NOTES

PROSECUTING CULTURAL PROPERTY CRIMES IN IRAQ

IAN M. RALBY*

TABLE OF CONTENTS

INTRODUCTION .................................................. 165
I. CRIMES OF THE HUSSEIN REGIME ....................... 168
   A. Foundation of the Regime ........................... 168
   B. Violations of International Law Under the Baath Regime . 169
II. THE CREATION OF THE IST .............................. 177
   A. The IST as Part of the Growing Tradition of International
      Criminal Justice ..................................... 178
   B. Crimes Outside the IST's Jurisdiction ............... 180
      1. Foreign Culpability ............................. 180
      2. Iraqi Non-Baathist Culpability .................. 182
   C. Absence of Cultural Property from the IST Statute .... 183
III. CULTURAL PROPERTY CRIMES IN THE ICTY, ICTR, SCSL, AND
     OTHER TRIBUNALS ...................................... 185
     A. The ICTY, ICTR, and SCSL Statutes ............... 185
     B. Cultural Property in Other Tribunals ............. 189
     CONCLUSION & RECOMMENDATIONS .................... 191

INTRODUCTION

On December 10, 2003, the Statute for the Iraqi Special Tribunal (IST) was signed into law, establishing a court that in the coming months and years will try former Iraqi President Saddam Hussein and his top lieutenants for crimes committed by the Baath Party regime between July 17, 1968 and May 1, 2003.1 The crimes for which the defendants will be indicted fall into three main categories: war crimes,

---

* Ian Ralby holds both a B.A. in Modern Languages and Linguistics and an M.A. in Intercultural Communication from the University of Maryland, Baltimore County, and he received his J.D. from William & Mary Law School. He is an associate at Hunton & Williams in Norfolk, VA and has been a clerk for the Iraqi Special Tribunal since January 2005. This Note won first place in the Lawyers' Committee for Cultural Heritage Preservation Student Writing Competition.

1. The Statute has twice been modified, first on August 11, 2005 under the elected government, and most recently on October 27, 2005, in order to bring it under the auspices of the new constitution. The name of the tribunal is currently unclear, as the most recent amendment appears to have changed the name to the Iraqi High Criminal Court. For purposes of clarity and consistency, therefore, this Note will continue to refer to the court as the Iraqi Special Tribunal.
crimes against humanity, and genocide. Nowhere in the IST Statute, however, is there a provision that specifically indicates whether defendants may also be charged for cultural property crimes.\textsuperscript{2} It is well documented that the Baathist government violated international conventions geared toward the protection of cultural heritage,\textsuperscript{3} yet there is no guarantee, or even indication, that the IST defendants will be charged with such violations.

While the IST Statute contains a number of different provisions that could be used indirectly to hold defendants criminally liable for cultural property crimes, this Note argues that such violations of both customary international law and international treaty law should be treated with greater seriousness. It therefore recommends that the new Iraqi government demonstrate its commitment to the rule of law by amending article 12 of the Iraqi Special Tribunal Statute to include a provision that expressly criminalizes violations of international cultural property law. It further recommends that future international tribunals follow the Iraqi government's lead.

As the world community becomes more competent at policing gross human rights violations, the emotional and psychological impact of international lawlessness needs to be addressed with greater focus. Cultural property crimes are being taken more seriously in international conventions, yet the symbolic importance of those crimes is underestimated in post-conflict judicial proceedings. In countries that have experienced the collapse of a government—whether by popular revolt, internal conflict, or external force—healing the wounds from the collapse, and building a sense of trust and unified identity are often crucial to success in the transition to stability. Physical objects and intangible factors—language and religious ceremonies, for example—that symbolize cultural heritage are often icons around which people may rally in asserting their identity. Such instances of governmental, societal, and economic collapse frequently coincide with the most egregious cultural property violations. Punishing cultural property offenders, therefore, is a necessary component of post-conflict reconstruction as it helps establish recognition for the legitimacy and sanctity


of cultural identity, which in turn can aid in re-establishing a stable society.

Since the fall of the Soviet Union in the early 1990s, the primary focus of U.S. foreign policy has been the Middle East. While the Israeli-Palestinian conflict continues to be a major destabilizing force, no country has received more attention than Iraq, and no leader has been more vilified than Saddam Hussein. Placed in power by the United States and made rich by extensive oil reserves, Hussein’s Baath Party controlled Iraq from 1968 to 2003. That rule was characterized by suppression of the religious majority, various instances of attempted genocide against ethnic minorities, acts of international aggression, and numerous other violations of human rights and international law. Among those crimes were grave breaches of the 1954 Convention for the Protection of Cultural Property in the Event of an Armed Conflict, the details of which will be discussed further in Part II. In 2003, the United States put an end to Baathist control by invading Iraq, toppling the Hussein regime, and installing the Coalition Provisional Authority (CPA). Not long after its creation, the CPA, with the guidance of the United States Department of Justice Regime Crimes Liaison’s Office, established the Iraqi Special Tribunal to prosecute the former leaders of Iraq.

The IST is an extension of the tradition of war crimes tribunals that began with the Nuremberg Tribunals after World War II and continues with, among others, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and, to a certain extent, the International Criminal Court (ICC). This Note examines the statutes of the major post-Nuremberg tribunals to analyze how cultural property crimes have been treated in these different venues of transitional justice and attempts to determine how the IST Statute should be amended to incorporate these principles directly.

Before recommending how the IST should handle cultural property crimes, this Note begins in Part I with a discussion of the documented cultural heritage crimes committed by the Baath regime and which international conventions were violated. Part II examines the IST Statute in search of cultural property provisions, but finds that it provides an inadequate legal framework for prosecution of such crimes. Part III analyzes cultural property provisions from other post-conflict

4. How the IST fits into the scheme of international tribunals, however, is increasingly unclear, as the court is now part of the Iraqi domestic judiciary.

2005] 167
tribunal statutes, finding that few statutes have addressed the issue at all. Finally, the Note concludes by proposing that the new Iraqi government amend the IST Statute to target cultural property crimes specifically in order to demonstrate its dedication to a successful process of rebuilding.

I. CRIMES OF THE HUSSEIN REGIME

A. Foundation of the Regime

Saddam Hussein was born on April 28, 1937, in Tikrit, a small farming village outside of Baghdad, to an impoverished, landless family. In 1957, young Hussein became involved in the Baath Socialist Party, which sought to take control of the country. After an unsuccessful coup in which he was shot in the leg, Hussein fled to Cairo, where he studied law at Cairo University. In 1963, he returned to his homeland and became the assistant secretary general of the Baath Party. Five years later, after a Baathist-led coup succeeded in taking control of the government, Saddam Hussein became the party's second-in-command, and by 1979 he assumed the presidency of Iraq.

While president, Saddam Hussein led the country through years of war with various nations, sanctions by the international community, and intense criticism from the United Nations and other international bodies. Interestingly, for much of his reign, Hussein and his Baath Party were avid protectors of cultural property. During times of war,

6. Id.
8. Id. ("Years of underground work gave Hussein a small core of like-minded friends, many related to him by blood or marriage and most from Tikrit").
9. Id. (noting that he conducted much of the business of Iraq, even before he became president).
11. One commentator stated:

Prior to 1991, Iraq had one of the most successful cultural property protection schemes in the Middle East. Iraqi national law has considered all immovable and movable antiquities to be owned by the state. The trade in antiquities has been illegal, and it has also been illegal to "break, mutilate, destroy or damage antiquities whether movable or
however, his regime committed highly publicized cultural property law violations. Nevertheless, cultural property crimes are not mentioned in the IST Statute, indicating that the drafters, and indeed the international community, do not find such crimes to be significant.

B. Violations of International Law Under the Baath Regime

To argue that the IST should concern itself directly with cultural property crimes, it must first be established that there is reason to charge the Iraqi defendants with such violations. Rather than creating an exhaustive list of Baath Party cultural property crimes, this Note instead endeavors to make a case for amending the IST Statute by arguing that sufficiently egregious cultural property crimes were committed during the Baath regime.

The first allegations of cultural property crimes under Saddam Hussein’s leadership arose out of the Iran-Iraq War, which raged for much of the 1980s.\textsuperscript{12} As Captain Joshua Kastenberg, an officer in the United States Air Force Judge Advocate General’s Corps said, “Iraqi forces attacked cultural sites in Iran that were not listed on the International Register, but which had been noted to the 1972 World Heritage Convention by Iran.”\textsuperscript{13} The 1954 Hague Convention,\textsuperscript{14} which some consider to have become customary international law,\textsuperscript{15} obligates

---

immoveable.” The Iraqi government outlawed the export of antiquities and established severe criminal penalties for the looting of archaeological sites. The government required that antiquities be reported within one week of discovery, and no excavations were allowed without permits from the national government. Before the invasion of Kuwait in 1990, Saddam Hussein’s regime directed healthy sums to the Iraqi Antiquities Department, guarded archaeological sites closely, and encouraged scientific excavation by local and international teams of archaeologists.


\textsuperscript{12} Joshua Kastenberg, The Legal Regime for Protecting Cultural Property During Armed Conflict, 42 A.F. L. Rev. 277, 296 (1997).

\textsuperscript{13} Id.


\textsuperscript{15} The United States, for example, never ratified the 1954 Convention, but may still be bound by some of its precepts:

It is unclear if the 1954 Hague Convention is applicable to certain nations. Iraq signed and ratified the 1954 Hague Convention and its First Protocol, but the United States only signed the Convention. Concerned that ratification might prevent the United States from

2005]
warring countries to protect the cultural property of the country in which the conflict is taking place. Iran and Iraq were both parties to the Convention.\(^{16}\) Iraq was therefore in violation of this Convention, but was able to avoid accountability because no mechanism existed for enforcing the law against the Baath regime.\(^{17}\)

After spending the majority of the 1980s at war with Iran, Iraq changed the political landscape of the Middle East by invading its tiny, oil-rich neighbor, the Kingdom of Kuwait, on August 2, 1990.\(^{18}\) While this unexpected act of aggression had numerous legal implications, its status as a major breach of the 1954 Hague Convention did not become clear to the rest of the world until the following October.\(^{19}\) As it turned out, one of the first priorities of the Iraqi government was to seize the extensive and significant collection of the Kuwaiti National Museum:

In September 1990, within weeks of Iraq’s invasion and occupation of Kuwait, the staff of the Iraq Museum turned up in Kuwait, loaded the contents of Kuwait’s National Museum into open lorries (their methods were “anything but professional,” notes the collection’s patron), and hauled them across the desert to the basement of their own museum. Kuwait had been abolished by Saddam, and these treasures were now part of Iraq’s patrimony. Most of the plunder was returned to the Kuwaitis—after Iraq’s defeat and a U.N. resolution. But some of

---

States from acting as necessary in the event of nuclear war, President Eisenhower cautioned against ratifying the Convention, and the U.S. Congress has never ratified it. Thus, the United States is not a party to the 1954 Hague Convention. However, just as the 1907 Hague Convention is regarded as customary international law, it is possible that the 1954 Hague Convention has achieved such status as well.


PROSECUTING CULTURAL PROPERTY CRIMES IN IRAQ

the collection was damaged, and 59 prime objects "disappeared," including a few spectacular emeralds—just the sort of thing a Baath higher-up would want in his pocket.  

Literally confiscating another country's national treasures, while not completely inconsistent with the strict Iraqi cultural property regime, marked a change in Iraq's policies toward cultural property.

The Baathists claim they took the property to protect it and thus reject allegations that they violated the 1954 Hague Convention. This argument, though accepted by many, is severely undercut by two major points. First, Iraq was not fighting a war with Kuwait; it was annexing Kuwait. When Iraq entered Kuwait, it declared Kuwait to be the 19th Iraqi Province. Iraq never intended to return the items; Iraq considered the property to be Iraqi as soon as it was taken. Second, and more important, the Iraqis only took certain collections; they were selective in what they removed to "protect." Isolated collections were removed, but many pieces, even entire collections, remained. Finally, at the end of the Iraqi occupation, the Iraqi forces burned the Kuwaiti National Museum, destroying the remainder of the pieces and implicating Iraq for violating the Hague Convention.

When Hussein's forces arrived at the Kuwait Museum in September of 1990, Iraq went from being one of the greatest champions of cultural property law to becoming a major violator of it. Iraq's actions at the Kuwait Museum were destructive toward Kuwaiti cultural heritage and

21. Some argue that Iraq was not breaching any laws and, in fact, was complying with the 1954 Hague Convention by ensuring that the art from the museum would not be harmed in the conflict. See, e.g., Forsyth, supra note 11, at 82 n.36 ("Some scholars have claimed this action was actually required under Iraq's obligations as a party to the 1954 Hague Convention. Under the terms of the 1954 Hague Convention, Iraq notified UNESCO that the collections of the Kuwait Museum were in danger and that they would be moving the collections to Baghdad for safekeeping.").
24. Rebecca Kinyon, Interview with Barbara Bodine, FLETCHER F. WORLD AFF.., Summer 2004, at 17, 23 ("Saddam declared Kuwait the 19th government of Iraq, with little credible historical basis.").
26. Id. at 16.
27. Id. at 17-18.
thus a violation of the 1954 Hague Convention.\textsuperscript{28} Again, however, there was no mechanism for adjudicating the Baath Party's responsibility for this breach of the law, so Iraq went unpunished. This lack of enforcement favors the consideration of cultural property crimes by the IST, given that the tribunal would be an ideal forum in which to finally hold the Iraqi leaders accountable for these breaches of international law.

While the looting of the Kuwait Museum during an invasion should be sufficiently significant to warrant a cultural property provision under the IST, Iraq's violations of cultural property laws only worsened with the intervention of the United States and other countries in 1991.\textsuperscript{29} During the Gulf War (and again during the most recent war in Iraq), the Baath regime set military policies that directly and intentionally violated international law. Under article 38, paragraph 1 of Protocol I of the Geneva Convention for the Protection of Victims of International Armed Conflict, "\textit{[i]t is . . . prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.}\textsuperscript{30} While there are numerous accounts of Iraqi soldiers having used the white flag to ambush Coalition forces,\textsuperscript{31} the damage to cultural property by the Iraqi forces went well

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{28} See Sarah Eagen, \textit{Comment, Preserving Cultural Property: Our Public Duty: A Look at How and Why We Must Create International Laws that Support International Action}, 13 \textit{PACE INT'L L. REV.} 407, 423-24 (2001) ("Although the Hague Convention produced relatively positive results during the Gulf War, there were some problems with its implementation. Specifically, Iraq, who was a party to the Convention, misused Article 4 in order to justify the removal of approximately 17,000 to 20,000 cultural objects from museums and palaces in Kuwait. Iraq claimed that 'military necessity' forced it to remove valuable cultural objects from Kuwait and take them into Baghdad, in order to protect the items from military destruction. When confronted by UNESCO, the Iraqi foreign minister promised the United Nations that all cultural property that had been removed from Kuwait, would [sic] be returned. In order to see that Iraq carried through on its promise, 'UNESCO did the most it could by publicizing Iraq's violations and gathering information regarding the stolen artifacts. [However,] the crucial aspect of the campaign's success . . . resulted from political pressure applied by the [United Nations] Security Council and the United States.' Fortunately, Iraq eventually returned the objects it had removed from Kuwait, but it did so under the supervision of the United Nations Security Council and the United States.") (italics and ellipses in original).
\item \textsuperscript{29} Forsyth, \textit{supra} note 11, at 78 ("The Gulf War and its aftermath shattered this cultural heritage protection scheme.").
\item \textsuperscript{30} Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 38 [hereinafter Protocol I to the Geneva Conventions].
\item \textsuperscript{31} See, e.g., Satterlee, \textit{supra} note 3, at 1 ("On March 25 [2003], Iraqi soldiers and Fedayeen fighters killed 10 U.S. soldiers and injured 40 in an ambush after feigning surrender by waving a white flag and then opening fire on the U.S. soldiers preparing to accept their surrender.").
\end{itemize}
\end{footnotesize}
beyond merely deceiving their enemies with the use of the flag of surrender.

In defiance of international law, Iraq also intentionally placed military targets in close proximity to items of cultural property.\textsuperscript{32} "Reports indicate that large caches of weapons and other heavy military equipment were stored or located near mosques and other historical and cultural landmarks."\textsuperscript{33} The placement of military targets in close proximity to cultural property as a means to draw hostile fire is strictly prohibited by international conventions. Article 53 of Protocol I reads:

Protection of cultural objects and of places of worship: Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited: (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; (c) to make such objects the object of reprisals.\textsuperscript{34}

During armed conflicts in Iraq, the Baath regime repeatedly violated this provision by intentionally luring enemy combatants to attack historical sites.\textsuperscript{35}

\textsuperscript{32} Forsyth, supra note 11, at 91.
\textsuperscript{33} Satterlee, supra note 3, at 4.
\textsuperscript{34} Protocol I to the Geneva Conventions, supra note 30, art. 53.

The fighting that has taken place in the very heart of the historic cemetery of Najaf (the Wadi Al-Salam, or valley of peace, one of the largest burial grounds in the world) has caused the degradation of the site with the destruction of many tombstones some of which date back to the beginning of the Islamic era (7th century). The coalition and Iraqi forces are currently surrounding the mausoleum of Ali, tomb of the cousin and brother-in-law of the Prophet Mohammed, where the Moqada Al-Sadr militias have taken refuge, endangering this monument which has already suffered damages....

\textit{Patrimoine sans Frontières calls to the:}

\begin{itemize}
\item Combatants that have taken refuge in the Mausoleum to respect the terms of the Hague Convention of 1954 on the protection of cultural heritage in the event of armed conflict and not use this site as a shield and target....
\end{itemize}
GEORGETOWN JOURNAL OF INTERNATIONAL LAW

The United States military, cautious of international law as well as public opinion, has been particularly careful to respect Iraqi cultural heritage, despite the presence of Iraqi soldiers at the sites. In both wars in Iraq, Coalition forces have been credited with avoiding co-located military targets and cultural sites. No matter how careful the intervening forces were, however, Hussein and the Baath regime wanted to be able to accuse the foreign powers of destroying Iraq's...


Our fighting positions were in and around Nasiriyah, which is also in and around the vicinity of the ancient city of Ur. I personally observed how Iraqi jets were parked around the ziggurat, obviously so we would not hit the jets. I personally observed how the Iraqi military forces moved jet fighters from the nearby Tallil airbase to the immediate proximity of the great ziggurat, which dates to approximately 2000 BC.

This was purposely done because the Iraqi military knows that we take extreme measures to protect cultural, religious, and archaeological sites. This is something that I firmly believe in, and that members of the U.S. military firmly believe in. This is also in accordance with the 4th Geneva Convention, as well as with common decency and respect.

In the case of Ur in 1991, for instance, our assessment was that the long-term damage to world culture was clearly not worth the short-term military gains that would have been made by destroying the Iraqi jets. As a result the Iraqi jets were not hit. They were later towed away, when we took that area, and towed away by tractors and then blown up in place. Our missiles and our jets intentionally let those jets survive because we did not want to hit that ziggurat.

36. Major Christopher Varhola, U.S. Army Civil Affairs Reservist and cultural anthropologist, explained the military’s caution:

A couple of key points to mention here: how the U.S. Army respects archaeological and cultural sites and how the Iraqi military uses these same sites for protection. Consider the recent activities in and around the Mosque of Ali in Najaf. I cannot speak for the ground commanders, but I can assure you that, because of civil affairs soldiers, the ground commanders are aware of the importance of preserving sites and of not letting short-term military necessity override that importance.

Kuttas & Varhola, supra note 35.

37. The military went so far as to incorporate many of the principles of customary international law into its rules of engagement:

174
PROSECUTING CULTURAL PROPERTY CRIMES IN IRAQ

cultural heritage. When the foreign forces did not destroy cultural property, Hussein took matters into his own hands.

Beyond merely endangering items of cultural significance during the first Gulf War, the Baath regime actually destroyed them in order to foster ill will against the Coalition forces.\(^38\) W. Hays Parks, Chief of the International Law Branch of the Office of the Judge Advocate General of the Army, describes the destruction of a mosque at Al Basrah:

We were very careful in watching where we carried out our air strikes during the Gulf War and watching for collateral damage as well. This is the Al Basrah Mosque. It attracted our attention early in the air campaign because there was a bomb crater adjacent to it. In tracing its origin, it was determined that it occurred because of an errant bomb off of a Navy strike aircraft. This was not the target. The target was a military objective nearby.

\[
\ldots 
\]

We wanted to make sure there was no more collateral damage done. We kept looking, and suddenly the next day, the mosque

In Operation Desert Storm, the Coalition forces proved that they could adhere to the limits of customary international law and prevail. Coalition forces could have lawfully attacked military threats in and around centers of cultural importance. However, in accordance with the set Rules of Engagement—set by the commanders in charge of the war—they did not strike these areas when cultural objects were likely to suffer collateral damage. This remained so despite Iraq’s failure to comport with international law by segregating its military targets from centers of cultural property. For instance, the Sumerian temple, which Iraq found as a welcome location for a few of its fighter aircraft, was a legitimate target. The Rules of Engagement, created by the commanders, would make it so only if it were an absolute necessity. The scenario that played out evidenced that the 1954 Hague Convention, as a reflection of a customary international law of war to protect cultural properties, was an appropriate and practical guide to follow. Had those aircraft been suspected as nuclear ready, an airstrike would have been permissible. Under the regime envisioned by Additional Protocol One, such a strike would not have been permissible. No customary international law of war would permit the utter devastation of an internationally recognized coalition force because of a de minimis lingering doubt.

See, e.g., Kastenberg, supra note 12, at 501.

38. W. Hays Parks, Chief, Int’l Law Branch, Office of the Judge Advocate Gen. of the Army, A Symposium on Destruction and Rebuilding of Architectural Treasures in Bosnia and Herze-
was falling apart. There had been no additional air strikes, but it was collapsing.

....

Three days later, there was even more damage.

....

Finally, the place [was] completely obliterated. Now what clearly was happening was the mosque was being torn down by the Iraqis so that Saddam Hussein could use this as a way of trying to split the Coalition because of the number of Moslem nations that were involved in it. 39

Iraq’s conduct was unmistakably destructive, and the Baath regime should be held accountable for its actions.

The cultural property protection scheme in Iraq deteriorated further after the first Gulf War. 40 International sanctions ended archeological research in Iraq and led to looting by civilians. 41 Illegally stolen and traded items of cultural heritage helped ameliorate economic hardship. 42 The Baath regime had been crippled by the Gulf War, and what was once a dominant system of cultural property preservation fell to

39. Id.
40. See generally Forsyth, supra note 11.

Following the Gulf War, illicit Iraqi antiquities emerged in substantial amounts on the international market. In the three years following the war, ten of Iraq’s regional museums were attacked, resulting in a loss of about three thousand objects. Looting also occurred at Iraq’s archaeology sites and evidence of such existed on the European market. From the end of the Gulf War until the fall of the Saddam Regime in 2003, Iraqis established illicit trade networks, identified transport routes, and successfully learned how to smuggle. Iraq is said to have porous borders because its ‘long land frontiers are difficult to police and allow easy passage into Turkey, Iran, Jordan, Saudi Arabia, and Syria.’ Thus, looted Iraqi antiquities flow easily out of their country of origin and onto the world-wide market with an end destination in Europe, the United States, or Japan.

42. Borke, supra note 41, at 388.

176 [Vol. 37
PROSECUTING CULTURAL PROPERTY CRIMES IN IRAQ

ruins.\textsuperscript{43}

Having now established that the Baath regime is sufficiently culpable in the arena of cultural property crimes to warrant prosecution, this Note moves to a discussion of where that prosecution should occur. The next Part examines the founding of the IST and analyzes the existing provisions that may be used to charge an individual for a violation of international cultural property laws.

II. THE CREATION OF THE IST

After the United States declared an end to hostilities in Iraq on May 8, 2003, it was left with control of the country and thus the responsibility for instituting a rule of law. After a brief military rule, the U.S.-led coalition installed the CPA as the ruling government in Iraq.\textsuperscript{44} In pursuit of transitional justice, the CPA authorized the creation of the Iraqi Special Tribunal on December 10, 2003.\textsuperscript{45} The IST Statute specifically gives jurisdiction over crimes committed by any Iraqi national or resident of Iraq between July 17, 1968, and May 1, 2003.\textsuperscript{46}

Given the changing political tides, the tribunal has undergone some recent changes. On August 11, 2005, the statute of the Tribunal was reaffirmed and amended by the duly elected Iraqi government. The amendments, unfortunately, still did not provide for prosecuting cultural property violations. On October 27, 2005, the Tribunal was brought under the authority of the new Iraqi constitution, making it a part of the Iraqi domestic judiciary. The substance of the statute, however, remained unchanged in so far as cultural property crimes are concerned.

Much of the IST Statute’s language was drawn from the statutes of existing international tribunals: the International Criminal Tribunal for the Former Yugoslavia (ICTY),\textsuperscript{47} International Criminal Tribunal for Rwanda (ICTR),\textsuperscript{48} Special Court for Sierra Leone (SCSL),\textsuperscript{49} and

\textsuperscript{43} Id. at 389.
\textsuperscript{44} For general information, see the official website of the Coalition Provisional Authority, at http://www.cpa-iraq.org.
\textsuperscript{45} Statute of the Iraqi Special Tribunal, supra note 2, at art. 38.
\textsuperscript{46} Id. art. 1.
International Criminal Court (ICC). While there is no international common law, the IST Statute specifically provides in article 17(b), that "[i]n interpreting Articles 11 to 13, the Trial Chambers and the Appellate Chamber may resort to the relevant decisions of international courts or tribunals as persuasive authority for their decisions." To determine how persuasive the decisions of each of these other tribunals may be, it is important to contextualize the IST in the tradition of international criminal justice.

A. The IST as Part of the Growing Tradition of International Criminal Justice

The institutionalization of post-conflict international criminal justice began with the Nuremburg Tribunal and other post-World War II military courts. Relying on principles of customary international law and composed of international judges, the Nuremburg Tribunal was the model on which the United Nations later based its tribunals. In 1993, decades after the Nuremburg trials ended, the United Nations founded the ICTY to try individuals for crimes committed in the former Yugoslavia.

Established at The Hague, the ICTY is guided in content, procedure, and composition by a U.N. statute, and is distinct from the Nuremburg Tribunal in a number of ways. Whereas the Nuremburg trials were held in the country in which many of the charged offences occurred, the ICTY proceedings are conducted outside of the conflict area. Additionally, the ICTY is bound by a specific statute, whereas Nuremburg was governed by its charter and a more flexible interpretation of the existing principles of international law. The United Nations founded the ICTR a year after the ICTY, and the Rwandan tribunal is essentially identical to the ICTY, except for minor differences in the language of the statute. It, too, is U.N.-sponsored, based on a statute, and located


51. International common law is not to be confused with customary international law. The latter, while derived from precedent, is distinct from stare decisis because the precedent is not judicially-based, but drawn from state practice.

52. Statute of the Iraqi Special Tribunal, supra note 2, art. 17(b).
outside of the conflict area, in Tanzania.

The founding of the Special Court for Sierra Leone (SCSL) on August 14, 2000 marked a divergence in the tradition of international criminal justice in a number of ways. First, unlike the other tribunals, which were established without the involvement of the conflict state, the SCSL was formed via an agreement between the government of Sierra Leone and the United Nations. As with the ICTY and the ICTR, the judges for the court are international—drawn from countries all over the world, rather than solely from Sierra Leone. For the first time since Nuremberg, the SCSL is situated in the country of conflict. The most important distinction, however, is that the legal content as codified by the enabling statute of the SCSL includes provisions under the country’s domestic law. The SCSL, therefore, is an international composition/hybrid content tribunal as opposed to the international composition/international content of the previous courts.

The IST is distinct from the previous tribunals in a number of ways. First, it does not have a U.N. sponsor, potentially weakening the legitimacy of this court and making its jurisprudence less persuasive. Like the SCSL, the IST took a hybrid content approach by incorporating Iraqi domestic law into the Statute along with international law. For the first time, however, the composition is not international, but rather purely Iraqi. While article 4(d) of the IST Statute allows for the

54. Agreement on the SCSL, supra note 49.
55. Salvatore Zappalà, The Iraqi Special Tribunal’s Draft Rules of Evidence and Procedure: Neither Fish Nor Fouf’l, 2 J. Int’l. CRIM. JUST. 855, 855 (2004) (“The Special Tribunal clearly is not an international or internationalized court, nor, however, is it purely an Iraqi national court. Similarly, it does not entirely draw inspiration from the procedural system of other war crimes courts (the International Criminal Court [ICC], or the International Criminal Tribunals for the Former Yugoslavia and Rwanda [ICTY and ICTR, respectively], or the Special Court for Sierra Leone [SCSL] or other mixed courts), and nor is it simply based on Iraqi procedural law. The Iraqi Special Tribunal is a hybrid institution with a hybrid procedural system.”).
57. See, e.g., United States Institute of Peace, Special Report 122, Building the Iraqi Special Tribunal: Lessons from Experiences in International Criminal Justice 8 (2004), available at http://www.usip.org/pubs/specialreports/sr122.html (“Political circumstances in Iraq suggest that appointment of foreign judges currently is not likely, however. The provision permitting the appointment of foreign judges, a last-minute addition to the Statute, reportedly was strongly urged on the Governing Council by the CPA, and has not been warmly welcomed. It is unclear what the attitude of a new post-June 30 interim government may be with respect to the appointment of foreign judges. In addition, it is unlikely that the CPA’s suspension of the death penalty will be continued after the planned June 30 transfer of authority in Iraq, making it doubtful that any UN organs would be willing to play a role in appointing IST judges.”).
appointment of non-Iraqi judges; article 28 specifies that they will be Iraqi nationals. This contradictory language can be attributed to the last-minute addition of article 4(d).

The single most important distinction between this tribunal and the others is that the defendants must be Iraqi nationals, whereas the previous tribunals have not placed nationality restrictions on those who may be tried. In Sierra Leone, for example, one of the thirteen individuals indicted by the SCSL was Charles Taylor, the acting head of state of Liberia at the time of his indictment. This limitation on potential defendants in the IST is extremely important, as it means that non-Iraqis cannot be held responsible for any of the crimes committed in Iraq.

B. Crimes Outside the IST's Jurisdiction

1. Foreign Culpability

The nationality restriction on the defendants is especially significant in the context of cultural property crimes. As discussed above, during peacetime the Baath regime was quite protective of Iraqi cultural heritage. Most of the Baathists' offenses occurred during wartime, but Baathists were not the only perpetrators. Arguably, some of the

58. Statute of the Iraqi Special Tribunal, supra note 2, art. 4(d) ("The Governing Council or the Successor Government, if it deems necessary, can appoint non-Iraqi judges who have experience in the crimes encompassed in this statute, and who shall be persons of high moral character, impartiality and integrity.").

59. Id. art. 28 ("The judges, investigative judges, prosecutors and the Director of the Administration Department shall be Iraqi nationals, except as provided for in Article 4(d)."").

60. UNITED STATES INSTITUTE OF PEACE, supra note 57, at 8.

61. Statute of the Iraqi Special Tribunal, supra note 2, art. 1(b) ("The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 to 14 below, committed since July 17, 1968 and up until and including May 1, 2003, in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait. This includes jurisdiction over crimes listed in Articles 12 and 13 committed against the people of Iraq (including its Arabs, Kurds, Turcomans, Assyrians and other ethnic groups, and its Shi'ites and Sunnis) whether or not committed in armed conflict.").

62. See, e.g., Eric Pape, Cleaning House: Sierra Leone's War Crimes Tribunal Defied History by Going After the Victims, Not Just the Losers, in the Country's Civil War. Rebuilders of Iraq Are Taking Notice, LEGAL AFF., Oct. 2003, at 69, 71 ("Taylor has long been blamed for using the war in Sierra Leone to enrich his regime. RUF rebels often found safe haven in Liberia, going there to exchange raw diamonds for weapons, food, and training. . . . Taylor is the first sitting head of state ever to be indicted for war crimes—a major step for the rule of international law.").

63. Forsyth, supra note 11, at 76-77.
most destructive cultural property crimes have been committed during the U.S. occupation, which began in March 2003. The IST’s jurisdiction, however, does not cover any events after May 1, 2003, thus preventing prosecution for some of the worst crimes. Perhaps even more regrettable is that those offenses were, in many instances, perpetrated not by Iraqis, but by U.S. and Coalition forces who did not fulfill their obligation to protect Iraq’s cultural heritage upon invasion.

While the Coalition has been chastised for destroying Iraqi cultural property, part of the problem is that almost any action by the U.S. military could cause unintentional destruction of historic sites. Major Christopher Varhola said, “More than just bombing can cause damage. Digging ditches, in southern Iraq for instance, or erecting earthworks, can damage the multiple soil layers that show the temporal and social context of a given site, so critical to understanding the longer-term cultural and archaeological significance of the site.”

Looting is perhaps even more problematic than the military operations. The discussion of postwar looting in Iraq centers around the

---

65. Id. at 61.

The looting sparked controversy about the adequacy of international law to protect cultural property during and after military conflict, the extent of United States obligations, and compliance by the United States with those obligations. The media highlighted such technical legal issues as the extent to which United States obligations were limited by its status as a non-party to several pertinent treaties, particularly the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which has been ratified by over 100 states.

Id. at 56; see also Anita Ramaswamy, Toppling Saddam, Not His Statues: Why It Is Important to Stop the Looting of Medical Supplies, the Theft of Cultural Artifacts, and Other Economic War Crimes, FINDLAW FOR CORPORATE COUNSEL, Apr. 22, 2003, http://writ.corporate.findlaw.com/ramaswamy/20030422.html.
66. Kuttas & Varhola, supra note 35.
67. Penn Museum, Iraq’s Endangered Cultural Heritage: An Update, http://www.museum.upenn.edu/new/iraq/update.shtml (last visited Sept. 21, 2005) (“Antiquities ripped from archaeological sites will be dispersed around the world, valued as objects of art. But looting destroys any knowledge of where artifacts come from, as well as the association they had with other artifacts in the ground. Context and association are keys that archaeologists use in determining how artifacts functioned and in reconstructing past behavior. If an artifact is ripped from the ground, we will never know whether it was found in a house where it was originally used, or a trash dump where it was discarded, or a burial. Each of those contexts would likely provide archaeologists with different kinds of information about ancient Mesopotamia.”).
Iraqi National Museum in Baghdad.68

The looting of the Iraqi National Museum took place between 8 April, when the security situation prompted staff to leave the museum, and 12 April when some of them managed to return. Despite early pleadings with US forces to move a tank to guard the museum gates, US tanks did not arrive until 16 April. Cynics would say that the protection of the Oil Ministry appeared to take priority at the time.69

While the looting committed by Iraqi civilians theoretically would fall under the jurisdiction of the IST, this incident raises questions as to whether the United States fulfilled its obligations under various international humanitarian laws, including the 1907 Hague Convention Respecting the Laws and Customs of War on Land70 and the 1954 Hague Convention.71

2. Iraqi Non-Baathist Culpability

The role of foreign powers notwithstanding, not all of the Iraqi cultural property crimes committed in Iraq between 1968 and 2003 were perpetrated by the Baath regime.

In 1991, at the end of the first Persian Gulf War, nine of Iraq’s regional museums were looted by rampaging mobs opposed to Saddam Hussein’s government. In all, about 4,000 items (including antiquities) were stolen or destroyed. Some were later smuggled out of Iraq, and by the following year, were turning up at art auctions and in the hands of dealers in London and New York.72

69. *Id.*
72. Ramasastry, *supra* note 65 (comparing looting after the Gulf War in 1991 to the situation in Iraq after the overthrow of Saddam Hussein in 2003.).

Baghdad’s National Museum of Antiquities has been ravaged—some suspect by international traffickers.

182
PROSECUTING CULTURAL PROPERTY CRIMES IN IRAQ

While Saddam Hussein was in many ways a champion of the protection and preservation of cultural artifacts, other non-Baathist Iraqis were responsible for significant looting and destruction, especially during the Gulf War in 1991 and the U.S. invasion in 2003. Some even argue that the destruction of the statues and images of Hussein were themselves crimes against cultural property.73 Hussein’s selective approach to cultural heritage preservation, however, does not mitigate the flagrant crimes of the regime discussed in Part I.

C. Absence of Cultural Property Crimes from the IST Statute

Examining the language of the IST Statute reveals that there is no explicit mention of cultural property crimes.74 However, a number of provisions exist under which cultural property crimes might be charged. Article 12 sets forth crimes against humanity, among which is “[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law . . . .”75 As will be discussed in more detail below, the Statute distinguishes between crimes against people and crimes against property, which makes this provision weak in regard to cultural property law. Under this language it is difficult to hold an individual accountable for cultural

Looters made off with statues, golden bowls, manuscripts and other treasures in the museum’s collection chronicling ancient Mesopotamia, considered the cradle of civilization and modern home to Iraq. According to the museum’s deputy director, who blames U.S. forces for refusing to prevent the plunder, at least 170,000 items were taken or destroyed.

73. Id.

74. See Statute of the Iraqi Special Tribunal, supra note 2.
75. Id. art. 12(a) (8).

2005] 183
property crimes, unless those crimes systematically targeted one particular culture's property, the destruction of which was designed primarily to cause emotional harm to members of that culture.

Perhaps the most general cultural property crimes provision of the IST Statute is article 12(a)(10), which criminalizes "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."76 This section does not allow per se criminalization of cultural property crimes; it requires proof of harm. Article 12 falls well short, therefore, of providing sufficient legal grounding for cultural property crime charges.

Article 13's prohibitions on war crimes provide a slightly more tenable basis for the prosecution of cultural property crimes. First is article 13(a)(4), which essentially criminalizes looting and pillaging, described as "[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly"77 under the Geneva Conventions of August 12, 1949. This broad provision does not target the type of crimes committed by the Baath regime. The only instance that might fall under this section is the burning of the Kuwaiti National Museum, a result that indicates that article 13(a)(4) is not an adequate provision for genuine prosecution of the Baath crimes.

The closest facsimile of a cultural property provision is found in article 13(b)(10), "[i]ntentionally directing attacks against buildings that are dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives."78 The language of this provision, however, does not readily allow a defendant to be charged for placing a military target next to a historic monument. The Baath regime should be charged both with intentionally making Iraqi cultural property vulnerable to attack and with destroying such property in an attempt to discredit foreign forces. Article 13(b)(10) does not address those charges.

Article 13(b)(14) prohibits "[d]estroying or seizing the property of an adverse party unless such destruction or seizure be imperatively demanded by the necessities of war."79 This provision may be used to charge defendants for the looting of the Kuwaiti Museum in 1990, but like all of these provisions, article 13(b)(14) falls short of distinguish-

76. Id. art. 12(a)(10).
77. Id. art. 13(a)(4).
78. Id. art. 13(b)(10).
79. Id. art. 13(b)(14).
ing cultural property from property generally. That distinction has been overlooked in post-conflict transitional justice.

If a thief were to steal a custom-made car in Washington, DC, the owner would be furious, and the justice system would take action. If the same thief, however, stole the Declaration of Independence, the whole country likely would join in an effort to recover it. Cultural property carries emotional significance far beyond the value of the object and appeals to a sector of the world’s population far beyond any individual owner. It is for this reason that cultural property must be treated separately in the international tribunals.

The IST is the most established mechanism for confronting the injustices perpetrated by the Baath regime. The country has suffered tremendous loss, and it is important to unify the population in pursuit of the common goal of rebuilding. One way to forge such cooperation is to use icons of shared cultural heritage. In instances where those icons have been destroyed, holding the individuals accountable for the destruction can be equally unifying. It is thus vitally important to the future identity of Iraq and to the establishment of governmental stability that the process of vetting occur and that the Baath Party be forced to take responsibility for its destructive behavior. Having found little in the IST Statute to accomplish this end, this Note now turns to other international tribunals to determine if any court has adequately addressed cultural property crimes in its founding statute.

III. Cultural Property Crimes in the ICTY, ICTR, SCSL and Other Tribunals

A. The ICTY, ICTR and SCSL Statutes

The IST Statute lays new groundwork in international criminal justice by more accurately articulating existing law in a number of significant areas, both procedural and substantive. For example, the IST is the first tribunal to explicitly allow for defendants to be charged individually for crimes committed by others when both the defendant and the perpetrator shared a common criminal plan and the defendant acted in furtherance of the plan, but perhaps did not participate in the actual crime. 80 There is no reason, therefore, why the IST cannot

---

80. Since the ICTY's 1999 Appeals Chamber decision in Prosecutor v. Tadić, the international criminal tribunals have all used a broad theory of liability for charging individuals with offences committed by a larger group. Known as the common purpose doctrine, it allows for and individual to be held criminally responsible for crimes that were committed by a group of people who shared a common criminal intent. Thus, even if a defendant did not participate directly in the crime, his...
take another step and make cultural property violations explicitly enforceable in international criminal justice.

Analyzing the statutes of the international tribunals necessarily begins with the Nuremberg Charter. Under part II, "Jurisdiction and General Principles," article 6(b) contains the only language that could allow for a defendant to be charged with a cultural property crime:

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity. 81

Obviously, this provision is not designed to target cultural property crimes specifically, but nowhere else in the charter is property mentioned, much less cultural property or heritage. 82

The ICTY, nearly fifty years later, provides the prosecutor and the court with better tools for charging and convicting a defendant for cultural property crimes. These advances may be attributed to the development of international conventions dealing with cultural property between the establishment of the Nuremberg Tribunal in 1945 and the ICTY in 1993, most notably the 1954 Hague Convention and the 1970 UNESCO Convention. 83 While the ICTY does not address cultural participation in the criminal enterprise could be sufficient to hold him liable to the full penalty for whatever action the group took in executing their criminal plan. It was not until the International Criminal Court (ICC) statutorily separated the concept of aiding and abetting from this broader theory of liability that these two distinct theories were independently codified. The IST has followed the ICC's lead by mimicking the statutory language on the matter. Since the ICC has yet to issue an indictment, the IST will likely be the first to use this newly articulated legal principle. See generally Allison Marston Danner & Jenny S. Martínez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of the International Criminal Law, 93 CAL. L. REV. 75 (2005); Statute of the Iraqi Special Tribunal, supra note 2, art. 15(b)(4).


82. See generally id.

83. See, e.g., Francesco Francioni, Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity, 25 MICH. J. INT'L L. 1209, 1213 (2004) ("[T]he exponential growth of international cultural property law in the past fifty years bears witness to the emergence of a new principle according to which parts of cultural heritage of international relevance are to be protected as the common heritage of humanity.").

186 [Vol. 37

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
property directly, there are a number of provisions under which defendants have been indicted and convicted of cultural property crimes.

Article 3(d) of the ICTY Statute, which addresses violations of the laws or customs of war, provides a more elaborate scheme of liability than did the Nuremberg Charter, and the most direct criminalization of cultural property violations in any tribunal to date:

(d) seizure of, destruction or wilful [sic] damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.\(^{84}\)

By criminalizing the destruction of historic monuments and works of art in addition to the plunder of public as well as private property, the ICTY took a major step toward a more direct, explicit codification of cultural property crimes.\(^{85}\)

A distinction must be drawn here between crimes against property and crimes against people.\(^{86}\) Grave breaches of the Geneva Convention are criminalized in article 2 of the ICTY Statute, and subsection (d) specifically outlaws "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly ...."\(^{87}\) Additionally, article 5(h) prohibits "persecutions on political, racial and religious grounds"\(^{88}\) when committed during an armed conflict.\(^{89}\) While both of these sections have been used to charge defendants with cultural property crimes, the mens rea of the

\(^{84}\) Statute of the ICTY, supra note 47, art. 3(d).

\(^{85}\) Hirad Abtahi, The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia, HARV. HUM. RTS. J., Spring 2001, at 30 ("The insertion in the ICTY Statute of crimes pertaining to cultural property, whether directly or indirectly, was a major step toward strengthening previous international instruments' protection of cultural property in times of armed conflict. The inclusion in ICTY indictments of criminal charges addressing damages to cultural property concretized this step. Finally, the ICTY's conviction of defendants for crimes involving cultural property was a remarkable achievement because it demonstrated the importance of the protection of cultural property in times of armed conflict.").

\(^{86}\) Id. at 31.

\(^{87}\) Statute of the ICTY, supra note 47, art. 2(d).

\(^{88}\) Id. art. 5(h).

\(^{89}\) Id.
two offenses is quite distinct: whereas the first is a general intent crime, the second requires specific intent targeted at a particular group of people.

Hirad Abtahi expresses the significance of this distinction between crimes against people and crimes against property very clearly:

The ICTY must also deal with the impact that the prosecution and punishment of crimes against cultural property may have on the traditional distinction between crimes against property and crimes against persons. The anthropocentric approach of law psychologically confines crimes against cultural property to a less visible position than other crimes. Even when crimes against cultural property are addressed, it is because the perpetrators' objective was to harm the population whom the cultural property represented. For example, the ICTY addresses crimes involving the destruction of a mosque because they harmed the Muslim population. The same reasoning applies to the destruction of a Catholic monastery, which injured the Croat population, or of an Orthodox church, which harmed the Serb population. These anthropocentric and ethnocentric approaches require the establishment of a link between cultural property and the group of individuals that it represents. As a result, in the hierarchy of international crimes, there is often a tendency to place crimes against cultural property below crimes against persons. Although no one can deny the difference between the torture or murder of a human being and the destruction of cultural property, it remains important to recognize the seriousness of the latter, especially given its long-term effects.90

To combat this confusion, a more direct approach is necessary. Cultural property laws should be explicit, rather than implicitly derived from a series of provisions protecting persons and property generally. Unfortunately, a review of the statutes of the other tribunals shows that virtually no progress has been made to this end.

Despite many similarities between the ICTY and the ICTR, the latter contains none of the provisions criminalizing cultural property crimes beyond the very broad prohibition of "[p]ersecutions on political,

90. Abtahi, supra note 85, at 2-3.
rational and religious grounds . . .”91 Accordingly, defendants have not been charged with cultural property crimes in the ICTR.

The SCSL, however, has taken a different approach to handling property crimes. As discussed above, the SCSL was the first tribunal to integrate domestic law into its statute.92 Interestingly, much of that domestic law deals with property offenses. Article 5 of the Statute, “Crimes under Sierra Leonean Law,” gives the SCSL jurisdiction over

(b) Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:
   (i) Setting fire to dwelling—houses, any person being therein, contrary to section 2;
   (ii) Setting fire to public buildings, contrary to sections 5 and 6;
   (iii) Setting fire to other buildings, contrary to section 6.

While these are not specifically cultural property crimes, they are all offenses under which a defendant could be charged with a cultural property violation. A review of the indictments from the SCSL, however, indicates that cultural property crimes have not been a major focus of the tribunal.

While the ICTY, ICTR, and SCSL statutes do not contain specific language relating to cultural property crimes, they are not the only international criminal tribunals established since Nuremberg. There are a number of other, less publicized tribunals, and it is worth examining some of their statutes in search of cultural property provisions.

B. Cultural Property in Other Tribunals

The Rome Statute of the ICC actually begins with language that indicates a deep regard for cultural property and heritage: “The States Parties to this Statute, Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time . . .” Article 7(1)(h) addresses crimes against humanity in the same way as

---

91. Statute of the ICTR, supra note 48, art. 3(h). Interestingly, however, the ICTR language does not require that these offences take place during an armed conflict, but rather “when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.” Id. art. 3; see also, Abtahi, supra note 85, at 21.
92. See generally Statute of the SCSL, supra note 49.

2005]
the other tribunals, even mimicking the language. Articles 8(2)(b)(ix) and 8(2)(e)(iv) both echo the language later found in the ICTY Statute: "Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives." The Rome Statute, therefore, falls short as well.

Perhaps the best approach to adequately addressing cultural property crimes in a tribunal setting is provided by the Cambodian Extraordinary Chambers, one of the least publicized of the recent international courts. In 2001, the Cambodian legislature approved the creation of a set of Extraordinary Chambers within the Cambodian national courts to try the Khmer Rouge for atrocities committed between April 17, 1975, and January 6, 1979.

The Khmer Rouge Tribunal will have subject matter jurisdiction over six categories of offenses: (1) crimes set forth in the 1956 Penal Code of Cambodia; (2) genocide; (3) crimes against humanity; (4) grave breaches of the four 1949 Geneva Conventions; (5) destruction of cultural property in violation of the 1954 Hague Convention for the Protection of Property in the Event of Armed Conflict; and (6) offenses committed against internationally protected persons as set forth in the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.

Given the limited scope of the tribunal, it is extremely significant that

93. Statute of the ICC, supra note 50, art. 7(1)(h) ("Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court . . . .").
94. Id. arts. 8(2)(b)(ix), 8(2)(e)(iv).
cultural property crimes constitute one of the six categories of offenses this court will hear.

The language of the Cambodian law, for the first time, explicitly gives the court jurisdiction to try individuals for cultural property crimes:

The Extraordinary Chambers shall have the power to bring to trial all Suspects responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979.97

While the IST Statute was crafted after the Cambodian law, the Statute’s drafters opted not to include this type of direct criminalization of cultural property offences. There existed precedent for including cultural property crimes in the founding statute of a tribunal, but the CPA and the U.S. Department of Justice chose not to follow that example. By making that choice, the IST has implicitly stated that it does not consider cultural property crimes to be worth prosecuting.

**CONCLUSION & RECOMMENDATIONS**

While the IST was established to try Iraqi nationals for crimes committed during the Baath regime, it fails to identify cultural property crimes as independent criminal offenses. There is a difference between property and cultural property, yet that distinction is generally lost in the IST Statute, as well as the statutes of other international tribunals. The ICTY has tried individuals for cultural property crimes, despite having no explicit provision under which to do so, but, with the exception of the Cambodian Extraordinary Chambers, none of the other tribunals has seen fit to independently codify cultural property crimes. Given that the current government is not technically bound to accept the IST because a former government created it, the IST is still in a position to amend its statute.

The new government should consider inserting a subsection of Crimes Against Humanity that reads “crimes against cultural heritage and property,” between article 12(a) (8) and article 12(a) (9). Then, it should amend article 12(b) to insert between subsections 6 and 7 a provision that reads:

---

97. Law on Cambodian Chambers, *supra* note 95, art. 7.
“Crimes against cultural heritage and property” shall be defined as the willful or wanton destruction, theft, damaging, or otherwise compromising of any property, tangible or intangible, which bears a significant nexus to the cultural, religious or historic origin of any reasonably identifiable group of people; or any other crime which falls under the 1954 Hague Convention or principles of international law regarding cultural heritage and property.

For the sake of completeness, article 13, “War Crimes,” should also be amended to include reference to the “1954 Hague Convention and other principles of international law regarding cultural heritage and property.” It is only with this specificity that the prosecutor will be able to truly hold the Baathist regime responsible for its violation of Mesopotamian heritage. In the interest of upholding international law, as well as recognizing the significance of cultural property crimes, it behooves the new Iraqi Government to alter the IST Statute and ensure that crimes against Iraqi, Iranian, and Kuwaiti cultural heritage do not go unpunished.