

## ARTICLE

Babylon Revisited:  
Reestablishing a Corps of Specialists for the Protection of  
Cultural Property in Armed Conflict

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## Introduction

In January 1943, British forces advancing on Tripoli after the Second Battle of El Alamein passed through the ruins of Leptis Magna, the once great city of the Roman Emperor, Lucius Septimius Severus. Though uninhabited for generations and in constant danger of disappearing into the Sahara, the faded grandeur of Leptis Magna remained evident in its impressive ruins.<sup>1</sup> Although most soldiers passing through the city were oblivious to its historical significance, Lieutenant Colonel Sir Robert Eric Mortimer Wheeler, an artillery officer with the British Eighth Army in North Africa, was not.<sup>2</sup> He understood that Leptis Magna represented the most complete and most extensive example of Roman ruins in Africa.<sup>3</sup> He also realized the commotion caused by the Army's advance, particularly the crushing force of the Army's heavy trucks, was endangering the ancient site.

When Mortimer raised his concerns with the Deputy Chief Civil Affairs officer, the officer shrugged.<sup>4</sup> "Are they important?" he asked.<sup>5</sup> Mortimer replied that they were and that it was their "duty as soldiers to protect them."<sup>6</sup> The Civil Affairs officer asked him if he was an historian. "I'm an archaeologist," Mortimer responded, "Director of the London Museum."<sup>7</sup> The Civil Affairs officer nodded. "Then do something about it, Director," he said.<sup>8</sup>

Sixty years later, another army in another desert arrived at another ancient city: the legendary city of Babylon, fifty-three miles south of

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<sup>1</sup> See, e.g., ILARIA DAGNINI BREY, *THE VENUS FIXERS* 49–52 (2009); ROBERT M. EDSSEL, *THE MONUMENTS MEN* 32–33 (2009); *Archaeological Site of Leptis Magna*, UNESCO, <http://whc.unesco.org/en/list/183>, [<http://perma.cc/4G65-PY4D>] (last visited Dec. 1, 2013).

<sup>2</sup> See, e.g., BREY, *supra* note 1, at 49; EDSSEL, *supra* note 1, at 34; LYNN H. NICHOLAS, *THE RAPE OF EUROPA* 216 (1994).

<sup>3</sup> See EDSSEL, *supra* note 1, at 34; UNESCO, *supra* note 1; see also BREY, *supra* note 1, at 50–51 (explaining that Mortimer considered an earlier Italian excavation a "debatable success" but was "nevertheless astounded by the beauty of the architecture and the statuary that had been brought back to light from under the African sand.").

<sup>4</sup> See EDSSEL, *supra* note 1, at 34.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* Lieutenant Colonel Wheeler was subsequently charged with protecting the site. NICHOLAS, *supra* note 2, at 216. He was aided by Major J.B. Ward-Perkins, another Army officer and former curator for the London Museum who, like Wheeler, had been accompanying British forces in the area. *Id.* As Lynn Nicholas explains in *THE RAPE OF EUROPA*, "Totally in their element, the two officers soon had the Italian custodians and Arab guards, who had been found hiding in the museum of Sabratha, back at work under the watchful eye of a British NCO." *Id.* Brey states that "[w]hat the two archaeologist-officers did at Leptis Magna would become standard operating procedure for the protection of monuments at later stages of the war . . ." BREY, *supra* note 1, at 51.

Baghdad, Iraq. This time, however, no one accompanying the advancing force appreciated the significance of the site or objected to its occupation until it was too late.<sup>9</sup> In April 2003, U.S. forces entered Babylon, driving tanks and armored vehicles along the city's ancient Processional Way.<sup>10</sup> These forces transformed the city into a Coalition military base by excavating, bulldozing, and crushing areas of the site to make it suitable for occupation as "Camp Alpha."<sup>11</sup> The damage inflicted over the course of the Coalition occupation was staggering.<sup>12</sup>

During World War II, the Allied militaries intuitively understood the significance of historic buildings, monuments, and works of art scattered across the battlefields of Europe. Although it took years of planning and preparation, the formation of a special branch of the military dedicated to the protection, preservation, and restitution of cultural property reflected the importance the Allies placed on preserving Europe's cultural heritage for subsequent generations. If not for the work of the Monuments, Fine Arts, and Archives (MFA&A) branch, masterpieces we still celebrate today, including Michelangelo's *Madonna of Bruges*, Jan Van Eyck's *Adoration of the Mystic Lamb*, and Veit Stoss's Gothic *Altar of Saint Mary*, might have perished long ago.

Unfortunately, after dedicating the resources to create the MFA&A and establish a corps of specialists trained to advise commanders on the protection of cultural property, the U.S. military allowed the capability to dissipate in the years after the war. Meanwhile, the harrowing experience of World War II inspired the adoption of stronger international legal measures to protect cultural objects during armed conflict. With the adoption of the 1954 Hague Convention for the Protection of Cultural Property (1954 Hague Convention), the international community recognized a *lex specialis* governing the protection of cultural property.<sup>13</sup> Later, Additional Protocol I to the Geneva Conventions of 1949 (Additional Protocol I) codified a rule of proportionality that would also implicate the protection of cultural property,

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<sup>9</sup> See, e.g., Mariam Umran Moussa, *The Damages Sustained to the Ancient City of Babel as a Consequence of the Military Presence of Coalition Forces in 2003*, in *THE DESTRUCTION OF CULTURAL HERITAGE IN IRAQ 143–50* (Peter G. Stone & Joanne Farchakh Bajjaly eds., 2008).

<sup>10</sup> Zainab Bahrani, *A Case Study in the Military Occupation of an Archaeological Site*, in *OF THE PAST, FOR THE FUTURE: INTEGRATING ARCHAEOLOGY AND CONSERVATION* 240, 244 (Neville Agnew & Janet Bridgland eds., 2006) ("Tanks drove along the ancient processional way").

<sup>11</sup> Moussa, *supra* note 9, at 144. Coalition forces occupied Camp Alpha from April 2003 to December 2004. *Id.* Moussa asserts that the occupying forces "caused significant, direct, and undisputed damage to the archaeological city, by their activities related to the defence and fortification of their camp," which included "digging, cutting, scraping, leveling, and the creation of earth barriers." *Id.*

<sup>12</sup> See, e.g., J.E. CURTIS, REPORT ON MEETING AT BABYLON 11TH – 13TH DECEMBER 2004 (2005) (documenting the damage caused by the military occupation of Babylon).

<sup>13</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

though under the more general penumbra of the *lex generalis*.<sup>14</sup> Despite these developments and a growing commitment to safeguard the world's cultural heritage, the U.S. Army never revived the MFA&A or any other cultural property program.

The U.S. Army's current guidance on the protection of cultural property is outlined in General Training Aid (GTA) 41-01-002, *Civil Affairs Arts, Monuments, and Archives Guide*.<sup>15</sup> The document's stated purpose is "to guide Soldiers' decisions and actions until leadership can summon heritage professionals" when they find themselves "responsible for cultural property or heritage sites damaged by or at risk from fire, flood, artillery, or other emergency events."<sup>16</sup> Though not uncommon for a military publication, the *Civil Affairs Arts, Monuments, and Archives Guide* can be brusque and starkly pragmatic. For example, the guide suggests cultural property should be protected merely because "[f]ederal and international law mandate the protection of cultural property," and because "[v]iolators will be prosecuted."<sup>17</sup>

Given this shallow appreciation of cultural property, it is not difficult to understand why the military has failed to internalize the need to protect cultural property. Compared with the dedicated officers of the MFA&A during World War II who inherently understood and readily educated those around them on the value of cultural property, the personnel charged with protecting cultural objects in today's contingency environments receive far less training and support from policymakers than their predecessors. Admittedly, the circumstances of World War II were *sui generis*, and it would be unfair to compare the average soldier today with the specialists who staffed the MFA&A in World War II. On the other hand, events in Iraq dramatically highlighted the enduring need to protect and preserve cultural property in armed conflict. The military's lamentable record of protection in Iraq,<sup>18</sup> however, never precipitated the institutional changes needed to prevent the same issues from arising again.<sup>19</sup> If U.S. forces are ever to take cultural property seriously, more must be done to ensure cultural objects are afforded due consideration during military operations.

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<sup>14</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, art. 52(2) [hereinafter Additional Protocol I].

<sup>15</sup> U.S. DEP'T OF ARMY, GENERAL TRAINING AID (GTA) 41-01-002, CIVIL AFFAIRS ARTS, MONUMENTS, AND ARCHIVES GUIDE (Aug. 2009) [hereinafter GTA 41-01-002].

<sup>16</sup> *Id.* at 1.

<sup>17</sup> *Id.* at 3.

<sup>18</sup> See, e.g., THE DESTRUCTION OF CULTURAL HERITAGE IN IRAQ, *supra* note 9; MATTHEW BOGDANOS, THIEVES OF BAGHDAD (2005).

<sup>19</sup> See Laurie W. Rush, *Cultural Property Protection as a Force Multiplier in Stability Operations: World War II Monuments Officers Lessons Learned*, MIL. REV., Mar.–Apr. 2012, at 37 ("DOD still needs an institutionalized program and process to engage the cultural property protection issue in a responsive, predictable, and dependable way that gets appropriate information to the right people at the right time.").

This Article will begin by briefly outlining, in Section II, the development of international rules regarding the protection of cultural property prior to World War II. These early rules will be examined in relation to the principles of military necessity, distinction, and proportionality. In Section III, the Article will explore how the United States endeavored to protect cultural property during World War II in light of these rules. The United States and its allies relied primarily on experts in art, architecture, archeology, and other specialty fields to safeguard, preserve, and recover objects of great cultural significance on the battlefield. Section IV will describe the international community's attempt to expand the protections afforded to cultural property following the trauma of World War II. The 1954 Hague Convention and the 1999 Second Protocol will serve as the focus of discussion in this section. Section V will examine the U.S. military's failure to safeguard historical sites and cultural objects during the invasion and occupation of Iraq during the Iraq War. Despite the U.S. experience protecting cultural artifacts during World War II, and the development of more robust legal protections for cultural property that followed, the U.S. military still failed to respect and protect cultural property in Iraq, including sites like the ancient city of Babylon. In Section VI, the Article will outline a proposal to reintegrate "cultural property officers" into the U.S. Army. These officers would help identify and advise commanders on cultural property issues and would serve as the foundation for a more methodical and systematized program of cultural property protection in the armed forces. Ultimately, adequately safeguarding and protecting cultural property in future conflicts will require the military's recommitment to the ideals it embraced when it fielded and supported the "Monuments Men" of World War II.

### I. Early Rules Regarding the Protection of Cultural Property in Armed Conflict

One of the earliest codifications of the law of armed conflict, the Lieber Code of 1863 (Lieber Code), outlined basic rules for the protection of cultural property.<sup>20</sup> Over time, subsequent treaties regulating the use of force in armed conflict refined those rules, which eventually found full expression in the 1954 Hague Convention. Because these treaties and their cultural property provisions have been described in depth elsewhere, this paper will forgo the usual chronological recitation of these treaties. Instead, this paper will trace the protection of cultural property relative to the development of three fundamental principles of the law of armed conflict: military necessity, distinction, and proportionality.

The law of cultural property protection is inextricably linked with broader *jus in bello* concepts regulating the use of force in armed conflict. In fact, the particular protections afforded to cultural objects were first

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<sup>20</sup> See U.S. DEP'T OF WAR, HEADQUARTERS, GEN. ORDERS NO. 100, arts. 34–38 (1863) [hereinafter Lieber Code].

articulated alongside more general rules governing the conduct of hostilities between rival armies. With the exception of the 1954 Hague Convention and its protocols, the majority of the operative rules regarding the protection of cultural property in armed conflict continue to derive from international humanitarian law treaties, including the 1907 Hague Regulations and Additional Protocol I. These treaties generally treat cultural property as a species of civilian object to which the principles of military necessity, distinction, and proportionality apply.

Examining the development of cultural property protections in conjunction with these principles is instructive. Advances in modern weaponry and the employment of increasingly indiscriminate methods of warfare, such as the advent of the airplane and the use of aerial bombing, provoked a number of changes to the rules of armed conflict in the 20th century. Meanwhile, a growing conviction of the need to safeguard the world's cultural heritage prompted explicit reference to cultural property in international humanitarian law treaties. The protections afforded to cultural property, however, were intended to be understood within the larger framework of the law of armed conflict, along with other military and civilian objects. In other words, cultural property was not subject to a separate regime under international humanitarian law. Like both military and civilian objects, cultural objects were equally subject to considerations of military necessity, distinction, and proportionality during armed conflict, although the special nature of cultural property theoretically endowed them with greater weight in the complex evaluative process of military decision-making. As norms of international humanitarian law evolved, so too did the understanding of how cultural property should be protected in armed conflict.

#### *A. Military Necessity*

The principle of military necessity permits states to use “measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”<sup>21</sup> This limiting principle, which was acknowledged by prominent early modern jurists and Enlightenment scholars alike, was codified for the first time in the Lieber Code.<sup>22</sup> Article 14 of the Lieber Code defines military necessity as “those

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<sup>21</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 3.a (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10]. See also U.K. MIN OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT, para. 2.2 (2005) (stating that military necessity “permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources”) (internal citation omitted).

<sup>22</sup> See ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 10–11 (2006) (observing that Enlightenment jurists such as Vattel, Wolff, and Burlamaqui “affirmed the general rule maintained by the early moderns that a belligerent had the right to

measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”<sup>23</sup> Subsequent codifications and commentaries on the law of armed conflict, such as the Brussels Declaration<sup>24</sup> and the Oxford Manual,<sup>25</sup> similarly recognized that enemy property could be destroyed when “imperatively demanded by the necessity of war.”<sup>26</sup>

Although they served as persuasive authority regarding the state of the law of armed conflict, the Lieber Code, the Brussels Declaration, and the Oxford Manual were not binding international agreements. In 1907, however, the international community formally adopted the positions outlined in the Brussels Declaration with the passage of the Hague Regulations concerning the Laws and Customs of War on Land, annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907 Hague Regulations).<sup>27</sup> Article 23(g) of the 1907 Hague Regulations forbade the destruction or seizure of an enemy’s property, “unless such destruction or seizure be imperatively demanded by the necessities of war.”<sup>28</sup> The convention never defined the term “necessities of war,” but the concept was generally understood to encompass the unavoidable consequences of both offensive and defensive military action.<sup>29</sup> The German jurist Lassa Oppenheim summarized the prevailing understanding of military necessity at the time as follows:

All destruction of and damage to enemy property for the purpose of offence and defence is *necessary* destruction and damage, and therefore lawful. It is not only permissible to destroy and damage all kinds of property on the battlefield during battle, but also in preparation for battle or siege. . . . If a farm, a village, or even a town is not to be abandoned but

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use armed force necessary to pursue a just end,” including the destruction of enemy property).

<sup>23</sup> Lieber Code, *supra* note 20, art. 14.

<sup>24</sup> Project of an International Declaration concerning the Laws and Customs of War, Brussels, Aug. 27, 1874 [hereinafter Brussels Declaration].

<sup>25</sup> The Laws of War on Land, published by the Institute of International Law, adopted by the Institute of International Law at Oxford, Sept. 9, 1880 [hereinafter Oxford Manual] INSTITUT DE DROIT INTERNATIONAL, LES LOIS DE LA GUERRE SUR TERRE: MANUEL PUBLIÉ PAR L’INSTITUT DE DROIT INTERNATIONAL (1882) [hereinafter Oxford Manual].

<sup>26</sup> See Brussels Declaration, *supra* note 24, art. 13(g) (declaring that “[a]ny destruction or seizure of the enemy’s property that is not imperatively demanded by the necessity of war” is “especially forbidden”); see also Oxford Manual, *supra* note 25, art. 32(b); O’KEEFE, *supra* note 22, at 18–19.

<sup>27</sup> Regulations Concerning the Laws and Customs of War on Land, annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, T.S. 539 [hereinafter 1907 Hague Regulations].

<sup>28</sup> *Id.* at art. 23(g).

<sup>29</sup> See O’KEEFE, *supra* note 22, at 23 n.109.

prepared for defence, it may be necessary to damage in many ways or entirely destroy private and public property.<sup>30</sup>

As noted above, the general concept of military necessity continues to allow for the destruction of civilian property when “indispensable for securing the complete submission of the enemy as soon as possible.”<sup>31</sup> In the trial of Wilhelm List and others before the International Military Tribunal at Nuremberg, also known as the *Hostage Case*, the Tribunal affirmed this interpretation of military necessity.<sup>32</sup> Addressing this principle within the context of belligerent occupation, the Tribunal explained that “[m]ilitary necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money.”<sup>33</sup> To be lawful, the Tribunal declared, the destruction of property “must be imperatively demanded by the necessities of war. . . . There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.”<sup>34</sup> The Tribunal further opined that “[p]rivate homes and churches even may be destroyed if necessary for military operations.”<sup>35</sup> The reference to churches in the Tribunal’s opinion is notable because it directly implicates a subset of cultural property and directly ties it to the concept of military necessity.

While the principle of military necessity clearly allows for the destruction of civilian property when the measures used are not otherwise forbidden by international law and when indispensable for the timely and complete submission of the enemy,<sup>36</sup> determining if and when the destruction of civilian objects is “imperatively demanded” by military necessity requires a closer understanding of what objects constitute legitimate military objectives and what objects are accorded protection because of their civilian character. Article 52(2) of Additional Protocol I succinctly states the modern requirement that “[a]ttacks shall be limited strictly to military objectives” under the law of armed conflict.<sup>37</sup> Additional Protocol I further defines “military objectives” as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or

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<sup>30</sup> O’KEEFE, *supra* note 22, at 23 n.109. Oppenheim further explains that a house be may damaged or destroyed to strengthen a defensive position; a village may be fired to cover an army’s retreat; and buildings and bridges may be razed around an enemy fortress. *Id.*

<sup>31</sup> Lieber Code, *supra* note 20, para. 3.a.

<sup>32</sup> *United States v. List* (Case No. 7), 8 LRTWC 34 (Military Tribunal XII, 1948), in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1951).

<sup>33</sup> *Id.* at 1253.

<sup>34</sup> *Id.* at 1253–54.

<sup>35</sup> *Id.* at 1254.

<sup>36</sup> See Lieber Code, *supra* note 20, para. 3.a.

<sup>37</sup> Additional Protocol I, *supra* note 14 at art. 52(2); see also *id.* at art. 48 (stating the requirement that belligerents distinguish between “civilian objects and military objectives” and direct their operations “only against military objectives”).

neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>38</sup>

This understanding of military objectives reflects a modern conceptualization of what objects constitute legitimate military targets. Moreover, the articulation of the duty to distinguish found in Additional Protocol I, though now widely accepted as an expression of customary international law, is similarly of a more modern vintage.<sup>39</sup>

### *B. Distinction*

Prior to the formulation of distinction as a dichotomy between civilians and combatants and between civilian objects and military objectives, the requirement to distinguish focused more generally on the difference between defended and undefended localities.<sup>40</sup> The 1907 Hague Regulations’ rule on attack and bombardment, codified in article 25 of the Convention, reflects this earlier understanding of the requirement to discriminate. Article 25 states that “[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.”<sup>41</sup> In contrast, with the exception of cultural property described in article 27, the attack or bombardment of defended towns, villages, dwellings, or buildings, including all property contained within, was completely permissible.<sup>42</sup> Consequently, towns identified as defended could be attacked without further regard for civilian property. Military necessity was invoked to justify the general bombardment of defended towns, including civilian districts, because bombardment was viewed as a means of convincing the populace to surrender.<sup>43</sup>

Following World War I, however, the 1907 Hague Regulations’ rules on bombardment were abandoned as impracticable, largely because the extensive fortifications along the Western Front and the ubiquity of troops in towns throughout the belligerent nations rendered virtually every town “defended” in the common understanding of article 25.<sup>44</sup> Arguably every town behind the front lines, many of which were also filled with troops as a result of massive wartime mobilizations, could therefore be the subject of attack under the prevailing law of armed conflict.<sup>45</sup> Meanwhile, advances in

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<sup>38</sup> *Id.* at art. 52(2).

<sup>39</sup> *See id.* at arts. 48, 49(3).

<sup>40</sup> *See* 1907 Hague Regulations, *supra* note 27, art. 25. *See generally* O’KEEFE, *supra* note 22, at 23–30.

<sup>41</sup> *Id.*

<sup>42</sup> *See* O’KEEFE, *supra* note 22, at 24. (observing that while the “rule eventually embodied in article 25 may have been envisaged in the nineteenth century as a gloss on the fundamental rule of military necessity,” by the early twentieth century, “military necessity was taken to impose no restraints. On the contrary, it justified general bombardment).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 36 (Noting that presence of troops in a town rendered the town defended).

<sup>45</sup> *Id.*

technology made the bombardment of towns deep within enemy territory entirely feasible.<sup>46</sup> As a result, all civilian property was suddenly open and susceptible to attack, and the distinction between defended and undefended towns lost whatever significance it once had held.

The draft Hague Rules of Aerial Warfare of 1923 represented an attempt to remedy this deficiency in the law of armed conflict.<sup>47</sup> Drafted in response to the phenomenon of aerial bombardment in World War I, the Hague Rules of Aerial Warfare sought to temper the widespread and indiscriminate destruction of civilian property that occurred under the now essentially meaningless scheme of article 25. Significantly, the drafters did not attempt to shoehorn the peculiarities of aerial bombardment to fit the paradigm of defended and undefended towns created under article 25.<sup>48</sup> Instead, they scrapped the concept of distinction based on defense, in favor of a new conceptual model based on distinction between civilian objects and military objectives.<sup>49</sup> The resulting rule, embodied in article 24 of the draft air rules, clearly established a duty to discriminate more in line with article 52(2) of Additional Protocol I and the modern understanding of distinction in international humanitarian law. Article 24(1) of the draft Hague Rules of Aerial Warfare states, “Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.”<sup>50</sup>

Article 24(3) of the air rules proposed something remarkable as well. Article 24(3) posited for the first time a *jus in bello* rule of proportionality requiring belligerents to weigh the collateral loss of civilian life, injury to civilians, and damage to civilian property, including cultural property, against the military advantage expected to be gained from military action.<sup>51</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> Hague Rules of Aerial Warfare, Feb. 19, 1923, 32 A.J.I.L. (Supp.) 12 (1938), *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 22, at 83–83.

<sup>48</sup> O’KEEFE, *supra* note 22, at 45.

<sup>49</sup> *See id.*; JIŘÍ TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 15 (1996) (“In fact, these rules made a distinction for the first time between *general protection* (identical to that contained in article 27 of the Hague Regulations) and *special protection*. What is more, they abandoned the criterion of ‘defence’ and replaced it with a new approach concerning the military objective.”)

<sup>50</sup> Hague Rules of Aerial Warfare, *supra* note 47, art. 24(1). Article 24(2), however, then proceeds to define an exhaustive list of objects against which aerial bombardment could legitimately be directed. In doing so, as O’Keefe points out, article 24(2) renders “superfluous the abstract definition of a military objective” provided in article 24(1). O’KEEFE, *supra* note 22, at 45–46.

<sup>51</sup> Hague Rules of Aerial Warfare, *supra* note 47, art. 24(1); *see also* O’KEEFE, *supra* note 22, at 46–47. Although proportionality as both *jus ad bellum* and *jus in bello* concepts existed prior to the Hague Rules for Aerial Warfare, the air rules were the first to define proportionality as a positive law requirement of the law of armed conflict. *See, e.g.*, Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34 (2005) (discussing proportionality as both *jus ad bellum* and *jus in bello* conditions of just war theory); Samuel Estreicher, *Privileging Asymmetric Warfare (Part II)?: The “Proportionality” Principle Under International Humanitarian Law*, NYU Sch. of Law Pub. Law & Legal Theory Working Papers, Paper 275 (2011) (describing proportionality in the resort to war and as a

Article 24(3) states, “The bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighborhood of the operations of land forces is prohibited.”<sup>52</sup> Paragraph 3 further declares that when the military objectives explicitly deemed legitimate objects of attack under article 24(2) are “so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.”<sup>53</sup> In other words, article 24(3) proscribed any aerial bombardment expected to result in harm to civilians and their property disproportionate to its military value.<sup>54</sup>

Notably, the 1907 Hague Regulations contained no analogous test of proportionality, and despite the particular protections afforded to cultural property under article 27 of the regulations, “[n]o positive rule compelled a belligerent to ask whether the military need to destroy a lawful target outweighed the damage likely to be caused to cultural property.”<sup>55</sup>

### C. Proportionality

The adoption of the proportionality principle marked a transformative shift in international humanitarian law.<sup>56</sup> Currently codified in article 51(5)(b) of Additional Protocol I, the *jus in bello* principle of proportionality prohibits any attack that “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>57</sup> Reiterating the language of article 51(5)(b), article 57 of the Protocol further mandates that “those who plan or decide upon an attack” must, *inter alia*, “take all feasible precautions” to avoid or minimize civilian collateral damage<sup>58</sup> and must “refrain from deciding to launch any attack” that may be expected to cause civilian collateral damage that would be “excessive in relation to the concrete and direct military advantage anticipated.”<sup>59</sup>

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principle in the conduct of war); *see also* MICHAEL WALZER, *JUST AND UNJUST WARS* (1977).

<sup>52</sup> Hague Rules of Aerial Warfare, *supra* note 47, art. 24(3).

<sup>53</sup> *Id.*

<sup>54</sup> *See* O’KEEFE, *supra* note 22, at 46 (explaining that article 24(3) purported to outlaw “aerial bombardment which visited on the civilian population injury ‘out of proportion to the interest that the belligerents have in destroying the objective’”) (quoting M. Sibert, *Les bombardements aériens et la protection des populations civiles*, *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 621, 648 (1930) (Fr.)).

<sup>55</sup> *See id.* at 24.

<sup>56</sup> *Id.* at 218.

<sup>57</sup> Additional Protocol I, *supra* note 14, art. 51(5)(b).

<sup>58</sup> *See id.* art. 57(2)(a)(ii).

<sup>59</sup> *Id.* art. 57(2)(a)(iii).

Before proportionality, a doctrine known as double effect generally regulated the use of force in armed conflict.<sup>60</sup> Derived from the writings of Saint Thomas Aquinas, Saint Augustine, and other Christian Just War theorists, the doctrine of double effect recognized that one act could have two effects: one intended and one unintended.<sup>61</sup> So long as the intended effect was not unlawful, the unintended effect, though unfortunate and undesirable, would not necessarily negate the lawfulness of an act. “[M]oral acts take their species according to what is intended,” Aquinas explained, “not according to what is beside the intention, since this is accidental . . . .”<sup>62</sup>

Applying the doctrine to armed conflict, classical jurists such as Emmerich de Vattel and Jean Jacque Burlamaqui generally recognized that “as a strict matter of natural law, what was otherwise impermissible in war was rendered permissible if it was the unintended and inevitable consequence of a permissible act.”<sup>63</sup> Accordingly, any damage to or destruction of civilian property, no matter how extensive, was commonly excused as an unintended consequence of a lawful attack conducted out of military necessity.<sup>64</sup> Even monuments and objects of great cultural significance were not immune from the rigid calculus of the double effect paradigm. The 1907 Hague Regulations attempted to provide some protection of cultural property in armed conflict; however, the qualifying language of article 27 of the regulations essentially robbed them of any real utility on the battlefield.<sup>65</sup>

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<sup>60</sup> O’KEEFE, *supra* note 22, at 218, 46–47.

<sup>61</sup> See generally SAINT THOMAS AQUINAS, *SUMMA THEOLOGICA* 1961 (Fathers of the English Dominican Province trans., Benzinger Bros. ed. 1947) (1274), <http://www.basilica.org/pages/ebooks/St.%20Thomas%20Aquinas-Summa%20Theologica.pdf>, [<http://perma.cc/A2WD-7X3Q>]. Aquinas’s original explanation of the principle of double effect was made in the context of individual self-defense. Question 64, article 7 of the *Summa Theologica* specifically addresses whether it is lawful to kill a man in self-defense. Aquinas’s analysis was eventually extended to encompass the intentional acts and unintended consequences of conduct on the battlefield.

<sup>62</sup> *Id.* at 1961.

<sup>63</sup> O’KEEFE, *supra* note 22, at 12 (citing Burlamaqui’s classical restatement of the doctrine of double effect).

<sup>64</sup> See, e.g., O’KEEFE, *supra* note 22, at 24. This view prevailed until the draft Hague Rules of Aerial Warfare introduced the requirement to weigh the consequences of intended and unintended effects in targeting deliberations. See *id.* at 46. O’Keefe argues that by asserting a cap on incidental damage, article 24(3) of the Hague Rules of Aerial Warfare represented “a rejection of the doctrine of double effect.” *Id.* at 47.

<sup>65</sup> See, e.g., *id.* at 37 (“In this free-for-all environment, where nearly all civilian property was fair game, article 27 of the Hague Rules proved insufficient to save some cultural property from destruction.”). For example, the gothic Cathedral of Rheims (Notre-Dame de Rheims), the site of Clovis’s baptism in 496 by bishop of Rheims Saint Remi, was repeatedly shelled by the German army between September 3 and October 5, 1914, because the Germans believed the cathedral’s bell tower was being used as an observation post to direct French artillery. See, e.g., ELIZABETH EMERY, *ROMANCING THE CATHEDRAL* 168 (2001). In a lecture delivered in 1916, the American architect Ralph Adams Cram lamented, “The glass that rivaled Chartres is splintered in starry dust on the blood-stained pavement and its fragments made the settings in soldiers’ rings. Its vault is burst asunder by bombs, its interior calcined by the conflagration, the incredible sculptures of its portals blasted and burned away.” *Id.* Similarly, the Germans bombarded the Church of Saint-Gervais and

Article 27 mandated that in sieges and bombardments, “all necessary steps” should 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.”<sup>66</sup> The qualifying phrase “as far as possible” reflected the belief that damage to or destruction of cultural property, like civilian property more broadly, was not unlawful so long as it was the unintended and inevitable consequence of an otherwise lawful attack.<sup>67</sup> Additionally, article 27 explicitly recognized that when used for “military purposes,” the privileged structures enumerated in article 27 would lose their protected status; however, the destruction of these structures, even after their loss of protection, was still subject to article 23(g)’s general prohibition on the destruction or seizure of enemy property unless “imperatively demanded by the necessities of war.”<sup>68</sup> Significantly, a defender was not prohibited from using cultural property for military purposes under the 1907 Hague Regulations.<sup>69</sup>

Following the 1907 Hague Regulations, several halting attempts were made to address the shortcomings of article 27 and strengthen the protection of cultural property. The Roerich Pact of 1935 expressed an obligation to respect and protect cultural property<sup>70</sup> and introduced a distinctive flag for use in marking the monuments and institutions covered by the agreement.<sup>71</sup> Similarly, a Preliminary Draft International Convention

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Saint-Protais (l’Église Saint-Gervais–Saint-Protais), one of the oldest churches in Paris, during Good Friday services in March 1918, killing eighty-eight people. *Id.* at 219 n.24; *see* 1 THE HISTORY OF PARIS FROM THE EARLIEST PERIOD TO THE PRESENT DAY 100 (1825) (“The origin of this church is unknown, but it is certain that it existed under the episcopacy of Saint Germain. . . . The earliest act in which it is mentioned as a parish church is of 1212.”).

<sup>66</sup> 1907 Hague Regulations, *supra* note 27, art. 27.

<sup>67</sup> *See* O’KEEFE, *supra* note 22, at 24 (“The proviso ‘as far as possible’ makes it clear . . . that damaged cases to privileged buildings and historic monuments as an unavoidable incident of the bombardment of other targets was not unlawful.”).

<sup>68</sup> *See* 1907 Hague Regulations, *supra* note 27, art. 23(g). O’Keefe further notes that article 23(g) imposed “no positive obligation on the defending party to desist from such use.” O’KEEFE, *supra* note 22, at 25.

<sup>69</sup> *See* O’KEEFE, *supra* note 22, at 25.

<sup>70</sup> Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 167 L.N.T.S. 290 [hereinafter Roerich Pact], art. 1. Notably, the Roerich Pact provides for the protection of “historic monuments, museums, scientific, artistic, educational and cultural institutions,” but not for moveable property not otherwise housed in the structures described. *See* O’KEEFE, *supra* note 22, at 52.

<sup>71</sup> Roerich Pact, *supra* note 70, art. 3. The design of the flag is described as a “red circle with a triple red sphere in the circle on a white background.” Later known as the “Banner of Peace,” the flag was intended to be flown over “buildings dedicated to art and culture to protect them in the same way that the Red Cross banner did for relief and medical workers and facilities.” WAYNE SANDHOLTZ, PROHIBITING PLUNDER 122 (2007); *see also* Roerich Pact and Banner of Peace, NICHOLAS ROERICH MUSEUM, <http://www.roerich.org/roerich-pact.php>, [<http://perma.cc/CM9S-48JJ>] (last visited Jan. 21, 2014) (“This Banner, flown at all sites of cultural activity and historical value, would declare them neutral, independent of combatant forces.”). Roerich imagined the three dots representing Art, Science, and

for the Protection of Historic Buildings and Works of Art in Times of War (Preliminary Draft Convention),<sup>72</sup> prepared under the auspices of the League of Nations' International Museums Office, aspired to increase the protections afforded to cultural property.<sup>73</sup> The drafters of the Preliminary Draft Convention, however, harbored "few illusions" about the destructive logic of military targeting and consciously avoided establishing rules that might prove "inoperative or inapplicable" in conflict.<sup>74</sup> Ultimately, both documents failed to solve the conundrum of cultural property protection, despite their noblest intentions. On the other hand, the International Museums Office's Preliminary Draft Convention did expand the protection of cultural property, at least theoretically, by prohibiting the use of monuments of artistic or historic interest, including by defenders, in a way that might expose them to attack.<sup>75</sup>

The failure of the International Museums Office's effort to establish new positive rules for the protection of cultural property had less to do with a lack of international consensus than with geopolitical events that, in September 1939, culminated in the outbreak of war. Following its submission to the Assembly and Council of the League of Nations in the fall of 1938, the Preliminary Draft Convention was circulated to sixty-two governments in anticipation of a diplomatic conference to finalize the treaty.<sup>76</sup> Before the conference could be held, however, German forces invaded Poland, heralding the start of World War II in Europe. The laudable, though modest, proposals tendered in the interbellum were consequently overtaken by a war which, in the sheer scope and magnitude of its destructiveness, would demand a radical reevaluation of the law with respect to the protection of cultural property in armed conflict.<sup>77</sup>

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Religion and the encompassing circle as a metaphor for the eternity of time. *Roerich Pact and Banner of Peace, supra*.

<sup>72</sup> Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 167 L.N.T.S. 290; Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Times of War, *in* League of Nations Official Journal, 19th Year, No. 11, at 937 (Nov. 1938).

<sup>73</sup> O'KEEFE, *supra* note 22, at 55. Unlike the 1907 Hague Regulations, the Preliminary Draft Convention sought to protect cultural objects by deliberately reducing their potential military value to an opposing force rather than by attempting to restrict an opposing force's ability strike them. *Id.*

<sup>74</sup> *See id.* (quoting League of Nations Journal 44, 19th Year, No. 11 (Nov. 1938)).

<sup>75</sup> *See* Howard M. Hensel, *The Protection of Cultural Objects During Armed Conflicts*, *in* THE LAW OF ARMED CONFLICT: CONSTRAINTS ON THE CONTEMPORARY USE OF MILITARY FORCE 39, 55 (Howard M. Hensel ed., 2007); O'KEEFE, *supra* note 22, at 56 (explaining that article 5(1) of the draft convention "plugg[ed] a costly gap in the Hague regime").

<sup>76</sup> *See, e.g.,* SANDHOLTZ, *supra* note 71, 124–25 (2007).

<sup>77</sup> *See, e.g.,* W. G. SEBALD, ON THE NATURAL HISTORY OF DESTRUCTION 4 (Anthea Bell trans., 2004) (describing the destruction visited on Germany during World War II as "on a scale without historical precedent"); EARL FREDERICK ZIEMKE, THE U.S. ARMY IN THE OCCUPATION OF GERMANY: 1944-1946, at 54 (1975) (averring that "[i]n its conception alone, Operation OVERLORD . . . made a strong bid to break all previous records for destructiveness"). Citing figures gleaned from Allied bombing surveys, the Federal German Statistics Office, and other sources, Sebald explains that "the Royal Air Force alone dropped

## II. Protecting Cultural Property in World War II

At the outbreak of World War II, the law of armed conflict acknowledged the need to protect cultural property, but the protective regime was largely an illusory one, vulnerable as it was to the palliative of “military necessity.”<sup>78</sup> The draft Hague Rules of Aerial Warfare, the Roerich Pact, and the International Museums Office’s Preliminary Draft Convention expanded the conversation on cultural property, but few truly concrete rules protecting cultural objects existed at the start of the war, particularly with regard to aerial bombardment.<sup>79</sup> Despite the feeble protections afforded by the *lex lata*, however, the belligerents extended additional protections to cultural monuments, buildings, and works of art as a matter of policy. Unsurprisingly, these protections remained susceptible to the exigencies of war, but they reflected at least some recognition of the importance of cultural property and the need to preserve it for posterity.

For the United States, the individuals charged with the mission of protecting cultural property on the front lines belonged to a curious, frequently overlooked, and historically under-appreciated branch of the U.S. War Department’s Civil Affairs Division: The Monuments, Fine Arts, and Archives Branch (MFA&A).<sup>80</sup> Laboring mostly in obscurity, these “monuments officers” saved innumerable monuments, buildings, and works of art from the crucible of war in Europe.<sup>81</sup> In doing so, they “set a moral precedent” and “established standards, practices, and procedures for the preservation, protection, and restitution of artistic and cultural treasures” in armed conflict.<sup>82</sup> Despite their remarkable achievements, the MFA&A was

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a million tons of bombs on enemy territory,” that 131 Germany towns and cities were attacked, and that three and a half million homes were destroyed during World War II. SEBALD, *supra*, at 3. In *The Bombers and the Bombed*, Richard Overy estimates that “around 600,000 European civilians were killed by bomb attack and well over a million more were seriously injured.” RICHARD OVERY, *THE BOMBERS AND THE BOMBED* at xi (2013). Ziemke opines that “[n]ext to simple ignorance and neglect, war has always been the greatest destroyer of man’s noblest relic of his past, and what fire and pillage once had done, the bombers and artillery of World War II could do a thousand times more completely.”). ZIEMKE, *supra*, at 53–54.

<sup>78</sup> See Section II.A, *supra*.

<sup>79</sup> O’KEEFE, *supra* note 22, at 63 (“The war broke out ‘before a clear understanding had been reached about the law of war governing bombardment from the air.’”) O’Keefe suggests, “The war could hardly have come at a worse time in the evolution of the law on aerial bombardment.” *Id.* at 61.

<sup>80</sup> The British armed forces fielded a similar corps of monuments officers. See, e.g., SANDHOLTZ, *supra* note 71, at 149; O’KEEFE, *supra* note 22, at 78.

<sup>81</sup> See, e.g., EDSEL, *supra* note 1; BREY, *supra* note 1; NICHOLAS, *supra* note 2; Denise DiFulco, *A Monumental Achievement: Two Williams Legends Helped to Recover and Return Some of Europe’s Greatest Art Treasures Plundered by the Nazis*, WILLIAMS MAGAZINE, Fall 2013, at 14 (estimating that in the years following World War II, monuments officers “returned to their rightful owners more than 5 million artistic and cultural treasures stolen by Adolph Hitler and the Nazis”). DiFulco observes the role of the monuments officers “in preserving the culture of civilizations was without precedent.” *Id.*

<sup>82</sup> S. Res. 223, 110th Cong., 153 CONG. REC. 14865 (2007) (enacted).

disbanded after the war, even as the international community strove to draft the 1954 Hague Convention codifying rules for the protection of cultural property in armed conflict.<sup>83</sup> Nearly two generations later, the elimination of these cultural specialists from the ranks of the military would have painful consequences for the cultural sites across Iraq.

#### A. *Legal Protections for Cultural Property in World War II*

While conventional law on the subject of cultural property changed very little in the interwar years, a handful of legal developments ruffled the relative calm of the *status quo ante*. As discussed above, the draft Hague Rules of Aerial Warfare substituted a rule of proportionality for the earlier doctrine of double effect. A few years later, passage of the Roerich Pact marked the adoption of the first international convention dedicated to the protection of cultural heritage in armed conflict.<sup>84</sup> Meanwhile, the International Museums Office's Preliminary Draft Convention, which was tabled at the outbreak of World War II, was eventually repackaged as a draft declaration, though only five states ultimately subscribed to it.<sup>85</sup> Lastly, a requirement to distinguish between military objectives and civilian objects, rather than defended and undefended localities, replaced the outdated scheme of article 25 of the 1907 Hague Regulations as a rule of customary international law.<sup>86</sup>

Still, the unsettled and uncertain state of the law regarding the protection of cultural property left a conspicuous gap in the protective framework of the law of armed conflict. As a matter of policy, the Allies attempted to bridge this gap with orders and directives designed to mitigate the destructive effects of war,<sup>87</sup> though cultural preservation was often a distant priority of commanders in the field.<sup>88</sup> To effectuate its preservation

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<sup>83</sup> See Emma Cunliffe, *We Will Need Monuments Men for as Long as Ancient Sites Remain Battlefields*, THE CONVERSATION (Feb. 7, 2014), <http://theconversation.com/we-will-need-monuments-men-for-as-long-as-ancient-sites-remain-battlefields-22964>, [<http://perma.cc/Q59F-E5D3>].

<sup>84</sup> See, e.g., SANDHOLTZ, *supra* note 71, at 123.

<sup>85</sup> *Id.* The repurposed declaration expressed a “statement of principles” that mirrored the language of the draft convention but that omitted the draft convention’s compliance regime. O’KEEFE, *supra* note 22, at 61.

<sup>86</sup> O’KEEFE, *supra* note 22, at 63.

<sup>87</sup> See, e.g., Memorandum from General Dwight D. Eisenhower, Commander-in-Chief, to All Commanders, subject: Historical Monuments (Dec. 29, 1943) [hereinafter Historical Monuments Memorandum]; SUPREME HEADQUARTERS, ALLIED EXPEDITIONARY FORCE, HANDBOOK FOR MILITARY GOVERNMENT IN GERMANY PRIOR TO DEFEAT OR SURRENDER (1944).

<sup>88</sup> See, e.g., Kenneth Clark to W. G. Constable (Feb. 25, 1943), in NICHOLAS, *supra* note 2, at 214 (“[E]ven supposing it were possible for an archaeologist to accompany each invading force, I cannot help feeling that he would have great difficulty in restraining a commanding officer from shelling an important military objective simply because it contained some fine historical monuments.”); Eric Maclagan, Dir. of the Victoria and Albert Museum, to W. G. Constable (Feb. 26, 1943), in NICHOLAS, *supra* note 3, at 214 (“In violent fighting damage will happen anyway . . . . I do not think it would be the faintest use to have an official

goals, the U.S. military relied on the MFA&A, established in the fall of 1943, and its small corps of monuments officers. Operating throughout the vast European theater in the closing days of the war, the MFA&A was perpetually understaffed for the work it was expected to perform.<sup>89</sup>

Given Europe's long history of warfare and the attendant theft, damage, and destruction inflicted on cultural property in those wars, the collective hand wringing over the state of Europe's cultural heritage at the start of World War II was not unexpected. Until the creation of the MFA&A, the safety of Europe's cultural treasures remained a largely rear guard preoccupation. Once the MFA&A became operational, however, monuments officers began carrying the mission of cultural protection to the front lines and, through their efforts, helped save much of Europe's cultural heritage in the process.

### *B. Origins of the Monuments, Fine Arts, and Archives Branch*

Two earlier organizations—the American Defense-Harvard Group and a special committee of the American Council of Learned Societies (ACLS)—helped inspire the creation of the MFA&A.<sup>90</sup> The American Defense-Harvard Group was established following the fall of Paris in June 1940 by members of the Harvard faculty and local civilians interested in preserving Europe's cultural heritage.<sup>91</sup> Meanwhile, a special Committee on Protection of Cultural Treasures in War Areas of the ACLS (ACLS Committee) embraced a similar mission.<sup>92</sup> Created in January 1943, the ACLS Committee expressed a belief that “works of architecture, sculpture and painting are not mere material for the art historian, nor merely something to stir the interest and admiration of the tourist.”<sup>93</sup> They are, the

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archaeologist at GHQ.”). Edsel explains that the MFA&A subcommission was “an official joint operation between the United States and Britain, run by the Civil Affairs branch of the Allied Military Government for Occupied Territories (AMGOT) and answering primarily to the M-5 division of the British War Office.” EDSEL, *supra* note 1, at 52. Edsel further comments, “The bureaucratic train wreck was a hint at the priority of the operation, which was buried so far down the military chain of command it was almost invisible.” *Id.*

<sup>89</sup> See SANDHOLTZ, *supra* note 71, at 148 (explaining that qualified personnel were “in chronic short supply” and noting that “there were seldom more than twelve officers in the field in Europe”); EDSEL, *supra* note 1, at 65 (“As impossible as it seems, it was the duty of . . . eight officers [assigned to British and American armies and the Communications Zone] to inspect and preserve every important monument that Allied forces encountered between the English Channel and Berlin.”).

<sup>90</sup> Other groups were similarly established, although the American Defense-Harvard Group and the special committee of the American Council of Learned Societies were perhaps the most esteemed and influential. See NICHOLAS, *supra* note 2, at 210.

<sup>91</sup> See generally, e.g., NICHOLAS, *supra* note 2, at 209–13, 218–21; SANDHOLTZ, *supra* note 71, at 147–48; BREY, *supra* note 2, at 40.

<sup>92</sup> See generally, e.g., NICHOLAS, *supra* note 2, at 220–21, 218–21; SANDHOLTZ, *supra* note 71, at 147–48; BREY, *supra* note 2, at 40–41, 44–47.

<sup>93</sup> SANDHOLTZ, *supra* note 71, at 147 (quoting Committee of the ACLS on Protection of Cultural Treasures in War Areas, *Minutes of the First Meeting of the Committee of the*

ACLS Committee declared, “an essential part, and the most eloquent part, of the common cultural heritage of the human race.”<sup>94</sup>

Members of both organizations were instrumental in building support for the MFA&A. A veritable who’s who of the American art world, the membership of the American Defense-Harvard Group included Paul Sachs, associate director of Harvard’s Fogg Art Museum; and George Stout, chief of conservation of the Fogg Art Museum, while the ACLS counted William Bell Dinsmoor, president of the Archaeological Institute of America; Francis Henry Taylor, director of the Metropolitan Museum of Art in New York; and David Finley, director of the National Gallery of Art in Washington as members.<sup>95</sup> Working in concert, these experts outlined plans for the creation of a government agency devoted to the protection and preservation of European cultural property.<sup>96</sup> In November 1942, after discussing the subject with Sachs and Stout in Cambridge, Massachusetts, Taylor traveled to Washington to lobby for the formation of a formal cultural preservation committee.<sup>97</sup>

In Washington, Taylor met with Supreme Court Chief Justice Harlan Stone, the chairman of the Board of Trustees of the National Gallery *ex officio*, and presented his proposals.<sup>98</sup> During the discussions, Taylor advocated for the creation of “a corps of specialists to deal with the matter of protecting monuments and works of art in liaison with the Army and Navy.”<sup>99</sup> The Chief Justice agreed to raise the subject with President Roosevelt, and on December 8, 1942, Stone sent a memorandum to the president recommending that Roosevelt appoint a committee “to aid in the conservation of artistic and historic monuments in Europe, and in the establishment of machinery to return to the rightful owners works of art and historic documents appropriated by the Axis Powers.”<sup>100</sup> Stone delineated the committee’s responsibilities both “During the War” and “At the time of the Armistice,” explaining that during hostilities, the committee would help furnish the General Staff of the Army with “museum officials and art historians, so that, so far as is consistent with military necessity, works of

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*American Council of Learned Societies on Protection of Cultural Treasures in War Areas*, June 25, 1943).

<sup>94</sup> *Id.*

<sup>95</sup> See, e.g., BREY, *supra* note 1, at 40–41; *The Art Army: Harvard’s Monuments Men at War*, HARV. MAG. (Feb. 2010), at 36–40, 75.

<sup>96</sup> See, e.g., NICHOLAS, *supra* note 2, at 210–11; SANDHOLTZ, *supra* note 71, at 146; BREY, *supra* note 1, at 41.

<sup>97</sup> See, e.g., NICHOLAS, *supra* note 2, at 210–11; SANDHOLTZ, *supra* note 71, at 146; BREY, *supra* note 1, at 41.

<sup>98</sup> See, e.g., NICHOLAS, *supra* note 2, at 11; SANDHOLTZ, *supra* note 71, at 146. Other members of the National Gallery’s Board of Directors included Secretary of State Cordell Hull and Secretary of the Treasury Henry Morgenthau, Jr. See NICHOLAS, *supra* note 2, at 211. William Dinsmoor also met with Chief Justice Stone days later. *Id.*

<sup>99</sup> NICHOLAS, *supra* note 2, at 211.

<sup>100</sup> Memorandum from Harlan F. Stone, S. Ct. Chief Justice, to Franklin Delano Roosevelt, U.S. Pres. (Dec. 8, 1942), in 1 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1943, at 470–72 (1968).

cultural value may be protected . . . .”<sup>101</sup> Notably, Stone recommended that the committee function alongside the “appropriate branch of the Army.”<sup>102</sup>

Roosevelt circulated Stone’s proposal to various government entities, including the Joint Chiefs of Staff, for review.<sup>103</sup> In April 1943, Roosevelt informed Stone that progress on the proposed organization was being made and that even the military had expressed support for the project, at least in principle.<sup>104</sup> “[T]he Joint Chiefs of Staff are in agreement as to its eventual desirability and will, when and if the committee is appointed, direct the American commanders concerned to give the committee every practicable assistance that does not interfere with their military operations.”<sup>105</sup> Roosevelt noted, however, that in relaying the endorsement of the Joint Chiefs, Admiral William D. Leahy, Chief of Staff to the Commander in Chief of the Army and Navy, had also communicated the belief that the “undertaking [did] not appear to promise any military advantage.”<sup>106</sup>

Several months later, Secretary of State Cordell Hull informed Stone that the president had approved the establishment of an “American Commission for the Protection and Salvage of Artistic and Historic Monuments in Europe.”<sup>107</sup> Meanwhile, at the urging of the American Defense-Harvard Group and other museum officials, planning for the training of cultural property specialists had already begun.<sup>108</sup> Hull advised Stone that a “special section has been formed in the School of Military Government . . . with the idea of training certain officers in the Specialist Branch of the service so that they could be attached to the staffs of our armies to advise the commanding officers of such troops as to the location of, and the care to be given to, the various artistic and historic objects in occupied territories.”<sup>109</sup>

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<sup>101</sup> *Id.* at 471. During the war, the committee would also compile “lists of property appropriated by the Axis invading forces, by representatives of Axis governments, and by private citizens of Axis countries.” *Id.* Meanwhile, at the conclusion of the war, the committee would “urge that the Armistice terms include the restitution of public property appropriated by the Axis Powers,” and would similarly advocate for the restitution of “private property appropriated by the Axis Nations.” *Id.*

<sup>102</sup> *Id.* at 470.

<sup>103</sup> Letter from Franklin D. Roosevelt, U.S. Pres., to Harlan F. Stone, S. Ct. Chief Justice (Apr. 24, 1943), in *FOREIGN RELATIONS OF THE UNITED STATES*, *supra* note 100, at 473.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Letter from Cordell Hull, Sec’y of State, to Harlan F. Stone, S. Ct. Chief Justice (Jul. 16, 1943), in *FOREIGN RELATIONS OF THE UNITED STATES*, *supra* note 100, at 478.

<sup>108</sup> *See id.*; NICHOLAS, *supra* note 2, at 212–13.

<sup>109</sup> Letter from Cordell Hull, *supra* note 107, at 476. Hull further explained, “It is contemplated that after the occupied territory has passed from a military to a civilian government, this work would be turned over to the properly constituted civilian authorities representing the United Nations.” *Id.*

The U.S. Army's School of Military Government was formally established on 2 April 1942 to train specialists in civil affairs and military government.<sup>110</sup> Prior to World War II, military and civilian officials alike viewed military government with suspicion,<sup>111</sup> and consequently, the military did not train its officers in military government.<sup>112</sup> The publication of Army Field Manual 27-5, *Military Government* (FM 27-5), in July 1940 gradually changed this mindset,<sup>113</sup> but given the woeful state of the Army in the summer of 1940, FM 27-5's recommendations initially went unheeded.<sup>114</sup>

The British, on the other hand, had begun, by early 1941, to train their military officers in "postwar reconstruction and other missions incident to military operations in foreign countries," and several American officers participated in the British courses.<sup>115</sup> Their experiences at a time when the United States had become increasingly involved in the war provided the needed push for the type of military government training outlined in FM 27-5.<sup>116</sup> In early January 1942, the Army Chief of Staff, General George C.

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<sup>110</sup> ZIEMKE, *supra* note 77, at 7. Chapter 1 of Ziemke's *The U.S. Army in the Occupation of Germany: 1944-1946* provides a comprehensive overview of the establishment of the U.S. Army School of Military Government.

<sup>111</sup> *Id.* at 3 (explaining that despite the Army's active involvement in military government following early conflicts, including the Mexican-American War, the Civil War, the Spanish-American War, and World War I, "neither the Army nor the government accepted it as a legitimate military function").

<sup>112</sup> *See id.* at 3.

<sup>113</sup> U.S. DEP'T OF WAR, FIELD MANUAL 27-5, MILITARY GOVERNMENT (30 July 1940) [hereinafter FM 27-5]. The creation a field manual dedicated to military government was inspired in part by a lengthy report drafted by Colonel Irwin L. Hunt following World War I. *See* COLONEL IRWIN L. HUNT, AMERICAN MILITARY GOVERNMENT OF OCCUPIED GERMANY, 1918-1920 (1920). Colonel Hunt, who served as the Officer in Charge of Civil Affairs for the U.S. Third Army and American Forces in Germany, concluded that "the American army of occupation [in Germany] lacked both training and organization to guide the destinies of the nearly 1,000,000 civilians who the fortunes of war had placed under its temporary sovereignty." *Id.* at 65.

<sup>114</sup> *See* ZIEMKE, *supra* note 77, at 4 ("[I]n the summer of 1940 the country was not at war, and of everything it then lacked, the Army undoubtedly missed a military government manual least."). In the absence of branch dedicated to civil affairs and military government, the Judge Advocate General of the Army was assigned the responsibility for drafting FM 27-5. *See id.* Ziemke explains that because of the "presumed close relationship between [military government] and military law," the task of preparing a field manual on military government "seemed to fall logically to the Judge Advocate General (JAG)." *Id.* Major General Allen W. Gullion, the Judge Advocate General at the time, at first declined the request to prepare the new field manual citing his office's recent publication of FM 27-10, *The Rules of Land Warfare*; however, with the outbreak of war in Europe and at the earnest behest of both the Army G-3 (operations and training) and G-1 (personnel), Major General Gullion's staff began drafting what would become FM 27-5. *Id.* Ziemke notes that "[t]he two field manuals, *The Rules of Land Warfare* and *Military Government*, would eventually be regarded as the Old and New Testaments of American military government . . ." *Id.*

<sup>115</sup> FM 27-5, *supra* note 113, para. 8; *see also* ZIEMKE, *supra* note 77, at 4.

<sup>116</sup> ZIEMKE, *supra* note 77, at 4-5. Ziemke observes that while the origins of the U.S. Army's military government training were later attributed to the politico-military course offered at Cambridge, "[t]he foundation had actually been laid earlier in FM 27-5." *Id.* at 5. He concludes that "[t]he British program, along with deepening U.S. involvement in the war

Marshall, approved the G-1's request to establish a school of military government operated by the Provost Marshal General,<sup>117</sup> and the school was duly established at the University of Virginia in Charlottesville, Virginia.<sup>118</sup>

By 1943, the movement to safeguard the art and monuments of Europe had begun to gain momentum. In April 1943, the director of the School of Military Government, General Cornelius W. Wickersham, recommended that art experts trained at the school be attached to the staffs of each theater commander.<sup>119</sup> Meanwhile, President Roosevelt appointed Supreme Court Justice Owen J. Roberts to chair the newly established American Commission for the Protection and Salvage of Artistic and Historic Monuments in Europe, more commonly known as the Roberts Commission.<sup>120</sup> Recognized as “the Commission with the longest name and the smallest budget in Washington,” the detailed maps compiled by the group would prove invaluable in identifying the locations of important buildings, monuments, and historic sites as the war progressed.<sup>121</sup> By the time the Allies began the invasion of Sicily in the summer of 1943, elements of a cultural protection program had begun to coalesce and influence the war effort.

### C. *Distinguishing Military Convenience from Military Necessity*

By the end of 1943, the institutional machinery needed to shield cultural property from the destructive effects of war had been established, but instilling a sense of responsibility for the protection of cultural property within the armed forces would prove more difficult. The military issued a number of policies and directives mandating respect for cultural property, but in the absence of an absolute legal obligation to protect works of art, historic buildings, monuments, and other cultural objects during military

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in the late summer of 1941, did in fact probably give the first impetus to proposals for instruction in the Army; but beyond this connection the American development was collateral, not derivative.” *Id.*

<sup>117</sup> ZIEMKE, *supra* note 77, at 6 (citing Memorandum from Chief of Staff of the Army, to Provost Marshal General of the Army, subject: School of Military Government (Jan. 10, 1942)). In July 1941, Major General Gullion, who had previously served as the Judge Advocate General, was appointed Provost Marshal General. Consequently, Major General Gullion was now responsible for supervising the training he had advocated in FM 27-5.

<sup>118</sup> ASF OPMG, Order No. 47, 2 Apr. 1942, in PMG, MG Div. decimal file 008.

<sup>119</sup> ZIEMKE, *supra* note 77, at 55.

<sup>120</sup> *See, e.g., id.* at 54. Initially, Chief Justice Stone had been requested to serve as the chairman of the commission, but as Secretary of State Hull explained to President Roosevelt, Stone “replied that he was obliged reluctantly to decline the invitation because his obligations to the Court preclude his assuming any other continuing responsibilities.” Letter from Cordell Hull, Sec’y of State, to Franklin D. Roosevelt, President (Aug. 4, 1943), in FOREIGN RELATIONS OF THE UNITED STATES, *supra* note 100, at 479. After the work of the commission was expanded beyond the European theater of operations, the phrase “in Europe” in the commission’s official title was replaced with “in War Areas.” O’KEEFE, *supra* note 22, at 77.

<sup>121</sup> BREY, *supra* note 1, at 42, 43–44.

operations, the temptation to invoke the rule of military necessity to excuse incidental damage to cultural property remained great.<sup>122</sup>

At the time of the Sicilian campaign, Major General John H. Hilldring, then serving as the chief of the recently formed U.S. Army Civil Affairs Division, reported to Assistant Secretary of War John H. McCloy that the directive for the invasion of Sicily included a reference to historic monuments.<sup>123</sup> Hilldring further noted that General Dwight D. Eisenhower had been assigned two experts, equipped with the latest research compiled by the ACLS Committee, to advise him on cultural property issues.<sup>124</sup> Eisenhower explained to General Marshall, “It is my policy, in so far as possible without handicapping military operations, to avoid the destruction of immovable works of art.”<sup>125</sup>

In a memorandum issued in December 1943, Eisenhower warned his commanders that military convenience should not be confused for military necessity.<sup>126</sup> Eisenhower explained that Allied forces in Italy were fighting in a country “rich in monuments” and that it was their duty to “respect those monuments so far as war allows.”<sup>127</sup> However, he explained, “If we have to choose between destroying a famous building and sacrificing our own men, then our men’s lives count infinitely more and the buildings must go. But the choice is not always so clear-cut as that.”<sup>128</sup> He continued:

In many cases the monuments can be spared without any detriment to operational needs. Nothing can stand against the argument of military necessity. That is an accepted principle. But the phrase “military necessity” is sometimes used where it would be more truthful to speak of military convenience or

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<sup>122</sup> See, e.g., Memorandum from Lieutenant Colonel Charles P. Burnett, Jr., Chief, Gov’t Branch, Civil Affairs Div., to Major General John H. Hilldring, Chief, Civil Affairs Div., subject: War Department Policy and Plans for Preserving Artistic Treasures (Oct. 26, 43) (reporting that the War Department had adopted a policy of “protecting artistic treasures to the fullest extent consistent with military operations”).

<sup>123</sup> ZIEMKE, *supra* note 77, at 55. The Civil Affairs Division was created on 1 March 1943. *Id.*

<sup>124</sup> *Id.* at 55. Lists prepared by the American Defense-Harvard Group were also apparently sent to military planners prior to Operation Husky. NICHOLAS, *supra* note 3, at 222. Known as “Harvard Lists,” they described in minute detail the monuments and art of nearly every Italian city and town. BREY, *supra* note 2, at 44. By the end of the summer, the Roberts Commission had provided the War Department with 168 maps of the Italian area of operations, including Sicily, Sardinia, and Dalmatia. *Id.* According to Brey, the Roberts Commission would eventually produce “maps for France, Greece, Bulgaria, Albania, Belgium, the Netherlands, and Denmark,” and provide Allied forces with “over 700 maps of European and Asian cities and towns that would come into Allied control, accompanying them with as many lists of their monuments, art collections, libraries, and archives.” *Id.*

<sup>125</sup> BREY, *supra* note 1, at 44.

<sup>126</sup> See Historical Monuments Memorandum, *supra* note 87.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

even of personal convenience. I do not want it to cloak slackness or indifference.<sup>129</sup>

He concluded by declaring it the responsibility of higher commanders “to determine through [Allied Military Government] Officers the locations of historical monuments whether they be immediately ahead of our front lines or in areas occupied by us.”<sup>130</sup>

Despite Eisenhower’s admonition, the rule of military necessity continued to frustrate the separation between civilian objects and military objectives, and as fighting intensified, the exigency of military necessity seemingly collapsed the distinction altogether.<sup>131</sup> For example, days after Germany invaded Poland in 1939, Britain and France announced that they had prohibited their armed forces from engaging in “bombardment whether from the air, or the sea, or by artillery on land of any except strictly military objectives in the narrowest sense of the word.”<sup>132</sup> By May 1940, however, the British had reversed course, taking a more permissive approach to targeting both from the air and on land.<sup>133</sup> Rather than evaluating military objectives “in the narrowest sense of the word,” the British embraced a more expansive view, adopting an “indulgent approach to incidental damage.”<sup>134</sup> As the British Secretary of State for Air asserted, “We cannot be prevented from bombing important military targets because, unfortunately, they happen to be close to ancient monuments. . . . We must bomb important military objects. We must not be prevented from bombing important military objects, because beautiful or ancient buildings are near them.”<sup>135</sup> The United States, meanwhile, acceded to this permissive approach, accepting that civilian objects and cultural property could be sacrificed at the altar of military necessity in the unrelenting pursuit of military objectives, broadly defined.

#### *D. Cultural Preservation and Military Necessity in Tension*

In the summer of 1944, the destruction of the monastery at Monte Cassino shocked the international community and brought the tension between cultural preservation and operational requirements to the forefront of public debate. The monastery had been established in the sixth century by Saint Benedict of Nursia,<sup>136</sup> the founder of the Benedictine order whose Rule

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See O’KEEFE, *supra* note 22, at 74.

<sup>132</sup> Letter from Philip Henry Kerr, U.K. Ambassador to the U.S., to Cordell Hull, Sec’y of State (Sep. 3, 1939), in 1 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1939, at 548 (1968).

<sup>133</sup> See, e.g., O’KEEFE, *supra* note 22, at 64–66, 74.

<sup>134</sup> *Id.* at 65.

<sup>135</sup> *Id.* (quoting Archibald Sinclair, U.K. Secretary of State for Air, 28 July 1943).

<sup>136</sup> See, e.g., JOHN ELLIS, CASSINO: THE HOLLOW VICTORY at xiii (1984) (dating the establishment of the monastery to approximately 524 C.E.); ALBAN BUTLER, 1 BUTLER’S LIVES OF THE SAINTS 653 (Herbert J. Thurston, S.J. & Donald Attwater eds., 2d ed. 1956)

of Saint Benedict (*Regula Benedicti*) served as the “charter” of European monasticism in the Middle Ages.<sup>137</sup> Given the monastery’s role in the spread of monasticism and its collection of important artistic and religious artifacts (Saint Benedict himself was believed to have been buried within its walls),<sup>138</sup> Monte Cassino’s historical significance was incontrovertible.<sup>139</sup> As one scholar noted, it was “no mere ecclesiastical museum.”<sup>140</sup>

Despite its unequivocal status as a historical site, the monastery became the subject of intense debate as the Allies advanced north through Italy during the Battle for Rome.<sup>141</sup> Several Allied commanders, most notably Lieutenant General Mark W. Clark, Commanding General of the U.S. Fifth Army, questioned the military necessity of bombing the monastery.<sup>142</sup> Clark’s opinion, however, was the minority view, and pressure from other Allied commanders, including Lieutenant-General Sir Bernard Freyberg, Commanding General of the 2nd New Zealand Division, and General Sir Harold Alexander, Commander-in-Chief of Allied Armies in Italy, who believed the monastery had been incorporated into the enemy’s defensive line, eventually persuaded Clark to order the bombing of Monte Cassino.<sup>143</sup> As Lieutenant-General John Harding, then serving as General Alexander’s Chief-of-Staff, explained:

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(dating the establishment of the monastery to approximately 530 C.E.); EDSSEL, *supra* note 1, at 45 (dating the establishment of the monastery to approximately 529 C.E.).

<sup>137</sup> ELIZABETH RAPLEY, *THE LORD AS THEIR PORTION: THE STORY OF THE RELIGIOUS ORDERS AND HOW THEY SHAPED OUR WORLD* at 8 (2011) (stating that although the Rule of Saint Benedict “would one day become the charter, so to speak, of European monasticism, [it] was originally written with one community in mind: Monte Cassino”).

<sup>138</sup> Although Saint Benedict was believed to have been originally buried at Monte Cassino, the true whereabouts of his body were in dispute by the time of the Second World War. *See, e.g.*, CHARLES FREEMAN, *HOLY BONES, HOLY DUST* 59–60 (2011); PATRICK GEARY, *FURTA SACRA: THEFTS OF RELICS IN THE CENTRAL MIDDLE AGES 120–21* (1991). According to one tradition, the relics of Saint Benedict were stolen from Monte Cassino in the late seventh century by monks from Fleury, located in present-day France. *See* GEARY, *supra*, at 120–21. Later popes issued conflicting declarations stating variously that Saint Benedict’s relics remained at Monte Cassino or that they had been moved to Fleury. FREEMAN, *supra*, at 60. The true whereabouts of Saint Benedict’s body, however, was largely immaterial to Monte Cassino’s status as a cultural site given its historical significance.

<sup>139</sup> *See, e.g.*, BUTLER, *supra* note 136, at 653–54. Thurston and Attwater’s revised edition of Alban Butler’s *Lives of the Saints* explains that around the two chapels Saint Benedict first built on Monte Cassino “there rose little by little the great pile which was destined to become the most famous abbey the world had ever known . . . . It was here that went forth the influence that was to play so great a part in the christianization and civilization of post-Roman Europe . . . .” *Id.*

<sup>140</sup> *Id.* at 654.

<sup>141</sup> *See, e.g.*, ELLIS, *supra* note 136, at 167–173; EDSSEL, *supra* note 2, at 44–48.

<sup>142</sup> *See, e.g.*, ELLIS, *supra* note 136, at 168–170.

<sup>143</sup> *See id.* at 169 (“Clark felt himself unable to ignore the wishes of two such prominent generals, one of them his superior officer.”). Clark was not only in the minority among his fellow commanders. As Edsel makes clear, nearly everyone wanted the monastery destroyed. *See* EDSSEL, *supra* note 1, at 46. He writes, “The citizens back home, appalled by the suffering of their boys, wanted Cassino destroyed. The British commanders wanted Cassino destroyed. The soldiers wanted Cassino destroyed.” *Id.*

General Alexander has decided that the Monastery should be bombed if General Freyberg considers it a military necessity. He regrets that the building should be destroyed, but that he has faith in General Freyberg's judgment. If there is any reasonable probability that the building is being used for military purposes General Alexander believes that its destruction is warranted.<sup>144</sup>

In addition to believing that bombing the monastery was not militarily necessary, Clark objected to the proposed bombing because "he did not wish to destroy a famous historical and religious monument" and because he remained unconvinced that German forces had actually occupied the complex.<sup>145</sup> Moreover, he believed bombardment of the monastery would prove counterproductive. He later wrote that bombing Monte Cassino would not only "fail to assist the attacking troops, but probably would make their job far more difficult by letting the Germans feel perfectly free to use the ruins of the buildings as defensive positions."<sup>146</sup> Nevertheless, despite Clark's recognition of the monastery's historical significance, Clark succumbed to the argument of military necessity and ordered the bombing of the hilltop complex.<sup>147</sup>

The destruction of the monastery at Monte Cassino served as a call-to-arms for the officers assigned to the MFA&A. Was the destruction of Monte Cassino truly militarily necessary? Was its destruction excessive relative to the military advantage anticipated to be gained? For the remainder of the war, the MFA&A would serve as a check on the destructive impulses of the armies at war. Although they are more popularly remembered for recovering art stolen by the Nazis during the war, they also played a critical

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<sup>144</sup> ELLIS, *supra* note 136, at 168–69.

<sup>145</sup> *Id.* at 169.

<sup>146</sup> *Id.* (quoting GENERAL MARK W. CLARK, *CALCULATED RISK* at 300 (1951)).

<sup>147</sup> Although still the subject of historical debate, most evidence suggests that the Germans had not occupied the monastery. Ellis writes, "Certainly the weight of evidence seems fairly conclusive that there were no troops actually in the Monastery," although Ellis further explains that "the decision not to occupy the Monastery had, in the last analysis, nothing to do with any abiding love for European culture but simply followed the dictates of normal military procedure." ELLIS, *supra* note 136, at 171. According to another source, the monastery's seventy-eight-year-old abbot, who had been evacuated from the Monte Cassino by German forces following the Allied bombing campaign, issued a statement stating, "I certify to be the truth that inside the enclosure of the sacred monastery of Cassino there never were any German soldiers." John G. Clement, *The Necessity for the Destruction of the Abbey of Monte Cassino* (May 31, 2002) (M.A. thesis, U.S. Army Command and General Staff College) (quoting FRED MAJDALANY, *THE BATTLE OF CASSINO* at 9 (1957)). Meanwhile, Clark correctly foresaw that the Germans would use the ruins of the monastery to their advantage. After the building's destruction, the Germans dropped paratroopers onto Monte Cassino and incorporated the devastated site into their defensive line. EDSEL, *supra* note 1, at 47. As Edsel notes, "It would take another three months, and an estimated 54,000 of their own men dead and wounded, for the Allies to capture Monte Cassino." *Id.*

role in saving buildings, monuments, and works of art outright through their moderating presence on the battlefield.<sup>148</sup>

### *E. Monuments Officers in Action*

Monuments officers often accomplished their preservation mission in small ways, but through their cumulative efforts, they managed to save an inestimable amount of cultural heritage from damage, destruction, and despoliation. One simple technique involved placing signs on historic monuments to highlight their cultural significance. The signs read:

OFF LIMITS  
To all Military Personnel  
HISTORIC MONUMENT  
Trespassing on or Removal of any Materials or  
Articles from These Premises is Strictly Forbidden  
By Command of the Commanding Officer<sup>149</sup>

To counter the impression that the Allies were invaders, a general MFA&A directive instructed monuments officers to rely on civilians to hang the signs whenever possible.<sup>150</sup>

On other occasions, monuments officers were forced to act more aggressively to save cultural property. One battlefield practice that invited active intervention was the bulldozing of damaged buildings and monuments following military operations. Damaged structures were regularly razed to clear paths through devastated areas, and the rubble was reused to construct roads for advancing forces.<sup>151</sup> Monuments officers actively intervened to rescue several of these culturally important buildings from demolition, often to the consternation of the local officers-in-charge. In one instance, a monuments officer saved part of the château of Comte de Germigny, a historic home on the protected monuments list, by stopping a bulldozer in its tracks.<sup>152</sup> When challenged by the commanding officer, the monuments officer insisted the home was a historic building and was not to be damaged.<sup>153</sup> The commanding officer persisted, “We have a war to win here,

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<sup>148</sup> A sampling of the art objects seized by the Germans can be found in the “Database of Art Objects at the Jeu de Paume” maintained by the U.S. Holocaust Memorial Museum with support from the Conference on Jewish Material Claims Against Germany. The searchable database contains information on over 20,000 works of art seized by the Einsatzstab Reichsleiter Rosenberg in German-occupied France and parts of Belgium. See “Database of Art Objects at the Jeu de Paume,” CULTURAL PLUNDER BY THE EINSATZSTAB REICHSLEITER ROSENBERG, <http://www.errproject.org/jeudepaume/>, [<http://perma.cc/67J2-F8US>].

<sup>149</sup> EDSEL, *supra* note 1, at 78.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 80.

<sup>152</sup> *Id.* (recounting the incident, which involved monuments officer Second Lieutenant James Rorimer).

<sup>153</sup> *Id.*

Lieutenant. My job in the war is to see that this road goes through,” he asserted.<sup>154</sup> The monuments officer remained steadfast. Producing a copy of Eisenhower’s declaration on historic monuments, the monuments officer replied, “Only in the event of necessity, sir. Supreme Commander’s orders. Do you want to spend the rest of your tour explaining why this demolition was a military necessity, not a convenience?”<sup>155</sup>

Acting as protectors of cultural heritage both at the staff level and on the front lines, the officers of the MFA&A filled a critical role during the closing years of World War II. Practically speaking, they helped implement policies designed to protect historic buildings, monuments, and works of art from damage and destruction in the war. However, they also achieved another, perhaps greater, purpose through their principled actions on the battlefield: they helped promote an appreciation for the enduring power of culture while reminding those around them that certain principles were worth fighting for. The officer at the château of Comte de Germigny in the example above eventually relented. “Okay,” he grumbled, “but this is a helluva way to fight a war.”<sup>156</sup> The monuments officer responded with characteristic conviction: “I disagree, sir. I think this is exactly the way to fight a war.”<sup>157</sup>

### III. Post World War II Conventions for the Protection of Cultural Property

#### *A. The 1954 Hague Convention for the Protection of Cultural Property*

The 1954 Hague Convention for the Protection of Cultural Property was inspired in large part by the “grave damage” inflicted on cultural property during World War II, and its protective provisions were guided by earlier rules for the protection of cultural property outlined in the 1907 Hague Convention and the Roerich Pact.<sup>158</sup> Adopted in 1954, the Convention recognizes that “the preservation of cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection.”<sup>159</sup> These protections are broadly divided into general protections and special protections.

The Convention begins by defining “cultural property” and giving it a specific legal meaning for purposes of the Convention and its Additional

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 81. Edsel further comments that “[i]t is doubtful the U.S. Army would have tolerated the MFAA if not for the prestige of the Roberts Commission, which had been formed with Roosevelt’s explicit backing.” *Id.* at 53.

<sup>156</sup> *Id.* at 81.

<sup>157</sup> *Id.*

<sup>158</sup> 1954 Hague Convention, *supra* note 13, preamble.

<sup>159</sup> *Id.*

Protocols.<sup>160</sup> As Roger O’Keefe observes in *The Protection of Cultural Property in Armed Conflict*, “[t]he label is not used in a lay sense—as one might refer, for example, to the ‘cultural property’ protected by articles 27 and 56 of the Hague Rules—but is given a specific legal definition in article 1.”<sup>161</sup> Article 1 defines cultural property to include the following three broad categories, “irrespective of origin or ownership”:

- (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 subparagraph (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 subparagraph (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.”<sup>162</sup>

Importantly, the cultural value attributed to the “buildings” and “refuges” described in subparagraph (b), as well as the “centres containing monuments” defined in subparagraph (c), derives from the movable and immovable property outlined in subparagraph (a).<sup>163</sup>

Meanwhile, the high-minded language of subparagraph (a) can be somewhat enigmatic. Reminiscent of the broad, aspirational language common to international treaties of the era,<sup>164</sup> article 1(a) defines cultural property to include both movable and immovable property “of great

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<sup>160</sup> 1954 Hague Convention, *supra* note 13, art. 1; Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 1, May 14, 1954, 249 U.N.T.S. 215; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 2, Mar. 26, 1999, 38 I.L.M. 769 [hereinafter 1999 Second Hague Protocol].

<sup>161</sup> O’KEEFE, *supra* note 22, at 101.

<sup>162</sup> 1954 Hague Convention, *supra* note 13, art. 1.

<sup>163</sup> See O’KEEFE, *supra* note 22, at 103.

<sup>164</sup> See, e.g., United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force 16 Nov. 1994); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205; see also Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/810 at 71 (1948).

importance to the cultural heritage of every people.”<sup>165</sup> This has been interpreted to mean of great importance “to the national cultural heritage of each respective Party” as opposed to “the cultural heritage of all mankind.”<sup>166</sup> Consequently, individual states are responsible for deciding what property constitutes movable and immovable property of great importance in their respective states.<sup>167</sup> While this process necessarily involves the exercise of subjective, value-based judgments,<sup>168</sup> state parties are bound to act both reasonably and in good faith when designating property of great importance to their cultural heritage.<sup>169</sup>

Notice is provided through the use of a distinctive emblem.<sup>170</sup> Article 17(1)(a) states that the distinctive emblem of the convention, described in article 16, when repeated three times may be used as a means of identifying, *inter alia*, “immovable cultural property under special protection.”<sup>171</sup> In comparison, when the emblem is used alone, it may be used to identify “cultural property not under special protection.”<sup>172</sup>

The regime of general protection derives from article 4, which states:

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

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<sup>165</sup> 1954 Hague Convention, *supra* note 13, art. 1(a).

<sup>166</sup> O’KEEFE, *supra* note 22, at 104; *see also* Nagendra Singh, Address at the Celebration of the Thirtieth Anniversary of the Hague Convention, in 1984 REPORTS at 14–15.

<sup>167</sup> *See* O’KEEFE, *supra* note 22, at 104. O’Keefe explains that the phrase “of great importance to the cultural heritage of every people” was “something of a compromise” during the drafting of the Convention. *Id.* Meanwhile, a state’s designation of property as culturally significant must be made in good faith. *Id.* at 104, 109 (citing the Vienna Convention on the Law of Treaties, 23 May 1969, art. 31(a), 26, 1155 UNTS 331,).

<sup>168</sup> *Id.* at 110 (“*Bona fide* value judgements [sic] on which reasonable people and peoples can differ are on thing, and are almost inevitable when dealing with notions as personally and culturally contingent as historic and, *a fortiori*, artistic significance.”).

<sup>169</sup> Vienna Convention on the Law of Treaties, 23 May 1969, art. 26, 1155 U.N.T.S. 331; *see also* Rights of the Nationals of the United States of American in Morocco (Fr v. U.S.), 1952 I.C.J., at 176, 212.

<sup>170</sup> 1954 Hague Convention, *supra* note 13, arts. 6, 16, 17.

<sup>171</sup> *Id.* art. 17(1)(a).

<sup>172</sup> *Id.* art. 17(2)(a).

misappropriation of, and any acts of vandalism directed against, cultural property. They shall, refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

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

5. No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3.<sup>173</sup>

Importantly, under the Convention, the obligation to respect cultural property may be waived “in cases where military necessity imperatively requires such a waiver.”<sup>174</sup> Today, this obligation must be considered within the greater context of international humanitarian law as it has developed since the convention was adopted.<sup>175</sup> In particular, the waiver must be considered in light of the discrimination rule of article 52(2) of Additional Protocol I.<sup>176</sup>

Cultural property under special protection is described in chapter II of the Hague Convention. Special protection ostensibly provides a higher standard of protection, although ultimately, the difference between the two protection regimes is minor. As O’Keefe points out, “the additional restraints mandated in relation to specially protected property amount to no more than a tweaking of the conditions under which the waiver as to military necessity may be invoked.”<sup>177</sup>

### *B. The 1999 Second Protocol*

The Second Protocol was adopted with the goal of updating the provisions of the 1954 Hague Convention and was “designed to supplement, not supplant, the provisions of the Convention.”<sup>178</sup> One of its more important achievements was the replacement of the hollow “special protection” regime of the 1954 Hague Convention. The special protections provided by the Convention were replaced with an “enhanced” protection regime outlined by the Second Protocol.

Article 4(b) of the Second Protocol explains the relationship between the Protocol’s enhanced protection regime and the 1954 Hague Convention’s

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<sup>173</sup> *Id.* art. 4.

<sup>174</sup> *Id.* art. 4(2).

<sup>175</sup> O’KEEFE, *supra* note 22, at 128 (“[T]he waiver in article 4(2) must today be read through the lens of the customary international rules on targeting, applicable to both international and non-international armed conflict, which have emerged since the adoption of the Convention . . .”).

<sup>176</sup> Additional Protocol I, *supra* note 14, art. 52(2).

<sup>177</sup> O’KEEFE, *supra* note 22, at 140.

<sup>178</sup> *Id.* at 241.

special protection regime. Article 4(b) states that the application of chapter 3 provisions of the Protocol are without prejudice to:

The application of the provisions of Chapter 2 of the Convention save that, as between Parties to this Protocol or as between a Party and a State which accepts and applies this Protocol in accordance with Article 3 Paragraph 2, where cultural property has been granted both special protection and enhanced protection, only the provisions of enhanced protection shall apply.<sup>179</sup>

The Second Protocol requires that parties ensure “the immunity of cultural property under enhanced protection by refraining from making such property the object of attack from any use of the property or its immediate surroundings in support of military action.”<sup>180</sup> The protocol further defines the circumstances under which cultural property under enhanced protection may lose its protection. These circumstances include when enhanced protection is “suspended or cancelled in accordance with Article 14” and “if, and for as long as, the property has, by its use, become a military objective.”<sup>181</sup> Article 13(2) additionally states that when enhanced protection is suspended or canceled in accordance with article 14, such property may only be the object of attack if:

- a. The attack is the only feasible means of terminating the use of the property referred to in sub-paragraph 1(b);
- b. all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to the cultural property;
- c. unless circumstances do not permit, due to requirements of immediate self-defence:
  - i. the attack is ordered at the highest operational level of command;
  - ii. effective advance warning is issued to the opposing forces requiring the termination of the use referred to in sub-paragraph 1(b); and
  - iii. reasonable time is given to the opposing forces to redress the situation.<sup>182</sup>

In the end, the 1954 Hague Convention and its protocols were intended to refine and strengthen the protections afforded to cultural property in armed conflict. In theory, the new protective regime marked a vast improvement over the state of the law at the conclusion of World War

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<sup>179</sup> 1999 Second Hague Protocol, *supra* note 160, art. 4(b).

<sup>180</sup> *Id.* art. 12.

<sup>181</sup> *Id.* arts. 13(1)(a) & (b).

<sup>182</sup> *Id.* art. 13(2).

II. Implementing the principles described in the Convention and its protocols, however, would prove far more challenging, particularly under the muddled circumstances of combat in a foreign, unfamiliar land. The absence of established procedures and the lack of oversight by trained cultural property specialists would further complicate any military operation conducted in and among important heritage sites.

#### IV. The Failure to Protect Cultural Property in the Iraq War: Babylon Revisited

The lack of a comprehensive program to identify monuments, historic buildings, and works of art prior to the U.S. invasion of Iraq, as well as the general absence of cultural property specialists on the battlefield, certainly exacerbated the military's missteps in Iraq. Having worked so tirelessly to save cultural heritage from the scourge of World War II, the U.S. military tread heavily across the battlefields of Iraq, destroying historic sites and cultural monuments in the process. While the extent of the United States' obligation to prevent looting during the early stages of the invasion has been much debated,<sup>183</sup> the duty to refrain from using historic and cultural sites was well-established long before the outbreak of the Iraq War. In accordance with article 4(1) of the 1954 Hague Convention, states undertake to respect cultural property by "refraining from any use of the property and its immediate surroundings . . . for purposes which are likely to expose it to destruction or damage in the event of armed conflict."<sup>184</sup> Although not a signatory to the Convention, the United States observed a similar rule in World War II.<sup>185</sup> Additionally, under the second part of article 4(1), state parties agree to refrain from directing "any act of hostility" against cultural property, a provision that has been interpreted to prohibit the demolition of cultural property for reasons short of imperative military necessity.<sup>186</sup>

Despite article 4(1)'s clear prohibition on the misuse of cultural property, Coalition forces in Iraq occupied a number of important heritage sites and cultural buildings during the war, including the ancient city of Ur<sup>187</sup>

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<sup>183</sup> See, e.g., Matthew D. Thurlow, Note, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE HUM. RTS. & DEV. L.J. 153 (2005). Article 4(3) of the 1954 Hague Convention imposes a duty to "undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed, against cultural property." 1954 Hague Convention, *supra* note 13, art. 4(3).

<sup>184</sup> 1954 Hague Convention, *supra* note 13, art. 4(1). Although limited on its face to armed conflict, article 18(2) extends article 4(1)'s prohibition to situations of belligerent occupation. See O'KEEFE, *supra* note 22, at 124.

<sup>185</sup> See Historical Monuments Memorandum, *supra* note 87.

<sup>186</sup> See O'KEEFE, *supra* note 22, at 130 ("[T]he demolition of cultural property in support of military operations, including belligerent occupation, is permissible only in cases where military necessity imperatively requires it – that is, where there is no feasible alternative for dealing with the situation.").

<sup>187</sup> See Abdulmir Hamdani, *The Damage Sustained to the Ancient City of Ur*, in THE DESTRUCTION OF CULTURAL HERITAGE IN IRAQ 151, *supra* note 9, at 151–55. Hamdani observes that Coalition troops, mainly from the United States, Italy, and Romania,

and the Malwiya Minaret in Samarra, which was famously used as a sniper position in support of Coalition operations.<sup>188</sup> The Coalition's occupation of Babylon, however, was probably the most protested example of the military's use of a cultural site during the war. As such, it highlights the consequences of the military's inadequate approach to the treatment of cultural property and underscores the value a corps of cultural property specialists could bring to future military commands.

The creation of a corps of specialized cultural property officers modeled on the monuments officers of World War II could help safeguard cultural objects in future military operations. With backgrounds in archaeology, art history, architecture, and other relevant disciplines, these officers would be responsible for advising commanders on issues related to cultural property and military operations. This might include identifying monuments, historic sites, collections of art, and the location of archives in a commander's area of operations. This might also involve advising commanders on the relative importance of cultural objects for purposes of weighing collateral damage under the proportionality balancing test. Lastly, cultural property officers would be responsible for educating U.S. forces more broadly on the importance of protecting cultural property. By inculcating a greater appreciation for works of artistic and cultural significance, cultural property officers could have a profound impact on U.S. forces before they ever set foot in a combat zone.

### A. *Background*

Located 90 km south of Baghdad, Babylon first appears in the historical record in the twenty-fourth century BCE. Known as the "door of the gods," Babylon was the capital of King Hammurabi (1792-1750 BCE),

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frequently visited the archaeological remains of Ur "without any restraint." *Id.* at 154. He argues that by "driving heavy military vehicles across the site" and by "wearing heavy boots as they trespass[ed] on the buildings," their presence "actually changed parts of the landscape" and "almost certainly, destroyed or damaged yet unexcavated artifacts and buildings . . . made only of baked or unbaked clay" still buried underground. *Id.*

<sup>188</sup> E.g., Josh White, *For U.S. Soldiers, A Frustrating and Fulfilling Mission*, WASH. POST (Jan. 2, 2005), at A12 ("Soldiers occupy this vantage point 24 hours a day, working in pairs for 12 hours at a time. . . . American commanders decided that placing snipers with .50-caliber rifles and powerful scopes in this circle of stone 10 feet in diameter, 180 feet above the ground, could deter the insurgents."); see also Aqeel Hussein and Colin Freeman, *US Snipers Make Minaret a Rebel Target*, TELEGRAPH (UK) (Jan. 22, 2006), <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1508506/US-snipers-make-minaret-a-rebel-target.html>, [<http://perma.cc/9Q58-92W8>]; René Teijgeler, *Embedded Archaeology: An Exercise in Self-Reflection*, in THE DESTRUCTION OF CULTURAL HERITAGE IN IRAQ 173, *supra* note 9, at 178; Patty Gerstenblith, *Change in the Legal Regime Protecting Cultural Heritage in the Aftermath of the War in Iraq*, in THE DESTRUCTION OF CULTURAL HERITAGE IN IRAQ 183, *supra* note 9, at 188. In his article, *Snipers in the Minaret*, Geoffrey Corn argues that assuming the minaret fell within the definition of cultural property, "the use was permissible based only on a determination of imperative military necessity." Geoffrey S. Corn, *Snipers in the Minaret—What Is the Rule?*, ARMY LAW., July 2005, at 28, 40.

the famous lawgiver whose Code of Hammurabi was the first written law code in human history.<sup>189</sup> Over the centuries Babylon thrived, and by the reign of King Nebuchadnezzar II (604-562 BCE), founder of the famous Hanging Gardens, Babylon had become the largest city in the ancient world. Babylon was so renowned that Alexander the Great considered establishing the city as his own capital in the fourth century BCE.<sup>190</sup>

United States forces arrived in Babylon in April 2003 after it had been abandoned by Iraq's Republican Guard.<sup>191</sup> Although it is unclear as to exactly why the U.S. military initially occupied the site—some charge the military acted out of sheer ignorance<sup>192</sup> while others contend the military sought to protect the ancient city from looters and vandals<sup>193</sup>—it is readily

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<sup>189</sup> See E.H.B., *The Code of Hammurabi* by Robert Francis Harper, AM. L. REG. Vol. 43, No. 9 (Sep. 1904) (book review) (describing the stelae on which the Code of Hammurabi was inscribed as “the most ancient legal writing in existence”); see also THE CODE OF HAMMURABI (Robert Francis Harper ed., 1904) (providing a translation of the Code of Hammurabi).

<sup>190</sup> Moussa, *supra* note 9, at 143. Philip Freeman describes the effect the city had on Alexander and his men: “Alexander had never seen anything to compare with Babylon. To his men from the poor villages of Macedonia, it was as if they had entered another world.” PHILIP FREEMAN, ALEXANDER THE GREAT 188 (2011).

<sup>191</sup> Łukasz Ołędzki, *Polish Activity on Behalf of the Protection of the Cultural Heritage of Iraq (2003-2006)*, in THE DESTRUCTION OF CULTURAL HERITAGE IN IRAQ, *supra* note 9, at 241, 250; see also CURTIS, *supra* note 12 (explaining that U.S. forces established a camp at Babylon in April 2003 and that command of the camp was turned over to Polish forces in September 2003).

<sup>192</sup> See, e.g., Zainab Bahrani, *The Battle for Babylon*, in THE DESTRUCTION OF CULTURAL HERITAGE IN IRAQ 165, *supra* note 10, at 165–71, Bahrani served as Senior Advisor to Iraq's Minister of Culture and helped negotiate the closure of Camp Alpha in the summer of 2004 on behalf of Iraq's State Board of Antiquities and Heritage. THE DESTRUCTION OF CULTURAL HERITAGE IN IRAQ, *supra* note 9, at 311. Bahrani writes:

[D]uring the dozens of meetings that I had with US offices on the matter of Babylon, in 2004, there was no-one [sic] who could answer the question of who it was that had taken the decision to occupy Babylon, or why. There was no-one [sic] who had any information about a decision, a plan or a strategy.

Bahrani, *supra*, note 10, at 169. Bahrani currently serves as the Edith Porada Professor of Ancient Near Eastern Art and Archeology in the Department of Art History and Archaeology at Columbia University. Dep't of Art History and Archaeology, Zainab Bahrani, COLUMBIA UNIV., <http://www.columbia.edu/cu/arhistory/faculty/Bahrani.html>, [http://perma.cc/72BX-3Z83] (last visited Mar. 7, 2014).

<sup>193</sup> See, e.g., Jonathan Charles, *US Marines Offer Babylon Apology*, BBC (Feb. 14, 2006), [http://news.bbc.co.uk/2/hi/middle\\_east/4908940.stm](http://news.bbc.co.uk/2/hi/middle_east/4908940.stm), [http://perma.cc/DA94-XK3K] (citing Colonel John Coleman, Chief of Staff, First Marine Expeditionary Force, as explaining that if U.S. forces had not moved into Babylon, the site “would have been left at the mercy of looters”); Ołędzki, *supra* note 191, at 250 (noting that Iraqi museum officials in Babylon requested assistance from the U.S. military following the burning of a “unique scientific archive” and that the “American decision to occupy Babylon was due in equal measure to strategic military considerations and the need to protect the site from plundering and devastation”). Ołędzki insists that the occupation of Babylon achieved its goal of containing looting, although he readily admits that the creation of Camp Alpha had serious repercussions for the Babylon. *Id.* at 250–51.

apparent that the Coalition's subsequent occupation of Babylon infringed on the duty to refrain from conduct likely to expose cultural property to damage or destruction.<sup>194</sup>

### B. *Damage Caused by the Coalition Occupation*

A survey of Babylon conducted by John E. Curtis of the British Museum in December 2004 detailed the condition of the site in the waning days of the Coalition military occupation.<sup>195</sup> Curtis's report describes a jumbled landscape of trenches, sandbags, HESCO barriers, and layers of crushed gravel. Several of the trenches, he notes, "apparently cut into ancient deposits."<sup>196</sup> Meanwhile, sandbags were apparently filled with soil strewn with artifacts,<sup>197</sup> and HESCO barriers were discovered containing ceramic shards, fragments of earthenware, and pieces of bone culled from the ancient site.<sup>198</sup> Curtis later explained that "[a]bout 300,000 square metres [sic] of the surface of the site ha[d] been flattened and covered with compacted gravel and sometimes chemically treated."<sup>199</sup> The presence of so much gravel would "contaminate the archaeological record of the site," he stated.<sup>200</sup>

Perhaps the most damaging aspect of the Coalition occupation, however, was the construction of a helicopter landing pad within the city of Babylon itself.<sup>201</sup> Curtis explains that Coalition forces significantly expanded an existing parking lot, which they "flattened, covered with compacted gravel and then treated with a petroleum product to prevent dust" to create the landing area.<sup>202</sup> While construction of the landing pad alone inflicted extraordinary damage, its repeated use had a similarly deleterious

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<sup>194</sup> See, e.g., CURTIS, *supra* note 12 (documenting the damage caused by the military occupation of Babylon).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* In an interview with BBC, Curtis stated that he had observed "about 12 trenches, one of them 170m long, which had been dug through the archaeological deposits." *Army Base Has 'Damaged Babylon,'* BBC (Jan. 15, 2005), [http://news.bbc.co.uk/2/hi/middle\\_east/4177577.stm](http://news.bbc.co.uk/2/hi/middle_east/4177577.stm), [<http://perma.cc/BG8E-MNUJ>].

<sup>197</sup> See, e.g., Charles, *supra* note 193 ("The soldiers also filled their sandbags with archaeological artefacts [sic], just because they were lying around and easy to pick up."); Jeffrey Gettleman, *Babylon Awaits and Iraq Without Fighting*, N.Y. TIMES (Apr. 18, 2006), <http://www.nytimes.com/2006/04/18/world/middleeast/18babylon.html>, [<http://perma.cc/BL6J-SJFD>] ("Archaeologists said American soldiers even used soil thick with priceless artifacts to stuff sandbags.").

<sup>198</sup> CURTIS, *supra* note 13 ("To the south of the Reno Gate for a distance of about 200m the road is lined by HESCO bags that have clearly been filled with deposits from the Babylon site, containing shards, bones, etc."); Moussa, *supra* note 9, at 148 (stating that some HESCO barriers contained "earthenware and ceramic fragments").

<sup>199</sup> *Army Base Has 'Damaged Babylon,' supra* note 196.

<sup>200</sup> *Id.*

<sup>201</sup> See, e.g., Ołędzki, *supra* note 191, at 251 ("When Camp Alpha occupied the site, the most severe damage was caused by the choice of location for the helicopter landing ground in the Kulabba zone.").

<sup>202</sup> CURTIS, *supra* note 12.

effect on the site.<sup>203</sup> On one occasion, the vibrations caused by landing helicopters caused the roof of a nearby building to collapse.<sup>204</sup> Overall, the presence of so many troops and heavy equipment, including helicopters and armored vehicles, undoubtedly caused far more damage than Curtis or other archaeologists could account for.<sup>205</sup> For a city built of mud and for a material culture made of clay, the rumbling, rattling intrusion of a modern army was devastating.

### C. Unsupportable Waiver for Military Necessity

The duty of article 4(1) of the 1954 Hague Convention Article—to refrain from exposing cultural property to damage or destruction—may be waived in cases of military necessity, and the U.S. military predictably adopted this argument to justify its occupation of Babylon.<sup>206</sup> As noted above, one common explanation for the occupation was the desire to prevent looting. Another rationale raised later involved the need to “further defeat terrorists and insurgents.”<sup>207</sup> The suggestion that imperative military necessity required the occupation of Babylon in either case, however, is unsupportable for the following reasons.

First, the prevention of looting, while consistent with the duty to respect cultural property outlined in the 1954 Hague Convention,<sup>208</sup> was not necessary to achieve the military defeat of the Iraqi Army. While the occupation of Babylon may in fact have curbed looting, the claim that the occupation of Babylon was *necessary* implies the prevention of looting was somehow imperative to the swift defeat of the Iraqi Army. This argument stretches credulity. In order for the occupation to have been justified under the principle of military necessity, the occupation would have had needed to be “indispensable for securing the complete submission of the enemy as

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<sup>203</sup> See Olędzki, *supra* note 191, at 251 (explaining that the creation of the helicopter landing pad involved leveling an area within the city of Babylon; digging sand pits into ancient tells; erecting observation towers on top of other tells; and emplacing fuel tanks into the ground around the site).

<sup>204</sup> Charles, *supra* note 193; cf. Bahrani, *supra* note 10, at 241 (claiming “at least two temple structures of the sixth century B.C.E.” collapsed due to helicopter flights into and out of Babylon).

<sup>205</sup> See, e.g., Olędzki, *supra* note 191, at 251 (“[T]he concentration of such a number of people and military equipment in a relatively small space must have had dire consequences for the condition of Babylon.”); Gettleman, *supra* note 197 (reporting the archaeologists believe “the use of heavy equipment, like helicopters and armored vehicles, . . . may have pulverized fragile ruins just below the surface”).

<sup>206</sup> See *Army Base Has ‘Damaged Babylon,’* *supra* note 196 (quoting a military spokesman as stating the base was needed to “further defeat terrorists and insurgents”).

<sup>207</sup> *Id.* The spokesman further insisted that “[a]ny of the excavation or earth works that we have done in order to do our operations . . . was done in consultation with the Babylon museum director and an archaeologist.” *Id.*

<sup>208</sup> 1954 Hague Convention, *supra* note 13, art. 4(3). Article 4(3) states that parties to the Convention “undertake to prohibit, prevent, and, if necessary, put a stop to any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against, cultural property.” *Id.*

soon as possible”<sup>209</sup> or otherwise “required . . . for the complete or partial submission of the enemy at the earliest possible moment.”<sup>210</sup> When Camp Alpha was established in April 2003, Coalition forces were ostensibly still fighting elements of Saddam Hussein’s Iraqi Army,<sup>211</sup> and the end of major combat operations would not be declared for another month.<sup>212</sup> Any argument for imperative military necessity would have been paper-thin at the time Camp Alpha was established, because U.S. forces had already captured Baghdad by April 9, ousting Saddam Hussein and toppling his Baathist regime.<sup>213</sup> Ultimately, the United States never sufficiently explained what motivated the initial occupation of Babylon. As a former Senior Advisor to the Iraqi Ministry of Culture explained, “When asked why the site of Babylon had been decided on as a military camp, no official was able to give an answer.”<sup>214</sup>

Second, the choice of Babylon as the site of a Coalition base was likely a matter of convenience rather than a compulsion of true military necessity. As noted above, the Republican Guard occupied the site before the arrival of U.S. forces in April 2003, and a number of alterations had already been made, including the addition of shooting ditches, mortar posts, and storage bunkers, to accommodate the unit’s military mission.<sup>215</sup> The site also encompassed a modern palace compound built by Saddam Hussein for his son Qusay who commanded the Republican Guard.<sup>216</sup> Given this pre-existing infrastructure, the establishment of a U.S. military base at the site would certainly have been expedient at the time.

As Eisenhower warned, however, military convenience should never be mistaken for military necessity, and under the circumstances, the military

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<sup>209</sup> FM 27-10, *supra* note 21, para. 3(a).

<sup>210</sup> THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 21, para. 2.2.

<sup>211</sup> DONALD P. WRIGHT AND TIMOTHY R. REESE, THE UNITED STATES ARMY IN OPERATION IRAQI FREEDOM, MAY 2003 – JANUARY 2005 at 9–21 (2008).

<sup>212</sup> Press Release, The White House, *President Bush Announces Major Combat Operations in Iraq Have Ended* (May 1, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030501-15.html>, [<http://perma.cc/E8RS-36RL>].

<sup>213</sup> WRIGHT AND REESE, *supra* note 211, at 19 (“By 9 April organized resistance ceased and the Americans appeared to be in control of the Iraqi capital.”); *id.* at 9 (“In early April 2003, Coalition forces led by the US Army overwhelmed the Iraqi Army, captured the ancient city of Baghdad, and toppled the Baathist regime that had controlled Iraq for over 30 years.”).

<sup>214</sup> Bahrani, *supra* note 10, at 244.

<sup>215</sup> *E.g.*, Olędzki, *supra* note 191, at 250, 251 (“[W]hen the Iraqi Republican Army occupied the site prior to 2003, they built shooting ditches, mortar posts and storage bunkers.”).

<sup>216</sup> *See, e.g.*, MULTINATIONAL DIVISION CENTER-SOUTH IRAQ, REAL ESTATE REPORT OF CAMP ALPHA (2004) (reporting that Camp Alpha included “a former palace complex of Saddam Hussein located amidst the ruins of the ancient city of Babylon”); Olędzki, *supra* note 191, at 250 (“The area included a museum compound and a modern palace compound, belonging to the sons of Saddam Hussein.”). Saddam Hussein’s son, Qusay, commanded the Republican Guard. Exec. Order No. 13, 315, 68 Fed. Reg. 52,315 annex (Sept. 3, 2003) (identifying Qusay Hussein al-Tikriti as the commander of the Republican Guard).

could have chosen an alternate site.<sup>217</sup> Nothing in the historical record indicates the occupation of Babylon fulfilled an imperative operational need.<sup>218</sup> In fact, after returning control of Camp Alpha to the Iraqi Ministry of Culture, Coalition forces relocated to Camp Echo near the city of Diwaniyah where they continued to fight “terrorists and insurgents” without any apparent decrease in capability or effectiveness.<sup>219</sup> Overall, scant evidence exists to establish the imperative military necessity of occupying Babylon, rather than an alternative site, to prosecute the war.<sup>220</sup> The choice appears to have been one of military convenience rather than of imperative military necessity.<sup>221</sup>

#### D. Breach of the Duty to Protect Cultural Property in Babylon

The damage U.S. and Coalition forces inflicted on Babylon breached the duty to protect cultural property in Iraq, including the duty to refrain from the demolition of cultural property described in article 4(1) of the 1954 Hague Convention. Although the United States had signed but not ratified the 1954 Hague Convention when Camp Alpha was established,<sup>222</sup> the United States arguably had a duty not to violate the “object and purpose” of

<sup>217</sup> Historical Monuments Memorandum, *supra* note 87.

<sup>218</sup> See, e.g., Olędzki, *supra* note 191, at 254 (observes that undoubtedly it would be “difficult to support the idea of establishing a military camp in the very centre of a place such as Babylon”). Olędzki served as a specialist for the protection of cultural heritage in Multination Division – Center-South with oversight over Babylon. THE DESTRUCTION OF CULTURAL HERITAGE IN IRAQ, *supra* note 10, at 316.

<sup>219</sup> See, e.g., *Camp Babylon*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/iraq/camp-babylon.htm>, [http://perma.cc/ND2H-63PT] (last modified Sept. 7, 2011) (reporting that Polish-led forces handed over Camp Alpha, also known as Camp Babylon, to the Iraqi Ministry of Cultural in January 2005); *New Base in Diwaniyah Safer for Soldiers, Poland’s Depute Defense Minister Says*, AP WORLDSTREAM (Nov. 10, 2004) (“Poland’s deputy defense minister said Wednesday that a new base in Diwaniyah in Iraq will be safer than the current headquarters near the historic ruins of the ancient city of Babylon.”); MIROSLAW OLBRYŚ, REPORT ON THE CURRENT CONDITION OF THE BABYLON ARCHAEOLOGICAL SITE (THE MILITARY CAMP ALPHA SITE) (2004) (stating that Camp Alpha would be closed and moved to Diwaniyah).

<sup>220</sup> See Historical Monuments Memorandum, *supra* note 87.

<sup>221</sup> *Id.* Bahrani goes even further, arguing that the occupation of Babylon was a “deliberate symbolic expression of power over Mesopotamia.” *Id.* at 244. She asserts, “The occupation of sites such as Babylon and the images of military force at the ancient ruins can be described as an aesthetic of occupation, a display of force that uses the sign of history and its control as a statement of victory.” *Id.* Whether true or not, Bahrani’s comments highlight the issue of perception and the scrutiny military forces inevitably face when they encounter monuments, historic buildings, and other objects of cultural significance.

<sup>222</sup> MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (THE CONVENTION) AND, FOR ACCESSION, THE HAGUE PROTOCOL (concluded May 14, 1954, and entered into force on August 7, 1956 with ACCOMPANYING REPORT FROM THE DEPARTMENT OF STATE ON THE CONVENTION AND THE HAGUE PROTOCOL, S. Treaty Doc. No. 106-1, at III, (1999) (“The Convention was signed by the United States on May 14, 1954, the same day it was concluded . . .”).

the treaty and was otherwise bound by other international agreements,<sup>223</sup> including the 1907 Hague Regulations and the Roerich Pact, to respect and protect Iraqi cultural property.<sup>224</sup> This would have included the obligation to refrain from demolishing large areas of Babylon to create and expand Camp Alpha for reasons other than imperative military necessity.

Article 4(1) of the 1954 Hague Convention proscribes two types of conduct in relation to cultural property: use of cultural property likely to expose it to destruction or damage and acts of hostility directed against cultural property. The first part of article 4(1) prohibits the use of cultural property and its surroundings “for purposes which are likely to expose it to destruction or damage.”<sup>225</sup> This includes any use likely to expose cultural property to attack, whether directly or indirectly. For example, the use of the Malwiya Minaret as a sniper position would have implicated the first part of article 4(1) because by drawing fire on the minaret, U.S. forces exposed the ancient spire to destruction or damage.<sup>226</sup> The first part of article 4(1) also prohibits the use of protected buildings as headquarters or barracks when such use is likely to cause more than *de minimis* deterioration.<sup>227</sup>

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<sup>223</sup> Corn, *supra* note 188, at 35; *see* CONG. RESEARCH SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. REP. NO. 106-71, at 113 (2001) (explaining the provisional application of treaties in the interim between signing and entry into force). Under customary international law, a state must refrain from acts that would defeat the “object and purpose” of an international agreement if it has signed the agreement and not otherwise expressed a clear intent not to become a party to the agreement. Vienna Convention on the Law of Treaties, art. 18, U.N. Doc. A/CONF.39/27 (1969), *reprinted in* AM. J. INT’L L. 875 (1969); *see also* Corn, *supra* note 188, at 35–36 (asserting that termination of the article 18 “object and purpose” obligation is understood to require “some action at the international level, such as submitting a formal diplomatic note to the treaty depository”). The “object and purpose” rule, which derives from article 18 of the Vienna Convention on the Law of Treaties, would have limited the United States’ ability to stray too far from the requirements of article 4(1). *See, e.g.*, CONG. RESEARCH SERV., *supra*, at 113; Corn, *supra* note 188, at 35. In any case, as President William J. Clinton explained when he transmitted the 1954 THE MANUAL OF THE LAW OF ARMED CONFLICT to the U.S. Senate for ratification, “United States military policy and the conduct of operations [have been] entirely consistent with the Convention’s provisions.” President William J. Clinton, Message to the Senate Transmitting the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Jan. 6, 1999).

<sup>224</sup> *See* 1954 Hague Convention, *supra* note 14, arts. 23(g), 27, and 56; Roerich Pact, *supra* note 70, art. 1.

<sup>225</sup> 1954 Hague Convention, *supra* note 14 art. 4(1).

<sup>226</sup> Corn, *supra* note 188, at 37. Corn explains that “use of cultural property as an observation position appears consistent with the principles reflected in the Cultural Property Convention if such use is the only feasible means available for the commander to achieve a valid military objective.” *Id.* He further opines that the “key consideration in analyzing the permissibility of such use would be the legitimacy of the conclusion that no other feasible alternate was available to achieve the important military objective.” *Id.* In other words, even though the use of the minaret for a military purpose implicated article 4(1), its use would have been permissible if no feasible alternative could have achieved the critical military objective that compelled its use.

<sup>227</sup> *See* O’KEEFE, *supra* note 22, at 124 (stating that “the provision forbids any use likely to expose cultural property to damage during armed conflict” that is likely to result in “more than *de minimis* deterioration in the fabric of the monument”). Although Coalition forces

The second part of article 4(1) forbids directing “any act of hostility” against cultural property. O’Keefe points out that the term “any act of hostility” is “significant in forbidding not just attacks against cultural property but also its demolition, whether by way of explosives or bulldozers or other wrecking equipment.”<sup>228</sup> O’Keefe further observes that “the demolition of cultural property in support of military operations, including during belligerent occupation, is permissible only in cases where military necessity imperatively requires it—that is, where there is no feasible alternative for dealing with the situation.”<sup>229</sup> The available evidence suggests that U.S. forces did not have to occupy Babylon at all. Rather, U.S. forces established a military base in Babylon because facilities were available and the transition was expected to be convenient. Additionally, the digging, bulldozing, leveling, and fortifying that occurred after Camp Alpha had been established were unnecessary. These modifications were made to accommodate a growing Coalition presence, not to satisfy any identifiable and imperative military requirement. As such, they constituted unlawful demolitions in contravention of the second part of article 4(1).

Lastly, it should be noted that the Republican Guard’s use of Babylon did not relieve U.S. or Coalition forces from the duty to respect cultural property under international law. In other words, the Republican Guard’s use of Babylon as a military base did not *ipso facto* justify the Coalition’s reuse of the site for the same purpose. For the reasons already discussed, only imperative military necessity could have justified the occupation of Babylon and the subsequent demolitions that damaged fragile areas of the archaeological site.

Although the temptation to occupy and then hold the enemy’s former positions must have been great, U.S. and Coalition forces remained obligated under international law to evaluate their conduct in light of cultural property. Cultural property officers accompanying the force could have prevented the initial occupation of Babylon or, barring that, could at least have forestalled much of the conduct that subsequently vitiated the military’s use of the site. For example, like their predecessors in the MFA&A, these cultural specialists could have used simple signs to place sensitive cultural sites off limits. They could also have intervened personally to prevent the demolition of sensitive heritage areas. Lastly, they could have raised the issue of protection and preservation up the chain of command far sooner, potentially preventing or minimizing much of the subsequent damage. The military’s failure to respect and protect Babylon, the origin of the world’s

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did occupy several culturally important buildings in Babylon, including the Hammurabi Museum and the Greek Theater, use of these structures apparently did not cause significant damage. See, e.g., CURTIS, *supra* note 13; REAL ESTATE REPORT OF CAMP ALPHA, *supra* note 213.

<sup>228</sup> O’KEEFE, *supra* note 22, at 126 (internal citation omitted).

<sup>229</sup> *Id.* at 130.

first written code of law, breached modern provisions of law designed to protect cultural property.

## V. The Role of Cultural Property Officers in Future Military Operations

Despite the predominantly negative publicity, the United States did achieve some successes with respect to cultural property during the Iraq War. Rather than validating the U.S. military's *ad hoc* approach, however, these positive examples underscore the need for a more structured program of oversight that ensures cultural property is adequately accounted for during military operations. The program would include the creation of a corps of specialized cultural property officers responsible for advising commanders on cultural heritage issues and military operations. These officers would identify movable and immovable cultural property both before and during the outbreak of hostilities. They would also advise commanders on the relative importance of cultural objects for purposes of evaluating incidental damage under the proportionality balancing test. Finally, as a general matter, these officers would have primary responsibility for educating U.S. forces on the importance of cultural heritage and the significance of cultural objects in their particular areas of operations.

As the occupation of Babylon demonstrated, commanders and their forces are often oblivious to the impact they have on cultural property. The presence of cultural property advisors on the battlefield would help ensure monuments, historic buildings, and other objects of cultural value receive the attention and consideration they deserve during armed conflict.

### A. *Failure of the Army's Ad Hoc Approach to Cultural Property*

Many stories regarding the successful protection of cultural property during the Iraq War tend to share a common theme: serendipity.<sup>230</sup> One positive anecdote describes how an “observant young soldier” at Forward Operating Base (FOB) Hammer realized contractors were filling HESCO barriers with archaeological material and dutifully reported the conduct to

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<sup>230</sup> See, e.g., Lance M. Bacon, *U.S. Troops Saved Art as the 'Monuments Men' of Iraq*, ARMYTIMES.COM (Feb. 17, 2014), <http://www.armytimes.com/article/20140217/NEWS/302170033/U-S-troops-saved-art-Monuments-Men-Iraq>, [http://perma.cc/76UJ-QJET] (citing the discovery of confiscated “Jewish communal and religious books and documents” during a search for weapons of mass destruction); Laurie Rush, *Cultural Property Protection as a Force Multiplier in Stability Operations*, MIL. REV., Mar.-Apr. 2012, at 36 (describing how an observant soldier noticed HESCO barriers were being filled with archaeological material and reported the conduct to his chain of command). More deliberate attempts to recover lost or stolen art, including art looted from the Baghdad Museum, have also yielded positive results, but because the recovery of cultural property remains outside the scope of this paper, those endeavors are not addressed here. See, e.g., MATTHEW BOGDANOS, *THIEVES OF BAGHDAD* (2005) (describing investigations leading to the recovery of thousands of looted artifacts, including the Sacred Vase of Warka, the Mask of Warka, and the Bassetki Statue).

his chain of command.<sup>231</sup> His commander quickly halted the practice.<sup>232</sup> Another example relates how members of a team searching for weapons of mass destruction accidentally stumbled on an Iraqi Jewish archive containing thousands of confiscated books and documents in a flooded basement.<sup>233</sup> The archive was salvaged and eventually restored by preservation specialists.<sup>234</sup>

As encouraging as these outcomes may appear, these stories also highlight the dubious and haphazard nature of the U.S. military's cultural property protection efforts in Iraq. This *ad hoc* approach to cultural property cannot be the standard by which future operations are compared; the protection of cultural property must be more than the product of mere happenstance. To be truly effective, the protection of cultural property must be pursued in an informed and methodical fashion, and it must be coordinated by experts knowledgeable in archaeology, art history, architecture, and other relevant disciplines charged with protecting cultural property during military operations.

### B. Identifying Movable and Immoveable Cultural Property

As discussed above, the international humanitarian law principle of distinction requires that belligerents distinguish between civilian objects and military objectives. Protecting cultural property in armed conflict requires an additional step: the identification and further differentiation of cultural property from more general civilian objects. Determining what objects constitute cultural property, however, can be difficult, especially when they have not been explicitly identified beforehand. International instruments, such as the Roerich Pact and the 1954 Hague Convention, have endeavored to identify cultural property through various means, including the physical marking of cultural property<sup>235</sup> and the publication of lists of cultural property,<sup>236</sup> but these forms of identification have frequently proven of

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<sup>231</sup> RUSH, *supra* note 19, at 38.

<sup>232</sup> *Id.*

<sup>233</sup> Bacon, *supra* note 230. The archive was found in one of Saddam Hussein's intelligence buildings. *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> See, e.g., 1907 Hague Regulations, *supra* note 27, art. 27 ("It is the duty of the besieged to indicate the presence of [protected buildings or places] by distinctive and visible signs, which shall be notified to the enemy beforehand."); Roerich Pact, *supra* note 70, art. 3 ("In order to identify monuments and institutions mentioned in article 1, use may be made of a distinctive flag . . ."); 1954 Hague Convention, *supra* note 13, art. 17 (outlining use of the Convention's distinctive emblem to mark, *inter alia*, immovable cultural property under special protection and cultural property under general protection), art. 6 (requiring cultural under special protection be marked with the distinctive emblem of the Convention).

<sup>236</sup> See, e.g., Roerich Pact, *supra* note 70, art. 4 (declaring that signatory governments "shall send to the Pan American Union . . . a list of the monuments and institutions for which they desire the protection agreed to in this Treaty" and further explaining that the Pan American Union will send the list when notifying governments of signatures or accessions to the pact); 1999 Second Hague Protocol, *supra* note 160, art. 11 (requiring that parties seeking enhanced protection for cultural property submit a list of the property for which it desires

limited value in practice. In the absence of complete or reliable information, cultural property specialists trained to identify cultural objects and verify the status of cultural property could fulfill a critical role during armed conflict.

The concept of marking cultural property with a sign or distinctive emblem to communicate its protected status is not new. The 1907 Hague Regulations declared it the duty of the besieged to indicate the presence of buildings dedicated to art, historic monuments, and other enumerated cultural property “by distinctive and visible signs.”<sup>237</sup> While the 1907 Hague Regulations did not specify a design, the Roerich Pact included a description of its protective emblem. The “distinctive flag” of the Roerich Pact, later known as the “Banner of Peace,” was described as a “red circle with a triple red sphere in the circle on a white background.”<sup>238</sup> The most recognizable protective emblem for cultural property, however, is probably the distinctive emblem of the 1954 Hague Convention. Defined as “a shield, pointed below, per saltire blue and white,”<sup>239</sup> the emblem can be used alone to denote cultural property entitled to general protection or “repeated three times in a triangular formation (one shield below)” to identify cultural property entitled to special protection.<sup>240</sup> In either case, use of the distinctive emblem is intended to facilitate recognition of cultural property.<sup>241</sup>

The ability to mark cultural property and the existence of protective emblems, however, does not guarantee that all cultural property will actually be marked during armed conflict. First, not all cultural property is eligible to be marked with a special symbol. The distinctive flag of the Roerich Pact, for example, is reserved only for the historic monuments and institutions enumerated in article 1 of the pact. All movable cultural property falls outside the orbit of the agreement. Second, use of protective emblems, such as the distinctive emblem of the 1954 Hague Convention, may be impractical.<sup>242</sup> For instance, while movable cultural property may be marked with the emblem of the 1954 Hague Convention, affixing the symbol to most movable works of art—including paintings, sculptures, a ceramics—would be aesthetically jarring<sup>243</sup> and could even cause unintended damage.<sup>244</sup>

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enhanced protection and further providing that enhanced protection “shall be granted to cultural property . . . from the moment of its entry on the [International List of Cultural Property under Enhanced Protection]”).

<sup>237</sup> 1907 Hague Regulations, *supra* note 27, art. 27. The 1907 Hague Regulation did not specify a design for its requisite signs.

<sup>238</sup> Roerich Pact, *supra* note 70, art. 3. For more information on the distinctive flag of Roerich Pact, see note 69, above.

<sup>239</sup> 1954 Hague Convention, *supra* note 14, art. 16(1). The Convention further describes the distinctive emblem in layman’s terms as “a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle.” *Id.*

<sup>240</sup> *Id.* art. 16(2), art. 17.

<sup>241</sup> *Id.* art. 6.

<sup>242</sup> See 1907 Hague Regulations, *supra* note 27, at art 6; O’KEEFE, *supra* note 22, at 117.

<sup>243</sup> See O’KEEFE, *supra* note 22, at 117 (suggesting that “practicality and aesthetics” militate against using the distinctive emblem on movable cultural property).

Finally, many states simply choose not to mark cultural property<sup>245</sup> as use of the distinctive emblem of the 1954 Hague Convention is not obligatory.<sup>246</sup> As O’Keefe observes, marking cultural property can be expensive, time consuming, and in an era of long-range, over-the-horizon weapons, ultimately futile.<sup>247</sup> The absence of a distinctive emblem, therefore, is not dispositive of a lack of protection; most cultural property is not formally marked.<sup>248</sup>

The inclusion of cultural property on published lists or inventories can supplement the visual marking regime, but these lists are also not entirely reliable. As noted in Section IV.A above, states individually decide what property within their territory constitutes cultural property for purposes of article 1 of the 1954 Hague Convention.<sup>249</sup> Article 26 of the Vienna Convention on the Law of Treaties imposes a duty to exercise this discretion in good faith, but even when states have acted reasonably and in good faith, different interpretations of article 1 can yield inventories of varying breadth.<sup>250</sup> Some cultural property lists are comprised entirely or in substantial part of a state’s own domestic catalogue of national heritage, which can include tens of thousands of items.<sup>251</sup> Other lists, like that of Spain, can be much more limited; Spain’s formal inventory of national cultural property virtually mirrors the items it submitted for inclusion on the UNESCO World Heritage List, a list comprised of just a few dozen Spanish items.<sup>252</sup> Arguably, a state like Spain possesses more movable and immovable cultural property than is accounted for in its official inventory.

A state’s failure to mark or otherwise identify cultural property located within its territory does not relieve an opposing party of the duty to protect that property during armed conflict. Under the 1954 Hague Convention, the obligation to respect cultural property located within the territory of another high contracting party endures regardless of whether such property has been expressly identified. As a practical matter, this means

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<sup>244</sup> See *id.* at 117 (“Ironically, a concern for the preservation . . . of the cultural property in question can contraindicate marking.”).

<sup>245</sup> See *id.* at 118 (observing that “selective use of the emblem” is “not uncommon among the Parties”); *id.* at 118 n.115 (explaining that Iraq refused to mark cultural property during the Iran–Iraq War because officials believed Iran would exploit the use of the distinctive emblem to aid in attacks).

<sup>246</sup> See 1907 Hague Regulations, *supra* note 27, art 6; O’KEEFE, *supra* note 22, at 117.

<sup>247</sup> O’KEEFE, *supra* note 22, at 117–18. Several states have proposed using technology to ameliorate some of the limitations of the protective emblem. *Id.* at 118.

<sup>248</sup> See 1907 Hague Regulations, *supra* note 27, art. 6; O’KEEFE, *supra* note 22, at 118 (“[T]he absence of the distinctive emblem does not, as a matter of law, denote the absence of protection under the Convention . . .”).

<sup>249</sup> See also O’KEEFE, *supra* note 22, at 105 (“[A]rticle 1 devolves to each Party the discretionary competence to determine the precise property in its territory to which the Convention applies.”).

<sup>250</sup> See *id.* at 107 (providing a sampling of figures for items under protection from various states).

<sup>251</sup> See *id.* at 106–08.

<sup>252</sup> *Id.* at 108.

the opposing party must determine what enemy structures and objects fall within the definition of cultural property established in article 1 of the Convention.<sup>253</sup> Because a state's cultural property is generally reflective of its "great importance to the national cultural heritage" of the state, an opposing party forced to make this determination may have difficulty assessing what is and is not culturally important.<sup>254</sup> O'Keefe suggests the "safest course" is to "err on the side of caution" and presume that every example of cultural property described in article 1—all movable and immovable property described in paragraph (a), every building described in paragraph (b), and every "centre containing monuments" described in paragraph (c)—should be protected.<sup>255</sup> Ideally, this identification process would take place before hostilities begin. Otherwise, cultural property officers trained to recognize movable and immovable objects of cultural significance could assist commanders to make these determinations after war has begun.

Identifying cultural property on the battlefield is essential to protecting such property on the battlefield. While the use of distinctive emblems can help distinguish cultural property, not all eligible property is consistently marked. Meanwhile, published lists or inventories of cultural property can be extensive and potentially overwhelming. In rarer cases, neither emblems nor a published list may exist to identify a state's cultural property. In each of these circumstances, trained cultural property officers could aid in the identification of cultural property. Potentially, the initial occupation and later demolitions that occurred in Babylon could have been avoided if a cultural property officer had been present with U.S. forces in April 2003 to identify Babylon as a cultural heritage area. In future conflicts, cultural property officers could help ensure movable and immovable objects are identified early and are appropriately protected during military operations.

### *C. Advising Commanders on Cultural Property and Military Operations*

In addition to assisting with identification, cultural property officers might also advise commanders on issues more directly related to military operations, including targeting that implicates cultural property. On the one hand, article 4(1) of the 1954 Hague Convention prohibits attacks against cultural property except in cases of imperative military necessity. On the other hand, the Convention does not address attacks that result in incidental damage to cultural property. The lawfulness of these latter forms of attack must be evaluated in accordance with more general principles of international law, particularly the principle of proportionality.<sup>256</sup>

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<sup>253</sup> *Id.* at 111.

<sup>254</sup> *See id.* (explaining that the "opposing Party must hazard an assessment as to the cultural importance of the property in question to the territorial Party").

<sup>255</sup> *Id.*

<sup>256</sup> *See* Section II.C, *supra*.

Determining the weight afforded to civilian objects under the proportionality balancing analysis, however, can become complicated when those objects are considered cultural property.

Arguably, cultural property should be afforded greater weight than other civilian objects under the proportionality balancing test.<sup>257</sup> According to *The Manual of the Law of Armed Conflict*, the characteristics of a target must be considered when evaluating military advantage for purposes of proportionality.<sup>258</sup> Similarly, the characteristics of civilian property should be accounted for in the proportionality analysis. Just as an attack on two qualitatively different military objectives may be expected to yield different degrees of military advantage, incidental damage caused to two qualitatively different civilian objects will result in different degrees of civilian harm. Incidental damage caused to the Great Pyramid of Giza, for example, would be qualitatively different than incidental damage to the pyramid-shaped Luxor Hotel in Las Vegas even though both, strictly speaking, are civilian objects for purposes of the proportionality test.

The U.S. Army's *Operational Law Handbook* states that balancing between incidental damage to civilian objects and anticipated military advantage may be done on a "target-by-target basis."<sup>259</sup> This analysis must ensure both sides of the proportionality equation are equally evaluated and that the value assigned to civilian objects must reflect qualitative differences among civilian property. When cultural property, as a subset of civilian property, is implicated, evaluating the expected incidental damage to civilian objects can become even more nuanced, and more esoteric.

Cultural property officers could assist commanders to weigh collateral damage on the civilian side of the equation. As experts, their insights could prove critical to determining the excessiveness of incidental damage in relation to military advantage. On a more pragmatic level, the destruction of cultural property can have far more serious consequences than the destruction of ordinary civilian objects, and commanders should be aware of those consequences before engaging in military action. As advisors to commanders, cultural property officers could help fill out the operational picture during the decision making process.

Importantly, the advice of cultural property officers should not be confused with legal advice on treaty compliance, the law of armed conflict,

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<sup>257</sup> *But see* Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, (U. Chi. L. Sch. Pub. Law & Legal Theory Working Paper No. 141, Nov. 2006), at 12 (arguing generally that "cultural property is not different from property in general" and that cultural property does not deserve "greater protection under international law than ordinary property").

<sup>258</sup> *See* U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT*, para. 5.33.4 ("In deciding whether an attack would be indiscriminate, regard must also be had to the foreseeable effects of the attack. The characteristics of the target may be a factor here.").

<sup>259</sup> INT'L & OPERATIONAL LAW DEP'T, *THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH.*, U.S. ARMY, *OPERATIONAL LAW HANDBOOK* 13 (2013).

or any other legal issue affecting the command. In the U.S. Army, only attorneys detailed to the Judge Advocate General's Corps, civilian attorneys under the qualifying authority of the Judge Advocate General of the Army, and other select attorneys within the Department of the Army may engage in the practice of law,<sup>260</sup> including advising commanders on interpretations of law or legal authority.<sup>261</sup> Instead, cultural property officers would help inform commanders' decisions by lending their unique historical and cultural insights to the decision making process.

### Conclusion

American author and historian Will Durant once observed, "Most of us spend too much time on the last twenty-four hours and too little on the last six thousand years."<sup>262</sup> The military is no different in this regard. War compresses time. Combat begets immediacy. As an institution, however, the military must resist the temptation to perceive time so shallowly. Sometimes, commanders must curb the impulse to value convenience over prudence and swiftness over thoughtful action. Sometimes, commanders must peer deep into the past for perspective and guidance on the judicious application of military power.

Recognizing the transcendent quality of cultural property, international law has evolved to provide greater protections for cultural objects in armed conflict. These archetypes of human ingenuity and the human imagination represent the "cultural heritage of all mankind," and they deserve to be preserved for posterity. Emmerich de Vattel understood this. Writing in the mid-eighteenth century, he declared that buildings "should be spared which are an honour to the human race and which do not add to the strength of the enemy . . . . It is the act of a declared enemy of the human race . . . wantonly to deprive men of these monuments of art and models of architecture."<sup>263</sup> Francis Lieber understood this as well. The Lieber Code included an early prescription to secure cultural objects "against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded."<sup>264</sup> Finally, Eisenhower, Roberts, and the members of the MFA&A understood this. Serving in the cataclysm of a world war, these individuals went out of their way to safeguard cultural property from the vicissitudes and uncertainties of armed conflict.

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<sup>260</sup> U.S. DEP'T OF ARMY, REGULATION 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 4-3, (Sept. 30, 1996) (RAR, Sept. 13, 2011).

<sup>261</sup> *Id.* at 60.

<sup>262</sup> History and Current Events Newsletter, LIBRARY AWARE (Feb 2014), <http://www.libraryaware.com/989/NewsletterIssues/ViewIssue/29fe5d40-28b7-47d8-98bd-25da88b6eb4f?postId=96ba09f4-363a-4689-92dc-8e1258544347>, [http://perma.cc/STY4-FZQZ].

<sup>263</sup> E. DE VATTEL, 3 THE LAW OF NATIONS, OR PRINCIPLES OF NATURAL LAW 293 (Charles G. Fenwick trans., 1916) (1758).

<sup>264</sup> Lieber Code, *supra* note 20, art. 35.

Unfortunately, lessons learned become lessons squandered when institutions fail to internalize them. The MFA&A of World War II set an admirable example of how an army can simultaneously protect cultural property while waging a bitter, protracted war. The Iraq War, however, demonstrated that the experience was perishable, that the failure to institute a permanent corps of cultural property specialists after World War II had degraded the military's ability to identify and safeguard cultural property in armed conflict. As a result, thousands of years of human history in the Cradle of Civilization, the birthplace of Abraham, the land of Hammurabi, Nebuchadnezzar, and Gilgamesh were bulldozed over, scraped away, or packed into fabric sacks for use as blast barriers. Those focused on the twenty-four-hour information cycle that drove military operations barely noticed.

After World War II, the United States helped inspire the creation of the 1954 Hague Convention. Likewise, the Roberts Commission served as the model for the advisory committees each nation was asked to adopt to protect cultural property.<sup>265</sup> Today, the MFA&A might also serve as an example. A corps of cultural property officers based on the monuments officers of the MFA&A would not only honor the noble precedent set in World War II but would also have a profound and positive impact on the way cultural objects are protected in armed conflict. John F. Kennedy once said, "I am certain that after the dust of centuries has passed over our cities, we, too, will be remembered not for our victories or defeats in battle or in politics, but for our contribution to the human spirit."<sup>266</sup> Once a paragon in the effort to protect cultural property in war, the United States can yet reclaim its former idealism. The United States could start by reestablishing a corps of dedicated cultural property officers in the armed forces.

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<sup>265</sup> O'KEEFE, *supra* note 22, at 115–16.

<sup>266</sup> John F. Kennedy, "Remarks at a Closed-Circuit Television Broadcast on Behalf of the National Cultural Center, November 29, 1962," in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY, 1962, at 846–47 (1963).