

Cultural Property Protection in Stability Operations

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Introduction

Cultural property protection has, once more, risen to a level of prominence in the law of war. The Treaty Priority List for 2007,¹ a message from the Executive Branch to Congress that conveys support for the ratification of treaties, included the 1954 Hague Cultural Property Convention² for the first time in this administration. On 15 April 2008, several key administration officials testified before the Senate Foreign Relations Committee on this convention and several other law of war treaties. In his opening remarks for the hearing, John Bellinger, the Legal Counsel for the Secretary of State, noted the efforts of the military in applying the 1954 Hague Convention in warfare: “After some fifty years of experience, we have concluded that U.S. practice is entirely consistent with this Convention and that ratifying it will cause no problems for the United States or for the conduct of U.S. military operations.”³ Although the Convention is yet unratified, Department of Defense (DOD) policy is to apply the law of war (of which the 1954 Hague Convention is an integral part) “during all armed conflicts, however such conflicts are characterized, and in all other military operations.”⁴ Over the last several decades, the result of U.S. adherence to these standards in armed conflict has been manifested in our conduct on the battlefield. But what of the application of this Convention in less certain times, during the post-conflict or stability phase of operations?

The protection of cultural property should serve as a key focal point in stability operations and counter-insurgency efforts by the U.S. military, even if such protection is not required as a matter of law. If the center of gravity of the counter-insurgency (COIN) fight is the people,⁵ then their cultural heritage is the conscience of the people, often serving as their ethnic or religious touchstone—or even a flashpoint for opposing ethnic groups—and a visible symbol of their society. Three illustrations of the importance of cultural property are available from recent United States and coalition operations: the protection of Eastern Orthodox monasteries in Kosovo; the destruction of the 1200 year-old spiral minaret in Samarra, Iraq;⁶ and the looting of the Iraqi National Museum.⁷ As a matter of law, each deserved varying degrees of protection from the ravages of warfare, ethnic hatred, and post-conflict chaos. However, it is clear, as a matter of policy, that their protection serves the interests of peaceful resolution and stability in the post-conflict phase of military operations. Evolving military doctrine in this area would do well to provide for the essential security and restoration or preservation requirements of similar cultural icons in the future.

The requirements for military forces to respect cultural property during international armed conflict are relatively clear. Hays Parks, the Deputy General Counsel for Law of War Matters in the DOD General Counsel’s Office, and several others have provided an exhaustive review of cultural property protections during armed conflict.⁸ The Hague Cultural Property

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¹ U.S. Department of State, *Treaties Pending in the Senate*, <http://www.state.gov/s/l/treaty/pending/> (last visited Oct. 1, 2008). Just prior to publication of this article, the U.S. Senate provided its advice and consent to 1954 Hague Cultural Property Convention. See S. EXEC. REP. 110-26 (2008).

² Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, reprinted in ADAM ROBERTS & RICHARD GUELFF, *DOCUMENTS ON THE LAW OF WAR* 374 (2001) [hereinafter 1954 Hague Convention]. The Convention was finally submitted for ratification in 1999. Letter of Transmittal from President Clinton to the Senate Committee on Foreign Relations, Treaty Doc. 106-1 (Jan. 6, 1999), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_documents&docid=f:td001.106.pdf.

³ *Hearing Before the S. Comm on Foreign Relations.*, 110th Cong. 3 (Apr. 15, 2008) (testimony of John B. Bellinger, Legal Advisor, Dep’t of State), available at <http://foreign.senate.gov/testimony/2008/BellingerTestimony080415p.pdf>.

⁴ U.S. DEP’T OF DEFENSE, DIR. 2311.01E, DoD LAW OF WAR PROGRAM 2 (9 May 2006).

⁵ U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1–28 (15 Dec. 2006).

⁶ Geoff Corn, “Snipers in the Minaret—What is the Rule?” *The Law of War and the Protection of Cultural Property: A Complex Equation*, ARMY LAW., July 2005, at 28.

⁷ See generally MATTHEW BOGDANOS, THIEVES OF BAGHDAD (2005); ANTIQUITIES UNDER SIEGE: CULTURAL HERITAGE PROTECTION AFTER THE IRAQ WAR (Lawrence Rothfield ed., 2008); see also Major John C. Johnson, *Under New Management: The Obligation to Protect Cultural Property During Military Occupation*, 190 MIL. L. REV. 111 (2006/2007).

⁸ William Hays Parks, *Protection of Cultural Property from the Effects of War*, in THE LAW OF CULTURAL PROPERTY AND NATURAL HERITAGE: PROTECTION, TRANSFER AND ACCESS 3-1 (Marilyn Phelan ed., 1998); see also ROGER O’KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED

Convention of 1954, despite the lack of ratification by the United States, provides for “safeguarding” and “respect” for cultural property to “prevent destruction or damage in the event of armed conflict.”⁹ These provisions provide for protections from intentional attack, incidental damage, pillage, and theft by state actors and military forces of states who are parties to the Convention.¹⁰

The efforts of the United States and other coalition forces to protect cultural property during the first Gulf War have been well documented, emphasizing the requirements of Article 27 of the Annex to the 1907 Hague Convention IV Respecting the Law of Customs of War on Land (Hague IV),¹¹ protecting cultural property, “provided they are not being used for military purposes.”¹² During Operations Iraqi Freedom (OIF) and Enduring Freedom (OEF) there have been no reports of the U.S. military intentionally targeting cultural sites; indeed, coalition forces were expressly prohibited from looting cultural sites or removing cultural property from the country.¹³ The measures designed to protect cultural sites from the ravages of war, per se, have been largely successful. It is the aftermath, post-conflict or stability operations, that provides the greatest current challenge in the protection of cultural property.

The requirement to assist “competent national authorities” in “safeguarding and preserving [their] cultural property” during periods of occupation is also relatively well settled.¹⁴ But when does “occupation” begin and what is the extent of assistance to “competent national authorities” that is required by international law? Are there exceptions to the military obligations to protect cultural property and refrain from its use? If the situation arises during peacekeeping or UN-sanctioned coalition operations, what are the legal obligations in those operations? Are they derived from the Law of War or International Human Rights Law? Are all coalition partners able to use deadly force to defend cultural property? If the legal obligations are unclear, evolving military doctrine for counter-insurgency warfare and stability operations make it imperative to protect cultural property, as an essential element of the national identity and conscience of the people who are the subject of this form of warfare.

Kosovo

Cultural property and religious sites have often been the object of destruction by ethnic belligerents bent on destroying the cultural identity of opposing groups. Harvard historian, András J. Riedlmayer, documented the systematic destruction of cultural and religious properties in Bosnia¹⁵ and Kosovo¹⁶ and testified during Slobodan Milosevic’s trial in the Hague for ethnic cleansing in the Balkans.¹⁷ And, shortly after the UN-sanctioned coalition operation in Kosovo began, the UN Education, Scientific and Cultural Organization (UNESCO) felt compelled to issue the following warning or instructions to the people of that region, be they Serb or Kosovar Albanians:

CONFLICT (2006); Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century* 37 GEO. J. OF INT’L LAW 245 (Winter 2006).

⁹ 1954 Hague Convention, *reprinted in* ROBERTS & GUELF, *supra* note 2, arts. 3, 4.

¹⁰ Parks, *supra* note 8, at 3-1.

¹¹ Hague Convention IV Respecting the Law of Customs of War on Land, Annex art. 27, 18 Oct. 1907, 36 Stat. 2277, 1 Bevans 631, *reprinted in* ROBERTS & GUELF, *supra* note 2, at 78.

¹² U.S. DEPARTMENT OF DEFENSE, FINAL REPORT TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR 611 (Apr. 1992).

¹³ U.S. Central Command, Gen. Order No. 1A (19 Dec. 2000), in 1 CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ 376 (Aug. 2004).

¹⁴ 1954 Hague Cultural Property Convention, *reprinted in* ROBERTS & GUELF, *supra* note 2, art. 5, at 375. *But see* Major John C. Johnson, *Under New Management: The Obligation to Protect Cultural Property During Military Occupation*, 190 MIL. L. REV. 111 (2006/2007) (implying that, during Operation Iraqi Freedom, once organized resistance ended U.S. Forces had a legal obligation to restore order and prevent looting).

¹⁵ ANDRÁS J. RIEDLMAYER, DESTRUCTION OF CULTURAL HERITAGE IN BOSNIA-HERZEGOVINA, 1992–1996: A POST-WAR SURVEY OF SELECTED MUNICIPALITIES, <http://hague.bard.edu/reports/BosHeritageReport-AR.pdf> (last visited Sept. 29, 2008).

¹⁶ ANDRÁS J. RIEDLMAYER, DESTRUCTION OF CULTURAL HERITAGE IN KOSOVO: A POST-WAR REPORT (Sept. 21, 2000), <http://palimpsest.stanford.edu/byform/mailling-lists/cdl/2000/1124.html>.

¹⁷ Riedlmayer testified in Slobodan Milosevic’s trial that over one third of the 607 mosques in Kosovo were destroyed during the 1998–1999 hostilities and ethnic cleansing by Serbs and Serb forces. *Prosecutor v. Milosevic*, Case No. IT-02-54 (Apr. 9, 2002) (transcript available at <http://www.un.org/icty/transe54/020409ED.htm>).

Cultural Property—Basic Rules

1. Do not damage or steal cultural property.
2. If you find a cultural object, do not sell it or barter it; bring it to the local administration.
3. Do not abuse cultural objects belonging to other ethnic groups. Do not destroy them; remember that this may inspire them to do the same to cultural objects dear to you.
4. Do not make your house in a church, a monument or museum.
5. Do not sell cultural objects to black market dealers; your country needs those objects.
6. Remember that cultural objects are not only for you but also for your children and grandchildren and for all humanity.
7. Do not damage the cemeteries of other ethnic groups; remember that this may inspire them to do the same to your own cemeteries.

Cultural property is protected by international treaty.¹⁸

But the destruction of cultural and religious property in Kosovo did not stop. Kosovar Albanians, frustrated with the lack of progress in political resolution of their final status as a country, engaged in reverse ethnic cleansing of Serbian enclaves and religious sites throughout Kosovo.¹⁹ In the resultant riots of 2004, several religious sites, including the fourteenth century Monastery of the Archangel at Prizren, were destroyed by crowds of angry Kosovar Albanians.²⁰

In discussing the obligation to protect cultural property with the legal advisor of the NATO contingent assigned that area of Kosovo, it became readily apparent that “national caveats” prevented the use of deadly force to protect property in UN peacekeeping operations; human rights law took precedence over the law of war in cultural property protection.²¹ Some national contingents felt constrained by the European Convention on Human Rights (ECHR), Article 2, which protects the “right to life,” to never use deadly force to defend property even if the property was occupied.²² For example, *R. v. Clegg*, the United Kingdom case on the use of force at a checkpoint in Northern Ireland, held that the use of deadly force to protect property was a violation of Article 2, ECHR and profoundly affected the utility and capacity of European contingents to protect cultural property.²³ This legal interpretation garnered a perverse result. In several locations during the 2004 riots, NATO contingents, following their own national instructions, evacuated Serb enclaves and religious sites²⁴ rather than defend those properties with deadly force, thereby implicitly engaging in the ethnic cleansing they were there to prevent. The proud and dedicated Italians, however, protected the fourteenth century Monastery at Decani, vowing not to evacuate their post and defend the lives of the monks, as well as the precious property, which was designated a world heritage site in 2004.²⁵

For UN-sanctioned peacekeeping operations, this clash of legal regimes may be resolved by more recent case law from the European Court of Human Rights. In the *Behrami* and *Saramati* cases from the Grand Chamber, the court applied a “displacement” theory—the activities (including, in *Behrami*’s case, mine clearing operations) of the UN Mission in Kosovo (UNMIK) that the UN Security Council sanctioned were not regulated by the ECHR, particularly Article 2.²⁶ *Saramati*, whose detention by UNMIK was at issue, was not given access to the “due process” provisions of the ECHR’s Article 5.²⁷

¹⁸ UNESCO, Protection of Cultural Property in Armed Conflict, 843 INT’L REV. RED CROSS 862 (Sept. 30, 2001), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/57JREN>.

¹⁹ Peter Bouckaert, *Failure to Protect: Anti-Minority Violence in Kosovo, March 2004*, 16 HUMAN RIGHTS WATCH NO. 6 (July 2004), available at [http://www.reliefweb.int/rw/RWFiles2004.nsf/FilesByRWDocUNIDFileName/HMYT-639R5V-hrw-s&m-26jul.pdf/\\$File/hrw-s&m-26jul.pdf](http://www.reliefweb.int/rw/RWFiles2004.nsf/FilesByRWDocUNIDFileName/HMYT-639R5V-hrw-s&m-26jul.pdf/$File/hrw-s&m-26jul.pdf).

²⁰ Dagens Nyheter, *To Defend the Monastery in Prizren*, EUROPE NEWS (June 25, 2007), available at <http://europenews.dk/en/node/1277>.

²¹ Interview with Legal Advisor, NATO Contingent at Prizren, Kosovo (Mar. 2005). Even though the monastery at Prizren was occupied, the contingent responsible evacuated the property, rather than resorting to deadly force to protect it. *Id.*

²² *Id.*; see also European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

²³ *R v. Clegg*, [1995] 1 AC 482, [1995] UKHL 1, [1995] 1 All ER 334; see also *McCann v. UK* [1995] ECHR 18984/1991, 213 (“the Court is not persuaded that the killing of the three terrorists [conducting a site recon for a bombing in Gibraltar] constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2(2)(a) of the Convention”); see also FRENCH PENAL CODE art. 122-5, available at <http://www.amnestyusa.org/document.php?lang=e&id=BC09E69B0637A55680256A0800458230> (last visited July 17, 2008) (authorizing the use of force in self-defense, but not in defense of property).

²⁴ Bouckaert, *supra* note 19.

²⁵ Interview with various Italian soldiers and commanders, Decani Monastery, Italy (Mar. 2005); UNESCO World Heritage Site Designation 28 COM 14B.47, <http://whc.unesco.org/en/decisions/130> (last visited Sept. 29, 2008), .

²⁶ *Behrami v. France, and Saramati v. France, Germany and Norway* (dec.) [GC], App. nos. 71412/01; 78166/01, Eur. Ct. H.R. (2007).

²⁷ *Id.* para. 127.

The UNMIK forces were subordinate to UN command and were therefore acting on behalf of the UN, not as European states, subject to the ECHR. The UK House of Lords opinion in *Al Jedda* is susceptible to a similar interpretation. The House of Lords found that Article 5 of the ECHR did not apply to military detention operations in Southern Iraq, which were authorized by UN Security Council Resolution 1546 and subject to the detention regime established for “imperative reasons of security.”²⁸

A recent Canadian case concerning detention in Afghanistan questioned application of the Canadian Charter on Rights and Freedoms. The case found that the detention regime was governed by an agreement with the Afghan government and international humanitarian law, or the law of war, and not by extraterritorial application of Canadian human rights law.²⁹ There is an emerging area of agreement in applying the law of war to actions taken pursuant to UN-sanctioned coalition and peacekeeping operations. This emerging consensus should allow application of the law of war-based standards for protection of cultural property in such operations in the future.

Iraq

The application of cultural property law in post-conflict stability operations in Iraq has been discussed in numerous fora over the last several years. Geoff Corn clearly covered the gambit of legal issues in his excellent article in the July 2005 *The Army Lawyer*, “Snipers in the Minaret—What is the Rule?”³⁰ Books have been written about the looting of the Iraqi Museum, a tragedy that resulted in the loss of thousands of artifacts which dated back to the dawn of civilization in Mesopotamia.³¹ But the legal analysis of both incidents bears repeating, in order to establish the legal obligations, so that the policy implications are clear for post-conflict stability operations.

Snipers in the Minaret, Revisited

The placement of U.S. military snipers in the 800-year-old spiral minaret in Samarra was a tactical decision, intended to overwatch key terrain, specifically, a road intersection that had “become the scene of almost incessant attacks,”³² but also driven by the obligation of occupying forces to provide security for the local populace from terrorist attacks. Even if the most stringent cultural property protections of Article 4(1) of the 1954 Hague Cultural Property Convention apply, requiring States to refrain “from any use of the property or its immediate surroundings . . . which are likely to expose it to destruction or damage in the event of armed conflict,”³³ the law allows these obligations to be waived “in cases where military necessity imperatively requires such a waiver.”³⁴ It is very difficult to argue to a tactical commander that imperative military necessity, derived from the Hague rules for occupation to provide security for the local populace does not trump the requirement of the commander³⁵—does not trump the obligation in Article 4(1). But a thorough understanding of COIN tactics and the importance of this monument to the patrimony of Iraq may have dictated a different outcome. While, as a matter of law, the use of the minaret by military snipers was permissible, as a matter of policy and COIN tactics, the destruction of the minaret that resulted from its occupation was antithetical to U.S. interests in establishing a stable Iraq that protects its antiquities from harm and respects the sanctity of ancient religious sites.

²⁸ *Al Jedda v. Sec’y of State for Defense*, 58 UKHL 25 (2007).

²⁹ *Amnesty Int’l, Canada v. Chief of Defense Staff*, 336 FC 83 (2008).

³⁰ Corn, *supra* note 6, at 28.

³¹ BOGDANOS, *supra* note 7.

³² Corn, *supra* note 6, at 40.

³³ 1954 Hague Convention, *reprinted in* ROBERTS & GUELFF, *supra* note 2, art. 4(1).

³⁴ *Id.* art. 4(2).

³⁵ Hague IV, *reprinted in* ROBERTS & GUELFF, *supra* note 2, art. 43.

The Looting of the Iraqi National Museum

The looting of the Iraqi National Museum received a great deal of media attention, much of which exaggerated the effects of the looting and ignored the efforts of the museum staff to hide and preserve the most valuable objects, reflecting the ancient history of the Tigris and Euphrates River Valleys.³⁶ In the protection of cultural property from looting, the 1954 Hague Convention requires military forces: (1) to refrain from “theft or pillage” in the conduct of military operations; and (2) in occupation, to “as far as possible, support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.”³⁷

There are no allegations that U.S. Armed Forces participated in looting; in fact, General Order Number 1 specifically prohibits such conduct.³⁸ As a matter of law, the obligation to “as far as possible, support the competent national authorities” does not attach until an occupation is established, which requires that “organized resistance [be] overcome and the force in possession must have taken measures to establish its authority.”³⁹ And there is still considerable controversy to this day about when U.S. forces established effective control over the area of Baghdad near the museum, which would trigger the protection of an occupying force.⁴⁰ However, while there was no legal obligation to prevent looting during a period of chaos between major combat operations and “occupation” both Colonel (COL) Bogdanos and Major (MAJ) John C. Johnson, rightly concluded that U.S. Armed Forces should have provided protection for the museum, to assist Iraqi authorities, sooner.⁴¹ It may or may not have prevented the tragedy; nonetheless, the failure to adequately plan for stability operations, even during the combat phase of operations, clearly was a lesson learned from OIF.

Analysis of the Planning for OIF

In the planning for OIF, the most glaring error was the failure to plan for stability operations and post-conflict reconstruction. Even before the war began, then-Chief of Staff of the Army General Shinseki testified to Congress that several hundred thousand troops would be required to stabilize the country after the invasion.⁴² General Shinseki was speaking from experience—he led the 70,000-strong NATO Stabilization Force (SFOR) into Bosnia at the end of the Bosnian conflict.⁴³ Admittedly in hindsight, several post-war histories have come to a similar conclusion. In a “Special Report” for the United States Institute of Peace, Robert Perito concluded, “Important lessons for future U.S. peace and stability operations can be found in the civil upheaval that occurred in Iraq following the collapse of Saddam Hussein’s regime. These include lessons pertaining to public order, street crime, border control, and police recruitment, training, and combat.”⁴⁴

In *Cobra II: The Inside Story of the Invasion and Occupation of Iraq*, Michael R. Gordon and General Bernard E. Trainor added, “Bush, Cheney, Rumsfeld, and Tommy Franks spent most of their time and energy on the least demanding task—defeating Saddam’s weakened conventional forces—and the least amount on the most demanding—rehabilitation of and security for the new Iraq.”⁴⁵ Gordon and Trainor provided a detailed analysis of the planning process, including assumptions made for planning, explaining that “there was no plan” for the occupation of Iraq.⁴⁶ In particular, when warned of the potential for looting by prominent Iraqis, including the current President, Jalal Talabani, the concerns were “duly

³⁶ BOGDANOS, *supra* note 7, at 15, 270–71.

³⁷ 1954 Hague Convention, *reprinted in* ROBERTS & GUELF, *supra* note 2, at 375.

³⁸ *See supra* note 13 discussion in text.

³⁹ U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 139 (1956).

⁴⁰ Compare BOGDANOS, *supra* note 7, at 205–11, with Johnson, *supra* note 7, at 149–52.

⁴¹ BOGDANOS, *supra* note 7, at 211; Johnson, *supra* note 7, at 152.

⁴² *Posture of the United States Army: Hearing on Defense Authorization Request for Fiscal Year 2004 and the Future Years Defense Program Before the S. Comm. on Armed Services*, 108th Cong. (Feb. 25, 2003) (statement of General Eric K. Shinseki, Chief of Staff, U.S. Army), available at <http://armed-services.senate.gov/statemnt/2003/February/Shinseki.pdf>.

⁴³ Greg Schulte, *SFOR Continued*, 46 NATO REV. 27, NO. 2 (Summer 1998), available at <http://www.nato.int/docu/review/1998/9802-08.htm>.

⁴⁴ ROBERT M. PERITO, THE COALITION PROVISIONAL AUTHORITY’S EXPERIENCE WITH PUBLIC SECURITY IN IRAQ (U.S. INST. FOR PEACE SPECIAL REPORT) 137 (Apr. 2005).

⁴⁵ M.R. Gordon & B.E. Trainor, *Cobra II: The Inside Story of the Invasion and Occupation of Iraq* 503 (2006).

⁴⁶ *Id.* at 152.

noted,” but the administration did not want Americans to “enforce the law in Iraq,” as it was “something best left to the Iraqis themselves.”⁴⁷

The official Army history of the conflict, “On Point II,” came to a similar conclusion regarding the planning for stability and support operations. “On Point II” noted the institutional memory available from the failure during the 1989 Panama invasion (Operation Just Cause) to adequately prepare for “a period of looting and general lawlessness in the wake of the collapse of the Noriega government.”⁴⁸ Despite a history and depth of experience in military operations other than war (the doctrinal term for stability operations at the start of OIF), particularly in the last decade of the twentieth century, and an Army commitment to “full-spectrum operations,” the authors noted a failure of emphasis on both doctrine and training for stability and support operations and counterinsurgency, partly due to the “Army’s preference for viewing itself as an institution that fights conventional wars.”⁴⁹ General friction in the inter-agency process, often exacerbated by then-Deputy Under Secretary of Defense Douglas Feith, prevented the Office of Reconstruction and Humanitarian Assistance (ORHA) from coordinating with other agencies on post-conflict planning.⁵⁰

At the end of the planning process, Phase IV (the post-conflict phase) was “nothing but a skeleton.”⁵¹ Although religious sites, like the Imam Ali Shrine in An Najaf, were identified as potential post-conflict “flashpoints,” and Phase IV objectives included “maintenance of law and order,” the forces assigned to the tasks did not match the forces required—of up to 300,000 troops.⁵² Despite these planning handicaps, the V Corps Staff, led by the Staff Judge Advocate, COL Marc Warren, planned for occupation ordinances to prevent “looting, rioting, and general civil disorder in post-Saddam Iraq;” these became the basis for V Corps fragmentary orders (FRAGO’s) issued to subordinate units during the march to Baghdad.⁵³ But much of the planning for stability and support operations assumed that the Iraqi institutions and infrastructure necessary to maintain general civil order would remain in place; and that quickly proved to be an erroneous assumption.⁵⁴ As both COL Bogdanos and the Iraqi Museum Director, Danny George, have noted, the Iraqi forces responsible for defending that area of Baghdad and the museum officials who were responsible for securing the museum had “melted away” by 10 April 2003, when the looting by Iraqi civilians ensued.⁵⁵ However, by all accounts, even if U.S. forces were not required to secure the museum as a matter of law at the time the Iraqi National Museum was looted, the responsibility to plan for adequate forces to conduct stability and support operations was a key failure of planning and execution in OIF.

Doctrinal Lessons Learned

The Army has been called one of the great learning institutions in the United States.⁵⁶ And in many respects, that learning is re-learning the lessons of the past.⁵⁷ But U.S. Army doctrine has certainly made great strides in the last five years to incorporate counterinsurgency doctrine and stability and support operations into the mainstream of Army thought and practice. The seminal doctrinal publication in that regard is Field Manual (FM) 3-24, *Counterinsurgency (COIN Manual)*,⁵⁸ followed more recently by the capstone manual for all Army operations, FM 3-0, *Operations*.⁵⁹

⁴⁷ *Id.* at 157.

⁴⁸ U.S. DEP’T OF ARMY, ON POINT II: TRANSITION TO THE NEW CAMPAIGN 55 (2008).

⁴⁹ *Id.* at 60.

⁵⁰ *Id.* at 71.

⁵¹ *Id.* at 72.

⁵² *Id.* at 73–74.

⁵³ *Id.* at 78.

⁵⁴ *Id.* at 79.

⁵⁵ BOGDANOS, *supra* note 7, at 206; *see also* ANTIQUITIES UNDER SIEGE, *supra* note 7, at 30–31.

⁵⁶ David Ignatius, *An Army that Learns*, WASH. POST, July 13, 2008, at B07.

⁵⁷ ON-POINT II, *supra* note 48, at 80; *see also* LIEUTENANT COLONEL JOHN A. NAGL, LEARNING TO EAT SOUP WITH A KNIFE: COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM (2005).

⁵⁸ FM 3-24, *supra* note 5.

⁵⁹ U.S. DEP’T OF ARMY FIELD MANUAL 3-0 (FM 3-0), OPERATIONS (27 Feb. 2008) [hereinafter FM 3-0].

While the *COIN Manual* emphasizes counterinsurgency tactics and winning the “hearts and minds” of the populace,⁶⁰ FM 3-0 recognizes stability and support operations as one of three primary missions for the Army, an integral part of “full-spectrum operations,” across the conflict spectrum, from peacetime engagement to major combat operations.⁶¹

The Army’s operational concept is full spectrum operations: Army forces combine offensive, defensive and stability or civil support operations simultaneously as part of an interdependent joint force to seize, retain, and exploit the initiative, accepting prudent risk to create opportunities to achieve decisive results. They employ synchronized action—lethal and non-lethal—proportional to the mission and informed by a thorough understanding of all variables of the operational environment. Mission command that conveys intent and an appreciation of all aspects of the situation guides the adaptive use of Army forces.⁶²

The operational concept addresses simultaneous engagement on many levels, more than combat between forces, for the first time in the doctrine of Army operations. It recognizes that “Army forces conduct operations in the midst of populations,” requiring forces to “defeat the enemy and simultaneously shape civil conditions.”⁶³ “Shaping civil conditions (in concert with civilian organizations, civil authorities, and multinational forces) is just as important to campaign success . . . [and] often more important than the offense and defense.”⁶⁴ Army forces “retain the initiative by anticipating enemy actions and civil requirements and acting positively to address them . . . [and] remedy the conditions threatening lives, property, and domestic order.”⁶⁵

The *COIN Manual* makes security of the populace and public order “over-arching requirements of counterinsurgency operations.”⁶⁶ Although there are multiple lines of operation in COIN, civil security operations “set the conditions for establishing essential services,” including the protection of public buildings and key cultural sites.⁶⁷ And enabling of host-nation capabilities, like protection of public facilities, is a key tenet of both COIN and stability operations.⁶⁸ Controlling crowds and urban unrest and securing key facilities are essential tasks for military forces supporting host-nation police in COIN operations.⁶⁹ By any measure, restoring public order and protection of public infrastructure have become centerpieces of military operations, instead of afterthoughts.

Respect for cultural norms and objects has also become an integral part of both stability and counterinsurgency operations. As emphasized in FM 3-0, “Cultural awareness makes Soldiers more effective when operating in a foreign population and allows them to leverage local culture to enhance the effectiveness of their operations.”⁷⁰ The *COIN Manual* educates Soldiers on the importance of “cultural forms,” including symbols or cultural objects, which counterinsurgents can use “to shift perceptions, gain support, or reduce support for insurgents.”⁷¹ Cultural awareness, too, is a critical competency for successful counterinsurgency:

Cultural awareness has become an increasingly important competency for small-unit leaders. Perceptive junior leaders learn how cultures affect military operations. They study major world cultures and put a priority on learning the details of the new operational environment when deployed. Different solutions are required in different cultural contexts. Effective small-unit leaders adapt to new situations, realizing their

⁶⁰ FM 3-24, *supra* note 5.

⁶¹ FM 3-0, *supra* note 59.

⁶² *Id.* para. 3-1.

⁶³ *Id.* para. 3-2.

⁶⁴ *Id.*

⁶⁵ *Id.* para. 3-3.

⁶⁶ FM 3-24, *supra* note 5, para. 6-1.

⁶⁷ *Id.* para. 6-6.

⁶⁸ *Id.* para. 6-6; *see also* FM 3-0, *supra* note 59, para. 3-7.

⁶⁹ FM 3-24, *supra* note 5, para. 6-21.

⁷⁰ FM 3-0, *supra* note 59, para. 3-16.

⁷¹ FM 3-24, *supra* note 5, para. 3-8.

words and actions may be interpreted differently in different cultures. Like all other competencies, cultural awareness requires self-awareness, self-directed learning, and adaptability.⁷²

Cultural awareness training, including the recognition of key cultural artifacts, has become an essential training block for deploying Soldiers.⁷³ For example, Ms. Rush, of the Fort Drum Cultural Heritage section in the Directorate of Public Works, in conjunction with Colorado State University, has developed an excellent pre-deployment training brief for Iraq.⁷⁴ The U.S. Army John F. Kennedy Special Warfare Center and School, along with experienced civil affairs officers, has developed an excellent guide for identification, planning considerations, documentation, and preservation of cultural arts, monuments and archives.⁷⁵ These training resources enhance preparedness and make cultural property protection an important consideration in military operations.

Civil affairs doctrine provides only limited support for cultural heritage protection, however. Previous generations relied heavily on civil affairs expertise, resident in the arts and monuments teams, to protect and preserve both movable and immovable cultural property. *The Rape of Europa*, by Lynn Nicholas, describes the herculean efforts of just such cultural property experts, drafted into the Army in World War II, to preserve and restore much of the art and cultural history of Europe during and after the war.⁷⁶ Only one such expert, MAJ Corinne Wegener, a reserve civil affairs officer who is an art curator in Minneapolis, was available to assist the Iraqis in restoring their National Museum in 2003.⁷⁷ And due to the difficulty of recruiting and retaining such expertise (particularly in a reserve function, subject to frequent deployments), the continued reliance on cultural property expertise in civil affairs is problematic.⁷⁸ The civil affairs doctrine, Field Manual 3-05.40, omits any mention of arts and monuments teams. Support to civil administration subsumes this function in the infrastructure and public health and welfare sections of civil affairs units.⁷⁹ As a result, no dedicated functional expertise is available to perform the tasks required to preserve, restore and reconstruct cultural property that has been ravaged by warfare. While civil affairs involvement in planning, coordination, and evaluation of host nation cultural property preservation capabilities will be essential to future stability operations, it is the capability resident in other government agencies, civil society, non-governmental organizations, and inter-governmental organizations that will provide the greatest protection for cultural property in stability operations.

The doctrine assigning responsibility for protection of cultural property in stability operations is still evolving. The management of interagency efforts in reconstruction and stabilization was assigned to the Department of State, Office of the Coordinator for Reconstruction and Stabilization (CRS), in a 2005 National Security Presidential Directive (NSPD-44).⁸⁰ The CRS was charged with coordinating: (1) U.S. Government “responses for reconstruction and stabilization with the Secretary of Defense to ensure harmonization with any planned or ongoing U.S. military operations, including peacekeeping missions, at the planning and implementation phases;” and (2) “reconstruction and stabilization activities and preventative strategies with foreign countries, international and regional organizations, nongovernmental organizations, and private sector entities with capabilities that can contribute to such efforts”⁸¹ The DOD policy is provided in DOD Directive 3000.05, *Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations*.⁸² The DOD policy states:

Stability operations are a core U.S. military mission that the Department of Defense shall be prepared to conduct and support. They shall be given priority comparable to combat operations and be explicitly

⁷² *Id.* para. 7-3.

⁷³ Corinne Wegener, *Assignment Blue Shield: The Looting of the Iraq Museum and Cultural Property at War*, in *ANTIQUITIES UNDER SIEGE*, *supra* note 7, at 171.

⁷⁴ Under Secretary of Defense Legacy Resource Management Program, Iraq Cultural Heritage Training (2008), <http://www.savingantiquities.org/0947/09476/resourcesiraqenl.html>.

⁷⁵ U.S. DEP’T OF ARMY, GRAPHIC TRAINING AID 41-01-002, CIVIL AFFAIRS ARTS, MONUMENTS AND ARCHIVES GUIDE (2005).

⁷⁶ LYNN H. NICHOLAS, *THE RAPE OF EUROPA* (1994).

⁷⁷ Wegener, *supra* note 73, at 164.

⁷⁸ Interview with Corinne Wegener, President of the U.S. Comm. of the Blue Shield, in Washington, D.C. (Apr. 2008).

⁷⁹ U.S. DEP’T OF ARMY, FIELD MANUAL 3-05.40, CIVIL AFFAIRS OPERATIONS pp. 2-13 to 2-14 (29 Sept. 2006).

⁸⁰ THE WHITE HOUSE, NAT’L SECURITY PRESIDENTIAL DIR. (NSPD) 44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTION AND STABILIZATION 2 (7 Dec. 2005).

⁸¹ *Id.* at 3.

⁸² U.S. DEP’T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS (28 Nov. 2005).

addressed and integrated across all DoD activities including doctrine, organizations, training, education, exercises, materiel, leadership, personnel, facilities, and planning.

Stability operations are conducted to help establish order that advances U.S. interests and values. The immediate goal often is to provide the local populace with security, restore essential services, and meet humanitarian needs. The long-term goal is to help develop indigenous capacity for securing essential services, a viable market economy, rule of law, democratic institutions, and a robust civil society.

Many stability operations tasks are best performed by indigenous, foreign, or U.S. civilian professionals. Nonetheless, U.S. military forces shall be prepared to perform all tasks necessary to establish or maintain order when civilians cannot do so.⁸³

Stability operations can only be successfully accomplished with integrated civilian and military efforts. The tasks assigned to the military include working closely with other U.S. Government agencies, foreign governments and security forces, global and international organizations, United States and foreign nongovernmental organizations, and private-sector individuals.⁸⁴ Provincial reconstruction teams in Afghanistan and Iraq⁸⁵ and recent legislation authorizing interagency reserve stability and reconstruction teams⁸⁶ are the first signs that all U.S. Government capabilities are being mobilized to support these efforts. While the specific doctrinal guidance for stability operations (other than the capstone policy in FM 3-0, discussed above) is still in draft, it is clear that civilian infrastructure protection and the development of indigenous capabilities in the area of cultural property protection will remain an integrated approach, incorporating the capabilities of the myriad actors and organizations of governmental and nongovernmental organizations and civil society.⁸⁷

Governments and international organizations have provided support to cultural property protection, to some degree, in current conflicts. The Italian government provided crucial support to the Iraq Department of Antiquities in restoring the damage done to cultural artifacts in Baghdad.⁸⁸ However, UNESCO is establishing a fund to support cultural property protection in armed conflict, pursuant to Article 29 of the Second Protocol to the 1954 Hague Convention.⁸⁹ The provision of funds for this purpose, once finally approved by the States parties to the Second Protocol, will provide important intergovernmental resources for the protection of cultural property during armed conflict.⁹⁰

There have also been developments in the capability of civil society to support cultural property protection in stability operations. The Second Protocol, in Articles 11 and 27, recognizes a role for “non-governmental organizations having objectives similar to those of the [1954 Hague] Convention,” to include UNESCO, the International Committee of the Blue Shield and its constituent bodies, the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM) and the International Committee of the Red Cross (ICRC).⁹¹

Most law of war practitioners are familiar with the ICRC’s role in assisting State parties to apply the Geneva Conventions, but few have heard of the International Committee of the Blue Shield, which has a similar mission focusing on the protection of cultural property. The recent establishment of a U.S. Committee of the Blue Shield should serve to assist

⁸³ *Id.* at 2.

⁸⁴ *Id.* at 3.

⁸⁵ See, e.g., U.S. Dep’t of State, Fact Sheet, Provincial Construction Teams: Building Iraqi Capacity and Accelerating the Transition to Iraqi Self-Reliance (11 Jan. 2007), available at <http://www.state.gov/r/pa/scp/78599.htm>.

⁸⁶ See U.S. Dep’t of State, Secretary Condoleezza Rice, Remarks at the Civilian Reserve Corps Rollout (16 July 2008), <http://www.state.gov/secretary/rm/2008/07/107083.htm>.

⁸⁷ The new U.S. Army Field Manual covering this area was released during the publication phase of this article. See U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS (6 Oct. 2008).

⁸⁸ ANTIQUITIES UNDER SIEGE, *supra* note 7, at 135–40.

⁸⁹ See, e.g., Adopted Recommendations, Second Meeting of the Committee for the Protection of Cultural Property in the Event of Armed Conflict, U.N. Doc. CLT-07/CONF/212/4 (Apr. 4, 2008), available at <http://unesdoc.unesco.org/images/0015/001593/159306E.pdf>.

⁹⁰ Mounir Bouchenaki, *UNESCO and the Safeguarding of Cultural Heritage in Postconflict? Situations: Efforts at UNESCO to Establish an Intergovernmental Fund for the Protection of Cultural Property in Times of Conflict*, in ANTIQUITIES UNDER SIEGE, *supra* note 7, at 207–18.

⁹¹ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 Mar. 1999), http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html. This Protocol entered into force on 9 March 2004, and there are currently forty-eight States which are parties to the Protocol, although the United States has not yet submitted this Protocol to the Senate for ratification. *Id.*

military personnel in the training and dissemination of cultural property materials, as well as (eventually) the type of emergency response capabilities provided by established humanitarian organizations like the ICRC.⁹² With U.S. membership from the local affiliates of the International Council of Museums, the International Council of Monuments and Sites, the International Council on Archives, the International Federation of Library Associations and Institutions, the Coordinating Council of Audiovisual Archives Associations, as well as the American Institute for Conservation of Historic and Artistic Works, and the Archeological Institute of America, the U.S. Committee of the Blue Shield has a wealth of expertise available to supplement military and U.S. governmental efforts to protect cultural property during armed conflict.⁹³ Ideally, the Blue Shield will take its place alongside other humanitarian organizations and nongovernmental organizations in the interagency planning process, currently facilitated by CRS, the Undersecretary for Policy in the Office of the Secretary of Defense, and the J5 of the Joint Staff, but conducted by joint force planners at the operational level (combatant command or joint task force level).⁹⁴ Employment of these capable nongovernmental assets would normally occur through civil-military operations centers, along with civil affairs assets, so that crisis-response capabilities resident in civil society will be available to assist in stability operations.⁹⁵

The Way Ahead

Protection of cultural property in stability operations has had a checkered past. While the legal obligations of cultural property protection in armed conflict have been scrupulously adhered to, the legal obligations to provide such protection in stability operations have been less clear. To varying degrees, the destruction of cultural property during stability operations in recent coalition operations in Kosovo and Iraq have demonstrated the failure of legal mechanisms in ensuring such protection, as well as the importance of emphasizing policy solutions and delineating responsibilities for the protection of cultural property during post-conflict stability operations.

Sarah Sewell, Director of the Carr Center for Human Rights at Harvard University, has noted that the law is necessary, but not sufficient, to protect humanitarian concerns in armed conflict; policy development has, in many instances, outstripped advances in the law.⁹⁶ The advances in military doctrine over the last several years, including the adoption of counterinsurgency concepts and acknowledgement of a core stability operations mission, highlighted by the *COIN Manual* and FM 3-0, have brought cultural property protection to a new level of emphasis in military operations across the spectrum of conflict.

The past is a prologue in military operations, as an agile Army responds to mistakes made in previous campaigns. The way ahead for cultural property protection during armed conflict includes continued protection of key sites, through improved intelligence and targeting techniques.⁹⁷ Continued emphasis on this issue in the planning and conduct of offensive combat operations will sustain an excellent U.S. military track record in this area.⁹⁸ Increased awareness of the importance of cultural property in stability operations and counterinsurgency should also increase the protection afforded to cultural property in future campaigns. But the increased emphasis on post-conflict security operations and simultaneous conduct of stability operations with combat operations should pay the greatest dividend for cultural property protection in future military operations. The emphasis on gaining effective control and maintaining public order during stability operations should enhance the protection of all public infrastructure, including key cultural sites, in coordination with host-nation security forces. The increasing acceptance by our coalition allies, particularly in UN-sanctioned operations, of the defense of essential cultural property as a military mission will also lead to enhanced protection for cultural sites that are an integral part of so many societies and represent their ethnic or cultural identity.

The increased integration of military and civil capabilities should also enable cultural property protection in future stability operations. While military capabilities in this area, particularly the expertise formerly provided by “arts and

⁹² Wegener, *supra* note 73, at 165.

⁹³ *Id.* at 171.

⁹⁴ U.S. DEP’T OF DEFENSE, JOINT PUB. 5-0, JOINT OPERATION PLANNING II-6 (20 Dec. 2006).

⁹⁵ *See generally* U.S. DEP’T OF DEFENSE, JOINT PUB. 3-57, CIVIL-MILITARY OPERATIONS chs. III, IV (8 July 2008); *see also* Wegener, *supra* note 73, at 171.

⁹⁶ Sarah Sewell, Keynote Address at the University of Virginia International Humanitarian Law Conference, Co-sponsored by the ICRC, UVA and TJAGLCS (May 31, 2007) [hereinafter Sewell Keynote Address].

⁹⁷ CHAIRMAN JOINT CHIEFS OF STAFF, INSTR. 3227.01, NO-STRIKE POLICY AND GUIDANCE (C) 2 (8 June 2007).

⁹⁸ The increased policy emphasis on targeting that has resulted in humanitarian benefits was the specific example used by Sarah Sewell in her UVA address. Sewell Keynote Address, *supra* note 96.

monuments” teams from civil affairs, may be decreasing, the capacity of the U.S. Government to respond to stability operations is increasing. International efforts to improve and fund cultural property protection during armed conflict are increasing, with the involvement of intergovernmental organizations like UNESCO and the States committed to the Second Protocol to the 1954 Hague Cultural Property Convention. Civil society, through organizations like the U.S. Committee of the Blue Shield, is mobilizing to enhance military training and protect cultural property during armed conflict. And the integration of host-nation, nongovernmental, intergovernmental, and U.S. governmental organizations in the planning and conduct of stability operations bodes well for future protection of the vital cultural heritage of nations involved in armed conflict. While the law has not evolved as quickly, through the development of policy and doctrine oriented toward the key aspects of stability operations, the U.S. military is poised to seize the moral high ground in cultural property protection during post-conflict and stability operations.