Reaction and Responses to the Looting and Destruction of Sites in Iraq during the Invasion and Period of Occupation

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Abstract

The reaction of the international community to the looting of the National Museum and archaeological sites in Iraq was one of outrage; that of the Bush Administration was one of indifference. Although the United States is legally responsible for the looting of the National Museum of Iraq in Baghdad and the looting and destruction of archaeological sites which took place during its occupation of the country, it is unlikely that they will ever face legal sanction.

Keywords: Iraq National Museum; looting; destruction of sites; reaction to invasion of Iraq; legality of invasion of Iraq; legal responsibilities of occupiers; consequences of Iraq invasion

Introduction

This article follows on the author's introductory article, "The Looting of Iraqi Cultural Property during the 2003 Invasion and Subsequent Occupation by the United States and Coalition Forces," as published in *Journal for Semitics* 27 (1) 2018 (https://doi.org/10.25159/1013-8471/4052). Both articles are largely extracted from the author's master's dissertation (Marston 2013).

Reaction

Political context

When he learned of the commencement of looting following the invasion of Iraq, UNESCO Director-General Koichiro Matsuura contacted both the American and British authorities. Emphasising the urgent need to preserve Iraqi heritage, he requested that

UNISA university of south africa PRESS

Journal for Semitics
https://upjournals.co.za/index.php/JSEM
Volume 27 | Number 2 | 2018 | #4053 | 34 pages

https://doi.org/10.25159/1013-8471/4053
ISSN 1013-8471(Online)

they take immediate steps to protect Iraqi archaeological sites and cultural institutions. He emphasised the need to protect the archaeological museums in Baghdad and Mosul (Iglesias-Kuntz 2003, 4).[1]

These pleas, like those made earlier, were ignored, and the response of the American government following the looting of the National Museum of Iraq was dismissive. According to Donald Rumsfeld,

> Stuff happens! But in terms of what's going on in that country, it is a fundamental misunderstanding to see those images over, and over, and over again of some boy walking out with a vase and say, 'Oh, my goodness, you didn't have a plan.' That's nonsense.[2] They know what they're doing, and they're doing a terrific job. (Rothfield 2009, 111)[3]

In a subsequent interview, Rumsfeld continued to abdicate responsibility for the looting of the National Museum of Iraq, blaming it on the chaos that inevitably follows when emerging from a dictatorship.[4]

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1 The governments of a number of countries also reacted. The government of Jordan requested the United Nations to take charge of safeguarding Iraq's historic sites, which it described as "a national treasure for the Iraqi people and an invaluable heritage to the Arab and Islamic worlds" (quoted in Sandholtz 2005, 190). Pakistan stated that it was "deeply concerned" about the plundering of the National Museum of Iraq; that "International law and accepted standards demand protection be given to such treasures that are a common heritage of mankind" (quoted in Sandholtz 2005, 191).

2 Unfortunately, the plan was aimed at the protection of those assets of more immediate value to the invading forces – oil. In an interview in 2007, the former chief of US Central Command, General John Abzaid, stated: "Of course it's about oil, we can't really deny that" (quoted in Baker et al. 2010, 18).

3 That the Bush administration failed to appreciate the level of outrage felt internationally was clearly demonstrated by similar statements made by Rumsfeld during that press conference: "The images you are seeing on television you are seeing over, and over, and it's the same picture of some person walking out of some building with a vase, and you think, 'My goodness, were there that many vases? Is it possible that there were that many vases in the whole country?'" (Rothfield 2009, 111). Rumsfeld also accused the media of exaggeration: "I picked up a newspaper today and I couldn't believe it. I read eight headlines that talked about chaos, violence, unrest. And it was just Henny Penny — 'the sky is falling.' I've never seen anything like it! And here is a country that's being liberated, here are people who are going from being repressed and held under the thumb of a vicious dictator, and they're free. It's just unbelievable how people can take that away from what is happening in that country! Do I think those words are unrepresentative? Yes." (Quoted by US Department of Defence 11 April 2003).

4 Rumsfeld's response resulted in the resignations of several members of the President's Cultural Property Advisory Committee — in particular the chairman, Martin Sullivan; Gary Vikan, director of Baltimore's Walters Art Museum; and Richard Lanier, director of the Trust for Mutual Understanding. In his letter of resignation, Sullivan pointed out that the destruction of the National Museum of Iraq was "foreseeable and preventable," a "tragedy" that "was not prevented, due to our nation's inaction".

Thereafter, the State Department contacted McGuire Gibson and Patty Gerstenblith requesting information on the National Museum of Iraq's inventory and the relevant international law that could be used to recover artefacts. Gerstenblith was also requested to obtain recommendations from the Archaeological Institute of America on how to rectify matters.[5] The information was required for a speech to be made by the Secretary of State, Colin Powell (Rothfield 2009, 111). Although the administration had expected the outrage engendered by the looting of the National Museum of Iraq to dissipate within a few days, this had not been the case and damage control was required.

When Powell issued a written statement dealing with the looting, although he recognised the importance of cultural property and invoked the United States National Stolen Property Act,[6] he did not accept any responsibility for what had happened, referring disingenuously instead to "the well-reported efforts made to protect cultural, religious, and historic sites in Iraq", stating that troops had been instructed to protect museums and antiquities, and that Iraqis were being encouraged to return items (Rothfield 2009, 112). The Office of Reconstruction and Humanitarian Assistance, under John Limbert, was to take the lead in restoring the artefacts and catalogues, and the United States undertook to work with UNESCO and Interpol to achieve this. The following morning, both the Federal Bureau of Investigation and Interpol announced that teams were being dispatched to Iraq (Rothfield 2009, 112).

The following day, Rumsfeld, accompanied by General Richard Myers, Chairman of the Joint Chiefs of Staff, again met the press. When asked whether he was prepared to concede in retrospect that the military plan had failed to protect Iraq's antiquities or provide sufficient security for the National Museum of Iraq, Rumsfeld was unrepentant. When questioned on the foreseeability of the looting, Rumsfeld denied that any warnings had been given (Sandholtz 2007, 248). Although Myers intervened at this

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He stated that in his view the decision to invade Iraq was "burdened by a compelling moral obligation to plan for, and to try to prevent, indiscriminate looting and destruction". He was shocked by Rumsfeld's reference to the chaos in Iraq as "untidiness", stating that he could not "imagine a sadder or more ironic understatement" (Sullivan 2003, 1). Richard Lanier criticised "the administration's total lack of sensitivity and forethought regarding ... the loss of cultural treasures" (Grey 2003, 1).

5 Her suggestions included sealing off borders, using helicopter fly-overs to establish short-term security at sites, providing funds to rehire and train new Iraqi guards, and using the US military to establish a security perimeter around the National Museum of Iraq so that Baghdad police forces could inspect houses in the vicinity (Rothfield 2009, 111). They were not implemented.

6 In terms of which the artefacts looted from museums and sites constitute stolen property.

quite outrageous misrepresentation, he carefully underplayed the numerous warnings given.[7]

The looting of the National Museum of Iraq captured front-page headlines in major newspapers around the world.[8] Considered a major cultural disaster, international reactions ranged from critical to scathing, with moral blame uniformly placed upon the United States.

Russian Culture Minister Mikhail Shvydkoi explicitly blamed American forces for permitting the looting. Su Donghai, a Chinese specialist on cultural relics, described the looting as "a catastrophe to human civilization", declaring that "the U.S. forces should be held accountable as they should take the responsibility, in compliance with

7 Still no troops arrived to protect the National Museum of Iraq. With the assistance of reporters, Dr Donny George contacted John Curtis, curator of the Near Eastern Department of the British Museum on 15 April. Curtis immediately advised Neil MacGregor, who contacted the Prime Minister's Office and requested that protection be provided (Curtis 2008, 202). Curtis also called Gibson, who contacted Varhola and John Marburger, the White House science advisor (Rothfield 2009, 113). On 16 April Captain Jason Conroy was instructed to secure the National Museum of Iraq, and did so.

8 The *Süddeutsche Zeitung* employed the headline "Barbaren in Bagdad" (quoted in Sandholtz 2005, 189), and an article in the *Korea Herald* concluded: "American and British forces, their commanders and ultimately George W. Bush and Tony Blair, cannot avoid the blame for their negligence in protecting cultural assets of the nation they invaded. If some of the effort that they expended in winning control of Iraq's many oil fields had been allocated to protecting cultural assets, they would have successfully guarded the precious contents of the Baghdad museum" (quoted in Sandholtz 2007, 245). An editorial in New Delhi's *Pioneer* proclaimed: "The sacking of the Baghdad archaeological museum—now home to smashed glass cases, broken pottery, torn books and mutilated statues—will forever remain a scathing indictment of this inexcusable and manifest indifference towards the very people the Coalition claims to have liberated. The theft of irreplaceable antiquities, some going back over 7 000 years, represents a loss that cannot be calculated in material terms; it is an assault on collective historical consciousness and, hence, a spiritual dispossession and desecration of identity" (quoted in Sandholtz 2007, 244). ITAR-Tass, the Russian news agency, reported that museum experts considered the looting "the greatest cultural disaster of the current century". The agency criticised President Bush, who, although describing the looting as "horrible", failed to acknowledge "the complete passivity of American soldiers, who did not prevent those horrors". The report also recorded the view held by a number of experts that the United States and the United Kingdom had been obliged to "guarantee the safety of Iraq's national treasures" in terms of international conventions (Sandholtz 2007, 245). An opinion given in Edinburgh's *Evening News* asserted that "the loss of Iraq's cultural heritage will go down in history—like the burning of the Library at Alexandria—and Britain and the U.S. will be to blame". *The Sunday Herald* quoted Lord Renfrew: "What has been allowed to happen has been nothing short of disgraceful. The invading country had a responsibility to look after its cultural heritage. It was foreseeable and preventable" (quoted in Sandholtz 2007, 245).

international laws, to protect Iraq's historic, cultural and religious legacies from being destroyed or looted" (quoted in Sandholtz 2007, 245).[9]

Reactions within American society were just as vehement as those expressed abroad.[10] Even members of the coalition forces were quick to distance themselves.[11] British cabinet member Clare Short called for a "massively bigger effort" by coalition forces to stop the looting, and suggested that by failing to prevent the looting in Baghdad American troops had violated the 1907 Hague and 1949 Geneva Conventions (Sandholtz 2007, 244).

George Bush made his only public comment on the National Museum of Iraq's looting on 28 April 2003, when he said: "We're working with Iraqis to recover artefacts, to

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9 Eleanor Robson, an Oxford don and council member of the British School of Archaeology in Iraq took it even further, asserting that: "This is a tragedy with echoes of past catastrophes: the Mongol sack of Baghdad, and the fifth-century destruction of the library of Alexandria;" that "[t]he looting of the Iraq Museum is on a par with blowing up Stonehenge or ransacking the Bodleian Library" (quoted in Bogdanos 2005, 21). According to Professor Piotr Michalowski of the University of Michigan, "The pillaging of the Baghdad Museum is a tragedy that has no parallel in world history. It is as if the Uffizi, the Louvre, or all the museums of Washington, D.C., had been wiped out in one fell swoop." Professor John Russell of the Massachusetts College of Art held a similar view: "Ten thousand years of human history has been erased at a moment" (quoted in Bogdanos 2005, 22).

10 Atwood (2003, 21) emphasised the foreseeability of the looting, pointing out that: "Around the globe, the aftermath of war in recent decades has come to mean the onset of looting. In Cambodia, the civil war that ended in 1991 was followed by the devastation of ancient Khmer cities that had basically stood intact since French archaeologists excavated them in the 19th century: Looters lopped the heads of nearly all the Buddhas at Angkor and chiselled off hundreds of stone carvings. In Afghanistan, the U.S. invasion was followed by waves of looters at remote archaeological sites, compounding the vandalism done by the Taliban. In Bosnia, looters barely waited for the guns to go silent before stripping old churches of their icons. The systematic removal of artefacts by teams of pillagers has become as much a part of the aftermath of modern warfare as blue-helmeted peacekeepers and CNN." Editorial writers, archaeologists, and archaeological associations expressed dismay and outrage at the looting of the National Museum of Iraq. According to a commentator in the *San Francisco Chronicle*, "We have to wonder how the Pentagon and the State Department could fail to see the cultural calamity coming, such a predictable consequence of urban war chaos," especially in light of all the warnings they had received from experts (Sandholtz 2007, 246). An editorial in the *Pittsburgh Post-Gazette* called the looting a "cultural tragedy": "Mr. Rumsfeld ridiculed news reports of the looting, saying that film clips appeared to show 'the same guy with the same vase' time after time. What had actually taken place was a cultural crime, the loss of an irreplaceable history of the region long referred to as the Cradle of Civilization" (quoted in Sandholtz 2007, 247).

11 Australia, although a member of the Coalition, was not involved in the assault on Baghdad and denied any culpability. General Peter Cosgrove, head of Australian Defence Forces "rejected suggestions that Australia, as an invading and occupying force with international legal responsibilities for protecting Iraq's heritage, should share the blame for the loss of artefacts" (Sandholtz 2007, 244).

find the hoodlums who ravished the National Museum of Antiquities in Baghdad. Like many of you here, we deplore the actions of the citizens who ravished that museum. And we will work with the Iraqi citizens to find out who they were and to bring them to justice" (quoted in Rothfield 2009, 116).

Conservative media opinion makers went on the attack a few weeks later, seizing on the errors in the original reports and decrying the entire episode as "much ado over nothing, or worse" (Rothfield 2009, 116). On 5 May 2003, it was reported that only 38 items were missing and that these had been taken from locked storage rooms, indicating an inside job. It was further alleged that:

> 'There is no comparison in the level of destruction seen in the museum and that seen in the administrative offices,' Bogdanos told the paper. 'It's absolute wanton destruction in the offices. We didn't see anywhere near that destruction in the museum. (People) stole what they could use. They left the antiquities' (quoted in WorldNetDaily.com 5 May 2008).

On 7 May 2003, Lieutenant General William Wallace informed the *Financial Times* that there was in fact very little looting, and that "as few as 17 items were unaccounted for" (quoted in *United Press International* 2003, 5). Charles Krauthammer, on 13 June 2003, accused those who criticised the looting as "indulging in 'narcissism' and 'sheer snobbery'" (*Washington Post*, 13 June 2003).

The Bogdanos Initiative

Marine Colonel Matthew Bogdanos was detailed to investigate the looting of the National Museum of Iraq. His mandate was not to prosecute looters or smugglers, but to recover the stolen antiquities (Bogdanos 2003, 1). Unfortunately, as many of the stolen items had not been documented or photographed, the identification and cataloguing of these items proved more difficult and time-consuming than originally anticipated (Bogdanos 2005, 136).

The involvement of religious and community leaders led to the return of thousands of artefacts. A religious decree banning the dealing in or smuggling of antiquities was issued by the Grand Ayatolla Alil Sistani, the highest Muslim Shi'ite authority in Iraq (Rothfield 2009, 125), and after one of the Imams of a nearby mosque was consulted the Imam not only issued a fatwa, but also arranged for a chest full of stolen manuscripts to be returned to the National Museum of Iraq that afternoon (Bogdanos 2005, 149). An earlier approach to local mosques by George and other members of staff had resulted in the return of George's computer printer and a number of the Nimrud ivories (Rothfield 2009, 103).

Arabic-speaking agents were placed on the pavement to solicit and encourage people to return items, and within the first three days over a hundred pieces were recovered. Each piece was checked for a National Museum of Iraq identification number, photographed, scanned into the computer, and entered onto an inventory. However, when attempts were made to subtract these from the list of missing items, it was discovered that none appeared upon the list; many had been omitted, including the copper bull from Ninhursag and the statue of Shalmaneser (Bogdanos 2005, 158). Subsequently, Dr John Russell, conducting an inventory of the National Museum of Iraq for UNESCO, found that most of the objects returned were forgeries or reproductions (Elich 2004, 3). Further, according to George, 16 077 objects returned to the National Museum of Iraq did not come from the Museum's collection, but were recently looted from archaeological sites, raising the obvious question: "If this is what is being returned, then what is being taken?" (English 2007, 3).

Although Bogdanos was reluctant to offer cash for the return of antiquities, since it encouraged the black market and theft, it did prove necessary in certain cases. One man, claiming to have 96 items, demanded $500 for their return. These items, subsequently recovered, included the Sacred Vase of Warka (Bogdanos 2005, 225).

Information also led to successful seizures. On 23 September 2003, the Mask of Warka was found buried in the grounds of a farmhouse, and other raids led, inter alia, to the recovery of the Nimrud brazier, the Bassetki Statue (Bogdanos 2005, 232), and 76 of the objects looted from the basement (Vreeke 2006, 5).

Raids and seizures at airports, checkpoints, and border crossings led to the recovery of thousands more. Looted artefacts were also confiscated at the borders to neighbouring states[12] and at airports in Europe and the United States.[13]

12 In May, over 465 artefacts stolen from the National Museum of Iraq were seized when a car en route to Iran was stopped. They comprised mostly cuneiform tablets, amulets, pendants, and some cylinder seals (Bogdanos 2005, 158)

13 On 30 April 2003, United States customs officials at Newark Airport seized four boxes containing 669 stolen artefacts from the National Museum of Iraq, en route from London to an art dealer in New York (Bogdanos 2005, 229). By the end of 2003, Italian authorities had seized 300 objects, Jordan 1450, Syria 360, Iran over 400, Saudi Arabia 18, and Kuwait 38 (George 2005, 2). On 11 June 2003, three cylinder seals clearly bearing identification marks from the National Museum of Iraq were discovered in the luggage of journalist Joseph Braude upon his arrival at Kennedy Airport. He pleaded guilty to smuggling and lying to federal agents and was sentenced to six months of house arrest and two years of probation (International TV 2005, 2). Not all countries were equally co-operative.

The recovery of artefacts is dangerous work. In 2005, Iraqi customs officials arrested several antiquities dealers and seized hundreds of artefacts. However, on their way back to Baghdad the officials were robbed of the artefacts, and eight were killed (Fisk 2007, 3).

Unfortunately, some artefacts will never be recovered. Not only because of dishonest collectors, but also because, according to Interpol, Iraqi artefacts finding their way into Switzerland reappear with certificates asserting that they were dug up in Syria or Turkey. As Sarah Collins points out,

> Unfortunately, it is a question of proof. Someone has to prove legally that it came from Iraq. That's hard — an expert can say where and when it was made, but we can't prove where and when it was dug up. (Quoted in Eagar 2004, 2)

Efforts at recovery continued after Bogdanos and his team were reassigned six months later.[14]

Efforts to Protect Archaeological Sites

In May 2003, Gibson sent a report to White House science advisor John Marburger and to Brigadier General John Kern, pointing out that: "The worst thing happening to antiquities is the continuing looting of sites" and requested assistance in combating this problem (quoted in Rothfield 2009, 131), that helicopters be used to fly over archaeological sites to deter looters, and that announcements be made in the local media reminding the public that looting was prohibited.

14 At the Regional Meeting to Fight the Illicit Trafficking of Cultural Property Stolen from Iraq held in 2004, Jordanian officials reported that they had appointed liaison officers to assist customs officials at the border with the assessment of seized objects, which were placed on computerised inventories and shared with both the Iraqi National Museum and UNESCO. They also co-operated with neighbouring states, UNESCO, and regional organisations to provide practical assistance, which included the funding and training of Iraqi archaeologists (Interpol 2004, 3). Saudi Arabia and Syria also reported on seized Iraqi artefacts (Interpol 2004, 4). The involvement of the public also led to the recovery of items: the statue of Entemena was recovered after a European businessman informed upon dealers in the Lebanon who wished to sell it (Vreeke 2006, 7), and the small second-century B.C.E. stone head of King Sanatruq I from Hatra was recovered after the Italian archaeologist who excavated it saw it displayed on the mantelpiece of a Lebanese interior decorator featured in a television programme (Rothfield 2009, 138). In 2009, the Minister for Tourism and Antiquities advised that some 6 000 items stolen from the National Museum of Iraq had been returned. Of these, 2 466 were recovered in Jordan, 1 046 from the United States, and 701 from Syria (*Los Angeles Times*, 23 February 2009).

Undeterred by a lack of response, Gibson wrote again, pointing out that certain members of the Civil Affairs staff could be used more effectively if their curatorial and archaeological expertise were placed in a task force formed to address this problem.[15] Although he received no response (Rothfield 2009, 132), official policy was made clear. According to Lieutenant Colonel Daniel O'Donahue: "[W]e don't have anywhere near enough marines to police every fixed site in the country ... Our view is that if it's a fixed site, it's primarily an Iraqi responsibility" (quoted in Thurlow 2005, 180). Army Colonel John Malay concurred — not only was guarding archaeological sites not a priority, but "if the looters were not looting ... they might be killing instead" (quoted in Garen 2003, 2).

Although on 14 July 2003, the State Department announced that an inter-agency working group to assist in rebuilding Iraq's cultural heritage had been formed, site security was not included within the remit of the group (Rothfield 2009, 132).

After Gibson again requested that guards be deployed at archaeological sites, the Coalition Provisional Authority advised him of a pilot project that might provide a model for the protection of sites. A special force, comprising 200 men, was being trained in Babil Province to protect the province's archaeological sites. Unfortunately, this project not only required the co-operation of local provincial governors, but it also relied upon United States commanders to pay for reconstruction projects (Rothfield 2009, 131).

Undaunted, Gibson contacted Colonel Kessel, commander of the Special Functions Team of the US Army 352nd Civil Affairs Command. Kessel ignored the request for troops,[16] but replied that the military was attempting to equip, train, and provide the State Board of Antiquities and Heritage (SBAH) with satellite communications

15 There were complaints that the staff seconded to the Coalition Provisional Authority (CPA) from government ministries had low levels of expertise. This was particularly so in regard to the US, who were not prepared to transfer their best staff to the Department of Defence for deployment to Iraq. Although twenty-seven police advisors, including some correctional officers subsequently sent to Abu Ghraib, were allocated by the United States Department of Justice's International Criminal Investigative Training Assistance Program to deal with policing, no real efforts were made regarding cultural heritage. When John Russell arrived in Baghdad in September 2003 as senior advisor to the CPA, he discovered that only one member of the Civil Affairs' Arts Monuments team had any cultural expertise (Rothfield 2009, 127).

16 Rothfield (2009, 134) believes that his decision may have been influenced by the killing of a number of his soldiers who had been working on the looting and trade in antiquities.

equipment, weapons, and vehicles, and asked Gibson if he knew of donors to fund this task (Rothfield 2009, 135).[17]

In 2006, and in spite of the fact that the American-sponsored Iraqi government had a budget surplus and a problem with unspent funds, the budget of the Antiquities Department was cut, resulting in an inability to purchase fuel for patrol vehicles (Baker et al. 2010, 28). When American assistance was requested, the response was that "we weren't going to fly helicopters over the sites and start shooting people" (quoted in Baker et al. 2010, 28). It is noteworthy that the $30MM contract paid to a security firm in 2006 to provide 800 guards to protect the oil pipelines in the Dhi Qar province resulted in not a single attack on the pipeline (Garen 2006, 1). The State Department rejected proposals for joint United States-Iraqi site policing programmes, misrepresenting that order had been restored, and that as a result no assistance was required (Rothfield 2009, 154).[18]

Nabil al-Tikrit asserts that in the six years following the initial destruction, the American government provided a "modest set of vacuum cleaners" and funded staff training initiatives through the National Endowment for the Humanities (al-Hussainy 2010, 100). According to Zainab Bahrani (2010, 73), those living in Iraq saw little of the projects launched to rescue Iraq's heritage, which were "more geared for the benefit of European and North American consumption rather than being of much use to heritage in Iraq itself." Although the United States designated $14 million for such assistance, a large part of the money was earmarked for American universities[19] and other institutions in the United States. As Bahrani (2010, 75) points out, the irony of Iraqis being taught how to take care of their cultural heritage by the country that destroyed it is hard to miss.

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17 The United States military contributed towards the payment of 350 guards to protect 432 sites in Babil Province. The Getty Conservation Institute's Iraq Cultural Heritage Conservation Initiative provided grants for site protection, which were used to replace the protective roofing over the Palace of Sennacherib at Nineveh and employ guards at sites (Rothfield 2009, 147).

18 At the beginning of July 2008, this viewpoint suddenly became a popular topic: "Iraq's Top Archaeologists Says Looting of Sites Is Over"; "'Cultural Heritage Sites Safe.' According to State Board of Antiquities Inspector Qais Rashid" (quoted in Rothfield 2009, 154). Another popular view at this time was that looting had never really been a problem: "So Much for the 'Looted Sites'" (Rothfield 2009, 154). The basis for these allegations was the report on eight sites in southern Iraq examined by a team from the British Museum. However, what was overlooked was the fact that these sites "were either close to (and in one case within!) Coalition bases, were under the long-standing control of local sheikdoms paid to guard them, or had received special protection after media reported on their looting in 2003" (quoted in Rothfield 2009, 154).

19 Unfortunately, the Committee on Iraqi Libraries at Harvard University was unable to provide advanced preservation training to Iraqi librarians as they were refused visas (al-Hussainy 2010, 100).

The occupying forces also participated in the looting of artefacts. In 2006 the police apprehended smugglers in possession of 174 artefacts, who alleged that they worked for foreign troops, and even possessed badges so that they could enter foreign military camps (Stone and Bajjaly 2008, 10). Although the nationality of the troops concerned was not stipulated, the artefacts were mostly sold to troops serving in Diwaniya, where the American authorities in that area declined to comment (al Jaberi 2006, 1). Such allegations were subsequently confirmed.[20]

Responses to the Occupation of Sites

The ire aroused by the military occupation of sites was resounding.[21] According to Bahrani (2008, 169), who raised the issue of the occupation of Babylon with American officers at "dozens of meetings" during 2004:

> There was no-one who could answer the question of who it was that had taken the decision to occupy Babylon, or why. There was no-one who had any information about a decision, a plan or a strategy. Later, after we had exposed the story through the press,

20 Marine Corps Reservist Matthew Boulay reported that while stationed in Diwaniyah in 2003, the camp commander sanctioned a flea market on the base, which included a very successful stall selling Iraqi artefacts in spite of standing orders declaring it illegal to purchase, possess, or repatriate antiquities. Boulay emailed Gibson, who suggested that he report the matter to the base commander. However, since "Corporals don't saunter up to colonels and make complaints," he reported the matter to his platoon commander, who sent it up the chain of command. In response, Boulay received a "cease and desist" order. Reluctant to do so, Boulay purchased eight cylinder seals for between $20 and $80, and had them examined by Bahrani, an archaeologist from Columbia University. They were authenticated and valued at several thousand dollars each. They were thereafter returned to Iraqi authorities (Rothfield 2009, 139). In March 2007, soldiers from the Army's 82nd Airborne looted a Torah scroll, some 400 years old, which was hidden below the floor of an abandoned building. Rabbi Menachem Youlus, who runs the "Save A Torah" foundation, facilitated its sale for $20 000. In terms of Iraqi law, this should have been handed over to the SBAH. Not only was its export illegal in terms of Iraqi law, but also contravened Security Council Resolution 1483 and the Emergency Protection for Iraqi Cultural Antiquities Act of 2004 in force in the United States at the time. Youlus admitted that "getting it out wasn't so easy", alleging that the 60 panels of the scroll had to be disassembled in order to smuggle it out of Iraq (Barford 2008, 1).

21 Zahi Hawass, the erstwhile first under-secretary of state in the Ministry of Culture and the secretary-general of the Supreme Council of Antiquities in Egypt was vociferous: "When the Taliban set about destroying the great rock-hewn statues of Buddha in Afghanistan, the world was up in arms. America led the campaign of criticism against them through UNESCO and the international media. The Taliban were accused of being morons who wilfully destroyed monuments. But now, it is the Americans who are destroying a heritage with the use of high-tech military equipment, and where are UNESCO, ICOMOS, or the international museums? Where are the experts and the defenders of culture while the Iraqi heritage is being desecrated?" (quoted in El Aref 2003, 3).

> the idea of "protection" emerged. This excuse of "protection" is now being invoked in various contexts across occupied Iraq.[22]

Bahrani argues that this justification "beggars belief", since the damage to the site "is both extensive and irreparable" (Bahrani 2008, 169):[23] had American forces really wished to protect it, they would have placed guards at the site, rather than "bulldozing it and setting up the largest Coalition military headquarters in the region."

She also points out that had the occupation of Babylon been for its own good, military commanders would have heeded requests to cease construction and terminate helicopter flights. Instead, these requests were either ignored[24] or rejected on the basis that no damage was being done. It is difficult not to agree with her statement that:

> The idea that the USA took Babylon for its own protection is perhaps similar to the idea that the USA invaded Iraq to bring it freedom. If you believe in the second statement, you are likely to believe the first. (Bahrani 2008, 170)[25]

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22 According to Lukasz Oledzki, a Polish archaeologist who was part of the team co-ordinated by the Polish Ministry of Cultural and National Heritage, the decision was made owing "in equal measure to strategic military considerations and the need to protect the site." Although he concedes that the occupation was "undoubtedly a serious mistake," he believes that it had its advantages in that the site was saved from "generalised looting and devastation" (Oledzki 2008, 250).

23 According to Bahrani: "The occupation has resulted in a tremendous destruction of history well beyond the museums and libraries looted and destroyed at the fall of Baghdad. At least seven historical sites have been used in this way by US and Coalition forces since April 2003, one of them being the historical heart of Samarra, where the Askari shrine built by Nasr al Din Shah was bombed in 2006" (quoted in Fisk 2007, 2).

24 Although the US military authorities claimed that their construction activities were carried out under the supervision of archaeologists (Oledzki 2008, 255), this is not credible as Mariam Moussa wrote numerous letters to the commanders recording her refusal to grant permission for any kind of construction, the use of helicopters, or the use of the site as a military base (Bahrani 2008, 170), all of which were ignored.

25 The decision to send a troop of marines with assault vehicles (Nisbett 2011, 9) to protect the Iraqi oil ministry in Baghdad (Gumbel and Keys 2003), and some 2 000 troops and armoured vehicles to protect the oilfields lent credence to the view that American and British interests had determined to do "some looting of their own on behalf of Western corporate interests" (Elich 2004, 2). Rieff (2004, 25) quotes a leader in the Hawza, the Shi'ite religious authority, who informed him: "It is not that they could not protect everything, as they say. It's that they protected nothing else. The Oil Ministry is not off by itself. It's surrounded by other ministries, all of which the Americans allowed to be looted. So what else do you want us to think except that you want our oil?" A Gallup poll taken in Baghdad asking about the American motives for the invasion found that 1% believed it was to establish democracy in the country, 5% believed that it was to assist the Iraqi people, but most attributed them to a desire "to

In November 2003, after Polish archaeologists were deployed to Iraq to document and protect archaeological sites and monuments which fell within their jurisdiction, they realised that the only way to protect the archaeology of Babylon was to relocate the military camp (Oledzki 2008, 252), and the troops left Babylon on 22 December 2004, transferring former Camp Alpha to the Ministry of Culture.

Three years after the US forces withdrew from Babylon, Colonel John Coleman, former Chief of Staff for the First Marine Expeditionary Force in Iraq that had occupied Babylon, issued an apology for the damage caused to the site by American forces. He persisted, however, with the argument that the occupation of Babylon had protected the ancient city from looters, and that the damage was less than that which would have been otherwise sustained in the event that the city had been left to looters (Singer 2010, 25). It seems that he was completely oblivious to the obligation of the United States to protect these sites; that he considered the only alternatives to be occupation or looting.

The Legal Position

The Legality of the Invasion

No country may invade another, unless it is in self-defence or in accordance with a resolution from the United Nations. When it became apparent that a United Nations resolution in favour of the invasion would not be supported,[26] the United States and United Kingdom withdrew it: it was preferable not to have a resolution than to have one that had been vetoed. Legal minds then weighed in to manipulate existing resolutions to justify the invasion.

The United Nations Security Council passed many resolutions after Iraq's invasion of Kuwait in 1990, but the most relevant to this issue are:

(1) Resolution 678, which authorised member states co-operating with Kuwait to "use all necessary means to implement resolutions," and "to restore international peace and security in the area";

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take control of Iraqi resources and to reorganise the Middle East in US and Israeli interests" (Chomsky 2004, 249).

26 In seeking support for their resolution, the US adopted a "with us" or "against us" attitude; there were to be benefits for the former, punishments for the latter: senior US officials asked members of the Security Council to "urge leaders to vote with the United States on Iraq or risk 'paying a heavy price.'" When Mexican diplomats replied that their people were overwhelmingly opposed to war, their stance was dismissed as ridiculous (Chomsky 2004, 35).

(2) Resolution 687, which brought into effect a formal ceasefire "between Iraq and Kuwait and the member States co-operating with Kuwait in accordance with resolution 678 (1990)" upon Iraq's notification of its acceptance of the Resolution. The Security Council also decided "to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area"; and

(3) Resolution 1441, in which it declared Iraq to be in material breach of its obligations under Resolution 687 and called for compliance. It also requested a report from the United Nations Monitoring, Verifications and Inspection Commission (UNSCOM), upon receipt of which it would reconvene "to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security".

The authority granted "to restore international peace and security" in Resolution 678 became the lodestone of apologists for the invasion, who argued that since Iraq had materially breached its obligations to disarm, the authorisation granted in Resolution 678 was revived and force could be used to compel Iraq to comply with its obligations (Aldridge 2003, 23).

This argument cannot be sustained. Once Iraq implemented its acceptance of the specified 12 resolutions and took the required action, the ceasefire came into effect and the authority to use force was terminated.

Wingfield (2003, 40) proffers an alternative argument based upon Resolution 1441. Since this resolution recalls that the Council had repeatedly warned Iraq that it would face "serious consequences" in the event that it continued to violate its obligations, it provided the coalition forces with the authority it required — by recalling in effect the earlier resolution. He argues that by passing this resolution the Security Council "wanted to ensure that no one could argue that the legal effect of its previous resolutions had lapsed through lack of deliberate action to enforce them".

This argument takes the word "recalling" out of context, and attempts to attribute to it a meaning clearly not apposite when it is read in context. It also overlooks the section which stated that the Council would reconvene upon receipt of the report from UNSCOM in order "to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security".

Finally, the argument that Resolution 1441 provided authorisation for the war ignores the fact that during preliminary discussions the United States and United Kingdom had sought to include an authorisation for the use of force in that resolution in the event that

Iraq failed to comply with its obligations – something which they had to abandon when faced with strong opposition from Russia, China, and France, a fact which they had expressly acknowledged at the time.[27] Thus any efforts to justify the war upon the basis of these resolutions must fail.

The Obligation to Protect Cultural Property

Efforts to develop laws to protect cultural property have a long history.[28] The Hague Rules[29] prohibit the destruction or seizure of enemy property (O'Keefe 2006, 23), and the attack or bombardment of undefended towns, villages, dwellings, or buildings except in the case of military necessity (O'Keefe 2006, 23). However, even in sieges and bombardments all necessary steps were to "be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, [and] historic monuments, ... provided they are not being used at the time for military purposes"

27 These countries later issued a joint statement in which they stressed that "Resolution 1441 (2002) adopted today by the Security Council excludes any automaticity in the use of force". The Syrian Ambassador stated that: "Syria voted in favour of the Resolution, having received assurances from its sponsors, the United States of America and the United Kingdom, and from France and Russia through high-level contacts, that it would not be used for a pretext for striking against Iraq and does not constitute a basis for any automatic strikes against Iraq. The Resolution should not be interpreted, through certain paragraphs, as authorising any state to use force. It reaffirms the central role of the Security Council in addressing all phases of the Iraqi issue" (quoted in Shiner 2083, 42). Jeremy Greenstock, the ambassador from the United Kingdom, stated: "We heard loud and clear during the negotiations the concerns about 'automaticity' and 'hidden triggers' — the concern that on a decision so crucial we should not rush into military action; that on a decision so crucial any Iraqi violations should be discussed by the Council. Let me be equally clear in response, as a co-sponsor with the United States of the text we have adopted. There is no 'automaticity' in this resolution. If there is a further Iraqi breach of its disarmament obligations, the matter will return to the Council for a discussion as required in operational paragraph 12. We would expect the Security Council then to meet its responsibilities" (quoted in Shiner 2008, 30).

28 The 1874 Draft International Regulations on the Laws and Customs of War (the Brussels Declaration), was an intergovernmental codification of the laws of war, but was not binding (O'Keefe 2006, 18). It prohibited pillage and the destruction of enemy property not "imperatively demanded by the necessity of war" (O'Keefe 2006, 19), and required restraint in regard to buildings dedicated to art, science, and charitable purposes, as long as they "were not being used for military purposes" (O'Keefe 2006, 20). This also applied during occupation (O'Keefe 2006, 21).

29 The Brussels Declaration formed the basis of the 1899 Regulations annexed to the Convention concerning the Laws and Customs of War on Land adopted at the First Hague Peace Conference (O'Keefe 2006, 22). These rules were revised in 1907, and the Regulations concerning the Laws and Customs of War on Land ("The Hague Rules") were annexed to the 1907 Hague Convention (O'Keefe 2006, 23).

(O'Keefe 2006, 24). Pillage was prohibited both during the capture of the territory and during occupation (O'Keefe 2006, 30, 33).

Treaties only apply to those State Parties who have agreed to be bound by them unless they have become customary international law. The 1907 Hague Convention is considered to be customary international law (Paroff 2004, 2032),[30] and is accordingly binding on all states and individuals, although it must be stated that both the United States and the United Kingdom ratified it.

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict produced by UNESCO in 1954 defined cultural property[31] and endowed it with both general and special protection.[32] Articles 4(1) and (4) require Parties to refrain from (a) using cultural property, its immediate surroundings and appliances in use for its protection for purposes likely to expose it to destruction or damage in the event of armed conflict; and (b) acts of hostility and reprisals directed against cultural property.

Once again however, such protection does not apply where "military necessity imperatively requires such a waiver." Article 4(3) requires Parties to "prohibit,

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30 The International Military Tribunal in Nuremberg found that "violations of these provisions constituted crimes for which the guilty individuals were punishable [were] too well settled to admit of argument", and convicted those involved in organising the seizure and destruction of artworks and monuments in the occupied territories (O'Keefe 2006, 88). Resolution 95(l), unanimously passed by the General Assembly of the United Nations in 1946, affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgement of the Tribunal." This was confirmed in 1950 by the UN's International Law Commission and in 2004 by the International Court of Justice (Sandholtz 2005, 223).

31 This embraces :
"(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centres containing monuments'."

32 Article 8 of the Convention provides special protection to cultural property if it is entered in the International Register for Cultural Property Protection. None of the cultural property in Iraq enjoyed such protection at the time of the invasion (Paroff 2004, 2048).

prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property."

Since the United States and Britain had not ratified the Convention at the time of the invasion, they could only be bound by its provisions if it had become part of customary international law. Other coalition partners, Italy, Poland, Australia, and Holland, were Contracting Parties, as was Iraq.

Article 38(1)(b) of the Statute of the International Court of Justice stipulates that customary international law is a "general practice accepted as law", which comprises two elements — state practice and an acceptance by the relevant state that such practice is legally required (Gerstenblith 2005–2006, 300).

The preponderance of legal opinion is that the protection of cultural property has become part of customary international law.[33] The International Committee of the Red Cross undertook a 10-year study to determine which principles or rules had become part of customary international humanitarian law. They adduced that certain rules pertaining to cultural property had indeed become part of customary international law:

> Customary law today requires that such objects (property of great importance to the cultural heritage of every people) not be attacked nor used for purposes which are likely to expose them to destruction or damage, unless imperatively required by military

33 Joshua Kastenberg (1997, 277) contends that although the 1954 Hague Convention has not become customary law, it is a reflection of customary international law, and accordingly most of its provisions are binding (Kastenberg 1997, 302). Although he does not specify the binding provisions, Wayne Sandholtz (2007, 257) believes that this would reasonably include "the treaty's main, general requirements, which are set out in Article 4." Victoria Birov is of the view that "[m]any of the provisions of the 1954 Hague Convention … are rapidly achieving the universally binding standard of customary international law," whereas David Meyer goes even further: "The absence of significant reservations to the 1954 Convention supports its status as customary international law" (quoted in Sandholtz 2007, 257). Adam Roberts and Richard Guelff, who compiled all of the documents relating to the laws of war, adopt the view that in light of the "long-established and general acceptance of the principle of special protection of cultural property … this special protection may be viewed as part of customary international law" (quoted in Sandholtz 2007, 257). Another compilation, Howard Levie's Code of International Armed Conflict, which seeks to include "all of those specific items of the law of war which have some international basis and as to which there are valid reasons for believing that they are (or may be) binding rules which are applicable … in all international armed conflicts," includes the main provisions of the 1954 Hague Convention, including Article 4(3) (Sandholtz 2007, 257). It is beyond the scope of this article to canvass all the authorities and viewpoints on this issue.

necessity. It also prohibits any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, such property. (Henckaerts 2005, 193)[34]

Although decisions of international courts are subsidiary sources of international law and do not constitute State practice, they are persuasive. Both the Trial Chamber and the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) have considered the 1954 Convention to be part of customary international law,[35] and the "seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art

34 In their report, they set out the following rules that form part of customary law in relation to cultural property, namely:
Rule 38. Each party to the conflict must respect cultural property:
38A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.
38B. Property of great importance to the cultural heritage of every people must not be the object of attack unless required by military necessity (Henckaerts 2005, 201).
Rule 39. The use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity (Henckaerts 2005, 201).
Rule 40. Each party to the conflict must protect cultural property:
40A. All seizure of or destruction or wilful damage done to institutions dedicated to religion, the arts, and sciences, historic monuments and works of art and science is prohibited.
40B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited (Henckaerts 2005, 202).
Rule 41. The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory (Henckaerts 2005, 202).
The US refused to accept the findings of this study, citing both a lack of sufficient evidence and concerns with the methodology. They considered the reference to military manuals to be unacceptable since they are not binding. For further information, see Bellinger and Haynes (2007, 443).

35 The Appeals Chamber, in the case against Dusko Tadic, stated that "some treaty rules have gradually become part of customary law" and included Article 19 of the 1954 Hague Convention among those rules. In terms of Article 19, in the event of an armed conflict occurring within the territory of a party, "each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property." This decision was cited and accepted by the ICTY Trial Chamber in the Strugar case (Sandholtz 2007, 209).

and science" is among the crimes which fall within their jurisdiction.[36] The Tribunal has convicted a number of persons for crimes against cultural property.[37]

In determining whether it was accepted as customary law by the United States during the Iraq invasion, it must be shown to be followed in general as law. This is done by studying its past conduct and written evidence, such as "diplomatic correspondence, military manuals, or newspaper accounts of contemporary events". If it was followed merely as a courtesy, then the test is not satisfied (Paroff 2004, 2038).

The United States has never objected to the substantive provisions of the Convention (Sandholtz 2007, 254). Instead it has repeatedly affirmed that its armed forces comply with the treaty provisions, both in policy and in practice (Sandholtz 2007, 255),[38] and has also consistently confirmed its acceptance of, and compliance with, the 1954 Hague Convention. Indeed, according to one assessment: "While the United States has not legally bound itself to the Hague Convention, it regards its principles as part of customary international law and claims to have incorporated the treaty into its field manuals and general approach to warfare" (Sandholtz 2007, 256).[39] The cultural

36 The United States supported the creation of the ICTY and has supported its work, providing investigators and prosecutors when required (Sandholtz 2005, 224).

37 These include Slobodan Milosevic, whose indictment, inter alia, alleged that he was responsible, with others, for "intentional and wanton destruction and plunder [which] included the plunder and destruction of homes and religious and cultural buildings", "[d]estruction or wilful damage done to historic monuments and institutions dedicated to education or religion" during the bombardment of the Old Town of Dubrovnik, which city was a UNESCO World Cultural Heritage Site, "intentional and wanton destruction of religious and cultural buildings of the Bosnian Muslim and Bosnian Croat communities including, but not limited to mosques, churches, libraries, educational buildings, and cultural centres" (Sandholtz 2007, 206). In his defence, Milosovic distinguished between religious and cultural heritage, arguing that the "reciprocal destruction of religious structures is the religious component of civil war" but that the "destruction of monuments of culture would be tantamount to genocide" (quoted in Sandholtz 2007, 207). Other convictions include those of six Bosnian Croat officers for, inter alia, the demolition of the Stari Most bridge in Mostar, and Serbian officers Pavle Strugar and Miodrag Jokic for their roles in the bombardment of Dubrovnik's historic Old Town (Sandholtz 2007, 207).

38 W. Hays Parks, who was at the time serving as the Chief of the International Law Branch of the International and Operational Law Division and Special Assistant for Law of War Matters, Office of the Judge Advocate General of the Army, stated that the United States military considered the 1954 Convention to be applicable during the 1991 Gulf War and that it "was followed by all Coalition forces throughout the Gulf War". He pointed out that "the treaty has been fully implemented by U.S. military forces for more than three decades, and Canadian, British, and U.S. military personnel receive training on its provisions" (quoted in Sandholtz 2007, 194).

39 A note in the *Army Lawyer* discussing the 1954 Hague Convention pointed out that "the duty of armed forces to protect cultural property applies to both international and internal armed conflicts" and states further that "[t]his universal application, during both types of armed conflict, supports the development of the principle as a fundamental principle of the law of war" (quoted in Sandholtz 2007, 256). This was confirmed

property training resource of the United States Central Command Historical/Cultural Advisory Group requires its armed forces to recognise that safeguarding cultural property is a treaty obligation and a legal requirement.[40]

The preponderance of opinion is that the key norms embodied in the 1954 Hague Convention, including Article 4, are part of customary international law, and as such they are binding on all states regardless of the ratification of the Convention. It is submitted that this view should be accepted.

The other issue to be addressed is whether article 4(3) is applicable to everyone or whether it applies to looting undertaken by the invading army's forces only. From a reading of the article, it would appear that it prohibits looting and pillaging by anyone, a view endorsed by Kevin Chamberlain who, in support, cites the obligation of an occupying power, contained in article 43 of the 1907 Hague Rules, to restore and maintain law and order (quoted in Gerstenblith 2005–2006, 309). Gerstenblith disagrees, and bases her view on three facts: the other provisions in article 4 constrain a State Party, the context in which the Convention was drafted (the extensive looting by the Nazi invaders), and her view that the law of war in general only refers to state action (Gerstenblith 2005–2006, 310).

Roger O'Keefe supports Chamberlain's view, pointing out that if it was intended to apply only to the invading state, then it would require them to "refrain" from theft, pillage and other acts as is required in Article 4(1), rather than placing upon them a positive obligation to "prohibit, prevent, and, if necessary, put a stop to" (O'Keefe 2006, 133). The change in language is significant, and indicative of a change in intention. It is submitted that this view is to be preferred.

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by the Department of Defence when, in its final report to Congress on the 1991 Gulf War, it included the 1954 Hague Convention among the laws of war applicable to the conflict, and specifically stated that "since U.S. military doctrine is prepared consistent with U.S. law of war obligations and policies, the provisions of Hague IV, GC [Geneva Conventions], and the 1954 Hague Convention did not have any significant adverse effect on planning or executing military operations." The report also confirmed that although Canada, the United Kingdom, and the United States were not parties to the Convention, "the armed forces of each receive training on its provisions, and the treaty was followed by all Coalition forces in the Persian Gulf War" (quoted in Sandholtz 2007, 195).

40 On the basis that "The Office of The Judge Advocate general has determined that the 1954 Hague Convention has reached the status of 'applicable customary international law' which makes it binding on the United States and/or its individual soldiers and citizens" (CENTCOM Historical/Cultural Advisory Group).

The Obligation to Protect Archaeological Sites

When it routed Saddam's forces and removed him from power, the United States and its coalition partners created a situation in which chaos prevailed, lawlessness was rampant, and cultural property was endangered.

However, to establish whether they were in fact guardians of Iraq's cultural property, and whether they had an obligation to protect archaeological sites, one must first consider whether they were an occupying power under international law, for as occupying powers they would be obliged to protect Iraqi cultural heritage — to "support",[41] as far as possible, "the competent national authorities of the occupied country in safeguarding and preserving its cultural property"[42] and, unless "absolutely prevented", to comply with Iraqi law in regard to cultural property in terms of which ownership of cultural property vests in the state and export is prohibited.

Whether the United States was an occupying power, and from which date, is a question of fact and is deemed in law to have commenced when the invader has taken effective control of the whole, or a portion, of another country.

The United States became an occupying power in Baghdad when it established its authority in that city. Bogdanos concedes that it became responsible for all the damage and looting in the National Museum of Iraq after 11 April 2003 (Bogdanos 2008, 39), on the basis that until this date the Iraqi forces were preventing the United States forces from reaching the Museum. Based upon this argument, and ignoring the illegality of the entire invasion for the moment, the United States should be held liable for the looting which took place on or after 10 April, when Lieutenant Colonel Schwartz gave the order to bury the dead and tidy up by moving disabled and abandoned vehicles in the very sector in which the National Museum of Iraq stood (Conroy and Martz 2005, 227). Such an order could not have been given if they had not been in control of the area. It is important to bear in mind that it was on that very day, when peace and quiet reigned in the area in which the National Museum of Iraq stood, that it was entered and looted.

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41 The obligation to support competent national authorities must be read in conjunction with the obligation imposed upon the occupying power "to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property", which has already been discussed above.

42 As a result of the failure of the United States to protect the National Museum of Iraq complex, the SBAH offices, which were in that complex, were looted and their equipment and vehicles stolen. The competent national authority was thus not in a position to perform its functions or to fulfil its obligations without assistance.

With regard to archaeological sites, it is common cause that there were insufficient troops to restore order, protect public safety, and safeguard Iraq's cultural treasures, all of which call into question the issue of effective control. Could this be used to argue that there was no effective control, and thus excuse the United States from any obligations as occupiers? Can a defence to the failure to comply with one's legal obligations be a plea that one considered them to be irrelevant? Even with the benefit of expert advice on the foolhardiness of sending in such a small force, the Bush Administration deliberately elected to do so. O'Connell (2004, 22) points out that:

> Even if it was necessary to overthrow Saddam, the decision to invade and occupy the country while intentionally disregarding the obligations of an occupying power amount to *ad bellum* violations. The decision by the US military and political leaders to send a force that had neither the orders to fulfil the *in bello* obligations, nor the practical means to do so, undermined any legal basis the US had to invade the country in the first place.

It is commonly accepted that when a country embarks upon such an invasion of another country, it must ensure that it is "in a position to make their authority felt and their protection effective within that newly occupied territory" (Clarke 2006, 157). Where occupiers are unable to fulfil their obligations under international law, they have four options: end their occupation and withdraw from the territory, declare certain portions of the occupied territory to be under the effective control of other belligerents, negotiate the transfer of control over the territory to local inhabitants preferably under UN auspices, or hand over control of the territory to a UN peacekeeping force (Clarke 2006, 158). None of these options was exercised.

However, although President Bush declared that active combat operations were over on 1 May 2003, he neither admitted nor acknowledged that his forces were in occupation of Iraq. The Third Infantry Division (Mechanised) subsequently conceded that their characterisation as "liberators" rather than "occupiers" was a political decision, one which did not affect the fact they were *de facto* occupiers (Third Infantry Division 2010, 6).[43]

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43 The authors of the report assert that this characterisation was a mistake; that the American authorities should have acknowledged their intention to abide by the international obligations of occupiers, since: "This may have caused military commanders to be reluctant to use the full power granted to occupying forces to accomplish our legitimate objectives. This status would have provided us authority to control almost every aspect of the Iraqi life, including the civilian population, government, resources, and facilities, making it easier for us to accomplish all SASO missions. Occupation law also imposed upon us obligations to protect the civilian population to the best of our ability. Because of the refusal to acknowledge occupier status, commanders did not initially take measures available to occupying powers, such as imposing curfews, directing civilians to return to work, and controlling the local

However, it was not merely the lack of troops that created problems. It was also a question of orders.[44] Orders were not given to protect the National Museum of Iraq — indeed, orders were specifically given not to interfere in the looting. Similarly, orders were not given to protect cultural property at archaeological sites. The coalition forces had the means to do so. Although the Third Infantry Division confiscated almost $1 billion from the palaces in Baghdad, they were specifically ordered not to "use the money to fund projects fulfilling obligations as an occupying power under international law, or responding to the legitimate needs within Baghdad" (Third Infantry Division 2010, 6). According to Elizabeth Stone, who studied satellite imagery of sites during and after the invasion, "if security had been established, the looting problem may have abated" (quoted in Rothfield 2009, 137),[45] for where guards were placed at sites, the looting decreased significantly.

The deliberate and conscious decision by the United States to deploy insufficient troops and its failure to provide them with appropriate orders made them non-compliant with their obligations in terms of the 1907 Hague Regulations, the 1954 Hague Convention, and the Geneva Convention.

It is clear that the international community considered the United States and coalition forces to be occupiers.[46] Although the first few months of occupation were not

governments and populace. The failure to act after we displaced the regime created a power vacuum, which others immediately tried to fill" (Third Infantry Division 2003, 6).

44 O'Connell (2004, 26) believes that the failure to issue proper orders is "related to the general contempt for international law on the part of the same US officials advocating for war. Secretary Rumsfeld has made clear time and again that he does not recognise international law as applying to the United States ... President Bush's lawyer, White House Counsel Judge Alberto Gonzalez has referred to the Geneva Conventions as outmoded and 'quaint.'"

45 Garen and Carleton established a link between looting and security: looting was prevalent in the absence of authority. They noted that during short periods of increased insecurity, looting at sites increased dramatically (Garen and Carleton 2005, 17).

46 On 24 April 2003, Kofi Annan called upon the Coalition to make it "clear that they intend to act strictly within the rules set down by the Geneva Conventions and the Hague Regulations regarding the treatment of prisoners of war, and by demonstrating through their actions that they accept the responsibilities of the Occupying Power for public order and safety, and the well-being of the civilian population" (quoted in Cayce 2004, 22). In response, the United States reiterated that they were liberating forces, but that they would comply with the Geneva Conventions (Cayce 2004, 22): "We find it — at best — odd that the Secretary General chose to bring this to our attention. The US has said that it has not yet established whether it is the occupying power under international law, but it is nevertheless respecting the rules ... We are simply saying that the issue of an occupying power has not yet been dealt with. Once again the situation is quite fluid. We will come to that, and presumably come to it quickly. But there should be no question — certainly no question in the mind of the Secretary General — that we need to make any clearer than we already have, and have been on the record

sanctioned by the international community since the invasion itself was illegal, it was officially endorsed on 22 May 2003 when the Security Council passed Resolution 1483 (Clarke 2006, 133).[47] The author supports the view that by supporting and voting in favour of this resolution, the United States and the United Kingdom acknowledged their status and obligations as occupying powers in Iraq and that they were, in consequence, obliged to assume the concomitant obligations (Clarke 2006, 136), including the obligation to protect archaeological sites and to prevent the looting,[48] devastation, and destruction that took place. They chose not to do so.

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repeatedly as being in conformance and wanting to be in conformance in every way with the Geneva Conventions" (quoted in Cayce 2004, 23).

47 The Preamble records the status of the coalition forces by "recognising the specific authorities, responsibilities, and obligations under applicable international law of these States as occupying powers under unified command (the 'Authority')", and went further:
Stressing the need for respect for the archaeological, historical, cultural, and religious heritage of Iraq, and for the continued protection of archaeological, historical, cultural, and religious sites, museums, libraries, and monuments,
Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the "Authority").

48 Other factors, brought about by decisions made by the American authorities in Iraq also contributed to the looting. The crops from the south had traditionally been purchased by the Iraqi government, and although the United States agreed to buy these crops after the first harvest under occupation, this policy was terminated and farmers had no market for their produce. Looting therefore became their sole source of income (Foster et al. 2005, 210). When Robert Fisk and Joanne Farchakh Bajjaly travelled to southern Iraq in June 2003, they were informed by the looters that "since the collapse of the Saddam regime no-one purchased their crops and the only way they had of surviving was by providing the goods demanded by antiquity dealers" (Stone 2008, 78). Tribal leaders did nothing to stop the looting in light of the economic benefit to the community. Further, they did not view looting as a crime, and rather than being charged with theft, looters were charged with "farming by mistake on archaeological sites". Some dealers lived in the villages, purchasing the looted antiquities, and extending credit to looters to tide them over when required (Bajjaly 2008, 138). The Iraqi police force was greatly weakened as a result of defection and the looting of its equipment (McAlister 2005, 33), and crime could no longer be effectively investigated (Polk 2006, 172). This was further exacerbated by certain decisions by the American occupiers. On 24 May 2004, Bremer demobilised the army. Almost half a million soldiers, who were still in possession of their weapons, were suddenly unemployed with no source of income (Polk 2006, 171). Bremer also instituted a de-Ba'athification programme and dissolved those entities which had been associated with the former regime, resulting in the unemployment of some 400 000 people. Further, all those who had been in the top four ranks of the Ba'ath party were excluded from public sector employment, and the next three layers were subject to "discretionary exemption", which led to the dismissal of a further

However, probably the most flagrant breach of American international obligations was the occupation of Babylon, and the damage caused by military occupation at that and other sites. The construction of the military base at Babylon and the permanent damage done to the site cannot be justified on any legal basis whatsoever. In terms of Article 43 of the 1907 Hague Regulations, the United States was obliged to "respect, unless absolutely prevented, the laws in force in the country." In terms of Iraqi law, construction activities conducted on or near archaeological sites were strictly regulated, and there were no circumstances that "absolutely prevented" the United States from compliance.[49]

Holding Them to Account

A failure by participants to comply with the laws of conflict constitutes a war crime. However, as Clarke (2006, 140) points out, in the absence of an "independent umpire, justice is discretionary". Resolution 1483 has been criticised for not requiring the coalition forces to pay for war damage and reconstruction costs in Iraq (Clarke 2006, 153).

International law generally requires states participating in an unlawful invasion to pay reparations,[50] and this would be the natural consequence of a finding by the relevant

30 000 people (Herring and Rangwala 2006, 73). Even those still in receipt of an income were crippled by runaway inflation which made money almost worthless. Food was so scarce that in April, May, and June 2003, starvation was a serious problem. Bombing had destroyed electricity, purification, and sewage facilities (Polk 2006, 171). The situation was desperate. For thousands of people, looting was the only way to survive (Polk 2006, 172).

49 The use of heritage sites as military bases was also a breach of article 56 of the Hague Regulations and article 4(1) of the Hague Convention, in terms of which Parties to the Convention undertake to refrain "from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict …" Article 5 further imposes an obligation upon an occupying force to "take measures to preserve cultural property situated in occupied territory and damaged by military operations", rather than to actively destroy them through unnecessary military occupation and construction. Such actions were also a breach of Article 6(3), of the 1972 Convention for the Protection of World Cultural and Natural Heritage, in terms of which State Parties undertake "not to take any deliberate measures which might damage directly or indirectly the cultural property and natural heritage … situated on the territory of another State Party to this Convention". Gerstenblith (2005–2006, 312) points out that the construction of the military base at Babylon also violated the United States National Historic Preservation Act. Although the ambit of the Act is primarily domestic, its application to historic sites outside the United States was extended in order to comply with treaty obligations when the United States ratified the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage.

50 Iraq had already paid over $18 billion of the amounts awarded to Kuwait and others for its unlawful invasion in 1990 in terms of United Nations Security Council Resolution 687 (1991)

authority that the invasion of the country was illegal. However, little point would be served by Iraq taking the United States and the members of the Coalition to the International Court of Justice (ICJ). That much is clear from The Republic of Nicaragua v The United States of America. In that case, the ICJ ruled against the United States and awarded reparations to Nicaragua after finding that the United States had breached, inter alia, its obligations under customary international law not to use force against another state. The United States simply blocked the enforcement of the judgement by the United Nations Security Council and prevented Nicaragua from obtaining any of the compensation awarded to it.

It is thus unlikely that the coalition forces, and the United States in particular, will ever be brought to task for their failure to comply with their international obligations.

Conclusion

In terms of international law, it is illegal for a country to invade another. The invasion of Iraq would only have been legal if sanctioned specifically by a resolution of the United Nations. When faced with the prospect that their resolution would fail, the United States and United Kingdom withdrew their resolution and decided to proceed without one — then they erected a smokescreen of legal subterfuge in a disingenuous attempt to justify their fundamentally unlawful conduct.

The complete disregard for international law displayed by the Bush Administration in the pursuit of its ambitions ran like a thread through the invasion and the occupation. No attempt was made to comply with any of the international obligations which are associated with war and occupation. Instead we were treated to more propaganda, in terms of which this omission was deflected, and errors were attributed to planning rather than deliberate strategy. The attempt by the United States to avoid their responsibilities by referring to their forces as "liberators" rather than occupiers was simply insulting. The occupation of archaeological sites, another breach of international law, was allegedly done to deter looting. However, the occupation itself wrought such damage that one wonders whether sites such as Babylon might not have been better off if they

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passed on 3 April 1991. In terms of paragraph 16 of that resolution: … Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.

had been left to looters. In short, the illegal invasion was followed by a complete abrogation of international law.

Although some (Thurlow 2005, 179) believe that the United States has learned a lesson from the excoriation its contemptuous disregard for Iraqi cultural property attracted, the author is not so sanguine. The Bush Administration, through its spokesmen, made it clear that it cared little for the destruction and devastation of cultural property which followed upon its unlawful invasion of Iraq. Rumsfeld's cultural ignorance was exceeded only by his arrogant dismissal of its significance. The initial response by the Bush Administration did, however, give way to lip-service when its philistinism attracted international ridicule and condemnation, and it realised that the issue was not simply going to blow over. A small team of marines, led by Bogdanos, was appointed to investigate the looting at the National Museum of Iraq, but only for some six months. The financial contributions of the American government were negligible, particularly when measured in terms of their effectiveness. The efforts of the American occupiers were akin to placing an Elastoplast on an amputated limb: the lifeblood of Iraq's cultural property simply continued to drain away.

It was left to other countries, organisations, and individuals to address the issues. Most of the assistance was targeted towards the National Museum of Iraq, its repair and reconstruction, as well as the improvement and advancement of the skills of the staff employed by the SBAH. Many others directed their efforts towards the publication of looted artefacts in an effort to make it more difficult for dealers to sell on the artefacts. Unfortunately the prized items in the National Museum of Iraq collection were probably looted to order and are unlikely ever to be seen in this lifetime. They are simply too well known and the right of Iraq to demand their recovery too unassailable.

As with every other branch of the law, the problem seldom lies in the law itself but in its enforcement. Had it taken cognisance of international law, the United States-led Coalition would never have invaded Iraq. Had it accepted its obligations under international law, the United States would have taken steps to protect both the National Museum of Iraq and archaeological sites. There is no question that international law could be improved in order to protect cultural property, but in this case, it is submitted that the state of the law was irrelevant. The United States and its collaborators flouted international law at every turn, secure in their knowledge that they would not be brought to account. They did as they pleased and the devastation of Iraq, its people and its cultural property was simply an irrelevance — collateral damage in their unbridled ambition and greed.

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