28

FROM KYOTO TO BAGHDAD TO TEHRAN: LEADERSHIP, LAW, AND THE PROTECTION OF CULTURAL HERITAGE

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In July 1945, at the end of World War II, US secretary of war Henry Stimson persuaded President Harry Truman to remove Kyoto, the ancient capital of Japan, from the top of the target list for the dropping of the atomic bomb. In 1991, during the Gulf War, US Central Command developed an extensive "no-attack" list of cultural, religious, and historical sites that were off-limits for military targeting. In March 2003, after the invasion of Iraq, it became clear that such no-attack lists are not enough when considerable looting took place at the Iraq Museum in Baghdad. Yet in response to widespread criticism of the US military for failing to prevent the looting, Secretary of Defense Donald Rumsfeld displayed little concern about the incident. In January 2020, President Donald Trump tweeted a threat to target Iranian cultural heritage sites, but Secretary of Defense Mark Esper promptly announced that US armed forces would follow the laws of armed conflict in any retaliatory attack against Iran.

These events took place in different eras with different international legal regimes in place regarding rules and standards for cultural heritage protection in war. But the contrasting statements and behavior also provide insights into the complex process by which ethical and legal reasoning and strategic imperatives interact to impact military decision-making. The history of these incidents illustrates why it is easier to prioritize protection of cultural heritage when it is deemed to make a positive contribution to winning the war and sustaining the peace. But that is not always the case, and trade-offs between cultural protection and military force protection are common. The legal principles of proportionality and precaution must always be followed so that soldiers take risks and properly weigh the harm of cultural heritage

destruction against the importance of destroying a legitimate target. Unfortunately, this complex balancing act is made more difficult when an adversary's military forces hide near or within cultural heritage sites. Nevertheless, the history also illuminates how legal constraints can take on a life of their own, influencing operational decisions even when individual political leaders are not particularly concerned about following international law.

The Role of Law in Cultural Heritage Protection

The historical case studies examined here illuminate four main arguments. First, the relationship between the ethical and legal requirements to protect cultural heritage and the strategic incentives to win wars is complex and contested. There are two central logics for protecting cultural heritage in war, a moral and a strategic one. The first emphasizes the intrinsic value of cultural heritage to humankind and argues that protecting cultural heritage is just the right thing to do; the strategic logic, in contrast, maintains that protecting an adversary's cultural heritage helps win wars. Under the moral logic argument, there can be tensions and trade-offs between cultural heritage protection and destroying legitimate targets that create "military advantage." Such calculations often force the US military, following the laws of armed conflict, to weigh the intended positive contributions of an operation against a specific target to eventual victory against the incidental harm to cultural heritage sites. Under the strategic logic, such trade-offs do not exist: protection of cultural heritage contributes to eventual victory both by encouraging local populations to support the protectors and by contributing to postwar stability and reconstruction. Laurie Rush has claimed, for example, that cultural heritage protection is "a force multiplier," that is, protection of cultural sites makes individual military operations more effective in achieving the broader goals of war, and the US military should therefore be "protecting the past to secure the future."[1] These two logics can coexist inside leaders' calculations, and there is strong historical evidence in the protection-of-Kyoto case in 1945 that Secretary Stimson used the strategic rationale for cultural heritage protection in order to more effectively persuade President Truman.

Second, the history demonstrates that laws protecting cultural heritage matter and that the United States has increasingly sought to comply with existing law. Like other countries, the United States tends to only ratify treaties that it believes serve its interests. This helps explain why it did not ratify the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereafter the 1954 Hague Convention) until 2009, after the Baghdad looting incident and other destruction of cultural property in Iraq encouraged a reassessment of US policy. International law, however, whether through a ratified treaty or acceptance as customary international law, can constrain states, often in unanticipated ways. As Laura Ford Savarese and John Fabian Witt argue, the laws of armed conflict create

"entailments": "What makes law strategically valuable is that it entails consequences beyond the control of the parties that invoke it."[2] Laws can create formal obligations, to be sure, but their existence also shapes expectations, makes violations more costly, and enables critics of policies to mobilize more effectively.

In this sense, the laws regarding cultural heritage protection are not different from other laws of armed conflict. The laws prohibiting torture of prisoners, for example, have not ended the practice of torture. However, they have increased the incentives for humane treatment, created opportunities for reciprocity, and increased the probability of punishment for violators of the law.[3] The laws protecting cultural heritage in war do not guarantee compliance, but they increase focus on protection and create extra political costs for violation in ways that the US government does not always anticipate.

Third, the history shows that laws regarding cultural heritage protection still require constant interpretation by junior and senior military officers. In this regard as well they are similar to other laws of armed conflict. To use a common legal theory analogy, the laws of armed conflict generally provide "standards," rather than "rules," to guide decision-making: a standard is like a law telling a driver "do not drive recklessly," while a rule is like a law telling a driver "do not drive above 60 miles per hour." In Additional Protocol I to the 1949 Geneva Conventions, the principles of proportionality (do not engage in attacks that kill disproportionate numbers of civilians) and precaution (take feasible precautions to avoid noncombatant deaths) are standards requiring much interpretation, while the principle of distinction (do not intentionally target civilians) is closer to a rule. The 1954 Hague Convention should be thought of as setting standards more often than rules. With the possible exception of the strict red line rule to refrain "from any act of hostility, directed against such [cultural] property," the treaty's guidelines still require complex, situation-dependent interpretation by battlefield commanders and military lawyers.[4] Examples of this can be seen in the history of the 1991 Gulf War.

Fourth, top-level leadership matters. The historical case studies described here demonstrate how different US presidents and secretaries of defense hold wide-ranging views about the importance of the laws of armed conflict. While some leaders are deeply concerned about these laws, others are not. If Henry Stimson, for example, had not been the secretary of war in 1945, the city of Kyoto would almost certainly have been destroyed. If Rumsfeld had not been secretary of defense in 2003, it is possible that the Iraq Museum would not have been looted. The history, however, also reveals one entailment of the laws of armed conflict: professional military and civilian leaders are trained and incentivized to follow the laws of armed conflict, and this can increase the probability of compliance, even when some top political leaders do not care. This is clear in the 2020 incident when Secretary Esper refused to target Iranian cultural sites despite President Trump's threats to do exactly that.

Sparing Kyoto

The decision to drop the atomic bomb on Hiroshima has been the subject of exhaustive research. What is less well understood is the complex, even convoluted, process by which Kyoto was taken off the top of the target list, with Nagasaki as its replacement. Michael Gordin calls the sparing of Kyoto "the solitary instance of moral restraint dictating target choice on behalf of any belligerent in World War II."[5] Gordin's argument, however, ignores the many instances of Allied bombing decisions taking into account protection of cultural heritage in Europe, a phenomenon well documented by Ron Hassner.[6] Gordin's argument also underplays the strategic element of the rationale behind Stimson's insistence that Kyoto be removed from the target list. It is impossible to disentangle or weigh the relative importance of moral and strategic motives in Stimson's mind.[7] But it is clear that both motives existed, and that Stimson employed the two arguments as necessary in his efforts to spare Kyoto.

When the Target Committee, which included Robert Oppenheimer and Major General Leslie Groves, met in Los Alamos, they considered destroying cultural heritage as a positive act, one that would reduce the Japanese civilian population's support for continuing the war. Committee meeting minutes suggest that the destruction of Kyoto and the Imperial Palace in Tokyo would contribute to military victory:

> Kyoto: This target is an urban industrial area with a population of 1,000,000. It is the former capital of Japan and many people and industries are now being moved there as other areas are being destroyed. From the psychological point of view there is the advantage that Kyoto is an intellectual center for Japan and the people there are more apt to appreciate the significance of such a weapon as the gadget … Hiroshima has the advantage of being such a size and with possible focusing from nearby mountains that a large fraction of the city may be destroyed. The Emperor's Palace in Tokyo has a greater fame than any other target but is of least strategic value (fig. 28.1).[8]

Military logic supported attacking Kyoto because of the increasing amount of military industry coming into the city, its location surrounded by mountains, and because of its large population. Indeed, Kyoto was well over twice the size of Hiroshima or any other city that had not yet been subjected to the firebombing campaign of the US Army Air Forces (as the US Air Force was then known). Simply put, if Kyoto was attacked, more Japanese people would be killed. This appealed to General Groves: as he later put it, "I particularly wanted Kyoto as a target because … it was large enough in area for us to gain complete knowledge of the effect of an atomic bomb."[9]

Groves' account of Stimson's opposition is revealing: "The reason for his objection was that Kyoto was the ancient capital of Japan, a historical city, and one that was of

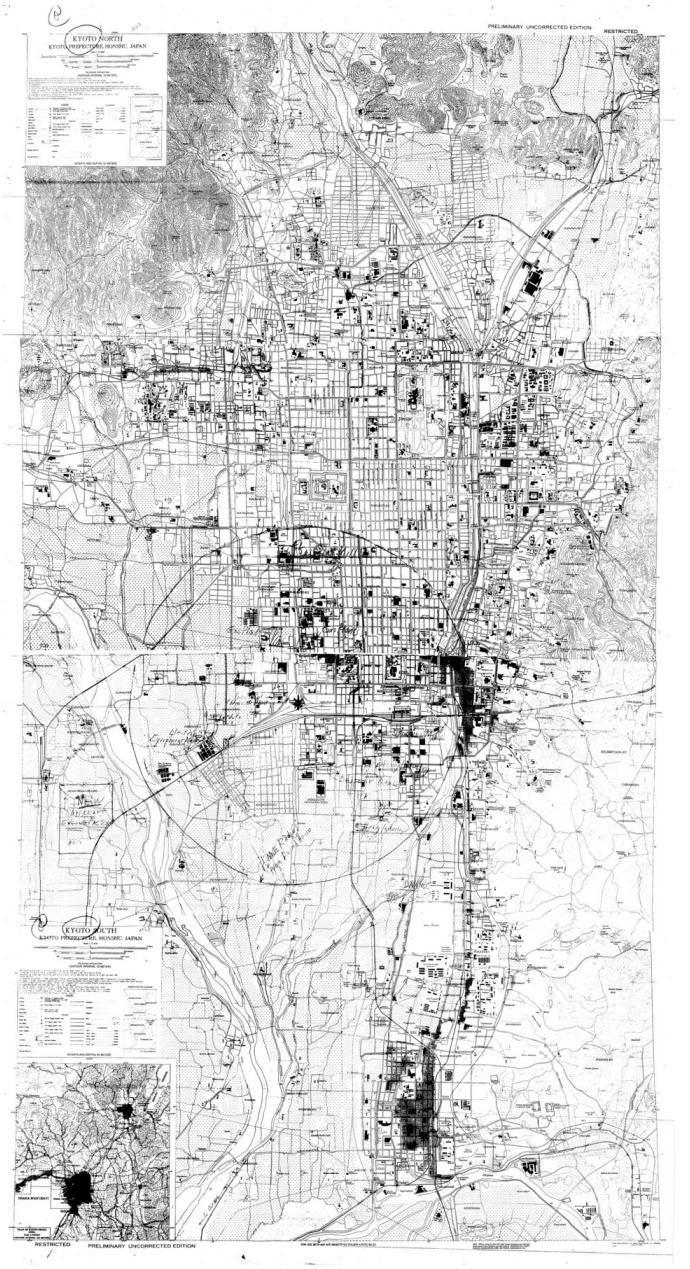

Figure 28.1 Target map of Kyoto, June 1945. (Alex Wellerstein, "The Kyoto Misconception," *The Nuclear Secrecy Blog*, 8 August 2014, http://blog.nuclearsecrecy.com/2014/08/08/kyoto-misconception/)

great religious significance to the Japanese." Groves noticed that Stimson's position then evolved to emphasize the strategic rationale: "In the course of our conversion he gradually developed the view that the decision should be governed by the historical position that the United States would occupy after the war."[10] Stimson stressed his moral reasoning for sparing Kyoto in his postwar memoirs: "With President Truman's warm support I struck off the list of suggest targets the city of Kyoto. Although it was a target of considerable military importance, it had been the ancient capital of Japan

and was a shrine of Japanese art and culture. We determined that it should be spared."[11]

But it was the "strategic" rationale for sparing Kyoto that Stimson emphasized as being effective in his crucial discussions with Truman at the Allied leaders' Potsdam Conference in Germany in July–August 1945. As Stimson recorded in his diary: "We had a few words more about the S-1 program, and I again gave him my reasons for eliminating one of the proposed targets. He again reiterated with the utmost emphasis his own concurring belief on that subject, and he was particularly emphatic in agreeing with my suggestion that if elimination was not done, the bitterness which would be caused by such a wanton act might make it impossible during the long post-war period to reconcile the Japanese to us in that area rather than to the Russians."[12] Truman's diary entry is also revealing: "I have told the Sec. of War, Mr. Stimson to use it so that military objectives and soldiers and sailors are the target and not women and children. Even if the Japs are savages, ruthless, merciless, and fanatic, we as the leader of the world for the common welfare cannot drop this terrible bomb on the old Capitol [Kyoto] or the new [Tokyo]. He and I are in accord."[13]

Stimson's use of the strategic rationale for sparing Kyoto helped persuade Truman to support his efforts against the military planners led by Groves. This decision saved the lives of many thousands of Japanese civilians, since Kyoto's population was significantly larger than that of Nagasaki, the city that replaced it on the target list. But saving Japanese lives was not Stimson's objective—this was saving Kyoto's cultural treasures. The evidence is clear that Truman's eventual decision to spare Emperor Hirohito from war crimes trials helped negotiate surrender and end the war, and aided the US in maintaining peace and stability during the occupation of Japan.[14] It is not clear, however, that sparing Kyoto had similarly important strategic effects.

The 1954 Hague Convention

The 1954 Hague Convention was a response to the massive cultural heritage destruction that occurred during World War II. In brief, Article 1 defines cultural property as "(a) movable or immovable property of great importance to every people … (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property … [and] (c) centers containing a large amount of cultural property."[15] Article 3 requires that states protect cultural heritage within their own territory, and, to that effect, Article 4 requires that states not place military objects in locations that would endanger cultural heritage sites. Article 4 additionally requires states to refrain from targeting cultural heritage in "any act of hostility," to prevent its damage by way of looting or vandalism, and to not target cultural heritage even in an act of reprisal.

As mentioned, the United States did not ratify the convention until 2009, and its instrument of ratification included important qualifying declarations, outlining the US

government's interpretation of a "military necessity exception": attacks on cultural heritage sites are permitted, provided they are "proportionate" and "required by military necessity and notwithstanding possible collateral damage to such property."[16] The US Department of Defense's 2016 *Law of War Manual* affirms this military necessity waiver. Nevertheless, the manual also cautions commanders to remember that "the requirement that military necessity imperatively require[s] such acts should not be confused with convenience or be used to cloak slackness or indifference to the preservation of cultural property."[17] This follows General Dwight Eisenhower's famous WWII warning that "'military necessity' is sometimes used where it would be more truthful to speak of military convenience or even personal convenience."[18] The manual also insists that even when a waiver of the protection of cultural heritage may be warranted as a matter of law, decisionmakers may still refrain from harming cultural heritage for broader strategic or policy reasons. It is important and worrisome to note that while the manual also cites Stimson's decision to spare Kyoto as an example of an appropriate restraint toward cultural heritage, it claims that by today's standards an attack on Kyoto could still have been justified under the military necessity exception.[19]

The 1991 Gulf War and 2003 Invasion of Iraq

Although in 1991 the United States was not yet a party to the 1954 Hague Convention, its armed forces were trained to adhere to some of the convention's principles, suggesting that the US military accepted most of the provisions as reflecting customary international law and thus legally constraining its plans and operations.[20] The effects of the laws of armed conflict regarding cultural heritage protection were direct and significant during the 1991 Gulf War. The after-action report by the Department of the Defense to Congress particularly highlighted the importance of "off-limits target lists" and the proportionality principle applied to legitimate military targets: "Planners were aware that each bomb carried a potential moral and political impact, and that Iraq has a rich cultural and religious heritage dating back several thousand years. … Targeting policies, therefore, scrupulously avoided damage to mosques, religious shrines, and archaeological sites, as well as to civilian facilities and the civilian population. … When targeting officers calculated the probability of collateral damage as too high, the target was not attacked (fig. 28.2)."[21]

Perhaps the most widely discussed example of adherence to cultural heritage protection rules influencing a US targeting decision was when the Iraqi Air Force placed two fighter aircraft immediately outside the Temple of Ur. The Iraqis apparently anticipated that the United States would refrain from attacking, or that if they did, the destruction of the temple would create a propaganda victory for Iraq. According to the Department of Defense report, US forces chose not to attack the aircraft because the military advantage of destroying them was deemed insufficient to

Figure 28.2 Iraqi military aircraft stationed near the Temple of Ur. (US Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (Washington, DC: Department of Defense, April 1992), https://apps.dtic.mil/dtic/tr/fulltext/u2/a249270.pdf, 133)

justify the risk to the temple, rather than the legal advice they received that Iraq would be responsible for any collateral damage to it. Thus, it was the proportionality rule that created the constraint. According to the report: "While the law of war permits the attack of the two fighter aircraft, with Iraq bearing responsibility for any damage to the temple, Commander-in-chief, Central Command (CINCCENT) elected not to attack the aircraft on the basis of respect for cultural property and the belief that the positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple."[22]

This example is widely cited as an effort by President Saddam Hussein to practice "lawfare," using US and international respect for the laws of armed conflict and cultural heritage protection to shelter his armed forces or, if attacked, weaken US domestic and coalition support for the war. It is also an example, however, of the subtle power of law's entailments since the US, had signed the treaty and was thereby obliged to refrain from acts that would defeat its purpose, even though the US had not ratified it. Most importantly, the law encouraged commanders to assess proportionality and take a broader perspective on the effects of attacks.[23] Patty Gerstenblith notes that in 1991 "no archaeological, cultural, or historic site was

intentionally targeted" though many sites were unintentionally damaged, including the brickwork at the Temple of Ur through "rocket or shell fire."[24]

The United States is also widely perceived to have been constrained in direct attacks on cultural sites in the 2003 invasion of Iraq, but that campaign raised an important new question about the priority that should be given to active measures to protect cultural heritage from local looters. After Saddam Hussein's government fell in Baghdad, Iraqi citizens began looting the ousted leader's residences, government agencies, and, most dramatically, the Iraq Museum, ultimately stealing thousands of antiquities, many of which remain missing to this day.[25] Chairman of the Joint Chiefs of Staff General Richard Myers defended the failure of the United States to stop the pillaging as the result of an overriding need to focus energies on subduing the paramilitary groups throughout Baghdad that remained loyal to the deposed government.[26] In response to growing condemnation as press coverage of the Iraq Museum increased, Secretary of Defense Rumsfeld seemed resigned to the inevitability of looting: "Freedom's untidy. … Stuff happens."[27]

In 2003 the United States was still not a state party to the 1954 Hague Convention. Accordingly, military manuals at the time did not specifically require personnel to protect Iraq's cultural heritage during the initial conflict or ensuing occupation, and only placed prohibitions on looting by US military forces, deliberate targeting of cultural sites, or the use of cultural sites for military purposes.[28] Inclusion of these prohibitions indicated only a limited acceptance at the operational level of the convention's principles. A military policy which lacked affirmative requirements to protect cultural heritage paved the way for the looting and destruction of the Iraq Museum and other important cultural sites in Baghdad. Patty Gerstenblith's conclusion was highly critical: "looting of government buildings by the local populace was tacitly permitted by the lack of intervention of coalition forces."[29]

As a result of the ensuing global outcry, according to Matthew Thurlow many officials in the US government learned that "intentionally destroying cultural sites is often conflated with negligently failing to prevent their destruction."[30] This political controversy encouraged the United States to finally ratify the convention in 2009.[31] The Department of Defense manual was later updated to require military commanders "to take reasonable measures to prevent or stop any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against, cultural property" during occupation.[32]

In October 2019, the Pentagon signaled a willingness to allocate greater energy toward cultural heritage protection when it announced that the army was training a group of commissioned officers of the US Army Reserve to "provide a scholarly liaison for military commanders and the local authorities to help secure the cultural heritage of the regions involved and rebuild civil society in war and disaster zones."[33] More specifically, the group was assigned to help the government fulfill its obligations as a

party to the convention by providing lists of sites to avoid in airstrikes and ground operations and locations where the military should try to forestall looting.

Trump's 2020 Threat to Iran

On 4 January 2020, one day after the United States killed Major General Qassem Soleimani, the commander of Iran's Islamic Revolutionary Guard Corps, President Trump tweeted out a threat to destroy Iranian cultural heritage: "Let this serve as a WARNING that if Iran strikes any Americans, or American assets, we have targeted 52 Iranian sites (representing the 52 American hostages taken by Iran many years ago), some at a very high level & important to Iran & the Iranian culture, and those targets, and Iran itself, WILL BE HIT VERY FAST AND VERY HARD. The USA wants no more threats!"[34]

Trump's tweet reflected the president's strong vengeful proclivities. The threat to target Iranian cultural sites is one of many examples of his disregard for the laws of armed conflict. During the 2016 US presidential election campaign, for example, Trump had accused the administration of President Barack Obama of fighting "a very politically correct war" against terrorists and said that he instead would "take out their families."[35] In November 2019, he granted clemency to three US servicemen convicted or accused of deliberately killing noncombatants.[36] In this light, it is not surprising that after facing criticism for his threat to attack cultural sites, Trump doubled down the next day: "They're allowed to kill our people. They're allowed to torture and maim our people. They're allowed to use roadside bombs and blow up our people. And we're not allowed to touch their cultural site? It doesn't work that way."[37]

However, Trump's threats to attack cultural heritage sites were criticized by a number of Democratic members of Congress as threats to commit "a war crime."[38] In addition, Republican senators, including staunch Trump allies Mitch McConnell and Lindsay Graham, respectively characterized targeting cultural sites as "inappropriate" and something that both is "not lawful" and "undercuts what we're trying to do."[39] In this incident, the laws of armed conflict created more political opposition than otherwise would have existed.

Secretary of State Mike Pompeo tried to reassure the public by stating: "The American people should know that every target that we strike will be a lawful target."[40] The following exchange between Secretary of Defense Esper and the Pentagon press corps perhaps best reveals the constraining power of the law*.* Question: "The president has twice now, not hypothetical, said he is willing to strike cultural sites. Truly cultural sites not with weapons that makes them military targets. So straight-up could you both say whether you are willing to target cultural sites?" Esper: "We will follow the laws of armed conflict." Question: "And that means no because targeting a cultural site is a war crime?" Esper: "That's, that's the laws of armed conflict."[41]

Trump finally backed away from the threat, but not without complaints about the constraints, on 7 January 2020: “They are allowed to kill our people. They are allowed to maim our people. They are allowed to blow up everything that we have, and there’s nothing that stops them. And we are, according to various laws, supposed to be very careful with their cultural heritage. And you know what, if that’s what the law is, I like to obey the law.”[42]

What should we make of this incident? We do not know whether a target list presented to the president included a cultural site that was being used by the Iranians for military purposes. But we do know that, with the exception of such military use by the enemy, direct targeting of cultural heritage sites would be illegal. The best contemporary legal analysis was by Mark Nevitt, a retired US Navy Judge Advocate General’s Corp (JAG) officer and professor at the US Naval Academy, who noted that targeting Iranian cultural sites would violate international law (the 1954 Hague Convention), US domestic law (18 US Code Section 2441), and US military law and guidance (outlined in the 2016 *Law of War Manual*). Nevitt concluded that “there is simply no legal gray area or colorable argument to the contrary. This ‘legal trifecta’ provides for strong protections of cultural sites around the world in both peacetime and across the spectrum of armed conflict.”[43] Unless there was specific intelligence that Iran was using a protected cultural site as a military facility (for example, by placing aircraft next to a temple or mosque), any officer who received an order to attack a cultural site would be obligated to disobey.[44] There was no evidence that such intelligence existed, however, when Trump issued his threat, which helps explain why the secretary of defense was so quick to clarify the Pentagon’s position and contradict the president.

Conclusions: The Past and Future of Cultural Protection

Global norms have moved a great distance from accepting plunder to promoting protection. When viewed from a great distance, the arc of history may well bend toward justice. But from a closer perspective that arc looks more like a roller-coaster ride, with successes mixed with failures to protect cultural heritage and different reactions to those failures.[45] The arc of history only bends toward justice if we make it do so.

This historical review has focused on the United States, but the lessons apply to all states. In general, democracies are more likely to comply with the international treaties that they have signed and ratified.[46] This is a reminder, therefore, of the importance of getting all states, democracies and nondemocracies alike, to ratify treaties that seek to protect cultural heritage in conflict. But because these treaties usually create standards of appropriate behavior—not specific rules to govern how to make trade-offs between acts that improve military advantage and constraints that protect cultural heritage—the international community needs to be constantly

vigilant to identify not only clear violations of law, but also poor interpretations of norms or implementation of laws that lead to unnecessary cultural heritage destruction.

The 1954 Hague Convention created entailments that encouraged the United States, despite not originally ratifying the treaty, to adjust its behavior over time. This phenomenon was neither linear nor inevitable. It was subject to backtracking, leadership pressures, and errors in wartime decision-making. For American political and military leaders in the crucible of war, both strategic and moral considerations were at play, considerations that sometimes reinforced each other and at others created tensions.

In many situations, protecting cultural heritage in war may contribute to victory and enhance the prospects of postwar reconstruction. But we lack empirical evidence about how often and to what degree this is true. Indeed, the evidence for the "strategic logic" regarding cultural heritage protection is quite anecdotal compared to the rigorous empirical social science research about the strategic effects of "force protection," torture of prisoners, and collateral damage to civilians.[47] The international community would benefit from more empirical research on the conditions under which protecting cultural heritage helps win conflicts and promotes peace afterward, and under which this strategic logic is compelling.

It is important that more governments recognize that protection of cultural heritage can be a force multiplier in some contexts, reducing the animosity of foreign civilians and increasing the prospects for peaceful settlements and post-conflict stability. But it is also important for the United States and other governments to take great care to protect cultural heritage, not only when it contributes to winning the war and sustaining the peace, but even when it does not. And we should protect cultural heritage even when we do not expect reciprocity. Ultimately, we should protect cultural heritage in war because it is the right thing to do. As Jennifer M. O'Conner, the chief legal officer in the US Department of Defense, argued in 2016: "We comply with the law of war because it is the law … we will treat everyone lawfully and humanely, even when our foes do not do the same. We follow the law because it reflects our core values, the very principles that we are fighting to protect and preserve—in short, it reflects who we are."[48] O'Conner was referring to the laws of armed conflict regarding protection of noncombatants, but the sentiment holds true about protection of cultural heritage as well. We should follow the law because it reflects who we are, or at least who we aspire to be.

BIOGRAPHY

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SUGGESTED READINGS

Joseph H. Felter and Jacob N. Shapiro, "Limiting Civilian Casualties as Part of a Winning Strategy: The Case of Courageous Restraint," *Daedalus* 146, no. 1 (2017): 44–

Laura Ford Savarese and John Fabian Witt, "Strategy & Entailments: The Enduring Role of Law in the US Armed Forces," *Daedalus* 146, no. 1 (2017): 11–23.

Patty Gerstenblith, "From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21^st^ Century," *Georgetown Journal of International Law* 37, no. 2 (2006): 245–351.

Katherine E. McKinney, Scott D. Sagan, and Allen S. Weiner, "Why the Atomic Bombing of Hiroshima Would Be Illegal Today," *Bulletin of Atomic Scientists* 76, no. 4 (2020): 157–65.

Wayne Sandholtz, *Prohibiting Plunder: How Norms Change* (New York: Oxford University Press, 2007).

NOTES

1. Laurie W. Rush, "Cultural Property Protection as a Force Multiplier in Stability Operations," *Military Review* (March–April 2012): 36. Also see Laurie W. Rush and Matthew F. Bogdanos, "Protecting the Past to Secure the Future: The Strategic Value of Heritage Training," *Joint Force Quarterly* 53, no. 2 (2009): 126–27; and Thomas G. Weiss and Nina Connelly, *Cultural Cleansing and Mass Atrocities: Protecting Cultural Heritage in Armed Conflict Zones* (Los Angeles: J. Paul Getty Trust, 2017), Occasional Papers in Cultural Heritage Policy no. 1, 14.

2. Laura Ford Savarese and John Fabian Witt, "Strategy & Entailments: The Enduring Role of Law in the US Armed Forces," *Daedalus* 146, no. 1 (2017): 11.

3. James D. Morrow, *Order within Anarchy* (Cambridge: Cambridge University Press, 2014); and Geoffrey PR Wallace, *Life and Death in Captivity* (Ithaca, NY: Cornell University Press, 2015).

4. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, Art. 4.1.

5. Michael D. Gordin, *Five Days in August: How World War II Became a Nuclear War* (Princeton, NJ: Princeton University Press, 2007), 45.

6. Ron E. Hassner, *Religion on the Battlefield* (Ithaca, NY: Cornell University Press, 2016).

7. See Sean L. Malloy, *Atomic Tragedy: Henry L. Stimson and the Decision to Use the Bomb against Japan* (Ithaca, NY: Cornell University Press, 2008), 120–42.

8. US Army, "Summary of Target Committee Meetings on 10 and 11 May 1945," Memorandum from Major JA Derry to Dr. NF Ramsey to General LR Groves, 12 May 1945, RG 77, MED

Records, Top Secret Documents, File no. 5d (copy from microfilm), the National Security Archive, Washington, DC, https://nsarchive2.gwu.edu/nukevault/ebb525-The-Atomic-Bomb-and-the-End-of-World-War-II/documents/011.pdf, 4, 6.

9. As quoted in McGeorge Bundy, *Danger and Survival: Choices about the Bomb in the First Fifty Year*s (New York: Random House, 1988), 78.

10. Bundy, 78.

11. Henry L. Stimson and McGeorge Bundy, *On Service in Peace and War* (New York: Harper & Brothers, 1948).

12. Office of the Historian, "Foreign Relations of the United States: Diplomatic Papers, the Conference of Berlin (the Potsdam Conference), 1945, Volume II," US Department of State, https://history.state.gov/historicaldocuments/frus1945Berlinv02/d1310. For an excellent analysis see Alex Wellerstein, "The Kyoto Misconception: What Truman Knew, and Didn't Know, about Hiroshima," in *The Age of Hiroshima*, ed. Michael D. Gordin and G. John Ikenberry (Princeton, NJ: Princeton University Press, 2020), 34–55.

13. David McCullough, *Truman* (New York: Simon & Schuster, 1992), 592.

14. See Katherine E. McKinney, Scott D. Sagan, and Allen S. Weiner, "Why the Atomic Bombing of Hiroshima Would Be Illegal Today," *Bulletin of the Atomic Scientists* 76, no. 4 (2020): 157–65; and John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: WW Norton, 1999).

15. 1954 Hague Convention, Art. 1.

16. UNESCO: Legal Instruments, "Ratification by the United States of America of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954)," 23 March 2009, http://portal.unesco.org/en/ev.php-URL_ID=44905&URL_DO=DO_TOPIC&URL_SECTION=201.html. On the negotiation of the treaty and the controversy around the military necessity waiver, see Wayne Sandholtz, *Prohibiting Plunder: How Norms Change* (New York: Oxford University Press, 2007), 180–86.

17. US Department of Defense, *Department of Defense Law of War Manual* (Washington, DC: General Counsel of the Department of Defense, June 2015, updated December 2016), 298–99 (para. 5.18.3.1, Imperative Military Necessity Waiver), https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-1

18. Quoted in US Department of Defense, 55 n.30. Original source: General Dwight D. Eisenhower, Commander-in-Chief, US Army, "Memorandum Regarding the Protection of Historical Monuments in Italy," 29 December 1943, X Whiteman's Digest, 438 (para. 13).

19. US Department of Defense, 301 n.618 (para. 5.18.5.1).

20. Federation of American Scientists, "Putting Noncombatants at Risk: Saddam's Use of 'Human Shields,'" January 2003, https://fas.org/irp/cia/product/iraq_human_shields/index.html; and David A. Meyer, "The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law," *Boston University International Law Journal* 11, no. 2 (1993): 349–89.

21. US Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (Washington, DC: Department of Defense, April 1992), https://apps.dtic.mil/dtic/tr/fulltext/u2/a249270.pdf, 132–33.

22. US Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress—Appendix on the Role of the Law of War* (Washington, DC: Department of Defense, April 1992). For text, see *International Legal Materials* 31, no. 3 (1992): 626, www.jstor.org/stable/20693692.

23. See W. Hays Parks, "The Gulf War: A Practitioner's View," *Penn State International Law Review* 10, no. 3 (1992): 393–423; and Meyer, "The 1954 Hague Cultural Property Convention," 376–77.

24. Patty Gerstenblith, "From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century," *Georgetown Journal of International Law* 37, no. 2 (2006): 280.

25. Matthew Bogdanos, "The Casualties of War: The Truth about the Iraq Museum," *American Journal of Archaeology* 109, no. 3 (2005): 477–526.

26. James Cogbill, "Protection of Arts and Antiquities during Wartime: Examining the Past and Preparing for the Future," *Military Review* (January–February 2008): 33; and Douglas Jehl and Elizabeth Becker, "Experts' Pleas to the Pentagon Didn't Save Museum," *New York Times*, 16 April 2003, https://www.nytimes.com/2003/04/16/world/a-nation-at-war-the-looting-experts-pleas-to-pentagon-didn-t-save-museum.html.

27. Sean Loughlin, "Rumsfeld on Looting in Iraq: 'Stuff Happens,'" CNN, 12 April 2003, https://www.cnn.com/2003/US/04/11/sprj.irq.pentagon/.

28. Matthew D. Thurlow, "Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law," *Yale Human Rights and Development Law Journal* 8, no. 1 (2005): 172, 175.

29. Gerstenblith, "From Bamiyan to Baghdad," 288.

30. Thurlow, "Protecting Cultural Property in Iraq," 179.

31. Patty Gerstenblith, "The Destruction of Cultural Heritage: A Crime against Property or a Crime against People?" *The John Marshall Review of Intellectual Property Law* 15 (2016): 355.

32. US Department of Defense, *Department of Defense Law of War Manual*, para. 11.19.

33. Ralph Blumenthal and Tom Mashberg, "The Army Is Looking for a Few Good Art Experts," *New York Times*, 21 October 2019, https://www.nytimes.com/2019/10/21/arts/design/new-monuments-men.html.

34. Donald Trump (@realDonald Trump, 4 January 2020), https://www.thetrumparchive.com/?searchbox=%22some+at+a+very+high+level%22.

35. Tom Lobianco, "Donald Trump on Terrorists: 'Take Out Their Families,'" CNN, 3 December 2015, https://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/.

36. See Scott D. Sagan and Benjamin A. Valentino, "Do Americans Approve of Trump's Pardons of Court Marshalled Military Officers?" *Washington Post*, 16 December 2019, https://www.washingtonpost.com/politics/2019/12/16/do-americans-approve-trumps-pardons-court-martialed-military-officers/.

37. Maggie Haberman, “Trump Threatens Iranian Cultural Sites, and Warns of Sanctions on Iraq,” *New York Times*, 5 January 2020, https://www.nytimes.com/2020/01/05/us/politics/trump-iran-cultural-sites.html.

38. Rick Noack, “The Disturbing History behind Trump’s Threat to Target Iranian Cultural Sites,” *Washington Post*, 6 January 2020, https://www.washingtonpost.com/world/2020/01/06/disturbing-history-behind-trumps-idea-target-iranian-cultural-sites/; and Elizabeth Warren, “You are threatening to commit war crimes. We are not at war with Iran. The American people do not want a war with Iran. This is a democracy. You do not get to start a war with Iran, and your threats put our troops and diplomats at greater risk. Stop,” @ewarren, 4 January 2020, https://twitter.com/ewarren/status/1213665218020171777.

39. Alexander Bolton, “McConnell: ‘Not Appropriate’ to Target Iranian Cultural Sites,” *The Hill*, 7 January 2020, https://thehill.com/homenews/senate/477187-mcconnell-not-appropriate-to-target-iranian-cultural-sites; and Jordan Carney, “Graham Says He Warned Trump against Targeting Iranian Cultural Sites,” *The Hill*, 6 January 2020, https://thehill.com/homenews/senate/477031-graham-says-he-warned-trump-against-targeting-iranian-culture-sites.

40. Conor Finnegan and Adia Robinson, “World Is Safer Because of Iranian Commander’s Death: Secretary of State Mike Pompeo,” ABC News, 5 January 2020, https://abcnews.go.com/Politics/world-safer-iranian-commanders-death-secretary-state-mike/story?id=68056187.

41. US Department of Defense, “Press Gaggle with Secretary of Defense Dr. Mark T. Esper and Chairman of the Joint Chiefs of Staff General Mark A. Milley,” Transcript, 6 January 2020, https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/2051321/press-gaggle-with-secretary-of-defense-dr-mark-t-esper-and-chairman-of-the-join/. Both Pompeo and Esper are graduates of West Point.

42. Quint Forgey, “‘I Like to Obey the Law’: Trump Backs Off Threat to Target Iranian Cultural sites,” *Politico*, 7 January 2020, https://www.politico.com/news/2020/01/07/pompeo-us-abide-laws-of-war-targeting-cultural-sites-095525.

43. Mark Nevitt, “Trump’s Threat to Target Iranian Cultural Sites: Illegal Under International, Domestic and Military Law,” Just Security, 8 January 2020, https://www.justsecurity.org/67961/trumps-threat-to-target-iranian-cultural-sites-illegal-under-international-domestic-and-military-law/.

44. Nevitt.

45. On the “cycle of norm change” see Sandholtz, *Prohibiting Plunder*, 1–29, 261–78.

46. Beth A. Simmons, “Treaty Compliance and Violation,” *Annual Review of Political Science* 13, no. 1 (2010): 273–96.

47. For examples see Joseph H. Felter and Jacob N. Shapiro, “Limiting Civilian Casualties as Part of a Winning Strategy: The Case of Courageous Restraint,” *Daedalus* 146, no. 1 (2017): 44–58; Ron E. Hassner, “What Do We Know about Interrogational Torture?” *International Journal of Intelligence and Counter-Intelligence* 33, no. 1 (2020): 4–42; Asfandyar Mir, “What Explains Counterterrorism Effectiveness? Evidence from the US Drone War in Pakistan,” *International Security* 43, no. 2 (2018): 45–83; and Janina Dill, “Distinction, Necessity, and Proportionality: Afghan Civilians’ Attitudes toward Wartime Harm,” *Ethics and International Affairs* 33, no. 3 (2019): 315–42.

48. Jennifer O'Connor, "Appling the Law of Targeting to the Modern Battlefield," Just Security, 28 November 2016, https://www.justsecurity.org/34977/applying-law-targeting-modern-battlefield-full-speech-dod-general-counsel-jennifer-oconnor/.

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