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## Articles

# Art and Ideology in the Third Reich: The Protection of Cultural Property and the Humanitarian Law of War

Matthew Lippman\*

### I. Introduction

Cultural property historically has been the target of invading armies. This plunder and looting has been driven by a desire to accumulate wealth and to psychologically dominate and to disable the indigenous population.<sup>1</sup> One of the most infamous examples was Napoleon's looting of the treasures of Europe, perhaps the most conspicuous of which were the four bronze horses seized from Saint Mark's Cathedral in Venice.<sup>2</sup>

One of Adolf Hitler's central war aims was to seize Europe's most prized paintings.<sup>3</sup> The Fuhrer aspired to centralize and to consolidate artistic property in the Third Reich in order to establish

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1. See Jeannette Greenfield, "The Spoils of War," in *THE SPOILS OF WAR, WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* 34, 36 (Elizabeth Simpson ed., 1997) [hereinafter *SPOILS OF WAR*].

2. See Dorothy MacKay Quynn, *The Art Confiscations of the Napoleonic Wars*, 50 *AM. HIST. REV.* 437, 438 (1945).

3. See Lynn H. Nicholas, *World War II and the Displacement of Art and Cultural Property*, in *SPOILS OF WAR*, *supra* note 1, at 40-41.

Germany as the cultural capital of the Western World. In exhibiting these items, Aryan art was to be portrayed as the apotheosis of artistic aptitude and acumen.<sup>4</sup>

The first portion of this essay outlines the Nazi regime's views and policies towards the visual arts in Germany and in the occupied territories. The next section sketches the Allied Powers' post-war criminal prosecutions of former Nazi officials for crimes against cultural property. This is followed by a review of international efforts to formulate treaties providing for the preservation and protection of cultural property. The impact of these instruments in encouraging the discovery and return of art looted and plundered during the Nazi occupation of Europe then is discussed. In conclusion, the emergence in the Balkans of a cultural nationalism which is reminiscent of Hitler's jingoistic philosophy is outlined.

## II. Mein Kampf

The Program of the German Worker's Party (DAP), the progenitor of the National Socialist Party (NSDAP), was drafted by railroad engineer Anton Drexler and Adolf Hitler.<sup>5</sup> The platform, which was ratified in 1930, called for the legal prosecution of those "tendencies in art and literature which corrupt our national life, and the suppression of cultural events which violate this demand."<sup>6</sup>

Hitler discussed his views towards cultural property in his venomous volume *Mein Kampf*, penned from his prison cell in 1924.<sup>7</sup> He recounted his rejection by the painting program of the Arts Academy in Vienna and his unrequited ambition to study architecture.<sup>8</sup> Hitler wrote that he subsequently found a partial outlet for his artistic ambitions by working as a draftsman and amateur painter of watercolors.<sup>9</sup> He noted that it was during these disappointing years that he first came to appreciate the threat posed by the twin menaces of Judaism and Marxism.<sup>10</sup>

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4. *See id.* at 39.

5. Programme of the German Workers' Party, in *I NAZISM 1919-1945 A HISTORY IN DOCUMENTS AND EYEWITNESS ACCOUNTS: THE NAZI PARTY, STATE AND SOCIETY 1919-1939* 14, (J. Noakes & G. Pridham, eds. 1983) [hereinafter *NAZISM*].

6. *Id.* at 16, art. 25 (c).

7. ADOLF HITLER, *MEIN KAMPF* (Ralph Manheim, trans., 1971) (1924).

8. *Id.* at 19-20.

9. *Id.* at 34.

10. *Id.* at 21.

The future Fuhrer blamed the Jews and Bolsheviks for producing degenerate and disgusting artistic “trash”<sup>11</sup> which debased popular culture in the arts, literature and theater.<sup>12</sup> Hitler queried whether there was “any form of filth or profligacy, particularly in cultural life, without at least one Jew involved in it?”<sup>13</sup> He answered his own question by contending that nine-tenths of the “literary filth, artistic trash, and theatrical idiocy” was produced by the one hundredth of the population who were Jews.<sup>14</sup>

Hitler argued that there was no distinctive Jewish artistic creation.<sup>15</sup> The semites’ alleged contributions either were comprised of an amalgam of the work of others or constituted intellectual theft.<sup>16</sup> This, according to Hitler, explained the dominance of Jews in theater, the most imitative of the arts.<sup>17</sup> The accolades directed towards these semitic thespians was the product of a Jewish media conspiracy to convince the public that such soulless silhouettes were worthy of esteem.<sup>18</sup>

The future Fuhrer viewed the Bolsheviks as the sponsors of what he termed the cubist, dadaist and futurist modern art movements which, he argued, had helped to usher in the cultural decline of Germany.<sup>19</sup> Hitler noted that sixty years ago the organizers of a dadaist art exhibit would have been committed to a mental institution while, in the current climate, they were praised and presided over art associations.<sup>20</sup> He ruefully noted that “if the age of Pericles seems embodied in the Parthenon, the Bolshevistic present is embodied in a cubist monstrosity.”<sup>21</sup>

Hitler warned that the cultural life of Germany was on the verge of being irrevocably contaminated and corroded by the Jewish-Bolshevik disease.<sup>22</sup> The artistic icons of German culture were being discarded and displaced by the products of the socialist and semitic pan-epidemic. He attributed the triumph of this foreign bacillus to the threats and attacks launched by the Bolshe-

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11. *Id.* at 58.

12. HITLER, *supra* note 7, at 57-58.

13. *Id.* at 57.

14. *Id.* at 58.

15. *Id.* at 303.

16. *Id.*

17. HITLER, *supra* note 7, at 303.

18. *Id.*

19. *Id.* at 258-59.

20. *Id.* at 258.

21. *Id.* at 262.

22. HITLER, *supra* note 7, at 262.

viks' against anyone who failed to acknowledge the merits of the Communist's atheistic, artistic atrocities.<sup>23</sup>

This was of more than aesthetic concern. Hitler attributed the collapse of German society to this cultural corrosion.<sup>24</sup> The triumph of the modern artistic sensibility had led to a loosening of morals which, in turn, had resulted in rampant crime, sexual licentiousness, prostitution, the proliferation of inter-racial sexual relations and to the spread of venereal disease and crime.<sup>25</sup> It was imperative to cleanse art, theater, the cinema and the popular press of "modern eroticism" and to place art in the "service of a moral, political and cultural idea."<sup>26</sup>

This required the ascendancy of the Aryan race. Hitler argued that humankind was divided into three groups: the founders, bearers and destroyers of culture.<sup>27</sup> Only the Aryans could be considered as falling within the first group.

<sup>28</sup> He wrote that "[e]verything we admire on this earth today—science and art, technology and inventions—is the creative product of only a few peoples and originally perhaps of *one* race. . . . If they [the single race] perish, the beauty of this earth will sink into the grave with them."<sup>29</sup> Hitler admonished that the future of the human race depended upon the creative ability of the Aryans<sup>30</sup> and warned that all great civilizations had perished due to the blood poisoning of the superior race.<sup>31</sup> He lectured that the inferior races were mere "chaff"<sup>32</sup> which were best suited to serve as beasts of burden.<sup>33</sup>

The duty of Hitler's Folkish State and citizen was to preserve and advance the Aryan race to a dominant position.<sup>34</sup> The future Fuhrer warned that this was a matter of life and death. The world was "moving toward a great revolution. The question can only be whether it will redound to the benefit of Aryan humanity or to the profit of the eternal Jew."<sup>35</sup>

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23. *Id.* at 259, 261-62.

24. *Id.* at 261.

25. *Id.* at 254-55.

26. *Id.* at 255.

27. HITLER, *supra* note 7, at 290.

28. *Id.*

29. *Id.* at 288.

30. *Id.* at 391.

31. *Id.* at 289.

32. HITLER, *supra* note 7, at 296.

33. *Id.* at 294-95.

34. *Id.* at 394-95, 402.

35. *Id.* at 427(emphasis omitted).

### III. The Consolidation of the National Socialist Legal Order

On January 30, 1933, Hitler was sworn in as Chancellor by the increasingly senile and sedentary President Paul von Hindenburg.<sup>36</sup> Hitler lacked a malleable majority in parliament and persuaded von Hindenburg to call new elections.<sup>37</sup> The ability of opposition parties to contest the campaign was limited by a requirement that political organizations receive permission from the police prior to conducting public meetings, marches and pamphlets.<sup>38</sup>

The future Fuhrer's campaign was ignited by the burning of the Reichstag on February 27, 1933 which, the historical evidence indicates, likely was immolated by National Socialist Party activists.<sup>39</sup> Hitler seized the opportunity to consolidate his control. Nazi officials warned of an imminent insurrection by Bolshevik battalions and immediately arrested Martinus van der Lubbe, a Dutch Communist, and subsequently also detained Ernst Torgler, parliamentary leader of the Communist Party, as well as Bulgarian Communists Georgi Dimitroff, Blagoi Popov and Vassily Taney.<sup>40</sup>

The day following the Reichstag fire, Hitler convinced President von Hindenburg to issue a decree adopting defensive measures against Communist subversion.<sup>41</sup> Article One suspended the freedoms of expression and assembly, the privacy of postal and other communications, the warrant requirement for house searches and placed restrictions on the use of property.<sup>42</sup> Disobedience to the decree was punishable by penalties ranging from imprisonment and fines to hard labor.<sup>43</sup> The death penalty also was imposed for

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36. INGO MULLER, *HITLER'S JUSTICE; THE COURTS OF THE THIRD REICH* 27 (Deborah Lucas Schneider trans., 1991).

37. *Id.*

38. *Id.* For a discussion of The Decree for the Protection of the German People *see id.*

39. *See* WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY* 267-73 (1960).

40. *See* WORLD COMMITTEE FOR THE RELIEF OF THE VICTIMS OF GERMAN FASCISM, *THE REICHSTAG FIRE TRIAL, THE SECOND BROWN BOOK OF THE HITLER TERROR* 16-23 (1969) [hereinafter *WORLD COMMITTEE*].

41. *See* Decree, 28 February 1933, by Reich President Von Hindenburg, Cosigned by Reich Chancellor Hitler and Reich Ministers Frick and Guertner, *Suspending Constitutional Rights and Instituting Other Measures, in III TRIAL OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 160* (1951) [hereinafter *JUSTICE CASE DOCS.*].

42. *Id.* art. 1.

43. *Id.* art. 2.

various offenses, including high treason and arson.<sup>44</sup> On March 29, 1933, a presidential decree retroactively extended capital punishment to crimes committed between January 31 and February 28, 1933.<sup>45</sup>

The five accused were brought to trial, in September 1933, before the Fourth Criminal Court of the Supreme Court.<sup>46</sup> Van der Lubbe was convicted of high treason and insurrectionary violence and was sentenced to death.<sup>47</sup> The Tribunal justified this harsh sentence on the grounds that van der Lubbe was part of a Communist conspiracy which fortunately had been frustrated by the Hitlerite regime.<sup>48</sup> The other defendants were acquitted, but the Court cautioned that it remained skeptical concerning their innocence.<sup>49</sup> The official organs of the Nazi Party termed the verdict a travesty of justice which proved that the legal system was ineffective. Hitler characterized the outcome as "laughable"<sup>50</sup> and attributed the decision to the senility of the judges.<sup>51</sup>

The Reichstag fire modestly increased the National Socialists' electoral support to forty-four percent of the vote.<sup>52</sup> A clear majority thus still eluded the Nazi Party. Hitler nevertheless managed to attract a sufficient number of votes in parliament to pass the Enabling Act, on March 24, 1933, which authorized the government of the Reich to disregard the procedures and text of the constitution.<sup>53</sup> This turned plenary power over to Hitler,<sup>54</sup> who immediately announced that the government "regards it as its duty . . . to keep those elements from influencing the nation which consciously and intentionally act against its interests."<sup>55</sup> Two months later, the Nazi regime proclaimed that the National Socialist Workers' Party was the sole political party in Germany and that the formation of competing parties was prohibited.<sup>56</sup>

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44. *Id.* art. 3.

45. H.W. KOCH, IN THE NAME OF THE VOLK. POLITICAL JUSTICE IN HITLER'S GERMANY 43 (1989).

46. World Committee, *supra* note 40, at 107.

47. *Id.* at 245, 272.

48. *Id.* at 250.

49. *Id.* at 245, 249.

50. *Quoted in* MULLER, *supra* note 36, at 34.

51. KOCH, *supra* note 45, at 45.

52. *Id.* at 34.

53. The "Enabling Act," in JUSTICE CASE DOCS., *supra* note 41, at 163.

54. KOCH, *supra* note 45, at 34.

55. *Quoted in* NAZISM, *supra* note 5, at 475.

56. Law Against the New Formation of Parties of July 14, 1933, in THE NAZI YEARS A DOCUMENTARY HISTORY 54 (Joachim Remak ed. 1969) [hereinafter NAZI YEARS].

President von Hindenburg succumbed to illness and passed away on August 2, 1934. Three hours later, it was announced that Adolf Hitler would assume both the posts of Chancellor and President and henceforth would be referred to as Fuhrer and Reich Chancellor.<sup>57</sup> The armed forces were immediately required to swear an oath of loyalty to the Fuhrer rather than to the German State.<sup>58</sup> On December 20, 1934, Hitler moved to stifle criticism of the Nazi regime.<sup>59</sup> Criminal penalties were imposed on persons making false or grossly distorted statements which were likely to debase the welfare of the Reich or the prestige of the Reich government.<sup>60</sup> It also was declared to be a crime to issue statements which undermined the confidence of the people and which manifested a "malicious, inciting or low-minded attitude" towards the leaders, policies and organization of the Nazi regime or National Socialist Party.<sup>61</sup>

#### IV. Nazi Domestic Policy Towards the Visual Arts

National Socialism rejected the notion that societies evolve in a progressive and abundant fashion; instead, Nazism aspired to return to a lost golden age.<sup>62</sup> Its artistic palette was limited to traditional landscapes, depictions of town and village life, still lifes, animal portraits and visions of the noble and courageous knights of the Middle Ages. The human body invariably was cast in a pale and classically proportioned form which embodied the alleged superior beauty, strength, courage and grace of the Aryan race.<sup>63</sup> These figures often were portrayed in a collective, compliant and coordinated effort which represented the organic unity and intellectual leadership of the State.<sup>64</sup> Art which did not fit this format was condemned. In March 1933, a retrospective of the work of modernist painter Oskar Schlemmer was closed following

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57. SHIRER, *supra* note 29, at 314. *See also* Law Concerning the Head of the German State of August 1, 1934, in NAZI YEARS, *supra* note 45, at 54.

58. SHIRER, *supra* note 29, at 314.

59. *See* Law, 20 December 1934, On Insidious Acts Against State and Party for the Protection of Party Uniforms, in NAZI PARTY DOCS., *supra* note 31, at 173.

60. *Id.* art. 1.

61. *Id.* art. 2.

62. TOBY CLARK, ART AND PROPOGANDA IN THE TWENTIETH CENTURY: THE POLITICAL IMAGE IN THE AGE OF MASS CULTURE 56 (1997).

63. *Id.* at 66-67.

64. *See id.*; ALAN E. STEINWEIS, ART, IDEOLOGY, & ECONOMICS IN NAZI GERMANY. THE REICH CHAMBERS OF MUSIC, THEATER, AND THE VISUAL ARTS 151 (1993).



a vituperative review in the Nazi press. The article queried, “[w]ho wants to take these pictures seriously? They are unfinished in every respect . . . they might as well be left on the junk heap where they could rot away unhindered.”<sup>65</sup>

On March 5, 1933, the Nazi Cabinet approved the establishment of the Reich Ministry of Popular Enlightenment and Propaganda.<sup>66</sup> The Fuhrer assigned the newly-designated head of the department, Minister Paul Goebbels, the task of spreading information and propaganda concerning government policies and the reconstruction of the German Fatherland.<sup>67</sup> Goebbels announced, at his first press conference, on March 15, 1933, that the bayonet was to be replaced by a program of persuasion designed to attract members of opposition parties to the Nazi cause.<sup>68</sup> In this effort, aesthetics were to be subordinated to pragmatism. Goebbels contended that artistic aspiration was the preserve of theatrical impresarios and of the directors of arts academies.<sup>69</sup> The essence of propaganda was the reduction of complex concepts into simple and simplistic messages which could be hammered into the heads of even the most dense citizens.<sup>70</sup> Ten days later, Goebbels addressed a meeting of radio executives and proclaimed that the Ministry of Propaganda was part of the national defense establishment and was dedicated to the spiritual mobilization of the German people in defense of the Fatherland.<sup>71</sup>

Hitler further enhanced Goebbels’ influence over the intellectual life of the Reich by issuing a supplementary decree, on June 30, 1933, which provided that the Reich Minister of Popular Enlightenment and Propaganda was “responsible for all influences on the intellectual life of the nation” and “public relations for State culture and economy.”<sup>72</sup> Goebbels quickly asserted formal control over the creation and communication of the arts and culture. He declared that the arts were a “public exercise: they are not only aesthetic but also moral . . . and the public interest demands not

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65. Quoted in Lynn H. Nicholas, *THE RAPE OF EUROPA: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* 6-7 (1994).

66. See *NAZISM supra* note 5, at 380.

67. *Id.*

68. See Goebbels: The Tasks of the Ministry for Propaganda, in DAVID WELCH, *THE THIRD REICH; POLITICS AND PROPAGANDA* 136, 138 (1993) (speech to representatives of the press, 15 March 1933).

69. See *id.* at 140.

70. See *id.* at 144.

71. See *id.* at 147-148.

72. Quoted in *NAZISM, supra* note 5, at 382.

only police supervision but also guidance.”<sup>73</sup> On September 1933, Hitler signed a law establishing the Reich Chamber of Culture, under the leadership of Goebbels, which was authorized to regulate all aspects of the arts. The arts were divided into seven chambers, and each chamber was further separated into subsidiary sections.<sup>74</sup> For example, the Chamber for Visual Arts was divided into departments for architecture, auctioneering, craft associations, interior and graphic design, painting, art publishing, design, sales, and sculpture.<sup>75</sup>

The first Decree for the Implementation of the Reich Chamber of Culture Law, promulgated on November 1, 1933, provided in Paragraph 10 that admission into a chamber may be refused, or a member may be expelled, when “there exist facts from which it is evident that the person in question does not possess the necessary reliability and aptitude for the practice of his activity.”<sup>76</sup> This broad provision was relied upon to exclude Jews, political dissidents, homosexuals and other so-called undesirables from the arts.<sup>77</sup>

Jews comprised less than one percent of the German population, but accounted for seven percent of those engaged in the visual arts and writing.<sup>78</sup> The initial expulsion list for the Visual Arts Chamber compiled by the Nazi authorities contained 1,657 names, including 1,328 full-Jews, 180 half-Jews, 23 quarter-Jews and 126 Aryans with Jewish spouses.<sup>79</sup> The list included 1,279 males and 378 females; 821 of whom resided in the vicinity of Berlin.<sup>80</sup> On November 15, 1933, Goebbels was able to declare that the Culture Chamber was free of Jews.<sup>81</sup>

The discriminatory reasons for excluding individuals often were concealed by invoking subjective criteria such as “nonmastery of balanced composition,” an inability “to express oneself,” a lack of a “sensitivity to color balance” or an “ineptitude for tastefully high-standing composition.”<sup>82</sup> For example, Adolf Ziegler, President

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73. *Id.* at 397.

74. *See* The Law setting up the Reich Chamber of Culture, September 22, 1933, in WELCH *supra* note 68, at 155.

75. CLARK, *supra* note 62, at 61.

76. *Quoted in* STEINWEIS, *supra* note 64, at 45.

77. *See id.* at 126-132.

78. *See id.* at 104.

79. *See id.*

80. *See id.*

81. *Quoted in id.* at 111.

82. *Id.* at 86-87.

of the Chamber of Fine Arts, wrote a letter to Karl Schmidt-Rottluff, a leading expressionist painter, informing the artist that he was forbidden to undertake any professional or amateur activity in the field of graphic arts.<sup>83</sup> Ziegler euphemistically explained that Schmidt-Rottluff's work "did not contribute to the advancement of German culture in its responsibility toward people and nation."<sup>84</sup>

The Law for the Restoration of the Professional Civil Service provided for the dismissal from state-supported institutions of non-Aryans and of those who could not be trusted to act without reservation in the interests of the State.<sup>85</sup> In 1933 alone, pursuant to this law, over twenty museum directors and curators were fired.<sup>86</sup> The civil service law institutionalized a pre-existing pattern of excluding Jews from cultural institutions.<sup>87</sup> For instance, in March 1933, the mayor of Frankfurt dismissed the Jewish employees of the city's opera, theater, libraries and museums.<sup>88</sup> The mayor defended this as retribution for the bilious hate propaganda disseminated by world Jewry.<sup>89</sup>

The exclusion from the visual arts of individuals viewed as undesirable largely eliminated the need for a strict system of censorship.<sup>90</sup> However, newspaper critics were not always supportive of art which was compatible with the Nazis' ideology. In November 1936, Goebbels admonished German critics for having failed to conform to National Socialist principles.<sup>91</sup> He decreed that, in the future, that criticism was to be replaced by description.<sup>92</sup> Commentaries also were to adopt an encouraging and enthusiastic tone. In addition, critics henceforth would be required to be at least thirty years old and to possess a certified background in the arts; their appointment was subject to the approval of the Reich authorities.

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83. Letter From the President of the National Chamber of Fine Arts to Karl Schmidt-Rottluff, in NAZI YEARS, *supra* note 56, at 66-67.

84. *Id.* at 66-67.

85. Law for the Restoration of the Professional Civil Service of April 7, 1933, in NAZISM, *supra* note 5, at 223, 224, arts. III-IV.

86. See Stephanie Barron, 1937: *Modern Art and Politics in Prewar Germany*, in 'DEGENERATE ART' THE FATE OF THE AVANT-GARDE IN NAZI GERMANY 9 (Stephanie Barron ed., 1991) [hereinafter DEGENERATE ART].

87. *See id.*

88. *See* STEINWEIS, *supra* note 64, at 105.

89. *See id.*

90. *See* NAZISM, *supra* note 5, at 398.

91. *See* Banning of art criticism, November 27, 1936, in WELCH, *supra* note 68, at 168.

92. *See id.*

The National Socialists desired to create a community cleansed of the cacophony of competing ideas and visions. On the so-called Night of the Books, in 1933, thousands of volumes written by both German and foreign authors were immolated.<sup>93</sup> Goebbels congratulated the student vigilantes: "The soul of the German people can again express itself. These flames not only illuminate the final end of an old era; they also light up the new."<sup>94</sup> On June 30, 1937 Goebbels authorized Ziegler to "select and secure for an exhibition, works of German degenerate art since 1910, both painting and sculpture, which are now in collections owned by the German Reich, by provinces and municipalities"<sup>95</sup> The directive broadly defined degenerate art as works that "insult German feeling, or destroy or confuse natural form, or simply reveal an absence of adequate manual and artistic skill."<sup>96</sup> The Fuhrer further instructed Ziegler to seize art that featured abstraction or colors which did not conform to nature.<sup>97</sup> In the end, nearly 16,000 works were secured from public collections.<sup>98</sup> At the anniversary meeting of the Reich Chamber of Culture, in 1937, Goebbels, with Hitler in attendance, pointed to this confiscated art as symptomatic of the "grave and fatal illness . . . whose abominable symptoms . . . slumber in . . . our museums."<sup>99</sup>

On July 19, 1937, the German regime opened the *Entartete Kunst* (Degenerate Art) exhibit in Munich. This included over 650 paintings, prints, books and pieces of sculpture which formerly were on display in thirty-two German museums and, which now, were considered to be outside the boundaries of acceptable artistic creation.<sup>100</sup> During the four months in which the exhibit was on view in Munich, it attracted over two million visitors.<sup>101</sup> During the next three years, the degenerate art show was displayed throughout Germany and Austria and was viewed by an additional one million persons.<sup>102</sup> This is five times the number which

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93. See SHIRER, *supra* note 39, at 333.

94. Quoted in SHIRER, *supra* note 39, at 333.

95. Quoted in NICHOLAS, *supra* note 65, at 16-17.

96. Quoted in Barron, *supra* note 86, at 19.

97. See Jonathan Petropoulos, *German Laws and Directives Bearing on the Appropriation of Cultural Property In the Third Reich*, in SPOILS OF WAR, *supra* note 1, at 106-07.

98. NICHOLAS, *supra* note 65, at 23.

99. Quoted in *id.* at 18.

100. Barron, *supra* note 86, at 9.

101. See *id.*

102. See *id.*

attended the Great German art exhibition which featured art approved by the Nazi regime.<sup>103</sup>

Only six of the 112 artists included in the degenerate art exhibit were Jewish.<sup>104</sup> The standards governing a painting's inclusion in this artistic chamber of horrors remained somewhat unclear. For example, included in the exhibits were works by Nazi sympathizer Emil Nolde, who had over one thousand of his works confiscated, and nationalists Auguste Macke and Franz Marc, both of whom died while fighting for Germany during World War I.<sup>105</sup> Marc's paintings later were inexplicably reclassified as compatible with the National Socialist vision.<sup>106</sup> The pictures in the degenerate art exhibit were displayed in a demeaning and disheveled fashion. The frames were removed, the amount paid for the work was prominently displayed, condemnatory statements and slogans were scrawled on the walls and some of the pieces were invidiously compared to the adjacent pictures which had been painted by mental patients.<sup>107</sup>

The degenerate art exhibit coincided with the opening of the House of German Art, the first building built during the Third Reich. The new gallery featured an exhibit of over 600 pieces of Nazi approved art.<sup>108</sup> The opening was held on the newly-inaugurated German art day and was centered on the theme of two thousand years of German culture. The exhibit was initiated by a march of over three thousand costumed participants and four hundred animals.<sup>109</sup>

Hitler utilized the opening of the German art exhibit to denounce modern art and expressed his intent to replace this ephemeral effluvium with an Aryan, eternal art which was created for a German audience, rather than for an international market.<sup>110</sup> Modern art, in Hitler's view, was reminiscent of the art manufactured in the Stone Age and reflected a retreat into a primitive stage of development.<sup>111</sup> He observed that these "prehistoric art stutterers" produce "[m]isinformed cripples and

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103. *See id.*

104. *See id.*

105. JONATHAN PETROPOULOS, *ART AS POLITICS IN THE THIRD REICH* 57 (1996) [hereinafter *ART AS POLITICS*].

106. *See id.*

107. Barron, *supra* note 86, at 20-22.

108. PETROPOULOS, *supra* note 105, at 57.

109. Barron, *supra* note 86, at 18.

110. Hitler's speech, July 18, 1937, in Welch, *supra* note 68, at 170-73.

111. *See id.*

cretins, women who inspire only disgust, men who are more like wild beasts, children who . . . must be regarded as under God's curse."<sup>112</sup> Hitler noted that these contemporary artists distorted reality by portraying blue meadows, green heavens and yellow clouds.<sup>113</sup> He observed that if they actually believed this that they likely suffered from a hereditary disease which must not be permitted to perpetuate itself.<sup>114</sup> On the other hand, if these paintings were fabrications, then such fraud was a matter for the criminal courts.<sup>115</sup> Hitler concluded that artists neither created for themselves or for the sake of art.<sup>116</sup> Instead, art must reflect and reinforce the healthy instinct of the people.<sup>117</sup> He vowed that the opening of the degenerate art exhibition would mark an end to the artistic stultification of Germany.<sup>118</sup>

The National Socialist regime quickly began to discard the thousands of pieces of degenerate art which it had stored in a Berlin warehouse. Initially, Nazi leaders, such as Hermann Goering, sold various priceless paintings to continental collectors at bargain prices.<sup>119</sup> In June 1939, the Fuhrer took control of the sales. He first signed a law freeing the government from compensation claims for this so-called "safeguarded" art.<sup>120</sup> Hitler then formed a Commission for the Exploitation of Degenerate Art which was instructed to sell off the collection for foreign currency.<sup>121</sup> The Commission's efforts generated a disappointing amount of money and the decision was made to sell 126 works at an auction in Lucerne, Switzerland.<sup>122</sup> Collectors realized that the Germans were eager to sell and the auction did little to augment the Reich's coffers.<sup>123</sup> In March 1938, the Nazi's vented their frustration by immolating 4,829 paintings and drawings.<sup>124</sup> Other works were saved by emigrants fleeing Germany who, until 1939, were able to claim the art as protected personal property.<sup>125</sup> This

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112. *Id.* at 173.

113. *Id.*

114. *Id.* at 174.

115. *Id.*

116. Hitler's speech, July 18, 1937, in Welch, *supra* note 68, at 174.

117. *Id.*

118. *Id.*

119. NICHOLAS, *supra* note 65, at 23

120. *Id.*

121. *See id.* at 23-25.

122. *See id.*

123. *See id.*

124. PETROPOULOS, ART AS POLITICS, *supra* note 105, at 82.

125. *See* NICHOLAS, *supra* note 65, at 30-31.

practice later was ended when the Nazis initiated the deportation of Jews to the East.<sup>126</sup> The property of these deportees typically was sold at pathetically low prices or was seized as state property.<sup>127</sup>

The regime also moved from regulation to criminalization of prohibited cultural expression.<sup>128</sup> Modern artists were prohibited from engaging in artistic work and regularly were visited by the Gestapo.<sup>129</sup> Books containing their works were proscribed and confiscated.<sup>130</sup>

## V. The Occupied Territories and the Visual Arts

### A. Austria

The establishment of Germany as the preeminent cultural center was one of Hitler's central war aims. His collection of paintings were the only tangible assets discussed in detail in his will.<sup>131</sup> He wrote that these works had been assembled in hopes of establishing a museum in his native city of Linz on the Danube, a bequest which he hoped would be duly executed.<sup>132</sup>

The Fuhrer was determined to restore Germany's artistic patrimony and to elevate the Reich to cultural preeminence in Europe. In 1940, Hitler ordered eminent art historian Otto Kummel, Director of the Reich's Museums, to compile an exhaustive list of art in foreign countries which formerly had been the property of Germany or German nationals.<sup>133</sup> The three volume work traced art seizures and transactions dating back to the sixteenth century.<sup>134</sup> The inventory included banners confiscated by the Swedes during the Thirty Years War, paintings exhibited on the walls of the Louvre and the Metropolitan Museum in New York, and art included in the collection of the English royal family.<sup>135</sup> The inventory also documented the fate of sculptures,

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126. STEINWEIS, *supra* note 64, at 159.

127. *See id.*

128. PETROPOULOS, ART AS POLITICS, *supra* note 105 at 95.

129. *See id.*

130. *See id.* On the fate of those artists who emigrated from Germany or German occupied territory, see STEPHANIE BARRON, EXILES + ÉMIGRÉS. THE FLIGHT OF EUROPEAN ARTISTS FROM HITLER (1997).

131. *See* HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART 23 (1997).

132. *See id.*

133. *See id.* at 24.

134. *See id.* at 25.

135. *See id.*

medieval armor, porcelain, silver, flags, glassware, medal and coins.<sup>136</sup>

In March 1938, German troops marched into Austria. The main cultural target was the art collections of Vienna's leading Jewish family, the Rothschilds. Alphonse Rothschild fled Austria prior to the German incursion and his paintings and libraries, along with those of other Jews, were confiscated.<sup>137</sup> Baron Louis de Rothschild was interned by the Nazis for nine months and only was released after agreeing to turn over his collection of more than one thousand highly-prized paintings to the Nazi authorities.<sup>138</sup> The Mayor of Nuremberg also arranged for the return of the crown jewels of the Holy Roman Empire, which had been sent to Vienna in 1794 in order to safeguard them from Napoleon.<sup>139</sup>

The possessions of individuals who escaped prior to the sealing of the borders were confiscated. Jews desiring to emigrate were required to turn their possessions over to the Nazi authorities.<sup>140</sup> Those who remained were subjected to a series of ordinances which culminated in the registration and eventual confiscation of their valuables.<sup>141</sup> These policies were carried out with callous efficiency by the Gestapo and Intelligence Service. By January 1939, Heinrich Himmler reported to the Reich Chancellery that art valued at between 60 and 70 million marks had been seized.<sup>142</sup> Hitler expressed his resentment towards the Viennese cultural community for the slights he suffered as a young man by decreeing that most of the Austrian art which had been collected would be sent to provincial German museums.<sup>143</sup>

Roughly a year following the Austrian action, Hitler entered and annexed the remainder of the fractured Czechoslovakian State. Here, the Nazi's cultural cache was augmented by confiscations from the library of Prague University, the Czech National Museum, the palaces of Archduke Franz Ferdinand and art plundered from various private collections.<sup>144</sup> The Nazis carried out a staggering

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136. *See id.*

137. *Nicholas, supra* note 65, at 38-39.

138. *See id.* at 39-40.

139. *See id.* at 40-41. These thirty-two objects included Charlemagne's prayer book and various scepters, orbs, swords, reliquaries, jewel-encrusted gloves and the coronation arcania.

140. *Id.* at 39.

141. *See id.*

142. PETROPOULOS, ART AS POLITICS, *supra* note 105, at 84-85.

143. NICHOLAS, *supra* note 65, at 45.

144. *Id.* at 43-44.



seizure of Jewish sacred objects. Eight Jewish curators and their assistants were deployed weighing, measuring and cataloguing tens of thousands of ceremonial objects.<sup>145</sup>

In 1939, Hitler assigned the task of populating the planned Linz museum with paintings to Dr. Hans Posse, director of the museum at Dresden. Posse was provided with an initial budget of ten million marks (the equivalent of eighty-five million dollars) and was charged with transforming Linz into one of the most luminous jewels in the Nazi cultural crown.<sup>146</sup> The museum was to be comprised of a series of mammoth buildings which, it was anticipated, would house the most important European art from prehistoric times to the twentieth century.<sup>147</sup>

At the same time that Posse was combing the confiscated collections, Alfred Rosenberg, the Fuhrer's Representative for the Supervision of the Intellectual and Ideological Instruction of the National Socialist Party, was busy inventorying, cataloguing and photographing confiscated art across the European continent. These then were compiled into albums which were presented to the Fuhrer for his perusal.<sup>148</sup> Most of the art which was not sequestered for the Linz Museum was sent to the private collections of Hitler, Goering and Foreign Minister Joachim von Ribbentrop or was used to decorate Nazi Party offices.<sup>149</sup> The works which were seized were so extensive that specialized curators were hired to catalogue areas such as armor, coins, books and paintings.<sup>150</sup>

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145. See Vivian B. Mann, *Jewish Ceremonial Art and Private Property*, in *THE SPOILS OF WAR*, *supra* note 1, at 84-85. See Pavel Jirasek, *Losses of Cultural Property From the Territory of the Czech Republic Due to World War II*, in *id.* at 232.

146. FELICIANO, *supra* note 131, at 21-23.

147. Northern European works were conceived as the centerpiece of the collection, the bulk of which was to be compiled through acquisitions and seizures from private and public sources in the countries occupied by the Reich. In his first report, in June 1940, Posse informed Hitler that he had acquired 465 paintings. He reminded the Fuhrer that works by Reubens, Rembrandt and Vermeer still were required to complete the collection. Hitler was eager to provide Posse with the required resources and, by 1944, despite Germany's economic woes, Posse's budget had grown to nearly seventy million marks. FELICIANO, *supra* note 92, at 21-23. Hitler closely monitored the collections confiscated in the occupied territories in order to advise Posse on appropriate selections for the museum. Those pieces which ultimately were selected were referred to as the *Fuhrervorbehalt* (Fuhrer Reserve). NICHOLAS, *supra* note 65, at 44.

148. FELICIANO, *supra* note 131, at 15, 22.

149. See *id.* at 15-16.

150. NICHOLAS, *supra* note 65, at 45-46.

### B. Poland

On September 1, 1939, Germany invaded Poland.<sup>151</sup> The plan was to eliminate the intellectuals and the Jews, enslave the Polish people and to colonize the western portion of the territory with ethnic Germans.<sup>152</sup> The Reich's military effort was pursued with reckless disregard, if not disdain, for Polish art and architecture.<sup>153</sup> One study documented the damage in Poland, between December 1939 and March 1940, and determined that ninety-two percent of the historical architecture in Warsaw was injured, ninety-two percent in Danzig, eighty-two percent in Gdansk, fifty-two percent in Poznan, eighteen percent in Lublin and, four percent in Cracow.<sup>154</sup> Overall, forty-three percent of Poland's architectural heritage was damaged.<sup>155</sup>

The western districts were annexed to the Reich while the Russians were ceded the eastern provinces.<sup>156</sup> The south-central area, including Warsaw, Cracow and Lublin, were designated by the Germans as the Governor General and were placed under the control of Hans Frank.<sup>157</sup> Poles and Jews were exterminated or deported to the East and their possessions were transferred or sold to newly-arriving ethnic Germans.<sup>158</sup> One million people were removed within a six month period.<sup>159</sup>

The Germans swiftly seized most of Poland's prized artistic possessions. This included the famed Czartoryski collection, consisting of more than 5,000 artistic objects.<sup>160</sup> A larger-than-life polychrome altarpiece created by German artist Veit Stoss, pursuant to a commission from the Regent of Poland and restored at great expense, was claimed as part of the German artistic heritage.<sup>161</sup> The altarpiece was removed from the Church of Our Lady in Cracow, exhibited in Germany, and deposited in a vault in

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151. *Id.* at 59.

152. *Id.* at 60-61.

153. *Id.* at 57-60. This was reminiscent of Germany's air attacks on Madrid during the Spanish Civil War, which targeted the Prado art gallery and the Palacio de Liria, which housed the collection of the Duke of Alba. *Id.* at 50.

154. Jan P. Pruszyński, *Poland: The War Losses, Cultural Heritage, and Cultural Legitimacy*, in *THE SPOILS OF WAR*, *supra* note 1, at 51.

155. *Id.*

156. NICHOLAS, *supra* note 65, at 62.

157. *See id.* at 62-63.

158. *See id.* at 63.

159. *See id.* at 63-64.

160. *Id.* at 62.

161. PETROPOULOS, *supra* note 105, at 108.

Nuremberg.<sup>162</sup> Thirty-one drawings by Albrecht Durer were confiscated from the Bawarowski Museum in Lvov and were presented to Hitler by Hermann Goering.<sup>163</sup> In Warsaw, the collections of the Royal Castle, the Royal Palace in Wilanow and the Palace-on-Water in Lazienki Park were plundered.<sup>164</sup> Between fifty-and-ninety percent of the collection of the National Museum in Warsaw also was removed and the rare book and manuscript collection of the Krasinski Library in Warsaw was immolated.<sup>165</sup> Churches were denuded, shrines desecrated, synagogues burned or destroyed and the headstones in Jewish cemeteries were used as paving stones.<sup>166</sup> Between December 1939 and March 1940 alone, the destruction and seizure of property, resulted in the decimation of over forty-three historical churches, seventy-four palaces, ninety-six manors, one hundred libraries, fifteen museums and numerous galleries.<sup>167</sup> As the invading Russian troops tightened their stranglehold on Poland in 1944, Nazi officials fled with much of the artistic heritage of the Polish State.<sup>168</sup>

### C. *The Netherlands*

On May 10, 1940, German troops marched into the Netherlands and swept into Luxembourg and Belgium.<sup>169</sup> The first order of business in Belgium was to destroy the newly-restored library at the University of Louvain which had been devastated by Germany during World War I.<sup>170</sup> The Nazi occupiers also seized and shipped to Germany the side panels of the Ghent Altarpiece by the van Eyck brothers and Dirk Bouts' *Last Supper*.<sup>171</sup>

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162. *See id.* at 108-09. *See also* NICHOLAS, *supra* note 65, at 70.

163. PETROPOULOS, *supra* note 105, at 101.

164. *See* Pruszyński, *supra* note 154, at 51.

165. *See id.*

166. NICHOLAS, *supra* note 65, at 64.

167. *Id.* at 79-80.

168. *Id.*

169. *Id.* at 83.

170. *Id.* at 85.

171. This was retribution for the humiliation suffered by Germany following World War I when the Reich was required to hand these same works over to Belgium in reparation. *See* Jacques Lust, *The Spoils of War Removed From Belgium During World War II*, in *THE SPOILS OF WAR*, *supra* note 1, at 58, 59-60; NICHOLAS, *supra* note 65, at 143. Holland was viewed as part of the Nordic Reich community and, unlike previously occupied territories, was placed under the control of a civilian, Reichskommissar Arthur Seyss-Inquart. The Dutch national art collections were considered to be under German control, but were permitted to remain in the Netherlands. *Id.* at 96-97.

The Netherlands nevertheless suffered under the iron fist of German rule. During the five years of occupation, 210,000 people died, including 198,000 civilians, sixteen thousand of whom fell victim to the famine of the winter of 1944-1945.<sup>172</sup> A mass of material was shipped to Germany, including industrial goods, raw materials, transport and railroad equipment and cattle.<sup>173</sup> Hitler also ordered the destruction of the harbors in Rotterdam and Amsterdam.<sup>174</sup> In 1945, the Dutch claimed reparations from Germany totalling 25.7 billion guilders, 3.64 billion of which were in compensation for Germany's confiscation and looting of property.<sup>175</sup> The twenty thousand registered art losses were estimated, in 1947, to value 150 million guilders.<sup>176</sup>

The German bombing of Rotterdam left thirteen percent of the population homeless and destroyed various private art collections.<sup>177</sup> Most of the center of Middelburg was destroyed, including the city's collection of antiquities, the archives and nineteen paintings in the museum.<sup>178</sup> The Arnhem Open Air Museum also was damaged, resulting in the loss of forty paintings as well as the collection of traditional national costumes, which had been a gift from Queen Wilhelmina in 1898.<sup>179</sup>

In July 1942, Seyss-Inquart ordered that Holland's church bells should be seized and made available to the German arms industry.<sup>180</sup> By 1944, 4,400 of the 6,500 church bells in the Netherlands had been transported to the Reich.<sup>181</sup> In 1943 and 1944, twenty-nine thousand homes were plundered and the goods were shipped to Germany.<sup>182</sup> Following the failed Allied landing in Arnhem, in September 1944, the Germans exacted retribution on the entire city, forcibly evacuating the population and systematically plundering the property.<sup>183</sup>

Goebbels ultimately ordered the removal of most of the Dutch national art collections to Germany, but his plans were confounded

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172. Josefine Leistra, *A Short History of Art Loss and Art Recovery in the Netherlands*, in *THE SPOILS OF WAR*, *supra* note 1, at 53.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 56.

177. LEISTRA, *supra* note 172, at 53.

178. *Id.*

179. *Id.*

180. *See id.*

181. *See id.*

182. LEISTRA, *supra* note 172, at 53.

183. *Id.* at 53-54.

by the deteriorating military situation.<sup>184</sup> The largest private collection, owned by the royal family, was declared to be the property of the Reich, however only minor pieces were forfeited.<sup>185</sup> The property belonging to the Freemasons also was confiscated, including the famous Bibliotheca Klossiana, which contained significant incunabula and books on the occult.<sup>186</sup> The library of the International Institute for Social History in Amsterdam was shuttered and the institute's collection of newspapers and 160,000 volume library were seized.<sup>187</sup> The International Archive of the Women's Movement also was deprived of its entire collection.<sup>188</sup> In August 1942, 499 crates containing books and archives seized from Jewish antiquarian book dealers and theosophic societies were transported to Berlin.<sup>189</sup> The collection of semitic books and manuscripts of the university library in Amsterdam also was shipped to Germany along with the 20,000 volume library and archive of the seminary of the Portuguese-Jewish community.<sup>190</sup>

One of the first acts of the new Dutch occupation regime was to order the arrest of Jewish refugees who had arrived in the country after 1933. The possessions of Jews who had been arrested or had fled were confiscated, including several well-known collections.<sup>191</sup> Jewish galleries were closed or were placed under the control of German trustees.<sup>192</sup> In May 1942, Jews were ordered to deliver their art, jewelry and valuable metals to a German bank.<sup>193</sup> Some of this was sent to Linz and other objects were transported to Germany and sold.<sup>194</sup> The next blow against the Jewish community was the confiscation of the collection of the Jewish Historical Museum in Amsterdam.<sup>195</sup>

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184. *See id.* at 54.

185. *See id.*

186. *See id.* at 55.

187. LEISTRA, *supra* note 172 at 55.

188. *See id.*

189. *See id.*

190. *See id.*

191. *See* NICHOLAS, *supra* note 65, at 101-02.

192. *Id.* at 104-05.

193. LEISTRA, *supra* note 172, at 56.

194. *See id.*

195. *See id.* The Germans were not above pragmatism. Among those arrested was art historian Max Friedlander, a former director of the Kaiser Friedrich Museum, who had brought his library and archives to Holland. The seventy-one year old Friedlander was released in exchange for agreeing to provide the Nazis with art appraisals for the remainder of the war. His arrest was declared a case of mistaken identity and he was exempted from the 1942 regulation which required Dutch Jews to wear a yellow star. NICHOLAS, *supra* note 65, at 101.

Art provided a relatively secure investment for German officials desiring to safeguard or to conceal their finances. The incorporation of Holland into the Reich resulted in the injection of German currency into the art market, which created a frenzy of cultural commerce.<sup>196</sup> The cash strapped Dutch sold their family artifacts through local galleries.<sup>197</sup> Nazi officials threatened to confiscate collections or guaranteed visas or protection to recalcitrant Dutch art collectors in order to persuade them to sell their art to German entrepreneurs.<sup>198</sup> In return, these Germans sold the work to Nazi officials at bargain prices and conveyed kickbacks to the occupation authorities who had helped to orchestrate the sales.<sup>199</sup> One year following the end of the war, 4,700 cultural objects were returned to the Netherlands.<sup>200</sup> Roughly six thousand paintings remain missing.<sup>201</sup>

#### D. *The Soviet Union*

On June 22, 1941, the Reich's military forces invaded Russia.<sup>202</sup> The Nazi's Second Special Battalion seized works of art which had been targeted by the Kummel Report.<sup>203</sup> The troops removed the delicately carved sheets of amber which adorned the Palace of Catherine the Great.<sup>204</sup> The Germans also seized the famous Gottorp Globe, a miniature planetarium in which twelve people could sit and contemplate the cosmos.<sup>205</sup>

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196. NICHOLAS, *supra* note 65, at 105-06.

197. *Id.* at 108.

198. *Id.* at 105-08.

199. *Id.* at 105-07. For instance, Arthur Seys-Inquart, the Reich Governor for Austria, threatened the trustees of the Mannheimer collection that he would confiscate their Vermeers and Rembrandts and other old masters unless the works were sold to the agents of the Linz museum. He reportedly later was rewarded with a substantial sum of money. PETROPOULOS, *supra* note 105, at 144. Jewish art dealer Nathan Katz obtained a visa to Switzerland in return for arranging the sale of some Italian works coveted by Posse. He then sold a Rembrandt from his personal collection in order to secure twenty-five visas to Spain for members of his family. Katz later arranged for his mother's release from a Dutch concentration camp in return for a picture which a high Nazi official desired to give Hitler for the Fuhrer's birthday. NICHOLAS, *supra* note 65, at 108-09.

200. LEISTRA, *supra* note 172, at 56.

201. *Id.*

202. Nicholas, *supra* note 65, at 187.

203. *Id.* at 191.

204. These originally had been affixed to the Prussian palace of Mon Bijon and had been given to Peter the Great by King Frederick William II in exchange for a battalion of Russian mercenaries. The Nazi forces shipped the panels to Germany where they were immediately exhibited in Konigsberg. *Id.*

205. *Id.* at 192.

Hitler declared that art and architecture on the Eastern Front was of little concern and should be destroyed.<sup>206</sup> The ravage and destruction defy description. In the occupied territory of the Union of Soviet Socialist Republics, over 427 museums were plundered; and 1,670 Russian Orthodox churches; 237 Catholic churches; 532 synagogues and various historic palaces were pillaged or immolated.<sup>207</sup> The seventy-three most significant museums suffered the destruction or removal of 564,723 exhibits; the fifteen most prominent lost 269,515.<sup>208</sup> The Soviet prosecutor at the Nuremberg trial of major German war criminals estimated that 34,000 objects had been seized from the Marly, Montplair and Pavlovsky castles alone.<sup>209</sup> It is estimated that forty-to-fifty freight cars of looted valuables were shipped to Germany each month.<sup>210</sup>

At Pushkin, the Catherine and Alexander palaces were denuded, including the destruction of the parquet floors, ceiling decorations, furniture, paintings, tapestries, books, Peter I's collection of 650 icons and Catherine II's porcelain collection.<sup>211</sup> The Germans went so far as to remove the metal adornments on the doors.<sup>212</sup> At Peterhof, outside of Leningrad, the famous cascading fountains were vandalized and the gilded bronze statues of Neptune and Samson were dislodged and transported to the smelting furnace.<sup>213</sup> The houses of Pushkin, Chekov, Rimsky-Korsakov, Tchaikovsky and Tolstoy were pillaged and Tolstoy's manuscripts were burned.<sup>214</sup> German war dead were buried adjacent to Tolstoy's grave and Tchaikovsky's home was utilized as a motorcycle garage.<sup>215</sup>

The Russian Republics also were victimized by the German occupation forces. Following the war, the Soviet Extraordinary State Commission on the Registration and Investigation of the Crimes of the German-Fascist Occupiers documented 564,723 art objects as either destroyed or missing.<sup>216</sup> This included 283,782

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206. See Mikhail Shvidkoi, *Russian Cultural Losses During World War II*, in THE SPOILS OF WAR, *supra* note 1, at 66, 68-69.

207. See *id.*

208. See *id.*

209. PETROPOULOS, *supra* note 105, at 149.

210. See *id.*

211. See Shvidkoi, *supra* note 206, at 68-69.

212. See *id.*

213. NICHOLAS, *supra* note 65, at 192.

214. See *id.* at 193-94.

215. *Id.* at 194.

216. See Marlene P. Hiller, *The Documentation of War Losses in the Former Soviet Republics* in THE SPOILS OF WAR, *supra* note 1, at 83.

from the Ukraine, 14,750 from Belarus; 507 from Latvia; and 1,016 from Lithuania.<sup>217</sup> Between twenty and two hundred million books were removed.<sup>218</sup> The Ukraine, in particular, suffered devastating losses. An estimated one thousand monuments were lost, ruined or damaged, forty-six million documents on Ukrainian history disappeared and over fifty-one million library books were destroyed.<sup>219</sup>

### *E. France*

On June 25, 1940, the French forces surrendered to Germany at Compiègne. The ceremony was conducted in the same railway car in which the two countries had signed the 1918 armistice. Under the terms of the surrender, France was divided and the French government was consigned to an unoccupied zone with headquarters in the resort town of Vichy.<sup>220</sup> Hitler secretly flew to Paris the morning following the French capitulation and issued an order to the military to confiscate artistic property of German origin which had been seized as war booty during the Napoleonic wars and World War I.<sup>221</sup> The Nazis then turned their attention to Jewish collections and art of Germanic origin and eventually broadened their efforts to objects considered to possess a Germanic character.<sup>222</sup>

France presented the opportunity to secure some of the most valued and historically significant cultural objects in Europe. The Nazi rampage was directed by Hermann Goering, whose avarice resulted in France being the most heavily looted country in Western Europe.<sup>223</sup> One-third of the art held in private hands was pillaged.<sup>224</sup> Between April 1941 and July 1944, 4,174 cases, which filled 138 boxcars and contained roughly 22,000 works of art, were shipped to the Reich.<sup>225</sup>

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217. *See id.*

218. *See id.* Including ninety-five percent of the books in the Belarusian libraries.

219. *See* Alexander Fedoruk, *Ukraine: The Lost Cultural Treasures and the Problem of Their Return*, in *id.* at 72, 73. *See also* Adam Maldis, *The Tragic Fate of Belarusian Museum and Library Collections During the Second World War*, in *id.* at 73.

220. NICHOLAS, *supra* note 65, at 116.

221. *Id.* at 118.

222. *Id.* at 125; *see also* PETROPOULOS, *supra* note 105, at 125.

223. NICHOLAS, *supra* note 65, at 132.

224. FELICIANO, *supra* note 131, at 4.

225. NICHOLAS, *supra* note 65, at 135.



The great prizes were the galleries of the leading Jewish art dealers in Paris, including the Wildenstein, Seligmann, Paul Rosenberg, and Bernheim-Jeune galleries and the collection of the Rothschild family.<sup>226</sup> It is estimated that the Rothschilds lost 3,978 works of art,<sup>227</sup> the most important of which were divided between Hilter and Goering.<sup>228</sup> In 1942, the Germans crossed into the French zone in pursuit of the 333 paintings in the collection of Adolphe Schloss.<sup>229</sup>

The Germans confronted a daunting task: the 218 major collections and other objects seized in France required evaluation and cataloguing.<sup>230</sup> The paintings began to overwhelm the German's depository at the Jeu de Paume museum.<sup>231</sup> On November 5, 1940, Goering issued an order providing for the disposition of the art.<sup>232</sup> Hitler was recognized as possessing the first choice over the objects and Goering would receive the second opportunity to select from the collections.<sup>233</sup> The third choice belonged to Alfred Rosenberg and his anti-semitic think tank.<sup>234</sup> The fourth selection was reserved for German museums.<sup>235</sup> In 1943, the modern work was divided into three categories.<sup>236</sup> The first two included leading impressionist and cubist artists and were to be retained for possible sale or barter.<sup>237</sup> The remaining works, as well as Jewish family portraits and works by Jewish artists, were vandalized by the security police and trucked to the garden of the Jeu de Paume where they were burned along with

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226. *Id.* at 125.

227. PETROPOULOS, *supra* note 105, at 131.

228. FELICIANO, *supra* note 131, at 47-48.

229. The Schloss collection was dominated by Dutch and Flemish artists. Schloss' sons were interned until their father agreed to convey the collection to the Germans. The pictures were transported to Paris where the Germans agreed to permit the French to retain forty-nine paintings. Hitler claimed 262 of the remaining works for the Linz museum. The Schloss family received no compensation for the collection, which was valued at over fifty million francs. NICHOLAS, *supra* note 65, at 172-73.

230. *Id.* at 134.

231. *Id.*

232. *Id.* at 132.

233. *Id.* at 128.

234. NICHOLAS, *supra* note 65, at 128.

235. *Id.*

236. *Id.* at 170.

237. *Id.*

the trash.<sup>238</sup> Among this art were works by Picasso, Klee, Miro, Ernst, Dali and Leger.<sup>239</sup>

French Jews, as is apparent, suffered considerable losses at the hands of the German occupants.<sup>240</sup> In November 1941, Gerhard Utikal, a high-level official in the Nazi's art confiscation program, produced a document in defense of the Reich's anti-semitic cultural policies in France.<sup>241</sup> Utikal wrote that the Reich had liberated the French from the influence of international Jewry.<sup>242</sup> He argued that the armistice with France did not include the Jews, who constituted a separate State which was the eternal enemy of the Reich.<sup>243</sup> The Jews, by amassing excessive wealth and riches, had denied the German people their rightful share of economic and cultural goods.<sup>244</sup> The confiscation of semitic art was a small price to pay to the Reich for saving Europe from international Jewry.<sup>245</sup> The law of war, according to Utikal, permitted a resort to the tactics adopted by the enemy.<sup>246</sup> The Jews regarded all non-Jews as cattle and, in Utikal's opinion, they deserved to be treated in the same fashion.<sup>247</sup>

#### *F. The Aftermath: Some Summary Observations*

In summary, the National Socialist regime aspired to realign the cultural contours of Germany and Europe. Modern art was considered to be an aesthetic effulgence which was the expression of a Jewish-Bolshevik sensibility. These works were viewed as denigrating and distorting the human physique and nature and as enervating, rather than elevating, the human spirit. Hitler moved to protect German culture and society by reviling and repressing modern art while simultaneously elevating and encouraging the

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238. *Id.*

239. NICHOLAS, *supra* note 65, at 170. In January 1942, the Germans had launched M-Aktion, which involved a house-by-house search and seizure of furniture in unoccupied dwellings in Paris. The belongings subsequently were sent to Germany. By August 8, 1944, 71,619 dwellings had been raided and 1,079,373 cubic meters of goods had been shipped to Germany in 29,619 railroad cars. The looting was accompanied by the removal of church bells and statues which were melted down and transported to factories in the Reich. *Id.* at 138-140.

240. *See supra* notes 225-30, 239 and accompanying texts.

241. NICHOLAS, *supra* note 65 at 136.

242. *Id.* at 137.

243. *Id.*

244. *Id.*

245. *Id.*

246. NICHOLAS, *supra* note 65, at 137.

247. *Id.*

classical forms and landscape painting. This prohibition against modern art, with its complexity and intellectual challenge, reflected the National Socialists' desire to replace the moral decay and degeneracy of the Weimar Republic with a stable, static and homogenous social order.<sup>248</sup>

Artists and their works were deemed to be degenerate for various reasons.<sup>249</sup> Hitler disapproved of the abstract art of Vasily Kandinsky and Franz Marc.<sup>250</sup> Camille Pissarro, as a Jew, was considered to be a racial pariah.<sup>251</sup> George Grosz and Kathe Kollwitz were condemned as leftists.<sup>252</sup> The criteria was so complex that even Nazi officials were confused at times.<sup>253</sup>

The National Socialists' perverse visual arts philosophy was extended to the occupied territories in Western Europe. These countries were viewed as components of the Greater Reich and their artistic collections were considered to be under German control.<sup>254</sup> Various categories of art were removed and confiscated. The first priority was to recover objects which had been handed over as war reparations or which had been seized as war booty. The second target was art which had been created or sold by German nationals. The Veit Stoss altarpiece, which had been commissioned for the Church of Our Lady in Cracow, was viewed as belonging to the Reich based on the fact that Stoss was born in Nuremberg.<sup>255</sup> Nazi forces also seized works which comported with their notion of correct and significant art, such as works by Leonardo, Raphael and Rembrandt. These paintings typically were summarily seized or purchased by Germans at below market prices, often through threats or coercion. The Nazis also exchanged visas and guarantees of safe passage for art.<sup>256</sup> Lastly, in every country Jewish ceremonial objects and works owned by Jews were confis-

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248. See George Mosse, *Beauty Without Sensuality/the Exhibition Entartete Kunst*, in *DEGENERATE ART*, *supra* note 86, at 25.

249. NICHOLAS *supra* note 3.

250. Marc, ironically, was killed while fighting for Germany during World War I. NICHOLAS, *supra* note 3, at 39.

251. *Id.*

252. *Id.*

253. Goebbels decorated his dining room with watercolors by Emile Nolde, a Nazi sympathizer. Hitler denounced the works during a visit and Goebbels had them immediately removed. *See id.*

254. See *supra* note 171 and accompanying texts.

255. See *supra* note 162 and accompanying text.

256. See *supra* note 199 and accompanying text.

cated.<sup>257</sup> At the same time that the Nazis were cramming warehouses with acceptable art, the modern paintings which had been seized were being sold, traded for other paintings, or destroyed.<sup>258</sup>

The National Socialist's cultural policy in the Eastern territories primarily was designed to strip these countries of their cultural heritage in order to erase all record of their artistic achievement and acclaim. The artistic creations of Slavs and Jews were to be decimated and disappear. This was part of the process of persuading these populations to accept the status of slave laborers. The Nazis viewed modern art as a Jewish invention which was designed to ensure semitic domination over contemporary culture. The suppression of these works was intended to fracture the Jewish monopoly and to assert German control over the visual arts. Some meretricious art was to be preserved and displayed in various museums devoted to the degenerate art and culture of Jews, Slavs and Freemasons.<sup>259</sup>

The acclaimed and approved art which was seized from the occupied territories was reserved for Hitler's planned cultural mecca in Linz. This was not merely sustenance for Hitler's ego and soul. The Fuhrer desired to construct a monument which affirmed that Germany was the cultural capital of the cosmos.<sup>260</sup> It also was contemplated that the museum would consolidate the cultural creations of all Germans.<sup>261</sup> This vision of cultural preeminence and consolidation was invoked to justify the Reich's extension of Germany's borders across the European continent. As early as 1937, Hitler pronounced to the Nuremberg Nazi Party Congress that "[t]his [nation] is not intended to be a power without a culture, a force without beauty. For the armament of a nation is only morally justified insofar as the shield and sword are used for a higher purpose . . . as [a] supporter and guardian of a higher culture!"<sup>262</sup>

The museum was to be situated adjacent to the Fuhrer's tomb on a hillside overlooking the Danube.<sup>263</sup> The galleries housing the old masters would lead directly to those holding nineteenth and

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257. See Vivian B. Mann, *Jewish Ceremonial Art And Property*, in *SPOILS OF WAR*, *supra* note 1, at 84.

258. See *supra* notes 199-126 and accompanying texts.

259. See *supra* notes 151-68, 202-19 and accompanying texts; PETROPOULOS, *supra* note 105, at 250, 252-53.

260. See PETROPOULOS, *supra* note 105, at 243.

261. See *id.* at 245.

262. Quoted in *id.* at 243.

263. *Id.* at 245.

twentieth century Austro-Bavarian works.<sup>264</sup> This was to symbolize the evolution of art and the apogee of its development in Nazi Germany. Additional museums devoted to Aryan culture were planned throughout the occupied territories. These were to display the achievements of German artists and to exhibit archeological evidence of an ancient German presence in these areas.<sup>265</sup>

There is no doubt that the artistic aspirations of the Nazi elite assisted National Socialist leaders in viewing themselves as refined rather than as rapacious. It also provided a symbol of authority, power and administrative achievement and served as a safe source for the sequestration of funds.<sup>266</sup> The costs to German society were considerable. The rise of the Third Reich resulted in the flight or repression of the cultural elite and to the extinguishment of the modern art movement in Germany.<sup>267</sup>

As the Allied armies encircled Germany, the Nazi regime moved its artistic holdings into hundreds of bunkers, castles, churches, mines and sheds.<sup>268</sup> The American forces entering Germany were accompanied by a Monuments, Fine Arts and Archives section (MFA&A) which was charged with salvaging and preserving European art.<sup>269</sup> Thousands of works were discovered in precarious places. The British uncovered uncrated pictures from the National Gallery of Berlin in a mine at Grasleben.<sup>270</sup> Goering's art collection and the Holy Roman Regalia were discovered walled up in Nuremberg and were surrounded by a system of underground bunkers filled with illicit coins and jewels.<sup>271</sup> The salt mine at Alt Aussee in Austria was found to contain the Fuhrer's prized pictures; including an estimated 6,577 paintings, 23,000 drawings and watercolors, 954 prints and 13 sculptures, along with other objects.<sup>272</sup> In the nearby ski town of Sankt Johann, American intelligence officers discovered pictures, tapestries and two million dollars worth of foreign currencies stored in the damp basement of a local pub.<sup>273</sup> In Merkers in Thuringia, the Kaise-

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264. *Id.* at 246-47.

265. *See* PETROPOULOS, *supra* note 105, at 248-49.

266. *Id.* at 261, 284-85.

267. *See* JOHN WILLET, ART AND POLITICS IN THE WEIMAR PERIOD; THE NEW SOBRIETY, 1917-1944 220-21 (1996).

268. NICHOLAS, *supra* note 65, at 43.

269. *Id.* at 43-44.

270. *Id.* at 43.

271. *Id.*

272. NICHOLAS, *supra* note 65, at 348.

273. *See id.*

roda mine was found to contain the bulk of Germany's gold reserves along with four tons of art from Berlin museums.<sup>274</sup> A mine in the town of Siegen was the depository for six hundred high-quality paintings, a hundred sculptures, the manuscript of Beethoven's Sixth Symphony and the relics of Charlemagne.<sup>275</sup>

The American and British policy was to return artistic objects which had been confiscated by the Nazis, or sold under duress, to their country of origin.<sup>276</sup> So-called heirless property, which the Germans had plundered from Jews who had been exterminated, was turned over to the Jewish Restitution Successor Organization, which distributed the property to Jewish communities.<sup>277</sup> The United States refused to treat art treasures as reparations, but did make the controversial decision temporarily to store the most precious objects in the German collection in Washington D.C.<sup>278</sup> The Soviet Union, in contrast, considered German art as reparations.<sup>279</sup> Unfortunately, despite the Allied determination to return art to its rightful owners, thousands of objects were stolen by civilian and military personnel and sequestered in undisclosed locations around the world.<sup>280</sup>

## VI. The Legal Protection of Cultural Objects at the End of World War II

Nazi officials certainly must have been aware that the type of looting and destruction of cultural objects that they engaged in during World War II was contrary to the international humanitarian law of war.<sup>281</sup>

The notion that cultural property merited protection was articulated in the writings of Emheric de Vattel, one of the foundation figures in the history of international law. Vattel, in the *Law of Nations*, in 1758, wrote that during warfare

we ought to spare those edifices which do honor to human society, and do not contribute to increase the enemy's strength—such as temples, tombs, public buildings, and all

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274. *Id.* at 332-33.

275. *Id.* at 330-31.

276. *See* NICHOLAS, *supra* note 65, at 44.

277. *See id.*

278. *See id.*

279. *See id.*

280. For instance, treasures of the church at Quedlinburg were discovered, in 1990, in a small Texas town, where they had been hidden by a former member of the United States military. NICHOLAS, *supra* note 65, at 43-45.

281. *See supra* notes 151-68 and 202-19 and accompanying texts.

works of remarkable beauty. It is declaring one's self an enemy to mankind, thus wantonly to deprive them of these monuments of art.<sup>282</sup>

Vattel provided the foundation for the nineteenth century notion that art was part of a country's national heritage.<sup>283</sup> This was reflected in the 1815 Convention of Paris which required Napoleon to return the cultural property which he had seized as war booty to its country of origin. The Duke of Wellington explained that Napoleon's systematic looting was "contrary to the principles of justice and the rules of modern war."<sup>284</sup>

Perhaps the earliest attempt to protect cultural property during armed conflict was the Lieber Code of 1863.<sup>285</sup> Francis Lieber, a professor at Columbia College in New York, promulgated these rules of engagement as a guide for the Union army during the Civil War.<sup>286</sup> Article 35 of the Lieber Code required that "[c]lassical works of art, libraries, scientific collections, or precious instruments . . . must be secured against all available injury, even when . . . contained in fortified places while besieged or bombarded."<sup>287</sup> The Code provided that a conquering nation may remove these items if this can be accomplished without injury. The ultimate ownership was to be settled in the ensuing treaty of peace. The Lieber Code further provided that armies of the United States shall not sell, give away, privately appropriate, or wantonly destroy or injure these works.<sup>288</sup>

The Lieber Code helped to inspire Russia to convene the 1874 Brussels Conference on the Proposed Rules for Military War.<sup>289</sup> The conference produced a wide-ranging declaration which

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282. *Quoted and cited in* Lawrence M. Kaye, *Laws In Force at the Dawn of World War II: International Conventions and National Laws*, in *SPOILS OF WAR*, *supra* note 1, at 100, 101.

283. *See id.*

284. *Quoted in id.*

285. *See id.*

286. *See* Instructions For the Government of Armies of the United States In the Field, General Order No. 100 (promulgated by President Abraham Lincoln, April 24, 1863) [hereinafter the the Lieber Code], *reprinted in* THE LAWS OF ARMED CONFLICTS A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3 (Dietrich Schindler & Jiri Toman eds., 1981) [hereinafter THE LAWS OF ARMED CONFLICT].

287. The Lieber Code, *supra* note 286.

288. *See id.* art. 36.

289. *See* Project of an International Declaration Concerning the Laws and Customs of War, Adopted by the Conference of Brussels (August 27, 1874) (Declaration of Brussels) (not ratified) in 1 AJIL 96 (Supp. 1907).

ultimately was not ratified by the Signatory States. Article Eight of the proposed rules provided that property devoted to religion, charity, education and the arts and sciences was to be treated as private property.<sup>290</sup> Any destruction or willful damage to such establishments, historical monuments or works of art or science, was to be prosecuted by the competent authorities.<sup>291</sup> Article Forty stipulated that private property was to be respected and the occupying power only shall demand such payments and services as are connected with the necessities of war.<sup>292</sup> These seizures were to be in proportion to the resources of the occupied territory.<sup>293</sup>

In 1880, the Institute of International Law at Oxford issued a model manual on the laws of war.<sup>294</sup> Article 34 provided that in the case of bombardment, the necessary steps must be taken to spare, if possible, buildings dedicated to religion, art, science and charitable purposes, and hospitals and places where the sick and wounded are treated, provided these buildings are not being used for military defense.<sup>295</sup> Article 34 added a novel requirement, providing that the besieged was obliged to indicate the presence of such buildings by visible signs.<sup>296</sup>

These various provisions attest to the international community's historic concern with protecting cultural property. American international law commentator Henry Wheaton, in his 1886 treatise, summarized the state of the law.<sup>297</sup> Wheaton wrote that in the ancient law of nations even sacred sites were not exempt from capture and confiscation; however, he concluded that in modern times buildings devoted to art, culture, religion and science were exempted from the operations of war.<sup>298</sup>

This was given legal effect in the 1907 Hague Convention.<sup>299</sup> Article 22 provides that the right of belligerents to adopt means of

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290. *See id.* at art. 8.

291. *See id.*

292. *See id.* at art. 40.

293. *See id.*

294. *See* The Laws of War on Land, Adopted by the Institute of International Law at Oxford, (September 9, 1880) (Oxford Manual) *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 286, at 35.

295. *See id.* at art. 34.

296. *Id.*

297. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (3d ed. 1946).

298. *Id.* 395, *quoted in* Kaye, *supra* note 282, at 101.

299. *See* Convention (No. IV) Respecting the Laws and Customs of War on Land, With Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention].



injuring the enemy is “not unlimited.”<sup>300</sup> The attack or bombardment of undefended towns, villages, dwellings or buildings also is condemned.<sup>301</sup> In addition, it is prohibited to destroy or to seize the enemy’s property, unless such destruction or seizure is imperatively demanded by the necessities of war.<sup>302</sup> Article 27, the first of two explicit provisions on cultural property, provides that all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, and hospitals and places where the sick and wounded are collected, provided that they are not being used for military purposes.<sup>303</sup> The besieged are obligated to indicate the presence of such buildings by distinctive and visible signs.<sup>304</sup>

An occupying power, under the Hague Convention, is required to take measures to ensure public order and safety while respecting, to the extent possible, the laws in force in the territory.<sup>305</sup> Collective penalties shall not be inflicted upon the population for acts of individuals for which the population cannot be regarded as jointly and severally responsible.<sup>306</sup> The rights and lives of persons and private property, as well as religious convictions and practice, must be respected and private property is not subject to confiscation.<sup>307</sup> Pillage also is prohibited.<sup>308</sup> Requisitions and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation, and such requisitions shall be in proportion to the resources of the country and shall not involve the inhabitants in military operations against their own country.<sup>309</sup> These contributions, in so far as possible, shall be paid for in cash or a receipt shall be issued.<sup>310</sup> An army of occupation only may take possession of cash, funds and realizable securities which are the property of the State and of property which may be used for military operations.<sup>311</sup>

Article 55 stipulates that the occupying power shall be regarded as an administrator and usufructuary of public buildings,

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300. *See id.* at art. 22.

301. *See id.* at art. 25.

302. *See id.* at art. 23(g).

303. *See id.* at art. 27.

304. *See* Hague Convention, *supra* note 299, at art. 27.

305. *See id.* at art. 43.

306. *See id.* at art. 50.

307. *See id.* at art. 46.

308. *See id.* at art. 47.

309. *See* Hague Convention, *supra* note 299, at art. 52.

310. *See id.*

311. *See id.* at art. 53.

real estate, forests and agricultural estates in the occupied country.<sup>312</sup> Article 56, the second provision explicitly pertaining to cultural property, provides that the property of municipalities and public and private institutions dedicated to religion, charity and education shall be treated as private property.<sup>313</sup> The seizure, destruction or willful damage to institutions of this character, or to historic monuments or to works of art and science, is prohibited and should be subject to legal proceedings.<sup>314</sup>

The categorization of cultural objects and structures as private property effectively insulates them from seizure, confiscation or trespass by an occupying power.<sup>315</sup> The Lieber Code's provision permitting the removal of cultural items by belligerent forces and the settlement of their ownership in the treaty of peace thus was rejected in favor of a policy which vested unassailable ownership in the occupied state and its citizens.<sup>316</sup> Article Three provides that a belligerent which violates the provisions of the Convention shall be responsible for all acts committed by persons forming part of its armed forces and shall be liable to pay compensation.<sup>317</sup> It is significant that Article 56, which protects the integrity of cultural property, is the only provision of the Hague Convention which provides for legal proceedings against those contravening the Convention.<sup>318</sup>

In sum, the Hague Convention of 1907 legally entrenched three principles pertaining to international conflicts. First, artistic, religious, scientific and humanitarian structures, to the extent possible, were to be immune from armed attack, unless employed for military purposes. These buildings were to be marked with visible symbols.<sup>319</sup> Secondly, this principle was qualified by the requirements of military necessity.<sup>320</sup> Thirdly, an occupying power was to avoid destroying, damaging, looting or plundering cultural property. Artistic objects and structures were to be treated as private property and were effectively immunized from seizure or requisition.<sup>321</sup>

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312. *See id.* at art. 55.

313. *See id.* at art. 56.

314. *See id.*

315. *See infra* notes 318-20 and accompanying texts.

316. *See supra* notes 288, 305, 307, 309-11 and accompanying texts.

317. *See* Hague Convention, *supra* note 299, art. 3.

318. *See supra* note 313 and accompanying text.

319. *See supra* note 303 and accompanying text.

320. *See supra* note 302 and accompanying text.

321. *See supra* note 313 and accompanying text.

A companion instrument, the Hague Convention (IX) Concerning Bombardment By Naval forces in Time of War, provides similar protections.<sup>322</sup> Article 5 stipulates that naval commanders are to take all necessary measures during bombardments to avoid injury to sacred architecture, buildings used for artistic, scientific or charitable purposes, historic monuments, and hospitals and places where the sick or wounded are collected.<sup>323</sup> This immunity is contingent on these buildings not being utilized for military purposes.<sup>324</sup>

The *American Journal of International Law*, in 1915, analyzed various issues of international law which had arisen during World War I. James W. Garner, in commenting on the destruction of cultural institutions, singled out Germany's burning of the library at the University of Louvain and the city's cathedral and public buildings.<sup>325</sup> He noted that the British Prime Minister had denounced the immolation as "the greatest crime committed against civilization and culture since the Thirty Years War—a shameless holocaust of irreparable treasures lit up by blind barbarian vengeance."<sup>326</sup> The Germans justified this as an act of reprisal for alleged attacks by Belgian civilians upon its forces.<sup>327</sup> Garner, however, contended that there was no indication at Louvain that the university, the library, the cathedral or other public buildings had been used to attack the German forces.<sup>328</sup> The destruction of these buildings could not be justified on the grounds of military necessity and the Germans were obligated, to the extent possible, to spare the buildings.<sup>329</sup>

Garner, in condemning the Germans' conduct, concluded that the civilized world had recognized two principles as the foundation of the humanitarian law of war. "First, that the sole object of war is to overcome the military forces of the enemy; and second, that the methods which may be adopted to accomplish this object are not unlimited."<sup>330</sup> As a corollary to the latter axiom, it was

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322. See 1907 Hague Convention (IX) Concerning Bombardment by Naval forces in Time of War, Oct. 18, 1907, 36 STAT. 2351, 2 AJIL 146 (Supp. 1908).

323. See *id.* at art. 5.

324. *Id.*

325. James W. Garner, *Some Questions of International Law in the European War*, 9 AM. J. INT'L L. 72, 101 (1915).

326. *Id.*

327. See *id.* at 103-04.

328. See *id.* at 106-07.

329. See *id.*

330. Garner, *supra* note 325, at 109-10.

recognized that cultural institutions, such as those at Louvain, were the common heritage of mankind and may not be targeted by military attack.<sup>331</sup>

Following World War I, the Preliminary Peace Conference of the Treaty of Versailles appointed a fifteen member commission to inquire into the war.<sup>332</sup> The Commission concluded that the Central Empires and their Turkish and Bulgarian allies had conducted the conflict through "barbarous and illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity."<sup>333</sup> Among the acts allegedly committed were pillage and the confiscation and wanton devastation and destruction of property, including religious, charitable, educational and historic buildings and monuments.<sup>334</sup> The Commission recommended that individuals who had violated the laws and customs of war or the laws of humanity should be subject to criminal prosecution<sup>335</sup> before either a national or multinational tribunal.<sup>336</sup>

The Treaty of Versailles required Germany and her allies to accept responsibility for the loss and damage they had caused.<sup>337</sup> Germany, in Article 233, pledged to provide compensation for the injury inflicted on the civilian population of the Allied and Associated Powers and on their property.<sup>338</sup> The Reich also was obligated to restore to the French government the trophies, archives, historical souvenirs and works of art seized by German authorities in both the war of 1870-1871 and in World War I.<sup>339</sup> An additional responsibility was imposed on Germany to return the French flags seized during the war of 1870-1871 as well as various political papers plundered by the Germans in 1870.<sup>340</sup> Germany also was obligated to restore to His Majesty the King of the Hedjaz, the original Koran of the Caliph Othman, which had been removed from Medina; and to hand over to Great Britain the skull of the Sultan Mkwawa, which formerly had been housed in East

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331. *See id.* at 108-10.

332. *See* Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 14 AM. J. INT'L L. 95 (1920).

333. *Id.* at 115.

334. *See id.* at 114-15.

335. *See id.* at 117.

336. *See id.* at art. 121-22.

337. *See* Treaty of Peace With Germany, June 28, 1919, art. 231 T.S. 658, 13 AM. J. INT'L L. 151 (Supp.1919).

338. *See id.* at art. 233.

339. *See id.* at art. 245.

340. *See id.*

Africa.<sup>341</sup> In addition, the Germans pledged to provide the University of Louvain with manuscripts, incunabula, printed books, maps and objects corresponding in number and value to those destroyed in the burning of the Library of Louvain.<sup>342</sup> Finally, the Reich was required to return two objects to Belgium which had been purchased in good faith by German museums; the leaves of the triptych of the Mystic Lamb painted by the Van Eyck brothers and the leaves of the triptych of the Last Supper painted by Dietrick Bouts.<sup>343</sup>

The treaties with Austria and Hungary provided for the restitution to the Allied and Associated Powers of all artistic objects which had been seized from invaded territories.<sup>344</sup> The treaties also included special provisions pertaining to the breakup of the Austro-Hungarian Empire.<sup>345</sup> Hungary agreed to negotiate with the former territories of the empire concerning the return of cultural objects which formed part of the intellectual patrimony of these newly-independent States.<sup>346</sup> In addition, Hungary was required to maintain in a safe condition, and not to alienate or to disperse for twenty years, the collections of the Government or the Crown of the Austro-Hungarian Monarchy.<sup>347</sup> The Treaty with Austria included a unique provision which established a committee of three jurists which was to examine claims by Italy, Belgium, Poland and Czechoslovakia concerning cultural objects and manuscripts which were alleged to have been removed from these countries.<sup>348</sup> Austria also was required to maintain the artistic objects of the Government or Crown of the Austro-Hungarian Monarch for twenty years.<sup>349</sup>

The significance of cultural property also was recognized in the Treaty of Peace between Poland, Russia and The Ukraine of

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341. *See id.* at art. 246.

342. *See id.*

343. *See id.* at art. 247.

344. *See* Treaty of Peace Between the Allied Powers and Hungary, Dec. 17, 1921, art. 175, T.S. 660, *reprinted in* SPOILS OF WAR, *supra* note 1, at 283, 284 [hereinafter Hungarian Treaty]; Treaty of Peace Between the Allied and Associated Powers and Austria, Nov. 8, 1921, art. 195, T.S. 659, 14 AJIL 1 (1920), *reprinted in* SPOILS OF WAR, *supra* note 1, at 282 [hereinafter Austrian Treaty].

345. *See, e.g.,* Austrian Treaty, *supra* note 344, at art. 193.

346. *See* Hungarian Treaty, *supra* note 344, at art. 177.

347. *Id.*

348. Austrian Treaty, *supra* note 344, at art. 195.

349. *Id.* at art. 196.

1921.<sup>350</sup> This required the return of all war trophies taken from Poland since 1772 and the restoration of art and archaeological collections and archives.<sup>351</sup> A unique provision provided that where the return of an object would impair the integrity of a collection of world-wide scientific importance, an object of comparable artistic or scientific value could be substituted.<sup>352</sup> The list of objects returned under the Treaty included the sword which had been used to crown Polish kings since the fifteenth century; 149 tapestries dating from the sixteenth century, valued at 115 million francs; 507 crates of artwork, which included 600 paintings, 60 Gobelins tapestries, porcelains, armor, and furniture; and the collection of the Numismatic Society of the University of Warsaw.<sup>353</sup>

Only a small number of Germans accused of war crimes ultimately were brought to trial, none of whom were charged with the confiscation or destruction of cultural property.<sup>354</sup> However, by the end of World War I, the arbitrary seizure and destruction of artistic objects clearly had been condemned as a violation of the humanitarian law of war. States engaging in this conduct were liable to return such objects or were responsible for reparations or to provide substitute works of art of comparable value.<sup>355</sup> The acceptance of the prohibition on the destruction of cultural property during warfare is illustrated by Article Twenty-Five of the 1923 Hague Draft Rules Of Aerial Warfare, which requires that "all necessary steps must be taken by a commander to spare as far as possible buildings dedicated to . . . art, science, or . . . historic monuments" which are to "be indicated by marks visible to aircraft."<sup>356</sup> Article 26 provides for the establishment of zones of protection around "important historic monuments" which are immune from bombardment.<sup>357</sup>

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350. See Treaty of Peace Between Poland, Russian and the Ukraine, March 18, 1921, 6 L.N.T.S. 123, reprinted in SPOILS OF WAR, *supra* note 1, at 284-5.

351. See *id.* at art. 11.

352. See *id.* at art. 11 (7).

353. See Lawrence M. Kaye, *Laws In Force at the Dawn of World War II: International Conventions and National Laws*, in SPOILS OF WAR, *supra* note 1, at 100, 103.

354. See generally George Gordon Battle, *The Trials Before the Leipzig Supreme Court of Germans Accused of War Crimes*, 8 VA. L. REV. 1 (1921).

355. See generally *supra* notes 337-53 and accompanying texts.

356. 1923 Hague Rules of Aerial Warfare, reprinted in DOCUMENTS ON THE LAWS OF WAR 123, 127, art. 25 (Adam Roberts & Richard Guelff eds., 2nd ed., 1989)

357. See *id.* at art. 26(1).

Following World War I, the League of Nations drafted two conventions which protected cultural property in periods of peace as well as war. These treaties ultimately were not adopted, but provide an indication of the prevailing state of international opinion at the onset of World War II. A draft Convention on the Repatriation of Objects of Artistic, Historical or Scientific Interest, Which Have Been Lost, Stolen, or Unlawfully Alienated or Exported was submitted to the League, in 1933, by the International Museum Office, the association of national museums.<sup>358</sup> The League observed that a substantial number of countries had proclaimed the inalienability of their artistic treasures and that, as a matter of international solidarity, this principle should be entrenched in an international treaty.<sup>359</sup> The proposed Convention provided for countries to cooperate in the repatriation of illegally exported objects.<sup>360</sup> Transactions involving these objects were to be considered null and void and bona fide purchasers were to be entitled to compensation.<sup>361</sup> A five year statute of limitations was established on claims concerning this property.<sup>362</sup> The League noted that domestic legislation generally established a statute of limitations of three years which permitted individuals to sequester artistic property for a relatively short period and then to dispose of it without fear of civil penalty or criminal prosecution.<sup>363</sup> According to the League, a five year period appeared to balance more fairly the interests of the parties.<sup>364</sup> In 1936, The League briefly considered the International Convention for the Protection of National Artistic and Historical Treasures, which provided for the repatriation of documented objects of significant paleo-ontological, archaeological, historic or artistic interest.<sup>365</sup> The discussion of a third treaty, the International Convention for the Protection of Historic Buildings and Works of Art in Time of War, was interrupted by World War II.<sup>366</sup>

The protections envisioned by the League of Nations were incorporated into the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, adopted by the

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358. See 14 LEAGUE OF NATIONS O.J. 1394 (1933).

359. See *id.* at 1395.

360. See *id.* at arts. 1-2.

361. See *id.* at art. 3.

362. See *id.* at art. 6.

363. See *id.* at 1396.

364. See *id.* at 1396.

365. See 17 LEAGUE OF NATIONS O.J. 1310 n.1 (1936).

366. See Kaye, *supra* note 282, at 104.

Seventh International Conference of American States, which anticipated subsequent international developments.<sup>367</sup> The so-called Roerich Pact was signed by twenty-one Latin American States and the United States.<sup>368</sup> The Preamble pronounced that the Convention was intended to preserve the "nationally and privately owned immovable monuments which form the cultural treasures of peoples."<sup>369</sup> Article One provided that historic monuments, museums, scientific, artistic, educational and cultural institutions and their personnel shall be considered as neutral and are to be respected and protected by belligerents. The parties to the conflict are to accord these objects the same respect and protection in time of war as in peace.<sup>370</sup> These protections are to be extended to monuments and buildings devoted to culture and science, regardless of the State which sponsored, funded or owned the structure.<sup>371</sup>

Signatory states agree to adopt the internal legislation necessary to insure the required protection and respect for cultural property.<sup>372</sup> The institutions covered by the Convention may be identified by a distinctive flag with a red circle, containing a triple red sphere, on a white background.<sup>373</sup> Signatory states also were to submit to the Pan American Union an inventory of monuments and institutions which are protected under the Treaty.<sup>374</sup> The institutions and buildings covered by the Convention ceased to enjoy immunity if utilized for military purposes.<sup>375</sup>

The Pact, while limited to American states, reflected the recognition that scientific and cultural structures and institutions were to be immune from military attack or involvement. This protection significantly was not qualified by military necessity.<sup>376</sup>

The above collection of international documents and treaties provided the legal basis for the 1943 Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under

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367. See Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, April 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 279.

368. *Id.* art. 8.

369. *Id.* pmb. l.

370. *Id.* art. 1.

371. *Id.* art. 2.

372. *Id.*

373. *Id.* art. 3.

374. *Id.* art. 4.

375. *Id.* art. 5.

376. See *supra* notes 370-71 and accompanying texts.



Enemy Occupation or Control.<sup>377</sup> The Allied Powers formally warned that they intended to take all steps which were required to "defeat the methods of dispossession" practiced by enemy nations against the countries which have been so "wantonly assaulted and despoiled."<sup>378</sup> The signatory states reserved the right to declare invalid any transfers or transactions pertaining to property rights and interests in the territories under German control.<sup>379</sup> This applied to looting and plunder as well as to transactions which appeared to be legal and voluntary.<sup>380</sup>

In 1946, the United States, United Kingdom and France issued a statement urging neutral nations to take steps to determine if there was any looted art or cultural property within their borders.<sup>381</sup> They were requested to immediately seize and to prohibit the export of such items.<sup>382</sup> The governments of the liberated countries were to furnish these neutrals with lists of spoliated articles which had not yet been returned.<sup>383</sup> The United States later wrote to domestic universities, museums, libraries, art dealers and booksellers that it was the responsibility and policy of the American government to recover and return to owner nations cultural objects illicitly brought into the United States during World War II.<sup>384</sup> These institutions were requested to vigilantly pursue such items.<sup>385</sup> The United States subsequently recovered a number of valuable objects which were returned to the European-owner nations.<sup>386</sup>

The United States extended this policy of protecting the national integrity of cultural objects to looted property uncovered in Germany.<sup>387</sup> Over a million art objects and four million books recovered in Germany were returned to the countries from which

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377. See Inter-Allied Declaration Against Acts of Dispossession Committed In Territories Under Enemy Occupation Or Control, 8 DEP'T ST. BULL. 21 (1943), reprinted in SPOILS OF WAR, *supra* note 1, at 287.

378. *Id.*

379. *Id.*

380. *Id.*

381. See Statement of Policy with Respect to the Control of Looted Articles, Paris, July 8, 1946, 25 DEP'T. ST. BULL. 340 (1951).

382. *See id.*

383. *See id.*

384. Universities, Museums, Libraries, Art Dealers, and Booksellers (1950) *id.* at 340.

385. *Id.*

386. See Ardelia R. Hall, *The Recovery of Cultural Objects Dispersed During World War II*, *id.* at 337.

387. *Id.*

they had been removed.<sup>388</sup> At the same time, the United States adopted the policy that German artistic and cultural property was not to be seized in reparation for property which had been destroyed or which could not be located.<sup>389</sup> According to Harlan F. Stone, the Chief Justice of the United States Supreme Court, this policy signified the United States' interest in "protecting these symbols of civilization from injury and spoliation."<sup>390</sup>

In summary, the international sentiment in support of the protection of cultural property during warfare<sup>391</sup> culminated in the legally binding protections incorporated in the Hague Convention of 1907.<sup>392</sup> In the aftermath of World War I, several peace treaties provided for the return of cultural objects to the countries from which they had been removed.<sup>393</sup> A similar policy was adopted at the termination of World War II,<sup>394</sup> which doubtlessly was inspired by various post-World War I documents which were protective of cultural property.<sup>395</sup>

Thus, the law governing cultural property at the end of World War II was relatively straightforward. Such property was immune from attack,<sup>396</sup> plunder and looting<sup>397</sup> and was to be clearly demarcated as protected property.<sup>398</sup> However, immunity was conditioned on this property not being deployed for military purposes.<sup>399</sup> A belligerent was responsible for returning all cultural property which had been looted or involuntarily conveyed.<sup>400</sup> Artworks also were not to be seized as reparations.<sup>401</sup>

The importance attached to the protection of cultural property is indicated by the fact that various German officers and officials involved in the summary seizure and destruction of artistic objects were subjected to criminal prosecution.

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388. *Id.* at 337-38.

389. *See U.S. Seeks to Replace Cultural Property Displaced During World War II*, *id.* at 345.

390. *Quoted in Hall, supra* note 265, at 337. *See generally*, Memorandum by The State Department Member of SWNCC, *Return of Looted Objects of Art to Countries of Origin*, 16 DEP'T. ST. BULL. 358 (1947).

391. *See supra* notes 289-97 and accompanying texts.

392. *See supra* notes 303-06 and accompanying texts.

393. *See supra* notes 343-53 and accompanying texts.

394. *See supra* notes 377-90 and accompanying texts.

395. *See supra* notes 358-76 and accompanying texts.

396. *See supra* notes 303, 323 and accompanying texts.

397. *See supra* notes 313, 370-71 and accompanying texts.

398. *See supra* notes 303, 323 and accompanying texts.

399. *See supra* notes 303, 323, 375 and accompanying texts.

400. *See supra* notes 339-43 and accompanying texts.

401. *See supra* note 389 and accompanying text.

## VII. War Crimes and Cultural Property

### A. *The Nuremberg Trial*

The Nuremberg Charter defined war crimes as including the “plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”<sup>402</sup> Crimes against humanity were defined as murder, extermination, enslavement, deportation and “other inhumane acts” committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>403</sup>

The International Military Tribunal at Nuremberg charged the defendants with the war crime of having plundered public and private property in that they “ruthlessly exploited the people and the material resources of the countries they occupied, in order to strengthen the Nazi war machine, to depopulate and impoverish the rest of Europe, to enrich themselves and their adherents, and to promote German economic supremacy over Europe.”<sup>404</sup> The indictment went on to note that the German plunder from Western countries, between 1940 and 1944, included paintings, antiques, textiles, furniture and cultural objects of “enormous value.”<sup>405</sup> The charging instrument specifically pointed to the looting of the museums of Nantes, Nancy and Old Marseilles.<sup>406</sup> Private collections also were plundered, resulting in the German’s acquisition of paintings by renowned artists such as Raphael, Vermeer, Van Dyck, Rubens, Rembrandt and Van Eyck.<sup>407</sup> The economic looting of Belgium alone between 1940 and 1944 resulted in losses

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402. See Agreement For the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(b) 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

403. See *id.* art. 6(c).

404. See International Military Tribunal, the United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics v. Hermann Wilhelm Goring *et. al.* (Indictment), I Trial of the Major War Criminals Before the International Military Tribunal 27, 55 (1947) [hereinafter Indictment].

405. *Id.* at 56.

406. *Id.* at 58.

407. *Id.*

amounting to 175 billion Belgian francs.<sup>408</sup> The United States prepared a document designed to assist the Nuremberg prosecutions which cited a German report which set the value of the 21,903 art objects seized from Western Europe at close to one billion German Reichsmarks.<sup>409</sup>

The indictment further charged that in the East the Nazi regime pursued "a systematic policy, a continuous course of plunder and destruction."<sup>410</sup> The Germans severely scarred virtually every city and village in Russia, damaging over six million buildings and rendering roughly 25 million persons homeless.<sup>411</sup> They destroyed 427 museums and, in Kiev alone, seized over 4 million books, magazines and manuscripts.<sup>412</sup> The Nazi forces singled out the Russian's national treasures for decimation, destroying the estates and desecrating the graves of Pushkin and Tolstoy.<sup>413</sup> They also defiled 1,670 Greek Orthodox and 237 Roman Catholic churches, 67 chapels, 532 synagogues and desecrated some of the most significant Christian monuments and monasteries.<sup>414</sup> The value of the material losses inflicted on the Soviet Union was estimated to total 679 billion rubles.<sup>415</sup>

The American prosecutor, Justice Robert H. Jackson, argued in his opening statement, that the Nazis' looting could be explained neither by the military's lack of discipline nor by the weakness of human nature.<sup>416</sup> This unprecedented and systematic plan of plunder was simply an effort to enrich the Reich and cripple the economies of its competitors.<sup>417</sup> Justice Jackson illustrated the extent of this effort by pointing to the fact that by April 16, 1943, 92 railroad cars, containing 2,775 cases of art, had been sent to Germany; 53 of these items had been claimed by Hitler and 594 by Goering.<sup>418</sup> Defendant Alfred Rosenberg inventoried the prize possessions in thirty-nine bound volumes which featured photos of paintings, sculptures, antique furniture, textiles and small objects of

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408. *Id.*

409. OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, I NAZI CONSPIRACY AND AGGRESSION 1105 (1946).

410. Indictment, *supra* note 404, at 58.

411. *Id.*

412. *Id.* at 59.

413. *Id.*

414. *Id.* at 59-60.

415. *Id.* at 60.

416. II TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 118, 141 (1947).

417. *See id.*

418. *See id.*

art.<sup>419</sup> Rosenberg set the value of this collection at close to one billion dollars.<sup>420</sup>

Defendant Rosenberg contended that the art had been collected in order to safeguard the works.<sup>421</sup> This was challenged by French Assistant Prosecutor M. Charles Gerthoffer, who reiterated that the Nazi regime looted and plundered in order to promote the Reich as the center of European culture, provide a secure source of economic wealth, and to accumulate a politically potent resource which could be used in negotiating peace treaties.<sup>422</sup> He concluded that “[n]ever . . . has history furnished an example of wholesale pillaging organized on so completely an administrative basis.”<sup>423</sup>

By 1949, the International Military Tribunal at Nuremberg held that the provisions of the Hague Convention of 1907 had been recognized by all civilized nations as declaratory of the laws and customs of war.<sup>424</sup> The Court concluded that individuals were criminally culpable for criminal conduct in contravention of these principles of international law regardless of their rank or status.<sup>425</sup> They possessed duties under international law which transcended their obligation to abide by domestic doctrine.<sup>426</sup> The fact that defendants may have acted in accordance with superior orders did not free them from criminal culpability, but might be considered in mitigation of punishment.<sup>427</sup> The test was whether the accused had been in a position to exercise a moral choice.<sup>428</sup>

The Tribunal determined that the evidence relating to war crimes was overwhelming. The Reich’s criminal conduct, in the view of the Court, stemmed from the German notion of “total war,” which posited that the rules regulating armed conflict could not constrain the Reich’s sovereign prerogative to wage war.<sup>429</sup>

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419. *Id.* at 142.

420. *Id.*

421. VII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNALS 51 (1947) (statement of M. Charles Gerthoffer, Assistant Prosecutor for the French Republic).

422. *See id.* at 65.

423. *See id.* at 66.

424. *See* 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 497 (1948) (Nuremberg Judgment).

425. *See id.* at 464-66.

426. *See id.*

427. *See id.*

428. *See id.* at 466.

429. *See* 22 TRIAL OF THE MAJOR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 466.

The removal of these restraints released the Nazis to wage a cruel and callous armed campaign which was characterized by the systematic pillage and plunder of public and private property.<sup>430</sup> The ultimate goal was to place the people and property of Europe in the service of the Third Reich.<sup>431</sup> In the East, this was part of a broader policy which was designed to destroy the indigenous population in order to create living space for German colonization.<sup>432</sup>

The International Military Tribunal did not clearly differentiate between war crimes and crimes against humanity. It noted that the policy of persecution, repression, and murder of dissidents and Jews in Germany before the war of 1939 was ruthlessly carried out.<sup>433</sup> The Tribunal, however, ruled that to constitute a crime against humanity the acts relied on must have been in execution of, or in connection with, either a war of aggression or a war crime, the two other delicts within the jurisdiction of the Court.<sup>434</sup> The Tribunal held that from the beginning of the war in 1939, war crimes had been committed on a vast scale which also constituted crimes against humanity.<sup>435</sup> The Court somewhat ambiguously ruled that to the extent that the acts committed prior to the initiation of the war in 1939, which were undertaken in connection with an aggressive war, did not constitute war crimes, that they comprised crimes against humanity.<sup>436</sup>

The Tribunal centered its discussion of cultural confiscation on Alfred Rosenberg, who had been appointed, in January 1940, as head of the Center for National Socialist Ideological and Educational Research.<sup>437</sup> This organization, referred to as "Einsatzstab Rosenberg," seized cultural objects under the claim of constructing a collection of Judaica.<sup>438</sup> The Court noted that throughout Europe, as a result of Rosenberg's efforts, private collections were robbed, libraries looted, homes pillaged and palaces and museums were reduced to rubble.<sup>439</sup> In the Ukraine, paintings and art were

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430. *See id.* at 482.

431. *See id.*

432. *See id.* at 480-82, 492.

433. *See id.* at 496.

434. *See* 22 TRIAL OF THE MAJOR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 497.

435. *See id.*

436. *See id.* at 498.

437. *See id.* at 484.

438. *See id.* at 484-85.

439. *See* 22 TRIAL OF THE MAJOR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 485.

seized from Kiev and Kharkov and sent to East Prussia.<sup>440</sup> Additionally, rare volumes and art were removed from the palaces of Peterhof, Tsarskoye Selo and Pavlovsk.<sup>441</sup> The value of art taken from Bielorussia' ran into the millions.<sup>442</sup> In October 1943 alone, roughly forty box-cars loaded with cultural objects were transported to the Reich.<sup>443</sup> The Tribunal rejected the contention that Rosenberg's intent was to safeguard and to secure these objects.<sup>444</sup> According to the Court, the evidence clearly indicated that the motive was to enrich the artistic collection of the Third Reich.<sup>445</sup>

The International Military Tribunal held that Rosenberg was responsible for structuring a system of pillage and plunder of museums, libraries and private collections.<sup>446</sup> The Court noted that Rosenberg had initiated Aktion-M, in 1941, which according to the defendant's own records, had resulted in the plunder of 69,619 Jewish homes in France.<sup>447</sup> The wide-spread scope of this looting is indicated by the fact that 26,984 railroad cars were required to transport the confiscated furnishings to Germany.<sup>448</sup> As of July 14, 1944, more than 21,903 art objects had been seized in the West by Rosenberg's organization.<sup>449</sup> Rosenberg later brought the same enthusiasm to his role as Reich Minister for the Occupied Eastern Territories in which he directed the denuding of raw materials and foodstuffs and was instrumental in engineering the extermination of Jews.<sup>450</sup> The Tribunal convicted Rosenberg of war crimes and crimes against humanity as well as waging a war of aggression and he was sentenced to death by hanging.<sup>451</sup>

Other defendants were also convicted of involvement in economic plunder. Hans Frank was Governor General of the occupied Polish territory.<sup>452</sup> He assisted in planning a policy of

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440. *See id.*

441. *See id.*

442. *See id.*

443. *See id.*

444. *See* 22 TRIAL OF THE MAJOR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 486.

445. *See id.* at 486.

446. *See id.* at 540.

447. *See id.*

448. *See id.*

449. *See* 22 TRIAL OF THE MAJOR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 540.

450. *See id.* at 540-41.

451. *See id.* at 588.

452. *See id.* at 542.

economic plunder which was far in excess of the needs of the German army.<sup>453</sup> This reduced Poland to a subsistence economy in which the population suffered from starvation and epidemic disease.<sup>454</sup> In addition, well over three million Jews were exterminated.<sup>455</sup> The Tribunal conceded that Frank may have lacked knowledge of some acts and that other policies likely had been initiated over his opposition.<sup>456</sup> Frank, nevertheless, according to the Court, had been a knowing and willing participant in the economic exploitation of Poland which resulted in the death by starvation of large numbers of people.<sup>457</sup> He was convicted of war crimes and crimes against humanity and was sentenced to death by hanging.<sup>458</sup>

Defendant Wilhem Frick, the former Minister of Interior, was responsible for drafting the Reich's draconian discriminatory decrees, which included the confiscation of Jewish property in Germany.<sup>459</sup> He subsequently was appointed Reich Protector of Bohemia and Moravia and was involved in the deportation of Jews and the seizure of their property.<sup>460</sup> Frick was convicted of war crimes and crimes against humanity and was sentenced to death by hanging.<sup>461</sup>

Walter Funk was Under Secretary in the Ministry of Propaganda and Vice-Chairman of the Reich Chamber of Culture, where he was involved in excluding Jews from the arts.<sup>462</sup> Funk later explained that the elimination of Jews from the economic and political spheres was a justified effort to protect Germany from the semitic threat.<sup>463</sup> In January 1939, Funk was appointed Minister of Economics and President of the Reichsbank and agreed to accept gold, jewels and other items seized from individuals exterminated in the concentration camps.<sup>464</sup> He also was deter-

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453. *See id.*

454. *See* 22 TRIAL OF THE MAJOR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 542.

455. *See id.* at 543.

456. *See id.*

457. *See id.* at 544.

458. *See id.* at 588.

459. *See* 22 TRIAL OF THE MAJOR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 544.

460. *See id.* at 545.

461. *See id.* at 588.

462. *See id.* at 551.

463. *See id.*

464. *See* 22 TRIAL OF THE MAJOR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 551.



mined to have been fully informed of Germany's occupation policies and to have participated in the exploitation of the occupied territories, seizing the gold reserves of the Czechoslovakian National Bank and liquidating the Yugoslavian Bank.<sup>465</sup> Funk was found guilty of both war crimes and crimes against humanity and was sentenced to life imprisonment.<sup>466</sup>

Arthur Seyss-Inquart was named Reich Governor of Austria in 1938.<sup>467</sup> He repressed Austrian Jews, confiscated their property and cooperated in deporting them to their death.<sup>468</sup> In 1940, Seyss-Inquart was appointed Reich Commissioner of the Netherlands where he introduced similar policies.<sup>469</sup> The International Military Tribunal convicted Seyss-Inquart of war crimes and crimes against humanity and he was sentenced to death.<sup>470</sup> The Court also ruled that the members of the upper-echelon of the Nazi Party, the Leadership Corps, were liable for membership in a criminal organization which violated the law by, among other things, engaging in economic and political discrimination against Jews in Germany and in the occupied territories.<sup>471</sup>

In summary, the International Military Tribunal at Nuremberg indicted the defendants for various offenses, including the confiscation and looting of art.<sup>472</sup> The judges determined that those involved in this plunder and looting were liable for war crimes<sup>473</sup> and crimes against humanity.<sup>474</sup> However, the Court's wide-ranging discussion of the defendants' activities makes it difficult to determine whether their acts of economic confiscation and discrimination were considered to constitute crimes against humanity as well as war crimes. In addition, it is not clear whether those convicted of crimes against humanity were held liable for acts of theft and confiscation carried out against Jews in Germany and Austria prior to the initiation of World War II.<sup>475</sup>

Defendant Rosenberg appears to have been included in the Nuremberg trial in order to highlight the Reich's theft of art and

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465. *See id.*

466. *See id.* at 588.

467. *See id.* at 574.

468. *See id.*

469. *See* 22 TRIAL OF THE MAJOR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 576.

470. *See id.* at 589.

471. *See id.* at 502, 505.

472. *See supra* notes 405-06 and accompanying texts.

473. *See supra* notes 451, 458, 461, 466, 472 and accompanying texts.

474. *See id.* and accompanying texts.

475. *See supra* notes 466, 469-70 and accompanying texts.

cultural property.<sup>476</sup> Rosenberg was convicted and subjected to unprecedented criminal punishment for art theft by the International Military Tribunal.<sup>477</sup> However, the Tribunal did not discuss or explicitly impose punishment for the theft of cultural property on other defendants, such as Goering<sup>478</sup> or Von Ribbentrop.<sup>479</sup>

*B. Prosecutions Under Control Council Law No. 10*

Other trials of Nazi war criminals were undertaken by the Allied Powers in exercise of their condominium jurisdiction over Germany. These prosecutions were based on Control Council Law No. 10 which provided a uniform basis for the prosecution of accused German war criminals.<sup>480</sup> The substantive provisions generally mirrored the Nuremberg Charter.<sup>481</sup> Three Control Council Law No. 10 trials before American occupation courts<sup>482</sup> involved the prosecution of German industrialists and addressed the legal standards regulating the protection of property in the occupied territories.<sup>483</sup>

In the *Krupp* case, the defendants, alleged that the Hague Convention of 1907 was inapplicable to the contemporary practice of total war.<sup>484</sup> The Tribunal, however, ruled that by 1939, the Hague Convention had been recognized as customary law which was binding on Germany as a matter of custom as well as treaty.<sup>485</sup> The Court, in discussing the liability of German industrial-

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476. See *supra* notes 406-19, 438-51 and accompanying texts.

477. See *supra* notes 423-28 and accompanying texts.

478. See *supra* notes 223-25 and accompanying texts.

479. See *supra* note 149 and accompanying text.

480. See Control Council Law No. 10, VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 XVIII (1952) [hereinafter CONTROL COUNCIL LAW NO. 10].

481. See *id.* art. II.

482. See Matthew Lippman, *The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany*, 3 INDIANA INT'L 7 COMP. L. REV. 1, 11-20 (1992). See also Matthew Lippman, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 TEMPLE INT'L AND COMP. L. REV. 173 (1995). See *infra* note 488.

483. United States v. Alfred Krupp, *et. al.* IX TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1327 (1950) [hereinafter *Krupp*]. See also United States v. Friedrich Flick, VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1187 (1952); United States v. Carl Krauch, VII TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1081 (1952) [hereinafter *Farben*] (all three trials involve the prosecution of Nazi industrialists).

484. See *Krupp*, *supra* note 483, at 1340.

485. See *id.*

ists in the *Farben* case, echoed this determination and ruled that the plunder of public and private property was recognized as a crime prior to the drafting of the Nuremberg Charter and that the defendants could not claim that they were being subjected to retroactive punishment.<sup>486</sup> The *Farben* Tribunal failed to find a change in the custom and practice of states regarding the protection of property during belligerent occupation which would legally justify the type of plunder and spoliation practiced by Nazi Germany.<sup>487</sup> The Court conceded that there were many areas of uncertainty in the humanitarian law of war pertaining to the scope of bombing and reprisals; however, this uncertainty did not exist in relation to the provisions pertaining to the protection of private and public property under belligerent occupation.<sup>488</sup>

The *Krupp* Court, in rejecting the related claim that the exigencies of war justified a belligerent's departure from the strictures of international law, observed that such a claim "means nothing more or less than to abrogate the laws and customs of war entirely."<sup>489</sup> The Tribunal also ruled that defendants may not escape liability based on the fact that their acts of spoliation were authorized and actively supported by German governmental officials.<sup>490</sup> The judges explained that it was a general principle of criminal law that a defendants' actions could not be excused by the fact that they were undertaken in collaboration with other wrongdoers.<sup>491</sup>

The Tribunal in the *Krupp* case observed there was no support in the laws and customs of war for the proposition that industrial firms may shadow invading military forces and seize and exploit property in occupied territories.<sup>492</sup> The economy of an occupied territory was to remain undisturbed, other than in those instances in which the goods were required to support the army of occupation. This exception encompassed requisitions for food, clothing, fuel, and housing which were not to exceed the economic capacity of the occupied territory.<sup>493</sup> The Tribunal also ruled that an occupant may expropriate public or private property in order to

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486. See *Farben*, *supra* note 483, at 1131.

487. *Id.* at 1137-38.

488. *Id.* at 1138.

489. *Krupp*, *supra* note 483, at 1347.

490. See *id.* at 1346.

491. See *id.*

492. *Id.*

493. See *Krupp*, *supra* note 483, at 1341-42.

preserve and maintain public order and safety.<sup>494</sup> Any civilian contributions were subject to indemnification or restoration by the occupying authority.<sup>495</sup> The protection of property reflected the belief that the inhabitants of occupied territories should not be arbitrarily deprived of their assets and that individuals and their goods should not be employed to assist enemy forces in the waging of war.<sup>496</sup>

The Tribunal, in discussing the liability of German industrialists in the *Flick* case, noted that the principles of the Hague Convention regulating property in occupied territories had been drafted prior to the mechanization and technological transformation of the military.<sup>497</sup> The continuing effectiveness of these provisions required that they be interpreted in a broad, dynamic and practical fashion in accordance with the demands of contemporary warfare.<sup>498</sup>

The *Krupp* Court determined that the Nazi's discriminatory decrees against Jews and spoliation and shipping of property to Germany was intended neither to support the German armies of occupation nor to secure public order and safety.<sup>499</sup> The *Krupp* Tribunal further ruled that transactions involving this illegally seized property were violative of the respect for public property guaranteed under the Hague Convention.<sup>500</sup> The Court also determined that the offense of spoliation does not require the transfer of title; the mere taking over of a factory or other protected asset in a manner which prevents the rightful owner from exercising his or her legal prerogatives contravenes the Convention.<sup>501</sup>

The *Krupp* Court stated that acts of plunder are not excused by the fact that they may have been carried out through complex or convoluted corporate schemes.<sup>502</sup> In addition, the *Farben* Tribunal determined that the acquisition of property against the will and consent of the owner of property, where not justified by

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494. *Id.* at 1342-43.

495. *Id.* at 1344.

496. *See generally id.* at 1341-42, 1346-47. Article 53, however, permits the seizure of depots of arms and all kinds of munitions of war even if they belong to private individuals. They must be restored and compensation fixed when peace is made. *See* Hague Convention, *supra* note 299, art. 53 and accompanying text.

497. *Flick*, *supra* note 483, at 1208.

498. *Id.*

499. *Krupp*, *supra* note 483, at 1345.

500. *Id.* at 1343.

501. *Id.* at 1346.

502. *Id.* at 1347.

any applicable provision of the Hague Convention, is not relieved of its illegal character by the payment of consideration.<sup>503</sup> On the other hand, the *Farben* Tribunal recognized that, while the Hague Convention was intended to protect the economy and industry of occupied territories, individuals were entitled to voluntarily transfer property to an occupying power, whatever the economic impact.<sup>504</sup>

The Farben firm was found to have utilized the coercive power of occupation authorities to compel French firms to cede Farben a controlling interest in the dyestuffs industry.<sup>505</sup> The *Farben* Tribunal noted that the occupation authorities effectively shuttered the French firms through the denial of manufacturing licenses and that the firms feared that a failure to amalgamate into the Farben consortium would lead to the confiscation or dismantling of their factories.<sup>506</sup> The Court noted that the corporate agreement between Farben and the French firms created an illusion of legality that masked Farben's aspiration to pillage, plunder and despoil factories in the occupied territories.<sup>507</sup> The *Farben* Court also rejected the contention that the Hague Convention was inapplicable to Alsace-Lorraine as a result of the Reich's annexation or incorporation of this territory: International law, according to the Tribunal, did not recognize Germany's incorporation of territories so long as the Nazi presence was being contested by armies in the field.<sup>508</sup>

In *Farben*, the defendants claimed that the firm's acquisition of a controlling interest in the factories and plants in the occupied territories was intended to, and did, contribute to the maintenance of the economy in these territories. They argued that their conduct was, therefore, in conformity with the responsibility of an occupying power to restore and to safeguard economic security and stability. The Tribunal ruled that had Farben's management indicated an intent to assume temporary control for the duration of the hostilities, this defense might have had some merit. However, the evidence indicated that these acquisitions had been motivated

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503. Farben, *supra* note 483, at 1132.

504. Flick, *supra* note 483.

505. *Id.* at 1148.

506. *Id.* at 1148-49.

507. *Id.* at 1140.

508. *Id.* at 1137.

by Farben's desire to assume permanent control, in order to enrich itself and to dominate the industries involved.<sup>509</sup>

In *Flick*, the defendants were charged with crimes against humanity stemming from four separate transactions in which Flick used the Nazi's Aryanization program to acquire Jewish industrial property in Germany.<sup>510</sup> The Tribunal ruled that the prosecution of war criminals was a daunting and demanding task and that the Court was not authorized or equipped to extend its jurisdiction over acts which were not connected with, or which were undertaken prior to, the initiation of armed conflict.<sup>511</sup>

In addition, the Tribunal ruled that while a sale compelled by pressure or duress may be questioned in a court of equity, such pressure, even when motivated on racial or religious grounds, did not constitute a crime against humanity. Significantly, the Court noted that a distinction "could be made between industrial property and the dwellings, household furnishings, and food supplies of a persecuted people. In this case, however, they were only concerned with industrial property, a large portion of which (ore and coal mines) constitutes natural resources in which the state has a peculiar interest."<sup>512</sup>

Furthermore, the Court noted that the crimes against humanity enumerated in Control Council Law No. 10 were crimes against the person, referring to acts that affect the life and liberty of individuals,<sup>513</sup> and did not apply to the compulsory taking of industrial property. Moreover, crimes against humanity are "against any civilian population" and have not been considered to encompass isolated cases of atrocity or persecution, whether committed by private individuals or governmental authorities.<sup>514</sup>

The Nuremberg decision, according to the *Flick* Court, had not established that the mere assertion of economic pressure to obtain industrial property owned by Jews constituted a crime against humanity.<sup>515</sup> These rules pertained so long as the presence of an

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509. *See id.* at 1141.

510. *Flick*, *supra* note 483, at 1212. *Flick* acquired the properties prior to the initiation of World War II.

511. *Id.* at 1213. Crimes against humanity under Control Council Law No. 10, *supra* note 460, in contrast to the Nuremberg Charter (*see* Nuremberg Charter, *supra* note 402, art. 6 (c)), were not required to be connected with a war of aggression or war crime. *See* Control Council Law No.10, *supra* note 480, art. II(1)(b).

512. *Flick*, *supra* note 483, at 1214.

513. *Id.*

514. *Id.* at 1215-16.

515. *Id.* at 1215.

occupying power was being contested by armies in the field.<sup>516</sup> By specifically ruling that industrial property does not fall within the ambit of crimes against humanity,<sup>517</sup> the *Flick* Tribunal left open the possibility that the systematic confiscation of cultural and personal property may constitute a crime against humanity.<sup>518</sup>

In summary, the prosecutions of German industrialists reiterated that the protection of cultural property, by 1939, had become a recognized component of customary international law.<sup>519</sup> These safeguards could not be abrogated under the claim of "total war."<sup>520</sup> These decisions also explicitly established that public and private assets in occupied territory were to be respected.<sup>521</sup> The occupying power may seize these assets to support the army of occupation, but such requisitions must be in proportion to the resources of the subject territory and individuals were to be compensated for the loss of their property.<sup>522</sup> Property was to be tarnished or destroyed only when necessary to maintain public order.<sup>523</sup> The guiding principle was that the conveyance of property must be carried out in a voluntary fashion and may not be the product of duress or coercion.<sup>524</sup>

### C. *Other Prosecutions Under Control Council Law No. 10*

In summary, the prosecution was required to establish that a defendant was affirmatively involved in formulating, initiating, directing or supporting the destruction, confiscation or seizure of cultural objects.<sup>525</sup> Mere knowledge, or an affirmative act which did not substantially contribute to the art confiscation program, was not deemed sufficient.<sup>526</sup> In the end, although various American courts condemned Germany's policy of cultural confiscation,<sup>527</sup> only two defendants were specifically convicted of the looting and plunder of artistic objects.<sup>528</sup>

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516. See *supra* note 508 and accompanying text.

517. See *supra* note 512-15 and accompanying texts.

518. See *supra* note 512 and accompanying text.

519. See *supra* notes 484-86 and accompanying texts.

520. See *supra* notes 489-90 and accompanying texts.

521. See *supra* notes 492-96 and accompanying texts.

522. See *supra* note 493 and accompanying text.

523. See *supra* note 494 and accompanying text.

524. See *supra* note 504 and accompanying text.

525. See *infra* notes 537, 548 and accompanying texts.

526. See *infra* notes 537-38 and accompanying texts.

527. See *infra* note 556 and accompanying text.

528. See *infra* notes 540-44 and 549-53 and accompanying texts.

The Reich's crimes against property were also discussed in several other cases brought under Control Council Law No. 10. In *United States v. von Weizsaecker*,<sup>529</sup> a number of Nazi officials were prosecuted for war crimes and crimes against humanity.<sup>530</sup> The war crimes and crimes against humanity charge encompassed the Reich's exploitation and plunder of property in the occupied territories. This included the looting of art treasures, furniture and textiles.<sup>531</sup> The Tribunal stated that the test for determining guilt was whether a defendant participated in the initiation or formulation of this spoliation program or influenced or performed a supervisory role in carrying out the Reich's criminal program.<sup>532</sup>

The Tribunal, in weighing the evidence, concluded that von Weizsaecker was not sufficiently involved in the spoliation program to render him legally liable.<sup>533</sup> Ernst von Weizsaecker, State Secretary of the German Foreign Office, was charged with receiving and acting upon reports concerning the seizure and looting of cultural and art treasures.<sup>534</sup> In July 1940, he was directed to insure that the military cooperated in securing Jewish art treasures in France.<sup>535</sup> Von Weizsaecker subsequently prepared a memorandum indicating that the military had informed him that the items already had been seized.<sup>536</sup> There also was evidence that von Weizsaecker was aware of the seizure of art treasures in Russia.<sup>537</sup>

Hans Lammers served as Reich Minister and Chief of the Reich Chancellery and was responsible for coordinating the Fuhrer's relations with the cabinet ministries. As Chief of the Chancellery, he was responsible for drafting, signing and disseminating decrees.<sup>538</sup> The Tribunal determined that Lammers cooperated in carrying out the confiscation of art treasures in the

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529. See *United States v. von Weizsaecker*, XIV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 314 (1950).

530. *Id.* at 680.

531. *Id.* at 681.

532. *Id.* at 684.

533. *Id.*

534. *U.S. v. von Weizsaecker*, *supra* note 529, at 690-91. The Tribunal cautioned that the appearance of von Weizsaecker's name on the distribution list attached to official documents was not sufficient to establish that he possessed responsibility over the subject matter of the document. *Id.* at 693.

535. *Id.* at 693-94.

536. *Id.* at 693-94.

537. *Id.* at 694.

538. *Id.* at 701, 702-03.



occupied territories.<sup>539</sup> He received reports concerning the confiscation of works of art and, in July 1942, directed all Reich authorities and officers to cooperate in Rosenberg's seizure of Jewish cultural treasures.<sup>540</sup> The evidence also indicated that, in December 1941, Lammers informed Rosenberg that the Fuhrer had approved Rosenberg's request to confiscate the household goods of Jews who had fled Paris.<sup>541</sup> Roughly a year later, Lammers, along with other high-ranking Nazi officials, attended a conference at which Rosenberg reported that the seizure program had netted 19,334 railroad cars of booty.<sup>542</sup> Lammers was sentenced to twenty years in prison.<sup>543</sup>

Defendant Gottlob Berger was the liaison officer between Alfred Rosenberg, Reich Minister for the Occupied Eastern Territories, and Heinrich Himmler, head of the Security Police.<sup>544</sup> In August 1943, Berger was appointed Chief of the Main Department for Politics in the Reich Ministry for the Occupied Eastern Territories.<sup>545</sup> His predecessor, Dr. Georg Liebbrandt, previously had informed the Reich authorities in Latvia and Ukraine that Rosenberg possessed exclusive authority to seize art treasures in these territories.<sup>546</sup>

The Tribunal determined that the confiscation program was initiated and well-advanced by the time that Berger assumed his position in the Ministry for the Occupied Eastern Territories and that he had not provided any assistance or direction.<sup>547</sup> Berger's only affirmative act was to sign an inventory, in September 1944, recording the seizure of eighty-five crates of paintings and other art objects from the Ukraine.<sup>548</sup>

In *United States v. Greifelt*,<sup>549</sup> officials of the SS Race and Resettlement Main Office (RuSHA), were charged with various war crimes, including the plunder of property.<sup>550</sup> The RuSHA

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539. U.S. v. von Weizsacker, *supra* note 529, at 715.

540. *Id.* at 713.

541. *Id.* at 714.

542. *Id.* at 715.

543. *Id.* at 867.

544. U.S. v. von Weizsaecker, *supra* note 529, at 723.

545. *Id.* at 724, 726.

546. *Id.* at 726.

547. *Id.* at 726.

548. *Id.* at 727.

549. *United States v. Greifelt*, V TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 88 (1950).

550. *Id.* at 89.

was responsible for the evacuation of the occupied territories and the resettlement of Germans. Its responsibilities included the confiscation of archives, museums, libraries, furniture, carpets and other cultural items and valuables.<sup>551</sup> Defendant Ulrich Greifelt, the Chief of RuSHA, was determined to have been deeply involved in the depredation of Polish property.<sup>552</sup> The Tribunal charged that these seizures had not been carried out on the grounds of military necessity, but were part of a plan to denude the Eastern territories of their wealth and population in order to facilitate the emigration of ethnic Germans.<sup>553</sup>

Lastly, in *United States v. Pohl*,<sup>554</sup> officials of the Economic Administrative Main Office (WVHA) of the Security Police were prosecuted for war crimes and crimes against humanity, including the looting of public and private property.<sup>555</sup> The Tribunal noted that this policy of plunder was not merely motivated by economic exigency or by the need to supply the German Army and population with necessities. It also was an effort to enrich the Reich.<sup>556</sup> This explained the fact that churches, libraries, art galleries and museums throughout Europe were deliberately denuded of their artistic archives, which possessed little immediate economic utility.<sup>557</sup>

In summary, these cases affirmed that an Occupying Power must reimburse individuals for requisitioned property.<sup>558</sup> The destruction or seizure of enemy property for reasons of military necessity is limited to actions undertaken during armed conflict.<sup>559</sup> Property also may not be damaged or seized, under the claim of military necessity, in reprisal for partisan attacks.<sup>560</sup> Collective

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551. *Id.* at 98-99.

552. *Id.* at 147.

553. *Id.* at 147-48.

554. See *United States v. Pohl*, V TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 958 (1950).

555. *Id.* at 976.

556. *Id.* at 976-77.

557. Trial of Phillippe Russ (Perm. Milit. Trib., at Metz, March 5, 1948) IX L. REPT. TRIALS WAR CRIM. 71-72 (1949).

558. Trial of Hans Szabados (Perm. Milit. Trib., Clermont-Ferrand, June 23, 1946) IX L. REPT. TRIALS WAR CRIM. 59 (1949).

559. Trial of Franz Holstein and Twenty-three Others, (Perm. Milit. Trib., Dijon, Feb. d. 1947) VIII WAR REPT. TRIALS WAR CRIM. 22 (1949).

560. Trial of Hans Albin Rauter (Netherlands Spec. Ct., The Hague, May 4, 1948) XIV I. REPT. TRIALS WAR CRIM. 89, 91, 98-100 (1949).

penalties also may not be imposed in retribution for acts of resistance.<sup>561</sup>

#### *D. Prosecutions Before Domestic Tribunals*

A number of European domestic courts prosecuted and convicted German combatants of the pillage and destruction of property. A French Permanent Military Tribunal, in 1947, convicted Christian Baus, a former German civilian official, of the larceny of civilian property which he subsequently transported to Germany, and sentenced him to two years in prison.<sup>562</sup> In 1948, a French court convicted Philippe Rust, a German Security Police officer, of forcefully requisitioning property without compensation or the issuance of receipts and sentenced him to imprisonment for one year.<sup>563</sup> In another trial, two German civilians were convicted of theft and of receiving property stolen from French civilians and were sentenced to eighteen months in prison.<sup>564</sup>

In a decision pertaining to cultural property, Karl Lingenfelder, a German civilian settler in occupied France, was charged and convicted of pulling down a monument erected to French soldiers who had died during World War I.<sup>565</sup> Lingenfelder was determined to have destroyed the marble slabs bearing the names of the dead and to have shattered a statute of Joan of Arc.<sup>566</sup> The defendant's action was held to have contravened the obligation to respect property which is dedicated to art, culture and science.<sup>567</sup>

In several Polish cases, the defendants were charged and convicted of genocide and sentenced to death.<sup>568</sup> In the trial of Amon Goeth, Commandant of the Auschwitz concentration camp,

561. *See supra* notes 394-95 and accompanying texts.

562. Trial of Christian Baus, (Perm. Milit. Trib., at Metz, Aug. 21, 1947) IX L. REPT. TRIALS WAR CRIM. 68-69 (1949).

563. Trial of Philippe Rust (Perm. Milit. Trib. at Metz., March 5, 1948), IX L. REPT. TRIALS WAR CRIM. 71-72 (1949).

564. Trial of Alis and Anna Bommer and Their Daughters (Perm. Milit. Trib. at Metz, Feb. 9, 1947). IX L. REPT. TRIALS WAR CRIM. 62 (1949).

565. Trial of Karl Lingenfelder, (Perm. Milit. Trib. Metz, March 11, 1947), IX L. REPT. TRIALS WAR CRIM. 67 (1949).

566. *Id.*

567. *Id.* at 68.

568. *See* Trial of Hauptsturmfuhrer Amon Leopold Goeth (Sup. Nat'l Trib. Poland, Crawcow, August 27-31 and Sept. 2-5, 1946), VII L. REPT. TRIALS WAR CRIM. 1 (1948). These prosecutions were brought under the Decree of 31st August, 1944, concerning the punishment of Fascist-Hitlerite criminals guilty of murder and ill-treatment of the civilian population and of prisoners of war, and the punishment of traitors to the Polish Nation, *cited in id.* at 5 (Notes on the Case).

the Supreme National Tribunal viewed the Nazi extermination of Jews as one component of an economic, social and cultural genocidal attack on the Jews.<sup>569</sup> The Court noted that “[t]he wholesale extermination of Jews and also of Poles had all the characteristics of genocide in the biological meaning of this term, and embraced in addition the destruction of the cultural life of these nations.”<sup>570</sup> In the trial of Joseph Buhler, the deputy to Governor-General Hans Frank in occupied Poland, the Supreme National Tribunal noted that one of the chief aims of Germany’s occupation policy was the destruction of Polish cultural values through the pillage and plunder of scientific and cultural objects.<sup>571</sup>

The notion that the Nazis’ destruction and confiscation of cultural property was a component of genocide was most fully articulated in the prosecution of Artur Greiser, former Governor and National Socialist leader in Poznan in the annexed Polish territories.<sup>572</sup> Various State and church archives were seized, theaters, opera companies and bookstores were closed, thirty public art museums and private collections were confiscated, and virtually every public monument was destroyed.<sup>573</sup> According to the Polish Tribunal, Greiser incited, assisted, and was personally involved in the “[s]ystematic destruction of Polish culture” and in the “robbery of Polish cultural treasures” and “private property.”<sup>574</sup> He also was found to have directed the administrative and party machinery that burned and destroyed synagogues and defiled cultural objects and cemeteries.<sup>575</sup>

The Court concluded that the Nazis’ occupation policies in Poland constituted a “general totalitarian genocidal attack on the rights of the small and medium nations to exist, and to have an identity of their own.”<sup>576</sup>

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569. *Id.* at 8 (Notes on the Case).

570. *Id.* at 9. *See generally* Trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess (Sup. Nat’l Trib. Poland, March 11-29, 1947), VII L. REPT. TRIALS WAR CRIM. 11 (1949) (Commandant of Auschwitz convicted of genocide based on medical experiments conducted on inmates of the concentration camp).

571. Trial of Joseph Buhler, (Sup. Nat’l Trib. Poland, June 17-July 10, 1948), XIV L. REPT. TRIALS WAR CRIM. 21, 44-45 (1949) (Notes on the Case).

572. *See* Trial of Gauleiter Artur Greiser, (Sup. Nat’l Trib. Poland, June 21-July 7 1946), XIII L. REPT. TRIALS WAR CRIM. 70 (1949).

573. *Id.* at 83-84.

574. *Id.* at 71.

575. *Id.* at 94.

576. *Id.*

The United Nations subsequently considered whether to incorporate a prohibition on cultural genocide into the 1948 Convention on the Prevention and Punishment of Genocide.

*E. The 1948 Convention on the Prevention and Punishment of Genocide*

The United Nations General Assembly Resolution 96(I) proclaimed, in 1946, that genocide had resulted in "great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations."<sup>577</sup> This suggested that a group's culture, as well as its physical integrity, required international protection. The 1948 Convention on the Prevention and Punishment of Genocide, however, failed to incorporate a clause protecting culture.<sup>578</sup>

The initial draft submitted by the Secretary-General, in Article I(II)(3), prohibited acts of cultural genocide, including the "systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship."<sup>579</sup> The three experts assisting the Secretary-General disagreed on the inclusion of this provision. Professor Donnedieu de Vabres, Professor of the Paris Faculty of Law, and Professor Vespasian V. Pella, President of the International Association for Penal Law, argued that the protection of culture represented an undue extension of the notion of genocide, which was designed to protect the physical integrity of groups.<sup>580</sup> On the other hand, Raphael Lemkin, the intellectual progenitor of the concept of genocide, argued that a group's coherence and continuity depended upon the perpetuation of its culture.<sup>581</sup>

An additional draft subsequently was formulated by the Ad Hoc Committee, appointed by the Economic, Social and Cultural Committee, which prohibited any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial, or religious group on the grounds of national or racial origin

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577. G.A. Res. 96(I), U.N. Doc. A/64/Add. 1, at 175 (1946)

578. See Convention on the Prevention and Punishment of Genocide, Dec. 9, 1951, 78 U.N.T.S. 277

579. United Nations Secretary-General, Draft Convention on the Crime of Genocide, at 6-7, art. I (3)(e) U.N. Doc. E/447 (1947).

580. *Id.* at 27 (Comments on the Draft Convention).

581. *Id.*

or religious belief.<sup>582</sup> The Ad Hoc Committee draft specifically condemned prohibitions on a group's language and the destruction or prohibition on the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects.<sup>583</sup> The rationale for this condemnation of cultural genocide was articulated by Mr. Perez Perozo of Venezuela who noted that it was "possible to wipe out a human group . . . by destroying its cultural heritage, while allowing the individual members of the group to survive."<sup>584</sup>

The Sixth Committee voted to omit the provision on cultural genocide.<sup>585</sup> Committee members recognized that the prohibition against genocide was intended to protect a group's physical existence as well as its culture. The destruction of a culture fractured a group's unity, limited the diversity of the human family, and exposed a group to anti-social influences.<sup>586</sup> In fact, the destruction of culture was one of the chief characteristics of the Nazi's genocidal policies.<sup>587</sup> Mr. Khan, a delegate of Pakistan, noted that cultural genocide

represented the end, whereas physical genocide was merely the means. The chief motive of genocide was a blind rage to destroy the idea, the values and very soul of a national, racial or religious group, rather than its physical existence. . . . It would be against all reason to treat physical genocide as a crime and not to do the same for cultural genocide.<sup>588</sup>

During the General Assembly's consideration of the Sixth Committee draft, delegates continued to advocate the prohibition of cultural genocide. Mr. Khomussko, delegate of the Byelorussian Soviet Socialist Republic, however, cautioned the Committee that restrictions on culture invariably were a feature of persecutions directed at the destruction of groups.<sup>589</sup> The failure to incorporate a provision on cultural genocide would be tantamount to

582. Report of the Ad Hoc Committee on Genocide to the Economic and Social Council on the Meetings of the Committee Held at Lake Success, New York, April 5 to May 10, 1948, 7 U.N. ESCOR, Supp. No. 6, at 6, art. III, U.N. Doc. E/794 (1948).

583. *Id.*

584. U.N. ESCOR Ad Hoc Comm. on Genocide, 6th Sess., 5th mtg., at 2, U.N. Doc. E/AC.25/SR.5 (1948).

585. U.N. GAOR, 6th Comm. 3d Sess., 83d mtg., at 206 (1948).

586. *Id.* at 195-97 (Mr. Perozo, Venez.).

587. *Id.* at 205 (Mr. Zourek, Czech.).

588. *Id.* at 193.

589. *Id.*, 83d mtg., at 202.

insuring that crimes against the culture, religion, or language of a group remained unpunished.<sup>590</sup>

Mrs. Ikramullah, delegate of Pakistan, noted that "the mere physical existence of a group was of little value from the point of view of humanity, for a group deprived of the living springs of the spirit was only a body without a soul, unable to make any contribution to the world's heritage of art and sciences."<sup>591</sup> Mr. Khomusko, of Byelorussian Republic, reminded the delegates that this was no mere academic debate; during World War II, in an attempt to destroy his people, the Germans had burned the Academy of Sciences, the State Library and academic and arts institutions.<sup>592</sup> An amendment prohibiting cultural genocide was nevertheless rejected by the General Assembly.<sup>593</sup> Almost forty years later, a review of the Genocide Convention by the Sub-Commission on Prevention of Discrimination and Protection of Minorities would recommend that further consideration should be given to the inclusion of a provision on cultural genocide, possibly in an optional protocol.<sup>594</sup> In 1948, however, the Sixth Committee determined that the prohibition against cultural genocide was best included within a separate human rights instrument<sup>595</sup> or in a supplemental document.<sup>596</sup> It was thought to be inappropriate to incorporate both physical and cultural genocide in the same instrument and to treat them with the equal seriousness and severity.<sup>597</sup> Other delegates expressed the fear that a prohibition on cultural genocide would be interpreted so as to inhibit the assimilation of cultural or linguistic groups and would discourage various States from ratifying the Convention.<sup>598</sup>

Despite the failure to include a prohibition on the destruction of culture in the Genocide Convention, by the end of the World War II, the destruction of property, including cultural objects, had been firmly established as a war crime.<sup>599</sup> And, under certain

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590. *Id.*

591. U.N. GAOR, 3d Sess., 178th plen. mtg., at 818 (1948).

592. *Id.* at 830.

593. *Id.* at 847-48.

594. Preliminary Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, Prepared by Mr. Whitaker, Sub-Commission on Prevention of Discrimination and Protection of Minorities, at 17, U.N. Doc. E/CN.4/Sub.2/1984/40 (1985).

595. *Id.*, 63d mtg., at 8 (Mr. Chaumont, Fr.).

596. *Id.*, 66th mtg., at 31 (Mr. Abdoh, Iran).

597. *Id.*, 83d mtg., at 200 (Mr. Abdoh, Iran).

598. *Id.*, 65th mtg., at 24 (Mr. Paredes, Phil.).

599. *See supra* notes 445-51 and accompanying texts.

circumstances, this also might constitute a crime against humanity.<sup>600</sup> The obligation of belligerents to protect property was reiterated in the 1949 Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War.<sup>601</sup> Article 53 provided that an occupying power's destruction of real or personal property belonging to private persons, the state, or to other public authorities or private organizations was prohibited, other than when considered to be "absolutely necessary for military operations."<sup>602</sup> Signatory states were required to enact legislation to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Convention.<sup>603</sup> The extensive destruction and appropriation of property, not justified by military necessity, and carried out in an unlawful and wanton fashion, was considered to be a grave breach of the Convention; this presumably included cultural objects.<sup>604</sup>

In 1954, the International Law Commission adopted the Draft Code of Offenses Against the Peace and Security of Mankind.<sup>605</sup> The draft punished war crimes<sup>606</sup> and crimes against humanity,<sup>607</sup> but did not specifically encompass crimes against property.<sup>608</sup>

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600. See *supra* note 514 and accompanying text.

601. Convention Relative to the Protection of Civilian Persons In Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

602. *Id.* art. 53.

603. Convention for the Amelioration of the Condition of the Wounded and Sick In Armed Forces In the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31.

604. *Id.* art. 50.

605. *Draft Code of Offenses Against the Peace and Security of Mankind*, Y.B. INT'L L. COMM'N 149 (1954).

606. *Id.* at 152, art. 2(12).

607. *Id.* at 151, art. 2(11).

608. *Id.* In 1989, Mr. Doudou Thiam, the Special Rapporteur on the Draft Code of Crimes Against the Peace and Security of Mankind, noted that crimes against property were encompassed within the war crimes provision of the Nuremberg Charter and, by implication, were prohibited under the Draft Code. Y.B. INT'L L. COMM'N 87 (1989). He further argued that existing precedents supported the notion that crimes against humanity under the Draft Code included mass attacks on property which were inspired by political, racial or religious motives. He explained that this was particularly pressing since a new category of property had been recognized—artistic and cultural objects—which was considered to part of the heritage of humankind. The destruction of these items constituted a great loss to civilization. According to the Special Rapporteur, recognizing that the protection of property was incorporated within crimes against humanity would expand the safeguards afforded to artistic objects, since he contended that the prohibition on crimes against humanity pertained in periods of peace as well as war. *Id.* at 87-88.



The Draft Code later was amended to incorporate a provision on “exceptionally serious war crimes”<sup>609</sup> which prohibited the “large-scale destruction of civilian property”<sup>610</sup> as well as “willful attacks on property of exceptional religious, historical or cultural value.”<sup>611</sup> The stage was set for the drafting of a document protecting cultural property during armed conflicts.

## VIII. The UNESCO and UNIDROIT Conventions

### A. *Convention in the Event of Armed Conflict*

In 1970, the General Conference of the United Nations Educational, Scientific and Cultural Organization in Paris adopted a Convention and Protocol for the Protection of Cultural Property in the Event of Armed Conflict.<sup>612</sup> The Preamble noted that cultural property had suffered grave damage during armed conflicts and that, due to developments in the techniques of warfare, such objects were exposed to an increased risk of destruction.<sup>613</sup> This damage to a state’s artistic treasures injures the “cultural heritage of mankind” since each group makes a distinct and central contribution to the “culture of the world.”<sup>614</sup> The Preamble went on to explain that as a consequence of the fact that each country’s cultural heritage is of importance to all peoples that it is essential that artistic objects receive both national and international protection.<sup>615</sup>

### B. *High Contracting Parties*

The Convention is applicable in all cases of the partial or total occupation of the territory of a High Contracting Party, even if the occupation does not meet with armed resistance<sup>616</sup>

609. See Y.B INT’L L. COMM’N 105, 106 (1991)

610. *Id.* art. 22(e).

611. *Id.* art. 22(f). The International Law Commission explained that the latter provision on the precedent of the Geneva Conventions was limited to willful attacks committed for the specific purpose of causing damage to property of exceptional value. *Id.* at 106-07 (Commentary).

612. UNESCO Convention and Protocol For the Protection of Cultural Property In the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter UNESCO Armed Conflict Convention].

613. *Id.* at pmb1.

614. *Id.*

615. *Id.*

616. *Id.* art. 18(2).

The UNESCO Armed Conflict Convention, in Chapter One, divided cultural property into three categories: property of every description which is of "great importance" to the world's cultural heritage;<sup>617</sup> buildings devoted to the preservation or to the exhibition this art;<sup>618</sup> and geographic "centers" comprised of a cluster of works of art and buildings.<sup>619</sup> Under Article Three, The High Contracting Parties undertake to take steps, during peacetime, to safeguard the cultural property within their territory against the effects of armed conflict.<sup>620</sup> States specifically pledge to formulate military regulations or instructions to ensure the observance of the Convention and to inculcate a respect for culture and cultural property.<sup>621</sup> The High Contracting Parties also agree to plan, or to establish within their armed forces, services or specialist personnel dedicated to the protection of cultural property.<sup>622</sup>

The High Contracting Parties, in Article Four, pledge to respect cultural property located within their own territory and within the territory of other High Contracting Parties. This requires refraining from any use of the property, its immediate surroundings, or of the appliances utilized for its protection, which is likely to expose the property to destruction or damage in the event of armed conflict.<sup>623</sup> Signatory States also are to avoid any act of hostility against such objects.<sup>624</sup> These obligations are waived in instances of imperative military necessity.<sup>625</sup>

The High Contracting Parties also pledge to prohibit, prevent and, if necessary, to halt theft, pillage or vandalism of cultural

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617. UNESCO Armed Conflict Convention, *supra* note 612, at art. 1(a).

618. *Id.* art. I(b).

619. *Id.* art. I(c).

620. *Id.* art. 3.

621. *Id.* art. 7(1).

622. UNESCO Armed Conflict Convention, *supra* note 612, at art. 7(2). Cultural property may be adorned with a distinctive emblem in order to facilitate its recognition. *Id.* art. 6. The distinctive emblem shall take the form of "a shield, pointed below, per saltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle)." *Id.* art. 16(1). This emblem repeated three times signified immovable cultural property under special protection; the transport of cultural property; or a so-called improvised refuges. *Id.* art. 17(1). The distinctive emblem, standing alone, was to be used to identify cultural property not under special protection and personnel engaged in the protection of cultural property. *Id.* art. 17(2). During an armed conflict, the use of the distinctive emblem in any other instance, or the display of a sign resembling the distinctive emblem, is forbidden. *Id.* art. 17(3).

623. *Id.* art. 4.

624. *Id.* art. 4(1).

625. *Id.* art. 4(2).

property. Signatories are to refrain from requisitioning movable cultural property situated within the territory of another High Contracting Party.<sup>626</sup> In addition, reprisals are not to be directed against cultural property.<sup>627</sup>

A High Contracting Party, in occupation of the whole or part of the territory of another High Contracting Party, shall support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.<sup>628</sup> The occupying power shall take steps to preserve cultural property damaged by military operations in those instances in which the competent national authorities are unable to act.<sup>629</sup> A High Contracting Party, whose government is considered by members of a resistance movement to be their legitimate representative, if possible, shall draw the movement's attention to their obligation to comply with those provisions of the Convention dealing with respect for cultural property.<sup>630</sup>

Chapter Two of the Convention places under special protection a limited number of "refuges" which shelter movable cultural property of "very great importance."<sup>631</sup> These centers are required to be distant from large industrial concentrations and from significant strategic objectives<sup>632</sup> and are not to be utilized for military purposes.<sup>633</sup> The High Contracting Parties undertake to ensure the immunity of this cultural property by refraining from

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626. *Id.* art. 4(3).

627. *Id.* art. 4(4).

628. UNESCO Armed Conflict Convention, *supra* note 612, at art. 5(1).

629. *Id.* art. 5(2).

630. *Id.* art. 5(3).

631. *Id.* art. 8 (1). Immovable cultural property which is situated near an important military objective may be placed under special protection if the High Contracting Party requesting such protection undertakes in the event of armed conflict not to make use of the objective, and, in the case of a port, railway station or aerodrome, to divert all traffic. *Id.* art. 8(5).

632. UNESCO Armed Conflict Convention, *supra* note 612, at art. 8(1)(a).

633. *Id.* art. 8 (1)(b). A refuge for movable cultural property also may be placed under special protection, whatever its location, if it is so constructed that, in all probability, that it will not be damaged by bombs. *Id.* art. 8(2). A center containing cultural property shall be considered to be used for military purposes whenever it is used for the movement of military personnel or material, even in transit, or whenever activities directly connected with military operations, such the stationing of military personnel, or the production of war material, are carried on within the center. *Id.* at art. 8(3). The guarding of cultural property by armed custodians or by the regularly constituted police shall not result in the center being considered to be employed for military purposes. *Id.* at 8(4). In order to receive special protection, cultural property must be entered into the International Register of Cultural Property under Special Protection. *Id.* art. 8(6)

any act of hostility against “refuges” and pledge to avoid using these structures or the adjacent areas for military purposes.<sup>634</sup> Cultural property under special protection shall be marked with the distinctive emblem established under the Convention and is to be open to international inspectors.<sup>635</sup> A High Contracting Party is released from respecting cultural property accorded special protection in those instances in which the opposing belligerent violates its obligations.<sup>636</sup> A party, whenever possible, shall first request the cessation of such violation.<sup>637</sup> Otherwise immunity shall be withdrawn from property only under special protection in “exceptional cases of unavoidable military necessity, and only for such time as that necessity continues.”<sup>638</sup>

Chapter Three provides that a High Contracting Party may request special protection for the transport of cultural property.<sup>639</sup> These transports shall display the distinctive emblem established under the Convention<sup>640</sup> and may not be the target of armed attack.<sup>641</sup> The cultural property and means of transport also shall be immune from seizure, but may be boarded and searched by belligerent forces.<sup>642</sup> Personnel engaged in the protection of cultural property, so far as consistent with the interests of security, are to be respected and, in the event that they are taken into custody, shall be permitted to continue to discharge their responsibilities.<sup>643</sup> A High Contracting Party also may not evade the requirement to respect cultural property by virtue of the fact that another High Contracting Party has not fulfilled its obligation to safeguard the structure.<sup>644</sup>

### C. *When Does the Convention Apply?*

Chapter Six provides that the Convention applies in the event of declared war or of any other armed conflict which may arise

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634. *Id.* art. 9. The pledge to avoid utilizing cultural property for military purposes does not extend to property situated near an important military objective which is not under Special Protection. *Id.* See *id.* art. 8(5) discussed in *supra* note 366.

635. *Id.* art. 10.

636. *Id.* art. 11.

637. UNESCO Armed Conflict Convention, *supra* note 612, at art. 11(1).

638. *Id.* at art. 11(2).

639. *Id.* art. 12(1).

640. *Id.* art. 12(2).

641. *Id.* art. 12(3).

642. UNESCO Armed Conflict Convention, *supra* note 612, at art. 14.

643. *Id.* art. 15.

644. *Id.* art. 4(5).

between two or more of the High Contracting Parties, despite the fact that the state of war is not recognized by one or more of the Parties.<sup>645</sup>

Belligerents which are parties to the Convention remain bound by its provisions, despite the failure of one or more of the combatants to ratify the Treaty.<sup>646</sup> The Signatory States shall apply the Convention to a non-ratifying belligerent so long as the latter declares that it accepts the Treaty and applies its provisions.<sup>647</sup> In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each belligerent shall apply, as a minimum, the provisions of the present Convention which pertain to respect for cultural property.<sup>648</sup>

Chapter Seven provides that the Treaty shall be enforced with the co-operation of Protecting Powers appointed by each of the belligerents and responsible for safeguarding the belligerent's interests.<sup>649</sup> The Protecting Powers shall lend their good offices in all cases where they may deem it useful to the interests of cultural property, particularly where there is disagreement as to the application or interpretation of the Convention.<sup>650</sup>

These Protecting Powers may organize meetings intended to protect cultural property,<sup>651</sup> call on UNESCO for assistance,<sup>652</sup> conclude special agreements for the protection of cultural property,<sup>653</sup> disseminate the text of the Convention,<sup>654</sup> and submit reports on the Convention's implementation.<sup>655</sup> The High Contracting Parties undertake to take all necessary steps, "within the scope of their ordinary jurisdiction," to prosecute and to impose penal or disciplinary sanctions upon persons, of whatever nationality, who commit, or order a breach of the Convention.<sup>656</sup>

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645. *Id.* art. 18(1).

646. *Id.* art. 18.

647. *Id.* art. 18(3).

648. UNESCO Armed Conflict Convention, *supra* note 612, at art. 19(1).

649. *Id.* art. 21.

650. *Id.* art. 22(1).

651. *Id.* art. 22(2).

652. *Id.* art. 23(1). UNESCO may make proposals for the protection of cultural property to the Protecting Powers. *Id.* art. 23(2).

653. UNESCO Armed Conflict Convention, *supra* note 612, at art. 24(1). A special agreement may not diminish the protection afforded by the Convention. *Id.* art. 24(2).

654. *Id.* art. 25.

655. *Id.* at art. 26(2).

656. *Id.* art. 28. The functions and procedures of the Protecting Powers and of the Director-General of UNESCO are elaborated upon in the regulations

The Protecting Powers are supplemented by Commissioner-Generals for Cultural Property attached to each belligerent.<sup>657</sup> The Commissioners shall be appointed by joint agreement between the belligerent to which he or she is to be accredited and the Protecting Powers appointed by the opposing power.<sup>658</sup> Each Commissioner shall work with the relevant Protecting Power and with the state to which he or she is affiliated, to safeguard and to report on the status of cultural property and to investigate alleged violations of the Convention.<sup>659</sup>

In an optional protocol accompanying the Convention, each High Contracting Party undertakes to prevent the exportation of cultural property from any territory it may occupy during an armed conflict.<sup>660</sup> In Article Two, the High Contracting Parties pledge to seize cultural property imported into their territory from an occupied territory.<sup>661</sup> At the close of the hostilities, High Contracting Parties pledge to return all illegally imported cultural property. Such property may not be retained as war reparations.<sup>662</sup>

The High Contracting Party who, as the occupying power, possessed the obligation to prevent the exportation of the cultural property, shall pay an "indemnity" to the holders in good faith of any cultural property which is required to be returned.<sup>663</sup> Cultural property which, in the interests of safety, was removed from the territory of a High Contracting Party during an armed conflict shall be returned at the termination of the hostilities.<sup>664</sup>

The UNESCO Convention is distinguished as the first legally-binding and comprehensive international instrument which addressed the protection of cultural property during both international and non-international armed conflicts.<sup>665</sup> It reflects a desire to prevent the continued plunder of culture property during armed

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accompanying the Convention. *See* Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. at 270 [hereinafter Regulations].

657. Regulations, *supra* note 496, art. 4.

658. *Id.* art. 2(c).

659. *Id.* arts. 6, 7.

660. Protocol, art. 1, 249 U.N.T.S. at 358.

661. *Id.* art. 2.

662. *Id.* art. 3.

663. *Id.* art. 4.

664. *Id.* art. 5.

665. *See supra* notes 645-48 and accompanying texts.

conflict, a threat which is magnified by the destructive potential of modern military technology.<sup>666</sup>

The Preamble to the Convention makes a major conceptual contribution in convincing countries to protect cultural property when it proclaims that damage to such objects does not merely injure a country's domestic artistic patrimony, but diminishes the "cultural heritage" of all peoples.<sup>667</sup> This philosophical position provides the justification for surrounding artistic objects with international protections.<sup>668</sup> As part of this regime, the Convention imposes mutual obligations on states to preserve and to safeguard cultural resources in both periods of peace and in war.<sup>669</sup> The duty to protect this property pertains in both international and in non-international conflicts.<sup>670</sup> Cultural property is to be immune from pillage and requisition,<sup>671</sup> attack<sup>672</sup> and reprisal,<sup>673</sup> and is not to be utilized for military purposes.<sup>674</sup> The fact that a belligerent fails to abide by its duties and responsibilities under the Convention does not release other belligerents from their obligations.<sup>675</sup> This curiously does not extend to property under special protection.<sup>676</sup>

The Convention also establishes individual criminal accountability for breaches of the Convention and vests states with jurisdiction in those instances in which they possess personal or "ordinary" jurisdiction over offenders.<sup>677</sup> However, there is no explicit provision for civil remedies and reparations to injured states.<sup>678</sup> The prohibition on the importation and exportation of cultural property from occupied territories,<sup>679</sup> along with indemnities to buyers in good faith,<sup>680</sup> is consigned to an optional protocol.<sup>681</sup>

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666. See *supra* notes 613-15 and accompanying texts.

667. See *supra* notes 614-15 and accompanying texts.

668. See *supra* notes 632-44 and accompanying texts.

669. See *supra* notes 620-31 and accompanying texts.

670. See *supra* notes 645-48 and accompanying texts.

671. See *supra* note 626 and accompanying text.

672. See *supra* note 624 and accompanying text.

673. See *supra* note 627 and accompanying texts.

674. See *supra* note 624 and accompanying text.

675. See *supra* note 644 and accompanying text.

676. See *supra* note 638 and accompanying text.

677. See *generally supra* note 656 and accompanying text.

678. See *generally supra* notes 649-62 and accompanying texts.

679. See *supra* notes 660-61 and accompanying texts.

680. See *supra* note 663 and accompanying text.

681. See *supra* notes 660-64 and accompanying texts.

The Convention makes a significant concession to the exigencies of armed conflict by providing that a belligerent's obligations towards cultural property may be waived in imperative<sup>682</sup> and exceptional instances of military necessity.<sup>683</sup> In the case of property under special protection, this decision only may be made by an officer who at least commands a division and reasonable notice must be provided to the opposing belligerent.<sup>684</sup>

Commentators point to the indefinite and fluid nature of the concept of military necessity and to the tendency to place military convenience over the protection of cultural property.<sup>685</sup> Professor John Merryman notes what he considers to be the American forces' unnecessary destruction of the Abbey of Monte Cassino in World War II, one of the oldest and most sacred sites in Europe.<sup>686</sup> Merryman points to this as an example of the depressing regularity with which artistic objects were destroyed during the war under the elastic claim of military necessity.<sup>687</sup> He observes that this rationale was used to justify the "saturation bombing of towns containing irreplaceable cultural treasures and the 'precision' bombing of factories and yards adjacent to great monuments of human achievement, guaranteeing wide-spread damage and destruction."<sup>688</sup>

The Convention's deference to military necessity seems contrary to the view that artistic property is part of the cultural heritage of humankind.<sup>689</sup> It may have been preferable to clearly circumscribe the scope and conditions of military necessity, or to have prohibited all military attacks on such property. The provision might have allowed for incidental and unavoidable damage to these objects. States signing the Convention also might have been obligated to turn sacred sites over to international trusteeship during the course of conflict.<sup>690</sup>

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682. See *supra* note 625 and accompanying text.

683. See *supra* note 638 and accompanying texts.

684. See UNESCO Armed Conflict Convention, *supra* note 614, art. 11(2).

685. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AJIL 831, 839-40 (1986).

686. *Id.* at 839. Merryman expresses some sympathy for the view that the preservation of rare and singular cultural property may be more valuable than the protection of a small number of ultimately replaceable human lives. *Id.* at 840.

687. *Id.* at 840.

688. *Id.* at 840.

689. *Id.* at 841.

690. See generally *supra* notes 625, 638 and accompanying texts.



At present, seventy-five countries have ratified the 1954 Hague Convention while sixty-three have ratified the protocol.<sup>691</sup> Separating these two instruments thus has somewhat weakened the prohibition on the export and import of artistic property from occupied territories. The United States has signed, but has refused to ratify the Convention on the grounds that the provisions would impede the utilization of nuclear weapons.<sup>692</sup>

Gerard Bolla, Assistant Director-General for Communications of UNESCO, in a 1983 address, pointed to the Convention's effectiveness in protecting monuments and museums during armed conflicts in the Middle East and during the strifes between both India and Pakistan and between Iran and Iraq. However, he observed that the procedures were too intricate and slow to protect cultural property during fast-paced and fluid modern conflicts which were no longer characterized by opposing armies attacking across defined battle lines.<sup>693</sup>

The 1977 Protocols Additional to the Geneva Conventions, the most recent international instrument regulating the humanitarian law of war, contain familiar provisions protecting cultural property.<sup>694</sup> Protocol I, Article 53<sup>695</sup> prohibits acts of hostility directed against historic monuments, works of art or places of worship which "constitute the cultural or spiritual heritage of peoples."<sup>696</sup> Such objects also are not to be used to support the military effort<sup>697</sup> or to be made the target of reprisal.<sup>698</sup> The Convention provides that it is a grave breach willfully to target and to cause extensive destruction to clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual

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691. Jennifer N. Lehman, *The Continued Struggle With Stolen Cultural Property: The Hague Convention, The UNESCO Convention, and The UNIDROIT Draft Convention*, 14 ARIZ. J. INT'L & COMP. L. 327, 332 (1997).

692. *Id.*

693. Gerald Bolla, Keynote Address, 15 N.Y.U. J. INT'L L. & POL. 765, 766 (1983) (conference on the 1970 UNESCO Cultural Convention Prohibiting the Import, Export and Transfer of Ownership Of Cultural Property).

694. See Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1977 U.N. Jurid. Y.B. 95, reprinted in 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1977 U.N. Jurid. Y.B. 135, reprinted in 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

695. Without prejudice to the provisions of the Hague Cultural Convention.

696. Protocol I, *supra* note 694, art. 53(a).

697. *Id.* art. 53(b).

698. *Id.* art. 53(c).

heritage of peoples and which are not located in the immediate proximity of military objectives.<sup>699</sup> Protocol II applies to conflicts taking place in the territory of a High Contracting Party, between its military and dissident forces or other organized armed groups.<sup>700</sup> Article 16 prohibits acts of hostility against, or the military use of, historic monuments, works of art or places of worship which constitute the "cultural or spiritual heritage of peoples."<sup>701</sup>

*D. Convention on the Import, Export and Transfer of Ownership*

In 1970, UNESCO adopted a complementary Convention to limit the illegal export, import or transfer of ownership of cultural property during peacetime.<sup>702</sup> The Preamble emphasizes that cultural property is a central record of civilization and national culture and that the full value of artistic objects only can be appreciated with a detailed knowledge of an object's origin, history and traditional setting.<sup>703</sup> The accomplishment of this goal requires each state to safeguard its cultural property against theft, clandestine excavation and illicit export.<sup>704</sup> The Preamble recites that the protection of this property is part of states' legal and moral obligation to respect their cultural heritage as well as that of other countries.<sup>705</sup> These efforts only will be successful if supplemented by collective international action.<sup>706</sup>

Article I provides that cultural property means property which, on religious or secular grounds, is designated by each state as being of importance for archeology, prehistory, history, literature, art or science.<sup>707</sup> A signatory party may invoke the Convention's protections over an object or objects which form part of the state's "cultural heritage," as defined in Article Four.<sup>708</sup>

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699. *Id.* art. 85(4)(d).

700. Protocol II, *supra* note 694, art. 1(1).

701. Protocol II, *supra* note 694, art. 16.

702. See UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Transfer Convention].

703. *Id.* preamble.

704. *Id.*

705. *Id.*

706. *Id.*

707. See UNESCO Transfer Convention, *supra* note 702. *Id.* art. 1. Article One enumerates fifteen types of property which are protected. See *id.* art. 1(a)-(k).

708. *Id.* art. 4. Article 4 enumerates five categories of property which forms part of the cultural heritage of each state. This includes property created by

The States Parties to the Convention recognize, in Article Two, that the illicit import, export or transfer of ownership of cultural property is one of the main causes of the “impoverishment” of the “cultural heritage” of the countries of the world.<sup>709</sup> States Parties accordingly undertake to oppose these practices “with the means at their disposal.”<sup>710</sup>

Article 3 establishes that the import, export or transfer of ownership of cultural property by States Parties in a manner which is contrary to the provisions of the Convention is “illicit.”<sup>711</sup> Several procedures are required to combat practices. First, States Parties are required to establish national services for the protection of their cultural heritage.<sup>712</sup> This includes promoting the development of institutions to ensure the preservation and protection of cultural property.<sup>713</sup> A range of other educational obligations are required which are designed to enhance an appreciation of the importance of cultural property and of the need to preserve the cultural heritage of humankind.<sup>714</sup> States Parties also are to require antiquarian dealers to maintain a register recording the origin of cultural property and to inform the purchasers of such objects of the prohibition on the export of this property.<sup>715</sup>

The major mechanism for safeguarding property is set forth in Article Six. This requires States Parties to issue certificates authorizing the export of cultural objects.<sup>716</sup> The export of objects which are not accompanied by such certificates shall be prohibited.<sup>717</sup>

Article 7 requires States Parties to undertake the necessary measures, consistent with their national legislation, to prevent museums and similar institutions within their territories from

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nationals of the State concerned or created within the territory of that state by foreign nationals or stateless persons resident within such territory. *Id.* art. 4(a); cultural property found within the national territory of the State concerned, *id.* art. 4(b); cultural property acquired by scientific missions with the consent of the country of origin of such property, *id.* art. 4(c); cultural property which has been the subject of a freely agreed exchange, *id.* art. 4(d); and cultural property received as a gift or purchased legally with the consent of the country of origin of such property. *Id.* art. 4(e)

709. *Id.* art. 2(1).

710. *Id.* art. 2(2).

711. *Id.* art. 3.

712. See UNESCO Transfer Convention, *supra* note 702, art. 5.

713. *Id.* art. 5(c).

714. *Id.* art. 10(a)(b).

715. *Id.* art. 10(a).

716. *Id.* art. 6(a).

717. See UNESCO Transfer Convention, *supra* note 702, art. 6(b).

acquiring cultural property which has been illegally exported. This, and other provisions, only apply to property exported after the entry into force of the Convention for the states concerned.<sup>718</sup>

A related obligation requires States Parties to prohibit the importation of cultural property stolen from a museum, religious or secular public monument or similar institution in another High Contracting State.<sup>719</sup> A State Party, at the request of the state of origin, is obligated to take steps to recover and to return any such property. The state of origin shall pay just compensation to an innocent purchaser or to a person who possesses a "valid title" to that property.<sup>720</sup>

A State Party whose cultural heritage is in jeopardy from the pillage of archeological or ethnological materials may call upon other States Parties to undertake a concerted international effort to prevent irremediable injury to the requesting state's artistic property. Pending agreement on a course of action, states shall take provisional measures, to the extent feasible, to prevent lasting damage.<sup>721</sup>

States Parties also undertake to impose penalties or administrative sanctions on any person who infringes the prohibition on exporting cultural property without the required certificate or who imports cultural property stolen from a religious or secular institution.<sup>722</sup> States Parties also are to facilitate the earliest possible restitution of illicitly exported cultural property<sup>723</sup> and are to admit actions for the recovery of lost or stolen items brought by or on behalf of the rightful owner.<sup>724</sup>

Article 11 reinforces the requirements of the Protocol to the 1954 Convention by providing that it shall be illicit to export and to transfer the ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a

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718. *Id.* art. 7(a). The original draft contemplated a tougher regime which would have prohibited states from importing property not accompanied by the requisite certificate. See Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 328 (1982). There is some question whether a state may retroactively designate an artistic object as cultural property which is protected under Article 7. *Id.* at 380-81.

719. UNESCO Transfer Convention, *supra* note 702, art. 7(b)(i)

720. *Id.* art. 7(2)(b)(ii). Requests for recovery and return shall be made through diplomatic channels. The requesting Party shall furnish the necessary documentation to support the claim. *Id.*

721. *Id.* art. 9.

722. *Id.* art. 8.

723. *Id.* art. 13(b).

724. *Id.* art. 13(c).

foreign power.<sup>725</sup> States Parties are to respect the cultural heritage of territories for whose international relations they are responsible and shall to take all appropriate measures to prohibit and to prevent the illicit import, export or transfer of ownership of cultural property.<sup>726</sup>

States Parties are to submit periodic reports to UNESCO<sup>727</sup> and may call upon the organization for technical assistance<sup>728</sup> or to aid in reaching a settlement in a dispute over the "implementation" of the Convention.<sup>729</sup>

In summary, the Convention highlights the importance attached to the preservation and safeguarding of cultural property.<sup>730</sup> It recognizes the prerogative of a State Party to regulate the export of artistic objects deemed to be part of its national heritage. Article 13 proclaims the "indefeasible right" of each State Party "to classify and declare "certain cultural property as "inalienable."<sup>731</sup> States Parties into whose territory these articles have been imported shall facilitate the earliest possible return.<sup>732</sup>

The Convention's restrictions on the transnational flow of art has led to a refusal by most major art-market nations, with the exception of the United States, to ratify the Convention.<sup>733</sup> This is a result of the fact that various developing nations, which are endowed with rich, indigenous artistic heritages, have been inspired by the Convention to prohibit the export of their cultural property. Market nations understandably neither desire to support a system which limits the flow of imports nor to obligate themselves to recover and to return property imported in contravention of the Convention.<sup>734</sup> In addition, there are objections to recognizing the authority of States Parties unilaterally to designate works as part of their cultural heritage without consulting or negotiating with dealers, collectors or museums in market nations.<sup>735</sup>

The 1954 Convention stressed the collective interest of the community of nations in preserving cultural property from damage

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725. *Id.* art. 11. See UNESCO Armed Conflict Convention, *supra* notes 654-55 and accompanying texts.

726. See UNESCO Transfer Convention, *supra* note 702, art. 12.

727. *Id.* art. 16.

728. *Id.* art. 17(1)-(4).

729. *Id.* art. 17(5).

730. See *supra* notes 703-05 and accompanying texts.

731. See UNESCO Transfer Convention, *supra* note 702, art. 13(d).

732. *Id.* art. 13(b).

733. Lehman, *supra* note 691, at 539.

734. See Merryman, *supra* note 685, at 843.

735. See *id.* at 844-45.

and destruction.<sup>736</sup> In contrast, the 1970 Treaty is concerned with a state's retention of its artistic objects.<sup>737</sup> Professor Merryman notes that these two approaches reflect differing perspectives on cultural property which he characterizes as "cultural internationalism" and "cultural nationalism."<sup>738</sup> He characterizes the former as "cosmopolitan" and "protective" and the latter as "nationalist" and "retentive."<sup>739</sup> According to Merryman, "cultural nationalism" currently dominates the debate.<sup>740</sup> At its logical extreme, this ethnocentric claim is reminiscent of Hitler's racial theories.<sup>741</sup>

Merryman contends that it cannot be convincingly argued that all works of art possess an imperative, romantic and singular connection to their cultural context or country of origin.<sup>742</sup> He argues that this is reserved for objects that are part of an existing and living culture and for works which are actively employed for religious, ceremonial or communal purposes.<sup>743</sup> Merryman notes that the relics of earlier civilizations in Egypt, Greece, China and Mexico perform no present societal function.<sup>744</sup> At the same time, another commentator has expressed concern that these countries have demonstrated a lack of interest in protecting the artistic traditions of those racial and religious minorities which are deemed to be socially undesirable.<sup>745</sup>

Merryman also argues that the notion that the export of such objects to the United States or Great Britain will result in their being "lost" is a mischaracterization.<sup>746</sup> The housing of objects in Western museums likely will result in a larger audience<sup>747</sup> and may lead to art being stored in safer and more secure environments.<sup>748</sup> Merryman also contends that the idea that a work only is able to be appreciated by individuals within a single culture overlooks the international and cosmopolitan nature of the

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736. See *id.* at 845.

737. See Merryman, *supra* note 685, at 846.

738. *Id.* at 846.

739. *Id.*

740. *Id.* at 849-50.

741. See John Henry Merryman, *The Public Interest in Cultural Property*, 21 U.C. DAVIS L. REV. 477, 491 (1988).

742. *Id.* at 497.

743. *Id.*

744. *Id.* at 497.

745. Michael J. Kelly, *Conflicting Trends in the Flourishing International Trade of Art and Antiquities: Restitutio in Intergrum and Possessio Animo Ferundi/Lucrandi*, 14 DICK. J. OF INT'L L. 31, 44 (1995).

746. Merryman, *supra* note 741, at 498.

747. *Id.* at 500.

748. *Id.* at 506-07.

contemporary artistic audience.<sup>749</sup> In addition, there is no indication that the export of indigenous art, which often was not even on display to the domestic population, will diminish a country's cultural life.<sup>750</sup>

Merryman notes that the restriction on the export of artistic objects does not diminish the demand for such works. He points out that this merely creates an expensive underground foreign market.<sup>751</sup> The value of such works in the domestic market simultaneously will be depressed<sup>752</sup> and the constraints of commerce may lead to the warehousing of redundant works in dilapidated and inaccessible storage facilities.<sup>753</sup> The creation of a black market also may encourage illegal excavations and result in damage to cultural objects whose origins have not been meticulously recorded.<sup>754</sup> Merryman does acknowledge the interest in preserving the physical integrity of ancient works of art as well as the need to insure that the archeological context in which such works are discovered is full documented.<sup>755</sup> However, according to Merryman, this only requires a restriction on the export of a small segment of artistic property.<sup>756</sup>

The claim of cultural nationalists, in Merryman's view, is of greater symbolic than substantive merit.<sup>757</sup> The ultimate result is to impede the dissemination of culture and learning at a time when nationalist forces simultaneously advocate a greater sensitivity to cultural pluralism.<sup>758</sup> The nationalist claim also can be complex and confused. Should a painting be housed where it was created? Exhibited for a lengthy period? In the country in which the artist lived the bulk of his or her life? Or in the artist's State of nationality? What of the artist's personal sentiments?<sup>759</sup>

The 1970 UNESCO Convention facilitates the protection of cultural property through a certificate system.<sup>760</sup> The Convention only explicitly addresses the broad obligations of States Parties to prevent cultural institutions from purchasing property which has

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749. *See id.* at 500.

750. *See id.* at 499.

751. *See Merryman, supra* note 741, at 509.

752. *See id.* at 501.

753. *See id.* at 507.

754. Merryman, *supra* note 685, at 847-48.

755. Merryman, *supra* note 741, at 503-04.

756. *See id.* at 506.

757. *See id.* at 498.

758. *See generally id.* at 498-500.

759. *See generally* UNESCO Transfer Convention, *supra* note 702, art. 4(a).

760. *Id.* art. 6(a).

been illegally exported<sup>761</sup> and to return art stolen from a museum, religious institution or public monument.<sup>762</sup> In other instances, only a general responsibility to combat the illegal export or import of art<sup>763</sup> and to entertain actions for the recovery of artistic objects is imposed.<sup>764</sup> The Convention thus fails fully to address the adjudication of disputes over the ownership of cultural property which is in the possession of,<sup>765</sup> or which has been stolen from, a private party.<sup>766</sup> Article Nine, pertaining to the protection of archaeological or ethnological materials from plunder and looting, also fails fully to set forth a firm and forceful set of international procedures.<sup>767</sup>

The Convention does strengthen the protection of artistic property during armed conflict by prohibiting the involuntary export or transfer of such objects from countries occupied by a foreign power.<sup>768</sup>

#### *E. The UNIDROIT Convention*

The divide over the 1970 UNESCO Convention led to the drafting of a politically more acceptable convention on illegally exported and stolen art. In 1995, a diplomatic conference in Rome adopted the Convention on the International Return of Stolen or Illegally Exported Cultural Objects which had been formulated by the United Nations International Institute for the Unification of Private Law (UNIDROIT).<sup>769</sup>

The Preamble to the UNIDROIT Convention expresses concern that the illicit trade in cultural objects is causing irreparable damage to artistic objects and to the cultural heritage of

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761. *Id.* at art. 7(a).

762. *Id.* at art. 7(b)(ii).

763. *Id.* at arts. 10(b), 13(a), 14.

764. *See* UNESCO Transfer Convention, *supra* note 702, at art. 13(c).

765. *See id.* at art. 7(a).

766. *See id.* at art. 7(b)(i)

767. *Id.* at art. 9.

768. *Id.* art. 11.

769. International Institute for the Unification of Private Law (UNIDROIT) Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, pmb. 1, 34 I.L.M. 1322 (1995) [hereinafter UNIDROIT Convention]. *See* Lehman, *supra* note 691, at 543-44. UNIDROIT is an organization of fifty nations charged with harmonizing the laws of the member nations. *See also* Nina R. Lenzner, *The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention*, 15 U. PA. J. INT'L BUS. L. 469, 475, n.30 (1994).



national, tribal and indigenous communities. This has resulted in the loss of irreplaceable archaeological, historical and scientific information. The Preamble explains that the Convention combats this by establishing minimal standards for the restitution and return of cultural objects between Contracting States in order to improve the preservation and protection of the cultural heritage of all peoples.<sup>770</sup>

The Convention seeks to harmonize the laws of states in order to protect the interests of both art exporting and importing states.<sup>771</sup> Article Three provides that the possessor of a stolen cultural object shall return the work.<sup>772</sup> A claim for restitution shall be brought within three years from the time that the claimant was aware of the location of the cultural object and of the identity of the possessor; in addition there shall be a fifty year period of repose on the filing of claims.<sup>773</sup>

The possessor of a stolen cultural object, who is required to return the work, shall be entitled to the payment of fair and reasonable compensation. This payment is contingent on proof that the possessor exercised due diligence when acquiring the object and neither knew, nor ought reasonably to have known, that the object was stolen.<sup>774</sup> In determining whether the possessor exercised due

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770. See UNIDROIT Convention, *supra* note 769, preamble. Article Two of the UNIDROIT Convention adopted the definition of cultural property contained in the 1970 Convention. *Id.* art. 2. See also *supra* notes 707-08 and accompanying texts.

771. See Lenzner, *supra* note 769, at 491-92.

772. UNIDROIT Convention, *supra* note 769, at art. 3(1). A cultural object which has been unlawfully excavated, or lawfully excavated, but unlawfully retained, shall be considered stolen. *Id.* art. 3(2).

773. *Id.* art. 3(3). A claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of the possessor. *Id.* art. 3(4). A state may declare a time limitation of seventy-five years governing all claims. *Id.* art. 3(5). Article Three shall apply to a cultural object that is stolen after the Convention enters into force in respect of the state where the claim is brought, provided that: the object was stolen from the territory of a Contracting State following the entry into force of the Convention for that state; or the object is located in a Contracting State after the entry into force of the Convention for that state. *Id.* art. 10(a)(b).

774. *Id.* art. 4(1). Reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, to pay the compensation where to do so would be consistent with the law of the state in which the claim is brought. *Id.* art. 4(2).

diligence, consideration shall be given to the circumstances surrounding the acquisition.<sup>775</sup>

Chapter Three addresses illegally exported cultural property. Under Article Five, a Contracting State may request the appropriate court, or other competent authority of another Contracting State, to order the return of a cultural object illegally exported from the territory of the requesting state.<sup>776</sup> The court or other competent authority shall order the return of the illegally exported cultural object if the requesting state establishes that the removal of the item from its territory significantly impaired (1) the physical preservation of the article or of "its context;"<sup>777</sup> (2) the integrity of a "complex object;"<sup>778</sup> (3) the preservation of information of a scientific or historical character;<sup>779</sup> (4) the traditional or ritual use of the object by a tribal or indigenous community;<sup>780</sup> or, (5) establishes that the object is of significant cultural importance for the requesting state.<sup>781</sup> A request shall be lodged within three years from the time that the requesting state was aware of the object's location and of the identity of the possessor. There is a fifty year period of repose dating from the time of export or from the date on which an object which was on loan was required to have been returned.<sup>782</sup>

The possessor of a cultural object who acquired the object after it was illegally exported shall be entitled to fair and reasonable compensation by the requesting state. This is contingent on the possessor neither having known, nor reasonably having ought to have known, at the time of acquisition, that the object had been illegally exported.<sup>783</sup> In making this determination, consideration

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775. *Id.* art. 4(4). These factors shall include the character of the parties, the price paid, whether the possessor consulted a register of stolen objects, and whether the possessor consulted relevant agencies or took any other reasonable step. *Id.*

776. *Id.* art 5(1). A cultural object which temporarily has been exported for purposes such as exhibition, research or restoration which is not returned in accordance with the terms of the applicable permit shall be deemed to have been exported illegally. *Id.* art. 5(3). The provisions pertaining to illegally exported objects applies to cultural objects that are illegally exported after the Convention has entered into force for the requesting state as well as for the state where the request is brought. *Id.* art. 10(2).

777. UNIDROIT Convention, *supra* note 769, at art. 5(3)(a).

778. *Id.* at art. 5(3)(b).

779. *Id.* at art. 5(3)(c).

780. *Id.* at art. 5(3)(d).

781. *Id.*

782. UNIDROIT Convention, *supra* note 769, at art. 5(5).

783. *Id.* at art. 6(1).

shall be given to the circumstances of the acquisition, including the absence of an export certificate.<sup>784</sup>

In summary, the UNIDROIT Convention undertakes a bold rewriting of the common and civil law of cultural property. For instance, the common law fails to provide protection for good faith purchasers of stolen property while the civil law provides for the unassailability of their title.<sup>785</sup> The UNIDROIT Convention appeals to both common and civil law countries by providing fair and reasonable compensation in return for requiring the possessor of stolen or illegally exported art to return the object.<sup>786</sup> The possessor, however, as a condition of restitution, is required to discharge the burden of establishing that he or she exercised due diligence and neither knew, nor ought to have known, that the property had been stolen or illegally exported.<sup>787</sup> The Convention sets forth various factors which should be considered by a court in determining whether the possessor exercised due diligence.<sup>788</sup>

Claims for property, under the Convention, may be brought by either individuals or states.<sup>789</sup> The Convention facilitates the recovery of art by deviating from the requirement of the common law *replevin* action which requires that the original owner exercise due diligence in locating and in bringing a legal action to recover an artistic object.<sup>790</sup> The UNIDROIT Convention also provides that the statute of limitations only runs from the time when the claimant knew the location of the cultural object and the identity of its possessor.<sup>791</sup> The failure to incorporate the common law rule that the original owner exercise due diligence is justified by the fact that the possessor is protected by the provision of compensation.<sup>792</sup> The absence of the requirement that owners exercise due

784. *Id.* at art. 6(2).

785. Brian Bengs, *Dead on Arrival? A Comparison of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 503, 529 (1996).

786. *Id.*

787. *Id.* at 528. In a common law *replevin* action, the original owner must establish due diligence in the search for stolen property. *Id.*

788. *Id.* at 528-29. See UNIDROIT Convention, *supra* note 769, arts. 4(4), 6(2).

789. UNIDROIT Convention, *supra* note 769, art. 3. Article Three is silent as to whether standing is limited to either States' Parties nor to individuals. *Id.* Claims for illegally exported property explicitly are restricted to States Parties. See *id.* art. 5(1); Bengs, *supra* note 785, at 532.

790. Bengs, *supra* note 785, at 519-20.

791. See UNIDROIT Convention, *supra* note 769, arts. 3(5), 5(5).

792. Bengs, *supra* note 785, at 529-530.

diligence is a recognition that a substantial amount of undocumented art flows out of source nations and that the identity and location of these objects often only come to public attention after the passage of a significant period of time. It would be unduly burdensome to require state authorities to keep track of indigenous art and to pursue works across international borders.<sup>793</sup>

The possessor of stolen or illegally exported art may avoid a recovery action by concealing an object for over fifty years.<sup>794</sup> States, however, are free to apply a rule more favorable to restitution or to the return of cultural property.<sup>795</sup> The fifty year period of repose also is not imposed on cultural property which forms an integral part of an identified monument or archaeological site, or which belongs to a public collection.<sup>796</sup> The provision that the possessor of a cultural object shall not be in a more favorable legal position than the party from whom he or she acquired a cultural object, by inheritance or gift, is intended to encourage museums to investigate bequests.<sup>797</sup>

The Convention also would modify the American rule that an object exported in contravention of the laws of a third party state is not considered to have illegally entered the United States.<sup>798</sup> This is counter-balanced by a provision which exempts works from coverage under the Convention which were created during an artist's lifetime and fifty years thereafter.<sup>799</sup> The treaty further balances the interests of art source and art market states by specifying that the treaty does not have retroactive application.<sup>800</sup> The Convention also advances the return of art by specifying that a Contracting State may apply a rule more favorable to the restitution or return of cultural property than is provided for by the Convention.<sup>801</sup>

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793. *Id.* at 531.

794. UNIDROIT Convention, *supra* note 769, at arts. 3(3), 5(5).

795. Lehman, *supra* note 691, at 546. *See also* UNIDROIT Convention, *supra* note 769, art. 9(1).

796. UNIDROIT Convention, *supra* note 769, art. 3(4).

797. *Id.* art. 4(5). *See* Bengs, *supra* note 785, at 532. Lenzer notes that this provision prevents the laundering of stolen items through gifts or bequests. *See* Lenzer, *supra* note 769, at 497.

798. Bengs, *supra* note 785, at 527. This is subject to a judicial determination that removal of the object significantly impairs one or more of various enumerated interests. *See* UNIDROIT Convention, *supra* note 769, art. 5(3).

799. UNIDROIT Convention, *supra* note 769, art. 7(1)(b).

800. *See* UNIDROIT Convention, *supra* note 769, art. 10(1)-(2). Bengs, *supra* note 785, at 534-35.

801. UNIDROIT Convention, *supra* note 769, art. 9(1).

These examples of harmonization are not exhaustive. They nevertheless illustrate the Convention's embodiment of an international policy which encourages the return of illegally exported and stolen art.<sup>802</sup> At this point, market nations have indicated that they possess little interest in giving advantage to the claims of countries which are the source of artistic objects.<sup>803</sup> But the Convention, at a minimum, likely will cause major cultural consumers carefully to investigate the genealogy of the artistic objects which they contemplate purchasing.<sup>804</sup>

### IX. The Recovery of Nazi Plundered Art

These three international treaties formulated since the termination of World War II have helped to bolster the claims of states and private individuals seeking the return of artistic objects.<sup>805</sup> Lyndel V. Prott of UNESCO<sup>806</sup> argues that international legal developments over the past fifty years require the return of cultural objects that have been plundered by enemy belligerents from occupied territories during World War II.<sup>807</sup> This principle pertains whether the conveyance of cultural objects has taken the form of looting or formally legal transactions.<sup>808</sup> Prott also posits that cultural property taken from an occupied territory may never be detained as war reparations.<sup>809</sup> Those items that are repatriated are to be accompanied by relevant scientific documentation.<sup>810</sup>

In October 1997, the heirs of Paul Rosenberg, a Jewish art dealer, who fled Paris during the Nazi invasion, claimed that a

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802. See Bengs, *supra* note 785, at 527.

803. See generally Claudia Fox, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L L. POL'Y 225, 253-54 (1993).

804. See generally, Lehman, *supra* note 691, at 544. Lenzner, *supra* note 769, at 497.

805. See generally Lyndel V. Prott, *Principles for the Resolution of Disputes Concerning Cultural Heritage Displaced During the Second World War*, in SPOILS OF WAR, *supra* note 1, at 225, 227-29.

806. *Id.* at 225.

807. *Id.* at 227 (Principle 1).

808. *Id.* at 228 (Principle 3).

809. *Id.* at 228 (Principle 4).

810. Prott, *supra* note 805 at 228, 229 (Principle 7). In those cases in which an object is in the possession of a third party, the state which removed the object in 1939 shall be responsible for its return, whether through repurchase, indemnity or other appropriate means. *Id.* at 228 (Principle 5). Prott also contends that restitution by replacement is an available remedy where unique cultural objects have been destroyed. *Id.* at 229 (Principle 8). Statute of limitations shall not be applicable for the return of art. *Id.* at 228 (Principle 6).

Matisse painting in the Seattle art museum had been seized by the Nazis from a French bank vault in which Rosenberg had stored the painting.<sup>811</sup> The *Odalisque* reportedly had been sold by a French art dealer to an American gallery in 1954.<sup>812</sup> It then was conveyed to an American collector who subsequently donated it to the Seattle museum.<sup>813</sup> Rosenberg's heirs were able to point to a pre-war catalogue which identified the painting as belonging to the Rosenberg family and to a French inventory of looted art which identified Paul Rosenberg as the owner.<sup>814</sup> In August, 1998, the Rosenberg heirs filed the first lawsuit which had been brought against an American museum for the return of art allegedly stolen from a Jewish family by the Nazi regime.<sup>815</sup>

Shortly after the discovery of the Seattle Matisse, the heirs of two Jewish families claimed ownership of several paintings by Egon Schiele which were on loan to the New York Museum of Modern Art.<sup>816</sup> The families claimed ownership of paintings which had been purchased by a Viennese doctor who, in turn, had sold them to the Austrian Leopold Foundation and Museum.<sup>817</sup> Sixteen other paintings by Egon Schiele, which were in the possession of various museums, also were subsequently identified as having been confiscated by the Nazis from the collection of Fritz Grunbaum, a Viennese Jewish cabaret artist.<sup>818</sup>

One of Schiele's paintings, *Dead City*, had been purchased by a Swiss art dealer from Grunbaum's sister-in-law, whom the heirs alleged had lacked a legal interest in the work.<sup>819</sup> The Swiss dealer, in turn, had sold the work to a Manhattan gallery. The latter then conveyed the painting to a Viennese doctor who, in 1994, sold the painting to the Austrian government-financed Leopold Foundation.<sup>820</sup> One other New York Schiele, the *Portrait of Wally*, had been left in Vienna by Lea Bondi Jaray, a

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811. Judith H. Dobryznski, *A Matisse Looted in '41 Turns Up*, N.Y. TIMES, Oct. 21, 1997, at B2.

812. *See id.*

813. *See id.*

814. *See id.*

815. Judith H. Dobryznski, *Seattle Museum Is Sued for a Looted Matisse*, N.Y. TIMES, Aug. 4, 1998, at B3.

816. Judith H. Dobryznski, *Modern Tries to Quash Order to Keep 2 Schieles*, N.Y. TIMES, Jan. 23, 1998, at B32.

817. *See id.*

818. Judith H. Dobryznski, *16 Other Schieles May Have a Murky Past*, N.Y. TIMES, Jan. 15, 1998, at A18.

819. *See id.*

820. *See id.*

Jewish art dealer who had fled the country.<sup>821</sup> Following the war, the painting erroneously had been returned to the family of an individual who had died in Theresienstadt concentration camp.<sup>822</sup> The picture then was purchased by the Austrian National Gallery which traded it to an Austrian doctor, who subsequently sold it to the Leopold Foundation.<sup>823</sup> In reaction to these claims, two paintings by French impressionist Pierre Bonnard were withdrawn from a scheduled exhibit at the New York Museum of Modern Art.<sup>824</sup> The owners apparently feared that the paintings might be the subject of a claim stemming from the events of World War II. In a related development, the Metropolitan Museum of Art required German museums to renounce all claims to paintings by Paul Klee which the Metropolitan had promised to ship to an exhibition.<sup>825</sup> At the same time, a settlement was reached with the Art Institute of Chicago over the disputed ownership of a painting by Edgar Degas, *Landscape With Smokestack*,<sup>826</sup> and a resolution also was reached over a reliquary stolen by an American servicemen from Quedlinburg in occupied Germany.<sup>827</sup> By August 1998, perhaps an additional half dozen claims had been made pertaining to paintings in American museums,<sup>828</sup> including a work which allegedly had been ripped from the wall of the Italian Embassy in Berlin during the closing days of World War II.<sup>829</sup>

In France, the estate of Alphonse Kann claimed to be the rightful owners of eight medieval manuscripts which, following the war, had been recovered by the Wildenstein family, a prominent Jewish art dynasty.<sup>830</sup> The Kann heirs pointed to clear markings made by Nazi art historians which indicated Alphonse Kann's ownership of the volumes.<sup>831</sup> The Wildenstein's argued that the

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821. *See id.*

822. *See id.*

823. Judith H. Dobrzynski, *German Court Revokes Ruling on Ownership of a Painting by Schiele*, N.Y. TIMES, Apr. 16, 1998, at B6.

824. Judith H. Dobrzynski, *2 Bonnards Pulled From a Show at the Modern*, N.Y. TIMES, Apr. 29, 1998, at B3.

825. *See id.*

826. Judith H. Dobrzynski, *Settlement in Dispute Over a Painting Looted by Nazis*, N.Y. TIMES, Aug. 14, 1998, at A15.

827. William H. Honan, *Case Against Heirs of Art Thief Is All But Over*, N.Y. TIMES, Apr. 14, 1998, at A14.

828. Dobrzynski, *supra* note 826.

829. Judith H. Dobrzynski, *Museum Exchanges Looted Art for a Borrowed Show*, N.Y. TIMES, Apr. 23, 1998, at B1.

830. Alan Riding, *Mighty and Secretive Art Dynasty Goes Public to Rebut Nazi Links*, N.Y. TIMES, Apr. 20, 1998, at B1.

831. *See id.*

Nazi inventory was in error<sup>832</sup> and that they had purchased the manuscripts at the turn of the century from the Kann family.<sup>833</sup> The controversy was complicated by the fact that Alphonse Kann left France, in 1938, without recording his artistic holdings.<sup>834</sup>

In Holland, the heirs of Jewish art dealer Jacques Goudstikker filed a claim with the Dutch government.<sup>835</sup> The family fled Holland in 1940, and shortly thereafter, 779 of 1,208 works were purchased by Hermann Goering from Goudstikker's mother for a relatively modest amount of money.<sup>836</sup> The remaining pieces were purchased by Alois Miedl, Goering's art agent. Only 300 of the paintings were recovered by the Allies following the war.<sup>837</sup> These were claimed by the Dutch government which auctioned off the lesser works and parceled out the remaining 120-to-150 paintings to museums.<sup>838</sup> Goudstikker's widow eventually tired of pursuing the pictures.<sup>839</sup>

The Goudstikker heirs later renewed the claim, arguing that Jacques Goudstikker's mother had not been authorized to sell the works and that she had sold the works for roughly one-third of their value in order to avoid being sent to a work camp.<sup>840</sup> In March 1998, the Dutch cabinet rejected the family's petition, concluding that the Goudstikker's had made a decision following the war to cede ownership to the Netherlands, which had insisted that the family remit the funds paid by Goering and Miedel.<sup>841</sup>

These events paralleled an increased interest in the art and artists of the Holocaust. In April 1998, the Amsterdam Municipal Archives reconstructed an art exhibition which had been organized to protest the German Art Olympiad, which had been conducted in conjunction with the 1936 Munich Olympic Games.<sup>842</sup> The

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832. *See id.*

833. Alan Riding, *Staking a Claim to Art the Nazis Looted*, N.Y. TIMES, Sept. 3, 1997, at B1, B4.

834. *Id.* at B1.

835. Alan Riding, *Heirs Claim Art Lost to Nazis in Amsterdam*, N.Y. TIMES, Jan. 12, 1998, at B1.

836. *Id.*

837. *Id.*

838. *Id.*

839. *Id.* at B6.

840. *Id.*

841. Alan Riding, *Dutch Bar Claim to Art Taken by Nazis*, N.Y. TIMES, March 27, 1998, at B35.

842. Alan Riding, *Dutch Recreate a 1936 Anti-Nazi Art Show*, N.Y. TIMES, Apr. 23, 1998, at B1. The Dutch, ironically, ordered the removal of various works from the exhibition and eventually closed the show in order to appease the Reich. *Id.* at B6.



original Dutch display included works by 150 artists, some of whom had been excluded from the German exhibit.<sup>843</sup> The Germans subsequently destroyed works which had been painted by various artists in the Dutch exhibition, several of whom subsequently were killed in concentration camps.<sup>844</sup>

A Berlin exhibition featured the work of Lyonel Feininger, who had fled pre-war Germany. Feininger had been denounced as a Jew, presumably due to his wife's semitic background. He left Germany when the Nazi's confiscated 378 of his works, some of which subsequently were featured in the degenerate art exhibit.<sup>845</sup> In England, an exhibit was mounted of the work of Charlotte Salomon, a twenty-six year old Jewess, who had fled to France and subsequently was deported and killed in Auschwitz.<sup>846</sup> France displayed a portion of the 987 unclaimed paintings, drawings and sculptures which had been seized by the Nazi occupation forces following World War II.<sup>847</sup> The works had not been claimed by their owners, many of whom presumably died in Nazi concentration camps. The French took the occasion of the exhibit to announce that three pieces would be returned.<sup>848</sup>

In November 1998, the Austrian Parliament bowed to the pressure which was building on museums to return works of art to their rightful owners and approved a law remitting hundreds of objects which had been seized by the Nazis.<sup>849</sup> The restitution was thought to involve twenty families and as many as 500 items, and a seven member advisory panel was established to review claims.<sup>850</sup> The facts surrounding most of the claims, such as that of the Rothschild family, were uncontested.<sup>851</sup> Other claims, for example those of the heirs of renowned collectors Ferdinand and Adele Bloch-Bauer, were not affected by the law since they

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843. *Id.*

844. *Id.*

845. Craig R. Whitney, *Poetic Justice for an Artist Ridiculed by the Nazis*, N.Y. TIMES, Sept. 9, 1998, at B2.

846. Alan Riding, *A Private World to Ward Off the Nazi Horror*, N.Y. TIMES, Nov. 30, 1998, at B1, B6.

847. Alan Riding, *France to Display Art Looted by the Nazis*, Apr. 3, 1997, N.Y. TIMES, at B1.

848. *Id.*

849. Judith H. Dobrzynski, *Austria to Return Some Art Seized by Nazis, but Disputes Remain*, N.Y. TIMES, Nov. 23, 1998, at A6.

850. *Id.*

851. *Id.*

involved conflicts over ownership which only could be resolved by the courts.<sup>852</sup>

Art activists<sup>853</sup> and non-governmental organizations<sup>854</sup> were propelled by these developments to seek a comprehensive solution.<sup>855</sup> The creation of a fund to pay claimants appeared to offer an attractive solution, but there was no readily apparent source of money. The proposal to shift this financial responsibility to auction houses, art dealers and museums was clearly controversial.<sup>856</sup>

The Association of Art Museum Directors, which includes the heads of the 170 largest art museums in North America, announced plans to formulate guidelines to resolve ownership claims arising out of the seizure of artwork by Nazi occupation forces.<sup>857</sup> Some experts estimated that the number of stolen works of art in American public and private galleries numbered in the hundreds, if not the thousands.<sup>858</sup> In June 1998, the Association of American Museum Directors pledged to review the provenance of works in their collection in order to uncover art which may have been plundered by the Nazis.<sup>859</sup> They also promised to scrupulously review the background of works which were lent for exhibition and of works which they were considering acquiring.<sup>860</sup> Member galleries further agreed to respond quickly to complaints and to

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852. *Id.* See also Jane Perlez, *Austria Moves Toward Return Artworks Confiscated by Nazis*, N.Y. TIMES, Sept. 11, 1998, at A8; Jane Perlez, *Austria Is Set to Return Artworks that Nazis Plundered From Jews*, N.Y. TIMES, March 7, 1998, A1, A23.

853. See Judith H. Dobrzynski, *A Bulldog on the Heels of Lost Nazi Loot*, N.Y. TIMES, Nov. 4, 1997, at B1 (discussing Hector Feliciano, journalist specializing in tracing art looted by Nazis).

854. See Judith H. Dobrzynski, *For What Nazis Stole, A Longtime Art Hound*, N.Y. TIMES, Nov. 29, 1997, at A13. The World Jewish Congress established the Commission for Art Recovery to trace lost art and to advocate on behalf of claimants while the National Jewish Museum in Washington D.C. established the Art Restitution Project to create an archive and database of lost art. *Id.*

855. See Judith H. Dobrzynski, *Man in the Middle of the Schiele Case*, N.Y. TIMES, Jan 29, 1998, at B1, B6 (discussing Ronald Lauder, Chair of the Museum of Modern Art and of the Commission for Art Recovery and discussing the need for international procedures for deciding ownership claims).

856. See Judith H. Dobrzynski, *No Simple Solutions in Meting Out Justice in Claims to Looted Art*, N.Y. Times, Sept. 9, 1998, at B3. The Art Dealers Association of America urged third-party mediation of wartime art disputes. *Id.*

857. Judith H. Dobrzynski, *Museums Call for a System to Address Nazi Looting*, N.Y. TIMES, Feb. 5, 1998, at B1.

858. *Id.*

859. Judith H. Dobrzynski, *Art Museums Promise to Review Holdings for Seized Nazi Loot*, N.Y. TIMES, June 3, 1998, at B31.

860. *Id.*

enter into mediation.<sup>861</sup> In addition, they indicated that they would encourage individuals to come forward with claims. Various directors suggested that the burden and cost of this process could be moderated through the development of a database of claims, claimants and confiscated and restored artwork.<sup>862</sup>

In December 1998, the United States Department of State convened a conference to address the issue of the estimated 10,000-100,000 art objects which had not yet been located as well as the insurance claims of Holocaust victims.<sup>863</sup> Delegates from forty countries and thirteen Jewish and Gypsy organizations attended the meeting.<sup>864</sup> The American government, realizing the difficulty of structuring a global settlement, hoped to gain agreement on a set of principles to guide claimants and owners.<sup>865</sup>

Russia surprised the conference by announcing that it would return World War II booty to individual claimants and their heirs and would contribute information to an international database on looted art.<sup>866</sup> However, this pledge did not extend to works seized from Germany and Eastern Europe that the Russians considered to constitute reparations for wartime damage.<sup>867</sup> The Soviets also turned over various documents that could help Austrian Jews in pursuing claims.<sup>868</sup>

The conference's major achievement was the promulgation of several non-binding principles pertaining to the restitution of stolen art.<sup>869</sup> These called on governments, museums and art dealers to search their holdings for art plundered by the Nazis, to create a central database and to resolve claims through mediation rather than litigation.<sup>870</sup>

At the same time that there was a suggestion of a solution pertaining to art plundered by the Nazis during World War II, the

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861. *Id.*

862. *Id.*

863. David E. Sanger, *U.S. Shifts From Nazi Gold to Art, Land and Insurance*, Dec. 1, 1998, at A6.

864. Judith H. Dobrzynski, *Albright Speaks With Emotion at Holocaust Conference*, N.Y. TIMES, Dec. 2, 1998, at A6.

865. *Id.*

866. Judith H. Dobrzynski, *Russia Pledges to Give Back Some of Its Art Looted in War*, N.Y. TIMES, Dec. 3, 1998, at A9.

867. *Id.*

868. Judith H. Dobrzynski, *Russia Moves to Aid Quest for Art Taken in Holocaust*, N.Y. TIMES, Dec. 4, 1998, at A11.

869. *Id.*

870. *Id.*

conflict in the Balkans presented a new threat to the protection of cultural property.

#### X. The Protection of Art and Contemporary Conflicts

Professor John Henry Merryman, as noted, has argued that there is a subtle, but significant, divide in the world community between cultural nationalism and internationalism.<sup>871</sup> The former considers cultural objects as the expression and possession of a single culture and supports the retention and reparation of works of art.<sup>872</sup> The latter views cultural objects as the common heritage of humankind and supports the free movement of these items.<sup>873</sup>

In recent years, a new strain of cultural nationalism has evolved which is characterized by an ethnocentric disdain for alien artistic creations and a desire to damage and to destroy the artistic representations of other traditions.<sup>874</sup> These jingoistic views, which are reminiscent of Hitler's racism, have led to widespread looting and plunder.<sup>875</sup> For instance, an estimated 20,000 Oriental frescoes and icons which were housed in Greek Orthodox churches have been ravaged in the Turkish portion of Cyprus.<sup>876</sup> The Turks have converted the churches to other uses or have permitted their decay.<sup>877</sup>

Geoffrey Best, of Oxford University, writes that this new ethnocentrism has been expressed in the military tactics and strategies of various nationalist movements.<sup>878</sup> Best notes that the ethnic conflicts in the former Yugoslavia and the former Soviet Union "show all too plainly how the solipsistically ethnic mentality perceives the enemy's most prized cultural possessions and (if he is of different religion) places of worship as primary targets."<sup>879</sup>

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871. See Merryman, *supra* note 685, at 846. For a discussion of this issue see *When the Quest for Cultural Objects Divides North From South*, 89 ASIL PROC. 433 (1995) (panel chaired by James A.B. Nafzinger). For a defense of cultural nationalism, see also John Moutakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989).

872. Merryman, *supra* note 685.

873. See *id.* at 843-47.

874. See Douglas Jehl, *Lifting the Veil, Just a Bit, on West's Decadent Art*, N.Y. TIMES, Oct. 1, 1998, at A4 (discussing Iranian refusal to exhibit modern art).

875. See *supra* notes 25-33 and accompanying texts.

876. Judith Miller & Stephen Kinzer, *Orthodox Churches Ravages in the Turkish Part of Cyprus*, N.Y. TIMES, Apr. 1, 1998, at A1, A8.

877. *Id.* at A8.

878. GEOFFREY BEST, *WAR AND LAW SINCE 1945* 285 (1994).

879. *Id.*

As part of their policy of ethnic cleansing, Serb forces in Bosnia and Herzegovina deliberately decimated significant cultural symbols of Croatian and Bosnian nationalism.<sup>880</sup> Helsinki Watch, a private non-governmental organization that monitors human rights abuses in the former Soviet Union and its satellites, concluded, in a 1993 report, that there was "pervasive" destruction of Muslim and Croatian homes and of cultural and religious sites in Serbian-controlled areas of Bosnia.<sup>881</sup> One Balkan commentator, in 1992, observed that the decimation and defiling of architecture which embodied the identity of Bosnia's Muslims "has meant the destruction of the singular, defining character of Bosnia itself."<sup>882</sup>

The Commission of Experts established by the United Nations Security Council to investigate events in the former Yugoslavia issued a report on the destruction of cultural property.<sup>883</sup> The document, prepared by Mr. Ke'ba M'baye of Senegal, selected two examples of what the investigators considered grave breaches of the Geneva Conventions and of international humanitarian law; the decimation of the Old Town in Dubrovnik and the destruction of the Mostar Bridge.<sup>884</sup>

In autumn, 1991, the Croatian region of Dubrovnik was besieged by the Yugoslavian National Army. The assault gradually spread to the town of Dubrovnik, established in the year 667, which is included in the UNESCO's list of the world's cultural heritage.<sup>885</sup> The intentional and selective shelling of historical sites in Dubrovnik, on December 6, 1991, lasted roughly seventeen hours and resulted in 640 direct hits, damaging as many as fifty-six percent of the buildings.<sup>886</sup> The report noted that the Serbian forces encountered no opposition and could not convincingly

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880. Karen J. Detling, *Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 MD. J. INT'L L. & TRADE 41, 66-69 (1993).

881. HELSINKI WATCH, II WAR CRIMES IN BOSNIA-HERZEGOVINA 15 (1993).

882. Smail Balic', *Culture Under Fire*, in WHY BOSNIA? WRITINGS ON THE BALKAN WAR 75 (Rabia Ali & Lawrence Lifschultz eds., 1993).

883. FINAL REPORT OF THE UNITED NATIONS COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO SECURITY COUNCIL RESOLUTION 789, DESTRUCTION OF CULTURAL PROPERTY (Annex II), U.N. Doc. S/1994/674/ Add. 2 (Vol. V) (1994) [hereinafter Cultural Report].

884. *Id.* at 4-5.

885. *Id.* at 5. The Convention for the Protection of the World Cultural and Natural Heritage, 1037 U.N.T.S. 152 (1977), 11 I.L.M. 1358 (1972), establishes a World Heritage List which is to include the world's most significant artistic sites. *Id.* art. 11.

886. CULTURAL REPORT, *supra* note 883, at 6-7.

contend that the attack was justified on the grounds of military necessity.<sup>887</sup>

On November 9, 1993, the Mostar Bridge, which had been built between 1557 and 1566, intentionally was destroyed by Croat tanks.<sup>888</sup> The bridge connected the Muslim and Croat communities in Mostar and was a symbol of the multi-cultural character of Bosnia and Herzegovina.<sup>889</sup> The attack appears to have been intended to discourage contact between Muslims and Croats.<sup>890</sup> The destruction of the Old Town in Dubrovnik and of the Mostar Bridge are representative of a campaign of destruction which, as of 1993, decimated nearly one thousand mosques, three significant national libraries, historic towns, cemeteries, ancient bridges and decorative fountains and public baths.<sup>891</sup>

The International Tribunal for the Former Yugoslavia, in *Tadic*, addressed various issues, including whether the destruction of cultural property fell within the Tribunal's jurisdiction.<sup>892</sup> Article Three of the Statute of the International Criminal Tribunal is entitled "Violations of the laws or customs of war."<sup>893</sup> This provision provides, in part, for the punishment of individuals who are responsible for the seizure, destruction or damage to institutions dedicated to religion, charity, education, the arts and sciences and to historic monuments and works of art and science.<sup>894</sup> According to the Secretary-General's commentary, Article Three encompasses acts condemned under the Hague Convention which were recognized by the Nuremberg Tribunal as declaratory of the laws and customs of war.<sup>895</sup>

Article Two, entitled "Grave Breaches of the Geneva Convention of 1949,"<sup>896</sup> prohibits the "extensive destruction and appropriation of property, not justified by military necessity and

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887. *Id.*

888. *Id.* at 5.

889. *Id.*

890. *Id.* at 9.

891. See Balic', *supra* note, 882, at 75-78.

892. International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Dusko Tadic', (Appellate Chamber, Oct. 2, 1995), 35 I.L.M. 32 (1996) [hereinafter *Tadic*'].

893. United Nations Secretary-General, Report on Aspects of Establishing an International Tribunal for the Prosecution of Person Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, 32 I.L.M. 1159, 1172, art. 3 (1993) [hereinafter *Statute*].

894. *Id.* at art. 3(d). Article 3(e) prohibits the plunder of public or private property. *Id.* at 3(e).

895. *Id.* at paras. 41-43.

896. See *Statute*, *supra* note 893, art. 2.

carried out unlawfully and wantonly.”<sup>897</sup> The commentary notes that this article reproduces the list of grave breaches contained in the 1949 Geneva Conventions which constitutes the core of the conventional and customary law applicable in international armed conflict.<sup>898</sup>

In *Tadic*, the Appellate Chamber of the International Criminal Tribunal for the Former Yugoslavia ruled that the war in Bosnia and Herzegovina contained elements of an international as well as an internal conflict.<sup>899</sup> The Tribunal further noted that Article Two did not explicitly refer to the nature of the conflict encompassed within the scope of its coverage and ruled that the reference to grave breaches dictated that Article Two should be limited to international conflicts.<sup>900</sup>

The Appellate Chamber held that it would defeat the purpose of the Tribunal to read a similar international conflict limitation into Article Three.<sup>901</sup> This would restrict the scope of the Tribunal for the Former Yugoslavia to those aspects of the struggle that constituted an international conflict while precluding jurisdiction over those components which qualified as an internal struggle.<sup>902</sup> Restricting the punishment of the wanton devastation and destruction of property to international conflicts would be illogical given that the Security Council was aware that the armed struggle in the former Yugoslavia could be considered at “varying times and places” as “internal, international, or both.”<sup>903</sup>

The court concluded that Article Three encompassed all serious violations of international humanitarian law, other, than the grave breaches of the Geneva Conventions falling under Article Two.<sup>904</sup> Article Three thus “functions as a residual clause designed to ensure that no serious violations of international

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897. *Id.* art. 2(d).

898. *Tadic* *supra* note 892, at paras. 37-38.

899. *Tadic*, *supra* note 892, at para. 72. The involvement of the Croatian Army in Bosnia-Herzegovina as well as the involvement of the Yugoslav National Army in Croatia and in Bosnia-Herzegovina transformed the Bosnian war into an international conflict. To the extent that the conflicts involved clashes between the Bosnian Government and Bosnian Serb forces in Bosnia-Herzegovina and between the Croatian Government and Croatian Serb forces in the Krajina region of Croatia, the Bosnian struggle was an internal conflict. *Id.*

900. *Id.* at para. 78.

901. *Id.*

902. *Id.*

903. *Id.*

904. *Tadic* *supra* note 892, at para. 87.

humanitarian law is taken away from the jurisdiction of the International Tribunal.”<sup>905</sup>

In summary, the needless devastation of cities, towns or villages and the plunder of public or private property in an international conflict, according to the Tribunal for the Former Yugoslavia, constitutes a “grave breach” of the Geneva Conventions.<sup>906</sup> This presumably could be read, under certain circumstances, to encompass the destruction of artistic property.<sup>907</sup> The Tribunal, in any event, also held that the destruction of cultural property, which is punished under Article Three of the Yugoslavian War Crimes Statute, is a serious war crime when committed in either an international or an internal conflict.<sup>908</sup>

The protection extended to cultural property during international conflicts was based on the requirements of the Hague and Geneva Conventions that had been recognized as components of international customary law.<sup>909</sup> In addition, according to the Tribunal, Article Nineteen of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which extends such protection to non-international conflicts, also had been incorporated into the customary law of war.<sup>910</sup> The Tribunal noted that “customary rules have developed to govern internal strife. These rules . . . cover such areas as protection of civilian objects, in particular cultural property.”<sup>911</sup> As a consequence, government officials and combatants who fail to respect cultural property in international or non-international conflicts are subject to the imposition of international criminal liability as a matter of conventional as well as the customary humanitarian law of war.<sup>912</sup>

*Tadic'* is the culmination of the historical development of international law. The decision clearly proclaims that the preservation and protection of cultural property, in both international and non-international conflicts, is a central component of the humani-

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905. *Id.* at para. 91.

906. *See supra* notes 896-900 and accompanying texts.

907. *See* Vienna Convention on the Law of Treaties, art. 31 (1), May 23, 1969, U.N. Doc. A/CONF. 39/27 AT 289 (1969), 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969) (a treaty is to be interpreted in accordance with its plain meaning).

908. *See supra* notes 903-05 and accompanying texts.

909. *See supra* notes 892-98 and accompanying texts.

910. *Id.* at para. 98. *See* UNESCO Armed Conflict Convention, *supra* note 612, art. 19.

911. *Tadic'*, *supra* note 892, at para. 127.

912. *Id.* at par. 134.



tarian law of war.<sup>913</sup> It is unclear, however, whether the plunder and looting of artistic property constitutes a crime against humanity, criminally punishable in periods of internal disruption or strife, not amounting to a non-international conflict.<sup>914</sup>

## XI. Conclusion

Adolf Hitler attributed part of Germany's decline to the degenerate art of Jews, political progressives and modernists.<sup>915</sup> Upon assuming power, Hitler implemented culturally catastrophic policies which promoted approved Aryan art and limited the creation and display of visual art which was deemed to be objectionable.<sup>916</sup>

Germany's seizure of artistic objects in occupied Europe was designed to transform the Reich into the cultural capital of the Western World. Hitler also aspired to rewrite the history of art in order to highlight Aryan supremacy.<sup>917</sup> Slavic art, on the other hand, was singled out as the expression of an inferior culture and was summarily defiled and destroyed.<sup>918</sup>

There were some authoritative documents and treaty law protecting artistic objects prior to the initiation of World War II.<sup>919</sup> Following the conclusion of the conflict, these instruments provided the foundation for prosecuting several Nazi officials for the pillage and plunder of artistic property.<sup>920</sup> An unsuccessful effort also was made to incorporate the prohibition against the destruction of a group's culture within the 1948 Genocide Convention.<sup>921</sup>

The international effort to safeguard cultural objects during war culminated in the 1954 Hague Convention On The Protection of Cultural Property In The Event Of Armed Conflict.<sup>922</sup> A prohibition on the export of art from occupied territories was included in an accompanying protocol.<sup>923</sup> The international interest in safeguarding art during peace as well as war was

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913. See *supra* notes 892-912 and accompanying texts.

914. See *supra* notes 512-15, 608 and accompanying texts.

915. See *supra* notes 6-33 and accompanying texts.

916. See *supra* notes 66-127 and accompanying texts.

917. See *supra* notes 131, 260-65 and accompanying texts.

918. See *supra* notes 151-68, 202-219 and accompanying texts.

919. See *supra* notes 286-324, 358-76 and accompanying texts.

920. See *supra* notes 404-23, 437-51, 534-37, 554-57 and accompanying texts.

921. See *supra* notes 577-604 and accompanying texts.

922. See *supra* notes 612-59 and accompanying texts.

923. See *supra* notes 660-64 and accompanying texts.

affirmed in the 1970 UNESCO Convention.<sup>924</sup> The UNESCO Convention's nationalistic approach<sup>925</sup> was moderated in the UNIDROIT Convention, which harmonized the rules and procedures pertaining to disputes over stolen or illegally exported artistic objects.<sup>926</sup>

These three post-war cultural conventions created a momentum which propelled efforts towards the collective settlement of claims for plundered art arising out of World War II. This progress has been counter-balanced by an incipient trend towards ethnocentric cultural claims<sup>927</sup> which is reminiscent of Hitler's racial ideology.<sup>928</sup>

In conclusion, the protection of art has been elevated into a central component of both the customary and conventional humanitarian law of war.<sup>929</sup> However, artistic objects continue to be decimated and destroyed in armed conflicts throughout the globe.<sup>930</sup> There is a need for a non-governmental organization which is devoted to combating international apathy towards the protection of art and which serves as an advocate on behalf of cultural objects which are exposed to the perils of armed conflict.<sup>931</sup>

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924. See *supra* note 702-29 and accompanying texts.

925. See *supra* notes 708, 716-17 and accompanying texts.

926. See *supra* notes 769-84 and accompanying texts.

927. See *supra* notes 877-91 and accompanying texts.

928. See *supra* notes 27-35 and accompanying texts.

929. See *supra* notes 892-912 and accompanying texts.

930. See Detling, *supra* note 880, at 61-65.

931. See *id.* at 75.

