects. Oftentimes the exigencies of war necessarily take primacy over the preservation of cultural property, but emerging norms and sentiments within the international community have signaled an increased desire on the part of states to preserve, for posterity, the cultural heritage of mankind. Thus, the critical question becomes: how do states balance these seemingly irreconcilable ends, and to what extent is the current state of the international legal regime able to facilitate an adequate response to the protection of cultural property during an armed conflict?

This paper will examine current examples drawn from conflicts in Iraq, the Balkans, and Afghanistan in order to expound these questions. It is instructive, therefore, to begin by outlining the current state of international humanitarian law as it relates to the protection of cultural property. This paper will then discuss in greater detail some of the factors that underpin the decisions made by states when they either deliberately target or are required, out of military necessity, to use cultural property in armed conflict. It will then address the ability of international law to mitigate the deleterious effect of these motivations. Finally, several recommendations to improve current international policy will be drawn from the discussion.

Cultural Property in International Law

Treaty law obligations for the protection of cultural property during armed conflict have existed since the nineteenth century, when some of the legal principles governing the conduct of states were first codified in the First and Second Hague Conventions of 1899 and 1907. Although far from comprehensive, the Hague Rules nonetheless provided that "In sieges and bombardments all necessary steps must be taken to spare as far as possible, buildings dedicated to religion, art, science…historic monuments…provided they are not being used for military purposes" (as quoted by Driver 2000, 3). The exact nature of "military purposes" is not specified in the treaty, but it is generally accepted that the destruction of an opponent's property can only be condoned if called for by the exigencies of war, and only to the extent necessary to achieve the objective (O'Keefe 2006, 25). This early treaty also delineated the responsibilities of an occupying power in regards to the treatment of cultural property as private property, and prohibiting the "seizure, destruction, or willful damage" of, *inter alia*, historic monuments and works of art and science (O'Keefe 2006, 31).

However, it was not until after the Second World War that the protection of cultural property was addressed in its own treaty. The largely indiscriminate destruction of cultural property during the war created the impetus for the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and its' First Protocol of the same year.

The 1954 Hague Convention defines cultural property in Article 1(a) as:

> …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 (Hague Convention 1954, Art. 1a).

Cultural property also encompasses the buildings in which these objects are housed or the places where they may be sheltered during conflict, or any center containing large amounts of cultural property (Hague Convention 1954, Art. 1a). The convention necessarily invokes an internationalist perspective of cultural property, stating that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage

of all mankind, since each people makes its contribution to the culture of the world," and should therefore "receive international protection" (Hague Convention 1954, preamble). As a corollary to this principle, the Convention provides for the respectful treatment of cultural property by both parties to a conflict by restricting any action, aside from that deemed imperative by "military necessity," that would lead to damage of the property. Similarly, states parties are prohibited from and must prevent any form of theft, pillage, misappropriation, or vandalism of cultural heritage (Hague Convention 1954, Art. 4).

Also noteworthy for this discussion is Article 19 of the Convention, which obligates state parties involved in non-international conflicts to abide by, at a minimum, the provisions relating to the respect of cultural property (Hague Convention 1954, Art. 19); it does not, however, provide a definition of non-international armed conflict. Also important to note is Article10 of the Convention, which calls for the creation of a special emblem to mark cultural property, distinguishing its significance from other surrounding objects. As further detailed in Article 16, the emblem is to take the shape of a shield, formed by a combination of blue and white triangles (Hague Convention 1954, Art. 10 and 16).

The First Protocol, drafted and opened for ratification at the same time as the Convention, is rather brief and provides specific guidelines for the import and export of cultural property from an occupied territory during armed conflict, and the return of such objects when held in protective custody abroad. In 1999, the Second Protocol to the 1954 Hague Convention was drafted, entering into force in March 2004. It differs from the earlier treaties in that it is expressly applicable to both international and civil armed conflicts (O'Keefe 2006, 246), and attempts to strengthen the protective regime by raising the threshold for military use of cultural objects. To this end, it provides for the establishment of an International Registry of Cultural Property under Special Protection, to which states can submit lists of important sites, monuments, or buildings of exceptional value to the common cultural heritage of mankind. It essentially ensures immunity for the site if it meets a set of criteria as set out by Article 10. Under this immunity, the protected item cannot be used for military purposes or to shield military sites, and the state which exerts control over the property commits to never using it in such a manner (Second Protocol 1999, Art. 10). However, many states have yet to make use of this system, and currently the only item of cultural property submitted for enhanced protection is the Vatican.

Although it does not constitute a significant part of Additional Protocol

I to the Geneva Conventions (1977), it is noteworthy to mention that the Additional Protocol considers attacks on civilian property (of which cultural property is inclusive) to qualify as grave breaches of the Convention, and is therefore punishable as a war crime (Driver 2000, 8). In addition, the importance of the Geneva Conventions in relation to the legal regime surrounding cultural property is that any effort to protect civilians during an armed conflict will necessarily enhance the protection of civilian and cultural property.

Overall, the effectiveness of the Hague Conventions and other international treaty regulations remains in dispute. Despite the fact that there are 116 signatories to the 1954 Convention, and 93 and 44 to the First and Second Protocol respectively (as of April 9, 2007), the notable absence of large market nations such as the United States and Great Britain has the potential to undermine the regime. In the case of the US, its primary objection to the 1954 Hague Convention concerned the use of nuclear weapons in that they are indiscriminate and the US would be unable to guarantee the protection of cultural objects in the event of their use. It would seem logical to conclude that the UK, also a nuclear state, faced similar concerns over its decision not to ratify.

Aside from treaty law, customary international law is another framework that delineates specific state responsibilities regarding the protection of cultural property during armed conflict. Customary international law is distinct from treaty law in that it consists of two key elements – state practice, which refers to the extent that states are actually participating in a certain manner that is consistent with a particular norm or principle, and *opinio juris*, which is a belief articulated by states that they engage in the behavior out of a specific legal obligation that is required by the current state of law. Both of these conditions must be met in order for a norm to be considered a tenet of customary law. In addition, norms that are considered to be custom bind all states, regardless of their respective treaty obligations.

In its comprehensive study regarding the current state of customary international law, the International Committee of the Red Cross (ICRC) has attempted to define the specific legal norms applicable to cultural property during international and non-international armed conflicts. Many of these principles are closely related to the provisions as outlined in the Hague Conventions and Protocols, including the respect for and protection of cultural property during armed conflict, except when required by military necessity; the prohibition on theft, plunder or willful damage during armed conflicts or in the event of occupation; and that

during occupation, the occupying power must prevent and return any illegally exported cultural property (Henckaerts and Doswald-Beck 2005, 127-136). This latter norm applies only to international armed conflicts, whereas all other provisions apply to intrastate wars as well.

Even those states not party to all or some of the aforementioned treaties have considered their actions in relation to the protection of cultural property as justified by legal obligations. This has been expressed by US President George Bush during the first Gulf War when the US recognized the Convention's rules and agreed not to target a list of places where valuable objects were located (Johnson 2007). Moreover, many elements of the Hague Conventions have been incorporated into US military manuals (O'Connell 2004, no pagination). These principles have also been reaffirmed in case law – the International Criminal Tribunal for the Former Yugoslavia (ICTY), for example, is expressly permitted to try individuals with responsibility in the destruction or willful damage to institutions of religion, historic monuments, or of importance to the arts and sciences (Ibid).

Targeting Cultural Property

The reasons that cultural property is targeted during armed conflict can largely be divided into two categories: that of collateral damage arising from military necessity and the exigencies of war, and the intentional destruction of cultural property as a concerted policy of warfare employed by one or both parties to the conflict. The response of international law to the different factors at play in each of these situations raises questions about the effectiveness of the legal regime, and the ability of states to create a system that can appropriately address the various motivations that play into the targeting of cultural property.

Military Necessity

Cultural property can be targeted as a legitimate military objective when one party to the conflict deliberately operates from within or closely situated to a building or site that is designated as having cultural or historical significance. In accordance with the Hague Convention, it is a violation of international law for combatants to use cultural property for such military purposes unless it is of absolute necessity, and that the military objectives sought cannot be achieved by any other means. However, once this has occurred, the item of cultural property loses its special status and can become a legitimate target for an opposing military. For sites registered under the regime of enhanced protection as provided by the Second

Protocol of 1999, such objects cannot be used for military purposes under any circumstance.

A recent example of the above is the use of the Iraq Museum in Baghdad by Iraqi forces during the invasion by the United States in 2003. The museum was arguably situated in a strategic military position in that it lay across from the elite Special Republican Guard compound (which in itself is a questionable location given the proximity to the museum), as well as being positioned 900 meters away from the al-Ahrar Bridge that crossed the Tigris (Bogdanos 2005, 501). At the time of the US invasion of Baghdad in April 2003, Iraqi forces had prepared fighting positions and military fortifications within the museum (Ibid.). However, to qualify as a violation of the Hague Convention (to which Iraq is a party) or customary international law, it would have to be proven that the utilization of the museum out of military necessity was done to achieve objectives that would otherwise be unattainable by any other means. Regardless, once Iraqi forces occupied the museum it could be considered a legitimate target for US soldiers to attack, although the US would still be obligated under customary international law not to cause disproportionate damage to the building or its environs. Therefore, damage to the building or its contents that occurred during the battle may not necessarily be a violation of international law – the contention that the US did nothing afterwards to protect the museum from rampant looting is a separate issue that is beyond the scope of this paper to answer. This nonetheless raises intriguing legal questions about the obligations of an occupying power and to what extent it is necessary for states to factor considerations of cultural property into their strategic military plans.

The location of monuments, museums, and other cultural heritage sites near legitimate military targets poses something of a dilemma – how do you balance the exigencies of war with the desire to preserve for posterity the common heritage of mankind? There are many instances where states have taken this question into consideration when determining how they will conduct themselves during times of warfare. For example, despite the renowned destruction and theft that occurred during WWII, there were conscientious attempts on the part of the Allies to resist unnecessarily destroying cultural targets that were beyond the bounds of military necessity. When the United States announced its intent to take whatever steps necessary to stop the Axis traffic through Rome in 1943, there was a concerted effort to avoid sites of religious and cultural value. Airfields located in the suburbs were bombed, but the enemy's military headquarters – undeniably a legitimate target – was left untouched as it was situated in

the heart of the historic city center. Moreover, the air raids were conducted by the more accurate US bomber aircraft available, and orders were given that planes were to return with their bombs if the targets were obscured or unidentifiable (O'Keefe 2006, 70-73).

Similarly, in the first Gulf War, Saddam Hussein had placed Iraqi aircraft next to invaluable archaeological monuments at the ancient Sumerian site of Ur. Despite the legitimacy of this as a military target, the United States refrained from ordering its destruction (O'Connell 2004). Saddam Hussein's actions are illustrative of instances where combatants may intentionally exploit cultural property during armed conflicts in order to encourage the other side to target the object out of military necessity, thereby achieving the destruction of the property without having to do it themselves. However, this is still a violation of the Hague Convention and customary international law when not done under the aegis of imperative military necessity.

Overall, in regards to the targeting of cultural property to achieve imperative military objectives, it does seem that international law can play a considerable role in mitigating states' potentially destructive behavior. Although the legal regime does seem largely sufficient, in some instances it may be necessary to set a greater threshold for the use of such objects. The Second Protocol attempts to deal with this concern, but the lack of signatories weakens the regime.

Intentional Destruction

Some of the factors that motivate belligerents to intentionally destroy cultural property are quite distinct from those outlined above, and they place questions of military objectives and necessity secondary to cultural and political motivations. The destruction of cultural property during armed conflict can be considered one manifestation of a policy of genocide or ethnic cleansing, and a way to dominate over a particular group by eliminating any physical record of their history. Indeed, following the destruction of Jewish cultural objects by the Nazi's during the Second World War, it was widely believed that destroying this type of property was integral to genocidal policy (Vrdoljak 2006, 163). Despite efforts to include a cultural component to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, it was felt by some states that the horrifying corporeal acts could not compare to the destruction of objects, and that more states would be likely to ratify the convention if it maintained a less expansive definition of genocide (Vrdoljak 2006, 169-170). Unfortunately, recent conflicts since the end of the Cold War have provided ample evidence

that cultural considerations are fundamental to campaigns of genocide and ethnic cleansing, and the wanton destruction of cultural property has occurred in flagrant opposition to international law and in the face of widespread condemnation by the international community.

It has been argued that the intersection of the cultural and the political during war has created a situation wherein wars are now conducted by the very means that the Hague Regulations were attempting to outlaw—through the direct destruction of cultural property as a means of eradicating the "other" (Herscher and Riedlmayer 2000, 109). An example of this can be seen in Kosovo during the armed conflict between Serb government forces and the Kosovo Liberation Army in 1998-1999. In March of 1998, Serbian forces began a counterinsurgency campaign against Kosovo's ethnic Albanian population, and countless ethnic Albanians were forced from their homes. At the same time, the historic architecture associated with Albanian culture was systematically targeted and destroyed (Ibid, 111). The nature of the damage and eyewitness accounts eliminated much of the possibility that the destruction could have been construed as collateral, and the timing of the destruction occurred not only as ethnic Albanians were forced to leave, thereby eliminating any incentive for them to return, but also continued long after their forced deportation in an attempt to eradicate any remnants of their cultural history (Ibid., 112). That many Albanians reciprocated by destroying and vandalizing Serbian cultural property upon their return to the region, including several medieval monuments that were on the World Heritage List (Ibid.), attests to the highly politicized nature of the attacks. This suggests that such military action carries personal and symbolic value far beyond traditional military objectives of war. Although this was an internal conflict at the time, as a party to the Hague Convention, Serbia was still bound by certain provisions as well as the principles established in customary international law.

As part of a way to help forces identify what sites are not within the realm of legitimate military targets, it is the intention of Article 10 of the 1954 Hague Convention to assist in the identification of cultural property by creating a universal symbol that marks immovable cultural heritage. Such an emblem is now universally recognized as a number of blue and white triangles placed together, known as the blue shield. However, this system has been subject to abuse, and it is an ironic fact that the marking of cultural property in such a fashion has enabled belligerents to more readily identify and target property that is of value to their opponent. For example, in anticipation of the conflict between the then Yugoslav People's Army, Croatia had marked much of its immovable cultural heritage with

the blue shield prior to the outbreak of hostilities in 1991. Following the war, Croatia reported that Yugoslavian forces had deliberately targeted the marked objects, including the old town of Dubrovnik that is listed by UNESCO as a World Heritage Site (Sulc 2001, 161). As a consequence, many states have since become reluctant to employ the symbol for fear of suffering the same consequences in future armed conflicts (Hladik 2004, 383).

The destruction of the Buddhas of Bamiyan in March 2001 is the clearest example of how the Taliban intended to eliminate the physical record and historical memory of Afghanistan's pre-Islamic past, not only for symbolic purposes but also to make a political statement of defiance towards the international community (Francioni and Lenzerini 2006, 28)[1]. Since 1994, the Taliban had increasingly exerted control over Afghan territory in its struggle against the National Islamic United Front for the Salvation of Afghanistan (United Front), and had succeeded in exercising effective control of almost 95% of Afghanistan by 2001. However, only a handful of primarily Muslim states recognized the Taliban as the legitimate government. After years of threatening to destroy the Buddha's as part of a policy of cultural cleansing, the Taliban finally followed through on their intent, justifying it on the grounds that a verdict by the Afghan Supreme Court made it imperative to "break down all statues/idols present in different parts of the country…because these idols have been gods of the infidels, and these are respected even now and perhaps maybe turned into gods again" (Ibid., 32). Despite much outcry by the international community, including offers by various governments to acquire ownership of the Buddhas, the 1500 year old monuments were destroyed.

The destruction of the Buddha's generated a common sense of loss in the international community, indicating the importance of these artifacts not just to those people who shared a similar historical and religious past as ancient Afghanistan, but to all those who took an interest in the Buddha's as part of the common cultural heritage of mankind. This example raises the question of what kind of obligations exist under international law to protect cultural heritage that is seen as being within the common interest of all of mankind, regardless of whether the state – or other actors within the state – consider it to be of any value. Although the destruction of the Buddhas did not occur during a period of international armed conflict, the country was nonetheless mired in civil war and certain provisions of the Hague Regulations would apply to the protection of cultural property, as would certain norms of customary international law. Problematic to this particular situation was that in 2001, Afghanistan was not a party to any

of the Hague Conventions or its Protocols, nor was it a signatory to the relevant Geneva Conventions. According to the discussion provided by Francioni and Lenzerini, the Taliban was nonetheless in violation of the customary norm prohibiting the destruction of cultural property during armed conflicts (Ibid, 37). However, contrary to this argument, O'Keefe argues that even if Afghanistan had been a party the Convention at the time of the destruction of the Buddhas, the action would have to have been related to the armed conflict in order to be bound by either the provisions of the Convention or customary international law (O'Keefe 2006, 99). Given the justification that the Taliban offered for destroying the Buddhas, the action was arguably not related to the armed conflict between it and the United Front.

It would therefore seem that a significant gap exists in international law whereby states are not necessarily required to provide protection for invaluable cultural heritage when its destruction can be considered beyond the bounds of an armed conflict. This is a particular concern in those situations where cultural property is vulnerable to ideologically driven and militaristic actors. In recognition of this fact, in October 2003, UNESCO issued a Declaration Concerning the Intentional Destruction of Cultural Heritage. Although not a binding legal document, it nonetheless reiterates the growing norms surrounding the necessity for all states to protect the common cultural heritage of mankind. The Declaration also encourages states to take appropriate measures to ensure the protection against and prevention of and punishment for the intentional destruction of cultural property, including joining all relevant international treaties (UNESCO 2003). Despite the clear normative sentiment offered by the Declaration, the role of international law itself is far from comprehensive. It would therefore seem that, without a liberal application of international law that would account for the kind of destruction wrought by the Taliban, there is no basis in international law that offers the protection of cultural property against those parties that wish to deliberately destroy mankind's common heritage.

The influence of international law in effectively mitigating the destructive capacity of certain actors is less than reassuring. As the above examples illustrate, when the specific targeting of cultural property has become a fundamental policy in the achievement of other objectives, the international community has proven itself relatively ineffective in its attempts to regulate this kind of behavior.

Conclusion and Policy Recommendations

The variety of factors that can motivate actors to target cultural property are countless. What the examples from recent conflicts in Iraq, the Balkans, and Afghanistan attempt to illustrate are some of the more prevalent and pressing considerations that belligerents undergo in their decisions on how to wage war, and how the international legal regime is currently capable of responding. Future efforts to prevent the destruction of cultural heritage that is of shared value to all of humanity will necessarily depend on the political will and foresight of the international community to prioritize and insist on its protection.

While it will always remain dependent upon the political will of states to enforce and fulfill their obligations under international law, one of the important issues raised by this discussion is whether or not international law relating to the protection of cultural property needs to place greater emphasis on enforcement and deterrence in order to be more effective. However, codifying such measures in treaty may make widespread ratification more difficult to achieve. Therefore, as with much of international law governing any issue area, the critical question becomes whether it is better to have a strong treaty with fewer states parties, or a weak treaty with broader ratification and applicability. Given that the two major market nations – the United States and the United Kingdom – have not ratified either the 1954 Hague Convention or its two Protocols, it seems unlikely that any strengthening of the regime would translate into a greater willingness by states to be bound by such obligations. However, there does seem to be a change in sentiment regarding the treatment of cultural property during war. As some of the above examples illustrate, when the wanton destruction of highly valued cultural heritage does occur, it is widely abhorred by the international community. Perhaps efforts to capitalize on the momentum created by recent events in Afghanistan and Iraq may result in greater political will on the part of states to strengthen the legal regime. Indeed, the UK has signaled its intention in 2004 to ratify the 1954 Hague Convention (Gaimster 2004, 699). Although this has yet to come to fruition, it seems to be an indication that some of the most influential actors in the field are changing their positions.

If there is indeed such a momentum within the international community to advance efforts regarding the protection of cultural property – particularly after recent and highly publicized events, such as the destruction and ransacking of the Iraq Museum in Baghdad – then the questions raised in this paper are especially relevant to current policy discussions regard-

ing the conduct of warfare and any future uses of force that might occur. Moreover, the repercussions of failing to uphold international law as it relates to cultural property are felt long after the fighting has ceased, and failure to proactively plan for the consequences of military conflict can have serious implications on the cultural legacy of a state or a group of people. Therefore, several recommendations can be made to strengthen the international legal regime in order to ensure greater protection of cultural property during armed conflicts.

One of the first recommendations would be to accurately define that which constitutes cultural property and be considered worthy of protection by the international community. It has been noted that current international law does not provide a standard and accepted definition of cultural property since states are largely able to decide for themselves what property is deemed to be culturally significant, as well as what comprises their national heritage. Indeed, the idea of culture itself is subjective, so any determination of what property is central to the identity of a state or an ethnic group will naturally encounter misunderstandings, and could even be subject to political aims (Fechner 1998, 377). Therefore, one of the ways to help facilitate state participation in the legal regime surrounding the protection of cultural property is to limit the legal definition of cultural property enough so that it does not encompass too much or is too unreasonable, but is broad enough so that it can serve to protect the property that is widely considered to be of shared significance and value to all of humanity. Such criteria could be based on considerations of the scientific, artistic, or historic importance of the cultural property (Fechner 1998, 381), as long as there is some kind of criteria to determine what falls under international legal protection. As Fechner argues, it is "unrealistic to expect a global system to care for every object of merely modest, local interest but without importance for science or in its aesthetic respect" (Fechner 1998, 377). Therefore, a reasonable suggestion would be the creation of a legal regime where there are different "intensities" of protection at the "local, national, and international levels, according to the importance of the object for only a small group, a nation, or the whole of humankind" (Fechner 1998, 380). A system that prioritizes what property should be protected during armed conflict will be more successful in the long run at preserving mankind's most important cultural heritage, rather than having in place an overly broad regime that would result in a weakening of legal rules, or one that is too narrow that would risk excluding equally worthy objects.

In addition, the establishment of an accepted and standard definition of

what cultural property should be protected could go a long way in helping to construct a legal regime that would encourage more states to participate, thereby addressing the apparent lack of political will on the part of states to take stronger measures to mitigate the loss of cultural property during armed conflicts. That many states find the destruction and deliberate targeting of cultural property to be an abhorrent practice is evident. As discussed earlier in this paper, one of the most apparent gaps in the current state of international law is that there is no basis in international law obliging states to act in the event of deliberate targeting of cultural property, when the targeting can be considered to have occurred outside of an armed conflict. If states have implicitly recognized the moral obligation to protect valuable cultural heritage from destruction – as exemplified by the many offers from the international community to shelter the Buddha's in Afghanistan from the Taliban – should a corresponding legal principle be introduced? Forging agreement on such a matter would be extremely difficult, but having in place such a principle could also allow states to prosecute and punish those actors who committed such acts. Additional Protocol I to the 1977 Geneva Conventions already establishes that the destruction of cultural property during an armed conflict qualifies as a grave breach and is therefore punishable as a war crime. Given its ability to prosecute war crimes, there could be a role for the International Criminal Court to play in prosecuting and punishing those actors responsible for such destruction, even if the acts should occur outside of an armed conflict.

Another important recommendation to be made is developing the idea of trusteeship in international public law. This would consider the idea that the cultural property most valuable to the common heritage of mankind can be attributable to certain states, but these states must have a corresponding duty to protect the heritage for future generations. These states should therefore be considered as trustees that have a responsibility to preserve the material and prevent its destruction, and if they are unable to do so they should be obligated to request assistance from the international community. Measures such as sanctions could be used to enforce these obligations and penalize those states that fail to comply (Fechner 1998, 388).

Finally, it is equally important that states make better use of the regime that is already in place. First and foremost, this means signing on and becoming party to the existing treaties. But even for those states that are already signatories to the key conventions, greater participation in the implementation of certain provisions should be encouraged. For example, more of the monuments and sites that are deemed culturally significant

should be submitted for enhanced protection under the International Registry for Cultural Property under Special Protection, as provided for under the Second Protocol to the 1954 Hague Convention, which would then ensure protection for some of mankind's most valuable and significant property. If states continue to be reluctant at having their actions restrained by such a measure, the conditions of immunity as outlined by the Second Protocol could be revisited in order to provide a more agreeable compromise, or to ensure that the consequences for violating the conditions in certain situations – subject to a high threshold of criteria – are not unduly harsh.

Notes

[1]Francioni and Lenzerini argue that it was no coincidence that the destruction of the Buddhas followed the implementation of sanctions by the international community for the Taliban's continued sheltering and training of terrorists – see Francesco Francioni and Federico Lenzerini, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq," in Art and Cultural Heritage: Law, Policy and Practice, ed. Barbara T. Hoffman (New York: Cambridge University Press, 2006): 28.

References

Bogdanos, Matthew. 2005. The Casualties of War: The Truth About the Iraq Museum. American Journal of Archaeology 109: 501.

Boylan, Patrick J. 2002. The Concept of Cultural Protection in Times of Armed Conflict: From the Crusades to the New Millennium56. In *Illicit Antiquities: The Theft of Culture and the Extinction of Archaeology*. Ed. Neil Brodie and Kathryn Walker Tubb. New York: Routledge.

Driver, Mark C. 2000. The Protection of Cultural Property During Wartime. *Review of European Community and International Environment*, Vol. 9, 1-3.

Fechner, Frank G. 1998. The Fundamental Aims of Cultural Property Law. *International Journal of Cultural Property*, Vol. 7, 2, 376-394.

Francioni, Francesco, and Federico Lenzerini. 2006. The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq. In *Art and Cultural Heritage: Law, Policy and Practice.* Ed. Barbara T. Hoffman. New York: Cambridge University Press.

Gaimster, David. 2004. Measures Against the Illicit Trade in Cultural Objects: The Emerging Strategy in Britain. *Antiquity*, Vol. 78, 301, 699.

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. 1954. http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_

DO=DO_TOPIC&URL_SECTION=201.html (accessed April 7, 2007).

Henckaerts, Jean-Marie, and Louise Doswald-Beck. 2005. Customary International Humanitarian Law, Volume 1: Rules. New York: Cambridge University Press.

Herscher, Andrew, and Andras Riedlmayer. Autumn 2000. Monument and Crime: The Destruction of Historic Architecture in Kosovo. *Grey Room*, No. 1,109.

Hladik, Jan. June 2004. Marking of Cultural Property with the Distinctive Emblem of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. IRRC. Vol. 86, 854, 383.

Johnson, Chalmers. The Smash of Civilizations. http://www.leopardforlag.se/attach_doc/Chalmers1.doc (accessed April 5, 2007).

O'Connell, Mary Ellen. 2004. Occupation Failures and the Legality of Armed Conflict: The Case of Iraqi Cultural Property. Ohio State University Moritz College of Law. Working Paper No.6, no pagination.

O'Keefe, Roger. 2006. The Protection of Cultural Property in Armed Conflict. New York: Cambridge University Press.

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. 1999. http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed at April 6, 2007).

Sulc, Branka. 2001. The Protection of Croatia's Cultural Heritage During War 1991-95. In *Destruction and Conservation of Cultural Property*. Ed. Robert Layton, Peer G. Stone, and Julian Thomas. New York: Routledge.

UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage. 2003. http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed at April 9, 2007).

Vrdoljak, Ana Filipa. 2006. International Law, Museums and the Return of Cultural Objects. New York: Cambridge University Press.