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LEAD ARTICLES

THE FAILURE TO PROTECT CULTURAL PROPERTY IN WARTIME

David Keane*

INTRODUCTION

“All art is quite useless.”

“The only excuse for making a useless thing is that one admires it intensely.”

- Oscar Wilde, ‘The Picture of Dorian Gray’¹

The notion that certain properties should not be attacked during wartime dates back to antiquity. Today, the need for protection is greater than ever. Cultural property has increasingly become a deliberate focus of attack. World Wars I and II, as well as the recent conflict in the former Yugoslavia, have led to the development of international law and the codification of protection for cultural property. However, these major developments in international law are reactionary in nature; they are a response to instances of grave damage to cultural property. Every time the protection has increased, this increase has subsequently proven inadequate.

This paper will chart the development of the protection of cultural property during armed conflict. It will adopt a chronological approach, in order to highlight the reactionary nature of the international rules. Section I will examine the development

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¹ OSCAR WILDE, THE PICTURE OF DORIAN GRAY (James Sullivan Publisher) (1890).

from the Lieber Code and the Hague Conventions of 1899 and 1907 to World Wars I and II and the trial of the major German war criminals by the International Military Tribunal (hereinafter “IMT”). Section II will study in detail the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Section III will look at the effectiveness of the protection afforded by the 1954 Hague Convention in light of the conflict in the former Yugoslavia. Section IV will examine the 1999 Second Protocol to the 1954 Hague Convention (hereinafter “Second Protocol”). This paper will demonstrate that while the international rules evolve and strengthen, the destruction of cultural property continues. This paper will seek to understand why this is, and what, if anything, can be done to prevent it

SECTION I.

A. Historical Development of Protection for Cultural Property

An awareness of harm to cultural property dates back to antiquity. The Greek historian Herodotus described the destruction of a temple by the Persian Army in 480 B.C.:

At the last-named place there was a temple of Apollo, very rich, and adorned with a vast number of treasures and offerings. There was likewise an oracle there in those days, as indeed there is at the present time. This temple the Persians plundered and burnt. . .for the purpose of. . .conveying to King Xerxes the riches which were there laid up.²

In the eighteenth century, Emiric de Vattel wrote that:

For whatever cause a country is ravaged, we ought

2. HERODOTUS, ‘THE PERSIAN WARS’, BOOK VIII – URANIA 8.33-8.35 (G. Rawlinson trans., The Modern Library: New York 1942).

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 works of remarkable beauty. What advantage is obtained by destroying them? It is declaring one's self an enemy to mankind, thus wantonly to deprive them of these monuments of art and models of taste. . . . We still detest those barbarians who destroyed so many wonders of art, when they overran the Roman Empire.³

These writings were only the seeds of the development of customary international law prohibiting the destruction of cultural property.

During the Napoleonic conquests, art treasures were stolen rather than destroyed. Napoleon attempted to legalize his looting by providing for the taking of Italian art in the treaties imposed upon the surrendering Italians.⁴ Following Napoleon's final defeat at Waterloo, France was ordered to return stolen art treasures under the Treaty of Paris, signed on November 20, 1815.

The first codified reference to cultural property is found in the Manual of the Laws and Customs of War, or Lieber Code, of 1863, which was created for the U.S. military.⁵ Article 35 of the Lieber Code states that "classical works of art, libraries, scientific collections, or precise instruments. . . must be secured against all available injury."⁶ Article 34 of the Code creates the general rule that cultural property should be treated as private property unless it

3. EMIRIC DE VATTEL, LES DROIT DES GENS, OU, PRINCIPES DE LA LOI NATURELLE, APPLIQUE A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS 168 (1758).

4. PROCTOR PATTERSON JONES, NAPOLEON: AN INTIMATE ACCOUNT OF THE YEARS OF SUPREMACY 1800-1814 257 (Proctor Jones 1992).

⁵ Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, LL.D., Originally Issued as General Orders No. 100, Adjutant General's Office, 1863, Washington 1898: Government Printing Office.

6. *Id.*

is used for a military purpose.⁷ The Lieber Code places the duty of protecting cultural property on both the attacker and the defender.

The first formal international treaties providing for the protection of cultural property during wartime were the Hague Regulations of 1899⁸ and 1907.⁹ Article 27 of the 1907 Hague Regulations concerning the Laws and Customs of War on Land 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. . . provided they are not being used for military purposes.”¹⁰ The presence of such buildings is to be indicated by visible signs.¹¹ Article 56 of the 1907 Hague Regulations provides that:

[t]he property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art, is forbidden, and shall be made subject to legal proceedings.¹²

The reference to State property as private property is a principle

7. Article 34 of the Lieber Code of 1863 states as a general rule: the property belonging to . . . establishments of education. . . whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of scientific character. . . such property is not to be considered public property [available for seizure].

8. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, July 29, 1899.

9. Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, October 18, 1907.

10. *Id.*

11. *Id.* at art. 27.

12. *Id.* at art. 56.

taken from the Lieber Code.¹³ However, the Lieber Code allows for the removal of cultural property by a belligerent force and the settlement of its ownership in the subsequent peace treaty.¹⁴ This policy was rejected in Article 56 of the 1907 Hague Regulations in favor of allowing the unassailable ownership of cultural property by the State and its citizens.¹⁵ In addition, Article 56 also allows for legal proceedings in the event of seizure of, destruction or willful damage done to cultural property.¹⁶

The 1907 Hague Regulations concerning the Laws and Customs of War on Land expanded the legal protection of cultural property. More significantly, the Hague Regulations were considered part of customary international law by the IMT at Nuremberg, and binding even on States that had not ratified them.¹⁷ Therefore, the IMT at Nuremberg marks the beginning of the customary protection of cultural property.¹⁸ The Hague Regulations legally

13. Article 34 of the Lieber Code of 1863 states as a general rule: the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character such property is not to be considered public property in the sense of paragraph 31.

14. Article 36 of the Lieber Code of 1863 states as a general rule: if such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

15. Convention (IV), *supra* note 9, at art. 56 (the property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden).

16. *Id.*

17. The Trial of German Major War Criminals before the International Military Tribunal Sitting at Nuremberg, Germany, November 14, 1945 to October 1, 1946, 241, available at <http://www.nizkor.org/hweb/imt/tgmwc/> (last visited Feb. 22, 2004).

18. The Trial of German Major War Criminals, Judgment, September 30, 1946 – 1 October 1946. ‘The Law Relating to War Crimes and Crimes Against Humanity’; [I]t is argued that the Hague Convention does not apply in this case

entrenched three core principles pertaining to international conflicts.¹⁹ First, artistic, religious and scientific property was to be immune from attack unless employed for military purposes.²⁰ Such properties were to be marked with visible symbols. Second, this principle was qualified by the requirement of military necessity.²¹ Third, an occupying power could not destroy, damage, loot or plunder cultural property. Cultural objects and structures were to be treated as private property. Violations of the Hague Regulations were subject to international sanctions.²²

The 1907 Hague Regulations failed to protect cultural property during World War I and as a result, the ineffectiveness of the international law contributed to a cycle of failures. The bombing of the cathedral at Rheims, the burning of the library at the Belgian University of Louvain, the looting of museums, churches and libraries all serve as examples of the futility of the Regulations

because of the “general participation” clause in Article 2 of the Hague Convention of 1907... In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt “to revise the general laws and customs of war” which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war.

19. Matthew Lippman, *Art and Ideology in the Third Reich: The Protection of Cultural Property and the Humanitarian Law of War*, 17 DICK. J. INT’L L. 1, 10-14 (1998).

20. Convention (IV), *supra* note 9, at art. 27, available at <http://www.lib.byu.edu/~rdh/wwi/hague/hague5.html> (last visited Feb. 22, 2004) (in sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand).

21. *Id.* at art. 23(g) (it is especially forbidden [t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war).

22. Article 56, *supra* note 15.

during the war.²³

After World War I, there were extensive reparations for the damage caused by the Germans provided for in Pact VII of the Treaty of Versailles.²⁴ Article 245 of the Treaty of Versailles states that the German Government “must restore to the French Government the trophies, archives, historical souvenirs or works of art carried away from France by the German authorities in the course of the war of 1870 to 1871 and during this last war.”²⁵ The Germans were ordered to return the original Koran of the Caliph Othman, which was removed from Medina by the Turkish authorities, and the skull of the Sultan Mkwawa, which was removed from the Protectorate of German East Africa, to the King of the Hedjaz.²⁶ Article 247 of the Treaty commissioned a rebuilding of the collection of the burnt library at Louvain. Article 247 also provides for the return of two Belgian works of art, namely, the leaves of the triptych of the Mystic Lamb painted by the Van Eyck brothers and the leaves of the triptych of the Last S

23. PATRICK J. BOYLAN, REVIEW OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (1993).

24. The Treaty of Versailles (July 1919) brought a formal end to World War I. The victorious allies (Great Britain, France and the United States) imposed severe terms on defeated Germany. These included: a substantial loss of territory, heavy reparations to be paid to the victors, a much reduced army and navy, and no air force. The Rhineland, which bordered France, was to be demilitarized, and Germany was forbidden from uniting with Austria. Above all Germany was compelled to admit sole responsibility for starting the war. The Treaty, when its terms were revealed, caused an outcry across the entire political spectrum in Germany. It was blamed for all the ills that affected Germany in the 1920's and was seen as a key factor in the rise of Nazism. In the 1920's and 1930's even commentators in France and Britain believed the terms of the Treaty were too harsh. However recent scholarship has challenged this view, and argues that the Treaty was a reasonable settlement, which aimed to punish, but not destroy, Germany. The problems of the 1920's stemmed from Germany's failure to acknowledge that it had posed a severe threat to European peace in the years before 1914, and that it had caused, and lost, the most devastating war in history, leaving millions dead and injured. See MacMillan, Margaret, 'Peacemakers', John Murray, London, 2001.

25. The Peace Treaty of Versailles, June 28, 1919, art. 245 (Special Provisions).

26. *Id.* at art. 246.

upper painted by Dierick Bouts.²⁷

Although no German was ever prosecuted for damage to cultural property during World War I, such destruction was clearly condemned as a violation of the ‘humanitarian’ laws of war. The principle of protection from the Hague Regulations of 1899 and 1907 was given practical effect in the Treaty of Versailles, and the restitution of cultural property following World War I represents an important advancement.

B. World War II and the Trial of Alfred Rosenberg

Alfred Rosenberg was responsible for a system of organized plunder of both public and private property throughout the invaded countries of Europe during World War II. Acting under Hitler’s orders of January 1940 to set up the ‘Hohe Schule’, Rosenberg organized and directed the Special Purpose Staff, or ‘Einsatzstab Rosenberg’ (hereinafter “Einsatzstab”), which plundered museums and libraries, confiscated art treasures and collections and pillaged private houses. By July 14, 1944, the Einsatzstab seized more than 21,903 art objects including famous paintings and museum pieces.²⁸

Rosenberg’s trial by the IMT at Nuremberg in 1946 highlighted the extensive and systematic removal of cultural property by the German Reich from occupied territories in Eastern and Western Europe during World War II. As head of the Einsatzstab, Rosenberg drew up catalogues of the thousands of pieces of art brought to Germany. These catalogues were detailed in documents submitted to the IMT, and included some 21,000 artistic treasures.²⁹

27. Lippman, *supra* note 19, pt. VI (both pieces had, however, been acquired legitimately by German museums).

28. Major General Nikitchenko, *Judgment of the International Military Tribunal sitting at Nuremberg, The Defendants: Rosenberg*, available at <http://www.nizkor.org/hweb/imt/tgmwc/judgment/j-defendants-rosenberg.html> (last visited Feb. 22, 2004).

29. The Trial of German Major War Criminals Sitting at Nuremberg, Germany, January 9, 1946, 124, Exhibit USA 385 (the Exhibit also detailed the

Hitler appointed Rosenberg Reich Minister for the Occupied Eastern Territories on July 17, 1941, which included the Soviet region.³⁰ The Soviet Prosecution at the Nuremberg trial accused the Einsatzstab of the plunder of cultural property in the Soviet region.³¹ Many of the arguments in the IMT focused on the Prosecution's contention that the Einsatzstab was created as "a matter of a long-range plan for the plundering of cultural treasures of other States."³² Furthermore, the Soviet Prosecution argued that the Germans tried to establish a "new order" as to culture, art and science.³³ Rosenberg contended throughout the trial that any property removed from the Occupied Territories was done in order to keep it safe from damage.³⁴ He pointed to an order of the Army High Command of September 1942 that stated that, "except for special cases, in which the safeguarding of endangered works of culture is urgent, efforts will be made to leave them in their present location for the time being."³⁵ The same order granted the Einsatzstab the authority to safeguard works of culture against damage or destruction in the operational area of Eastern Europe.³⁶

The Prosecution also examined the removal of furniture from Jewish homes in France,³⁷ and the diversion of confiscated art treasures by Hitler and Goering into their own collections. Rosenberg cited Article 279 of the Treaty of Versailles as a justification for the removal of furniture from Jewish homes in France.³⁸ Rosenberg stated "the Chief French Prosecutor declared at this trial that the Versailles Treaty was based on the Hague

looting of the contents of 71,000 Jewish homes in France).

30. Nikitchenko, *supra* note 28.

31. The Trial of German Major War Criminals, April 16, 1946, Direct Examination of Alfred Rosenberg by Dr. Thomas, 23, Doc 161 – PS, *available at* <http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-12/tgmwc-12-109-01.shtml> (last visited Feb. 22, 2004).

32. *Id.* at 27.

33. *Id.* (Exhibit USSR 39, 1).

34. *Id.* (Exhibit USA 85, Doc 1015-PS).

35. *Id.* at 10.

36. *Id.*

37. The Trial of German Major War Criminals, *supra* note 31, at 27.

38. *Id.* at 7.

Convention. Therefore, I drew the conclusion that this measure against a very distinct category of citizens appeared to be as justified and to have as much international legal sanction as the measure of the Allies during the 1914 – 1918 war.”³⁹ However, Rosenberg admitted that he was aware that this was “a serious encroachment on private property.”⁴⁰

At Nuremberg, Rosenberg did not deny that the art treasures were channeled into Hitler and Goering’s private collections. Rosenberg argued that Goering did not intend to keep his collection, but would presently return it to the German Reich.⁴¹ He stated that the Reich Marshal “utilized” these works of art, contrary to the claim of the French Prosecution that he “misappropriated” them.⁴² He admitted to being “uneasy” because he was responsible for the cataloging and any potential negotiating concerning these works.⁴³ The diversion of art treasures was raised again during Goering’s trial. The Prosecution pointed to the Nazis’ hierarchy or list of priorities for the disposal of works of art from the Louvre which was: (1) works of art which the Fuhrer reserved for himself the decision as to their use, (2) works of art which completed Goering’s collection, (3) works of art and library stocks that would be useful in establishing higher institutions of learning, and (4) works of art suitable for German museums.⁴⁴ In light of the high priority afforded by the order to the completion of Goering’s own collection, it is not surprising that Goering continued to aid the operations of the Einsatzstab. Thus Goering’s responsibility for the planning of the looting of art, which was actually accomplished by the Einsatzstab, is clear.⁴⁵

39. *Id.*

40. *Id.* at 11.

41. *Id.* at 10; “I knew that Reich Marshal Goering intended later to give this collection to the German Reich and not to retain it for himself”.

42. *Id.*

43. *Id.*

44. The Trial of German Major War Criminals, January 8, 1946, *available at* <http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-12/tgmwc-12-109-01.shtml> (last visited Feb. 22, 2004).

45. *Id.*

On May 8, 1941, Rosenberg prepared instructions for all Reich Commissioners in the Occupied Eastern Territories. The last paragraph of the instructions stated “from the point of view of cultural policy, the German Reich is in a position to promote and direct national culture and science in many fields. It will be necessary that in some territories an uprooting and resettlement of various racial stocks will have to be effected.”⁴⁶ The damaging of the three-hundred-year-old University of Dorpat in Riga, Latvia, was said by Rosenberg to be “the result of warfare.”⁴⁷ He claimed to have removed cultural objects only when fighting made it necessary.⁴⁸ Yet, he seized Jewish cultural objects under the claim of constructing a collection of Judaica.⁴⁹ Paintings and art were taken from Kiev and Kharkov in the Ukraine, and the palaces of Peterhof, Tsarskoye Selo and Pavlovsk.⁵⁰ The value of art taken from Bellarussia alone ran into several millions of dollars. Based on the aforementioned history of Nazi activities, one can surmise that the intention was to enrich the artistic collection of the Third Reich, not to safeguard these cultural objects.⁵¹

The IMT declared Rosenberg responsible for “a system of organized plunder of both public and private property throughout the invaded countries of Europe.”⁵² The judgment of the IMT found Rosenberg guilty of the organization and direction of pillage and plunder as part of a policy of Germanisation.⁵³ It found that Rosenberg directed that the Hague Rules of Land Warfare were not applicable in the Occupied Eastern Territories.⁵⁴ The Einsatzstab plundered museums and libraries, confiscated art treasures and collections, and pillaged private houses.

46. *Id.* (Exhibit USA 144, Doc 1030-PS).

47. The Trial of German Major War Criminals, *supra* note 29.

48. *Id.*

49. Lippman, *supra* note 19, at pt. VII.

50. *Id.*

51. *Id.*

52. Judgment of the IMT available at <http://www.nizkor.org/hweb/imt/tgmwvc/judgment/> (last visited Feb. 22, 2004).

53. Nikitchenko, *supra* note 28.

54. *Id.*

Furthermore, its own reports show the extent of the confiscations. The IMT found Rosenberg guilty of war crimes and crimes against humanity relating to cultural property, as well as crimes against peace and the waging of aggressive war.⁵⁵ He was sentenced to death and executed at Nuremberg on the morning of October 16, 1946.

SECTION II

A. The Convention for the Protection of Cultural Property in the Event of Armed Conflict

The Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter “1954 Hague Convention”) was adopted at the Hague on May 14, 1954. The Hague Convention is considered by the United Nations Educational, Scientific and Cultural Organization (hereinafter “UNESCO”) to be a sequel to the fourth Hague Convention, particularly the Laws and Customs of War on Land of 1907.⁵⁶ The Preamble of the 1954 Hague Convention describes the cultural internationalist approach of the Convention and outlines cultural property as the “heritage of mankind.”⁵⁷ The 1954 Hague Convention is a reaction to the events of World War II. It recognizes that “cultural property has suffered grave damage during recent armed conflicts”⁵⁸ and seeks to address the inadequacies of the 1907 Hague Regulations in light of the systematic plunder of cultural property by the Nazis.

55. Judgment of the IMT, *supra* note 52. *See also* Lippman, *supra* note 19 (the Court’s wide-ranging discussion of the defendant’s 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).

56. Conventions and Recommendations of UNESCO Concerning the Protection of the Cultural Heritage, ‘Introduction to the Hague Convention’, 7-8.

57. Convention for the Protection of Cultural Property in the Event of Armed Conflict, Preamble, 14 May 1954.

58. *Id.*

Article 1 of the 1954 Hague Convention defines cultural property as:

moveable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.⁵⁹

The protection of cultural property involves the safeguarding of and respect for such property. Safeguarding places an obligation on High Contracting Parties⁶⁰ in times of peace to protect their cultural property against the foreseeable effects of an armed conflict.⁶¹ The obligation on High Contracting Parties to respect cultural property applies within their own territory as well as within the territory of other Parties to the 1954 Hague Convention.⁶² The 1954 Hague Convention State Parties must refrain from using cultural property for purposes that are likely to expose it to damage in the event of armed conflict, and from directing any act of hostility against such property. Article 4 Paragraph 2 states that these obligations “may be waived only in cases where military necessity imperatively requires such a

59. The Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215, *available at* http://www.unesco.org/culture/laws/hague/html_eng/page2.shtml#General%20provisions- (last visited Feb. 22, 2004).

60. High Contracting Parties are the signatories to a treaty who agree to be bound by the treaty’s rules.

61. Convention for the Protection of Cultural Property, *supra* note 59, at art. 3.

62. *Id.* at art. 4.

waiver.”⁶³

The Protocol to the 1954 Hague Convention is a clear reaction to the events of World War II. Article I of the Protocol prohibits the exportation of cultural property from a territory occupied by a High Contracting Party during an armed conflict.⁶⁴ The Protocol does allow for the removal of cultural property from an occupied territory for the purposes of protecting such property against the dangers of an armed conflict, but it must be returned at the end of hostilities.⁶⁵ This was the defense raised by Alfred Rosenberg throughout his trial. He argued that the removal of cultural property from the occupied territories was for its protection.⁶⁶

Article 3 of the 1954 Hague Convention requires States to safeguard their own cultural property in peacetime and to reduce the need to remove cultural property from a territory during wartime.⁶⁷ Furthermore, the 1954 Hague Convention has specific provisions for the transport of cultural property in its Chapter III.⁶⁸ In World War II, the Nazis transported cultural property in boxcars from occupied territories to Germany. It is unknown whether this was to protect it or to appropriate it. The provisions on transport in the Hague Convention remove this confusion, by providing for the international supervision of the transport of cultural property under

63. *Id.* at art. 4(2).

64. *Id.* at art. 1.

65. *Id.* at sec. II.

66. Trial of the German Major War Criminals, *supra* note 29 (the order of the Fuhrer approving the suggestion was issued at the beginning of July 1940, and since, in addition to the archives, a great quantity of art treasures, of which many were imperiled, was found in many mansions, *the safe keeping and the transporting of these treasures* into the German Reich was decreed by the Fuhrer, Direct Examination of Alfred Rosenberg by Dr. Thomas).

67. *See* The Convention for the Protection of Cultural Property, *supra* note 59, at art. 3 (the High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate).

68. *Id.* at Chapter III (transport of Cultural Property, Articles 12, 13 and 14, Convention for the Protection of Cultural Property in the Event of Armed Conflict).

its Article 12(2).⁶⁹

The principle of individual responsibility for violations of international humanitarian law stemming from the Nuremberg trials is affirmed in Article 28 of the 1954 Hague Convention.⁷⁰ It provides that High Contracting Parties may undertake all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons who commit, or order to be committed, a breach of the Convention.⁷¹ Article 28 therefore confers universal jurisdiction to prosecute. The provision does not, however, provide a list of violations that require a criminal sanction. Experience of the International Committee of the Red Cross (hereinafter "ICRC") Advisory Service on International Humanitarian Law has shown that such a list is essential if a coherent and complete system of criminal repression of war crimes is to be instituted worldwide.⁷²

In addition to the general protection of cultural property afforded by the 1954 Hague Convention, there is also a system of special protection provided for in Chapter II of the Convention. It applies to a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, as well as to centers containing monuments and other immovable cultural property of very great importance.⁷³ It is argued that the Convention affords extraterritorial protection to this type of

69. *Id.* at art. 12(2) (Convention for the Protection of Cultural Property in the Event of Armed Conflict; Transport under special protection shall take place under the international supervision provided for in the aforesaid Regulations and shall display the distinctive emblem described in Article 16).

70. *Id.* at art. 28 (Convention for the Protection of Cultural Property in the Event of Armed Conflict; The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention).

71. *Id.*

72. Jean-Marie Henckaerts, *New Rules for the Protection of Cultural Property in Armed Conflict*, International Review of the Red Cross No. 835.

73. *See* The Convention for the Protection of Cultural Property, *supra* note 59, at art. 8.

property.⁷⁴ Article 9 of the 1954 Hague Convention confers immunity on cultural property under special protection.⁷⁵ Property under special protection cannot be used for military purposes, except in cases of unavoidable military necessity.⁷⁶

There are major shortcomings to the system of special protection. First, it is not widely used. Only one center containing monuments and eight refuges have been listed in the International Register of Cultural Property under Special Protection as provided for in Article 8 of the 1954 Hague Convention.⁷⁷ There are a number of reasons for this. First, entry on the list is conditional on the cultural property being situated at an adequate distance from any large industrial center or military objective.⁷⁸ This condition is almost impossible to fulfill because many of the objects envisioned for protection are located in cities and are surrounded by military objectives. In addition, the term 'adequate distance' is not defined by the Convention. It must be remembered that the Convention and Protocol were drafted before the development of precision targeting.

Second, States may object to a proposal for entry into the International Register. For example, in 1992, Cambodia sought to register the famous Angor Wat complex. The registration was

74. Victoria A. Birov, *Prizes or Plunder? The Pillage of Works of Art and the International Law of War*, 30 N.Y.U. J. INT'L L. & POL. 201, Section C (1997). Extraterritorial protection would imply that the provision governing special protection would apply on the territories of States which are not High Contracting Parties to the Convention.

75. See The Convention for the Protection of Cultural Property, *supra* note 59, at art. 9.

76. *Id.* Convention for the Protection of Cultural Property in the Event of Armed Conflict; The High Contracting Parties undertake to ensure the immunity of cultural property under special protection by refraining, from the time of entry in the International Register, from any act of hostility directed against such property and, except for the cases provided for in paragraph 5 of Article 13, from any use of such property or its surroundings for military purposes.

77. See International Register of Cultural Property under Special Protection, UNESCO Doc. CLT-97/WS/12, August 1997.

78. See The Convention for the Protection of Cultural Property, *supra* note 59, at art. 8(1)(a). Convention for the Protection of Cultural Property in the Event of Armed Conflict.

opposed by Cuba, Yugoslavia, Egypt, and Romania, on the grounds that they did not recognize the legitimacy of the Cambodian government.⁷⁹ Such political barriers to the protection of cultural property are inconsistent with the view expressed in the Preamble of the 1954 Hague Convention that cultural property is the heritage of all mankind. There have been no formal requests for special protection since the failed Cambodian application.⁸⁰

B. Exception to the Convention - Military Necessity

In 1758, immediately following his call for the protection of cultural property in wartime, Emeric de Vattel wrote:

Nevertheless, if we find it necessary to destroy edifices of that nature in order to carry on the operations of war, or to advance the works in a siege, we have an undoubted right to take such a step. The sovereign of the country, or his general, makes no scruple to destroy them, when necessity or the maxims of war require it. The governor of a besieged town sets fire to the suburbs, that they may not afford a lodgment to the besiegers. Nobody presumes to blame a general who lays waste gardens, vineyards, or orchards, for the purpose of encamping on the ground, and throwing up an entrenchment. If any beautiful production of art be thereby destroyed, it is an accident, an unhappy consequence of the war; and the general will not be blamed, except in those cases when he might have pitched his camp elsewhere without the smallest inconvenience to himself.⁸¹

The difficulties with the notion of military necessity in the 1954

79. Birov, *supra* note 74, at Section B.

80. BOYLAN, *supra* note 23, at 71.

81. VATTEL, *supra* note 3, at 168.

Hague Convention begin with the fact that it is not defined. Gauging the scope of the concept is therefore problematic. It is possible to look to the Lieber Code for its meaning because Article 14 of the Lieber Code defines military necessity as, “the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern usages of war.”⁸²

The main difference between general and special protection of cultural property in the 1954 Hague Convention is the military necessity exception. Protection for cultural property under general protection can be waived “only in cases where military necessity imperatively requires such a waiver.”⁸³ Immunity can be withdrawn from cultural property under special protection “only in exceptional cases of unavoidable military necessity.”⁸⁴ The existence of two standards of military necessity, imperative and unavoidable, would seem to contradict the idea of ‘necessity’ in its ordinary meaning. The negotiations at the Diplomatic Conference that drew up the 1954 Hague Convention clarify to some extent the intended difference in meaning between the two forms of military necessity.⁸⁵ The Secretariat’s draft for the Conference states that:

it should here be emphasized that, in using the term ‘unavoidable’ in connection with special protection, it was intended to give it a connotation even

82. Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, LL.D., Originally Issued as General Orders No. 100, Adjutant General’s Office, 1863, Washington 1898, Government Printing Office.

83. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, entered in force: August 7, 1956, at art. 4 para. 2, available at <http://www.icomos.org/hague/hague.convention.html#contents> (last visited Feb. 22, 2004).

84. *Id.* at art. 11 para. 2 (such necessity can only be established by an officer commanding a force the equivalent of a division, and the Party withdrawing immunity must inform the Commissioner-General for cultural property).

85. Jan Hladik, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Notion of Military Necessity*, International Review of the Red Cross No. 835, at. 621-635.

stronger than that implied by the expression 'imperative military necessity' used in Article 4 paragraphs 1 and 2. . . Moreover, it was considered desirable to avoid a situation in which any officer or holder of rank whatever might, on the field of operations, constitute himself the judge of the unavoidable character of a given military necessity.⁸⁶

It has already been noted that very few cultural objects benefit from special protection. The stricter requirements for special protection only serve to widen the scope of interpretation for imperative military necessity. During the 1954 Diplomatic Conference discussions, some States wished to exclude the exception, arguing that it would open the door to abuses.⁸⁷ Also, the lack of a proper definition invites its misapplication.⁸⁸ The exception was already anachronistic at the time of the drafting of the 1954 Hague Convention.⁸⁹ The Roerich Pact of 1935 required unconditional protection for cultural property and contained no exception in cases of military necessity.⁹⁰ More importantly, the Geneva Conventions of 1949 demanded absolute compliance with their norms "in all circumstances."⁹¹ The USSR, France, Greece and Spain opposed the exception. By including the exception in the 1954 Hague Convention, the parties took a step backward in

86. Records of the Conference convened by the United Nations Educational, Scientific and Cultural Organization held at The Hague from April 21 to May 14, 1954, published by the Government of the Netherlands, the Hague, 1961, at 310.

87. *Id.*

88. Birov, *supra* note 74, at pt. IV.

89. *Id.*

90. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, (or 'Roerich Pact'), April 15, 1935, 49 Stat. 3267 T.S. No.889, at art. 1 (the Treaty was named after a Russian painter, poet and activist on behalf of cultural preservation, whose draft for the Convention was in large part adopted by the nations of North and South America).

91. Article 46 Geneva I, Article 47 Geneva II, Article 13 Geneva III, and Article 33 Geneva IV.

the development of international humanitarian law.⁹²

Today, the exception is no longer required because of modern weapons technology and the resulting reduction of collateral damage. There is also no requirement of proportionality.⁹³ If a single sniper was seen in a cathedral, the destruction of the entire cathedral would be justified. This was a situation realized in former Yugoslavia. It is further problematic that there is no requirement in the 1954 Hague Convention as to who decides what is meant by imperative military necessity. Eisenhower once stated during fighting in Italy that: “the phrase ‘military necessity’ is sometimes used where it would be more truthful to speak of military convenience or even of personal convenience.”⁹⁴ This broad interpretation resulted in the abuse of the notion of military necessity during the conflict in the former Yugoslavia.

SECTION III – THE CONFLICT IN THE FORMER YUGOSLAVIA

The shelling of the city of Dubrovnik of the former Yugoslavia highlights the ineffectiveness of the 1954 Hague Convention. Thirty percent of the city’s historic center was destroyed in the attacks of December 6, 1991.⁹⁵ Nickola Obujen, mayor of Dubrovnik, made a statement regarding the destruction to the international press:

We had UN and UNESCO flags flying from our ramparts. . . We were on the lists of world heritage sites, had been for years. We were covered by the Geneva Conventions, the Hague Conventions, two men from UNESCO in Paris had been sent there especially to observe. But nobody could stop it. I

92. Birov, *supra* note 74, at Part IV.

93. *Id.*

94. BOYLAN, *supra* note 23, at 22.

95. Final Report of the United Nations Commission of Experts established pursuant to Security Council Resolution 789, Destruction of Cultural Property Annex II, UN Doc. S/1994/674/Add.2 (Vol. V) (1994), at 7.

must say, we were disappointed in the world.⁹⁶

Yugoslavia was a High Contracting Party of the 1954 Hague Convention. Under Article 19 of the 1954 Hague Convention, “in the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.”⁹⁷ The International Criminal Tribunal for the Former Yugoslavia (hereinafter “ICTY”) in *ICTY v. Tadic*⁹⁸ ruled that Article 19 of the 1954 Hague Convention had been incorporated into the customary law of war.⁹⁹ The U.N.

96. Amy E. Schwartz, *Can We Shield Art From War?*, The Washington Post, June 23, 1993, at A17.

97. Convention for the Protection of Cultural Property, *supra* note 59, at art. 19.

98. M. Cherif Bassiouni, *The Institute for Global Legal Studies Colloquium: The UN and the Protection of Human Rights: Appraising UN Justice-Related Fact-Finding Mission*, 5 WASH. U. J.L. & POL’Y 35 (2001) (in 1992, the UN Security Council established one of the most significant fact-finding missions in UN history, the Yugoslavia Commission, which preceded the establishment of the ICTY, pursuant to Resolution 780 [S.C. Res. 780, U.N. SCOR, 47th Sess. at 2, U.N. Doc. S/RES/780 (1992)]. The Commission received the broadest mandate since the establishment of the IMT at Nuremberg, but received no funding from the UN to conduct its investigations. Its final report, which at over 3,300 pages was the longest ever made by the Security Council, was completed with funding from private sources, voluntary contributions from States, and ultimately DePaul University, Chicago, where its database was established. The Commission’s work gave the UN Security Council the basis to establish the ICTY pursuant to Resolution 808 [U.N. SCOR, 48th Sess., 3175th mtg. at 1, U.N. Doc. S/RES/808 (1993)].

99. Lippman, *supra* note 19, at pt. X; *See also* International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Dusko Tadic, (Appellate Chamber, Oct. 2, 1995), 35 I.L.M. 32 (1996), at para. 98 (the emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallized, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva

Security Council established the ICTY by its Resolution 808 of February 1993 “to investigate and act on allegations of ‘grave breaches and other violations of international humanitarian law...including...destruction of cultural and religious property...”¹⁰⁰

The Director-General of UNESCO appealed to all sides to respect cultural property at the outset of the war but his call went unheeded.¹⁰¹ Indeed, it is clear that cultural property was the subject of deliberate attack throughout the conflict.¹⁰² In response to charges of deliberate destruction of cultural property, the Yugoslav federal government claimed its attacks were justified under military necessity.¹⁰³ Similarly, the Serbs cited the defense of imperative military necessity for the shelling of Dubrovnik.¹⁰⁴ They claimed that Croats were using buildings in the city center for military purposes. Such use is prohibited by the 1954 Hague Convention under the requirement of respect for cultural property contained in Article 4.¹⁰⁵

Three months prior to the shelling, Croatia called on the then Director-General of UNESCO, Federico Mayer, to assist in the organization of protection for cultural property in the region, under Article 23 of the 1954 Hague Convention.¹⁰⁶ Mayer sent a mission

Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, at 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954, and to the core of Additional Protocol II of 1977).

100. BOYLAN, *supra* note 23, at para. 2.82.

101. UNESCO Director-General, Federico Mayer, Calls For Respect for Yugoslav Cultural Heritage, UNESCOPRESSE, October 4, 1991.

102. KAREN J. DETLING, ETERNAL SILENCE: THE DESTRUCTION OF CULTURAL PROPERTY IN YUGOSLAVIA, (1993).

103. *Id.*

104. Birov, *supra* note 74, at sec. B pt. II.

105. DETLING, *supra* note 102, at pt. VI – Conclusion .

106. Convention for the Protection of Cultural Property, *supra* note 59, at art. 23 para. 1 (the High Contracting Parties may call upon UNESCO for technical assistance in organizing the protection of their cultural property, or in connection with any other problem arising out of the application of the present Convention or the Regulations for its execution. The Organization shall accord such assistance within the limits fixed by its program and resources).

to Yugoslavia in October 1991. At the conclusion of the mission in the following month, two permanent observers were sent to Dubrovnik. They arrived just in time to witness the destruction. As one commentator stated, “they served only to catalogue the atrocities.”¹⁰⁷

The destruction in Dubrovnik is the most significant example of the widespread targeting of cultural property in the former Yugoslavia. In another illustration, Council of Europe Report highlights the deliberate destruction of mosques in the eastern Gradacac front.¹⁰⁸ The entire town of Gradacac was badly damaged. The Report points to “a certain amount of deliberate targeting”¹⁰⁹ of religious structures within the town. This practice of targeting religious and cultural property was part of a campaign of ethnic cleansing in Bosnia. The Council of Europe described the process as “cultural cleansing.”¹¹⁰ However, since the protection afforded by the 1954 Hague Convention does not extend to local religious sites, much of the targeting was not in violation of the 1954 Convention.¹¹¹

The sixteenth century fortress at Stara Gradiska on the Sava River, the Mostar Bridge, the historic center of Sarajevo, the Roman villas at Split, and four-thousand-year-old archaeological sites at Vuhovar are all properties of international importance that were damaged in a campaign aimed at local populations. Federico Mayer, former Director-General of UNESCO, stated “we have seen in years how, particularly in areas where the assault on the heritage has been brutal, that this assault is part of the attack on the

107. Dubrovnik’s Black Friday: UNESCO Observers Eyewitness Account, UNESCOPRESSE, February 7, 1992.

108. Report on a Fact-finding Mission on the Situation of the Cultural Heritage in Bosnia-Herzegovina and Croatia, June 1994, at 8 Eur. Parl. Ass. Rp. Doc. AS/CULT/AA n.38.

109. *Id.* at 42.

110. *Id.* at 22.

111. See Gregory M. Mose, *The Destruction of Churches and Mosques in Bosnia-Herzegovina: Seeking a Rights-based Approach to the Protection of Religious Cultural Property*, 3 BUFF. J. INT’L L. 180 (1996) (commentators have argued for the inclusion of religious property under the protection of the 1954 Hague Convention).

peoples themselves.”¹¹² Many of these buildings were flying the blue and white flag of Article 17 described in the 1954 Hague Convention.¹¹³ There is some suggestion that the flag served as an incentive for attack.¹¹⁴

The Commission of Experts appointed by the UN Security Council to investigate events in the former Yugoslavia considered the destruction of Dubrovnik and the Mostar Bridge as grave breaches of the Fourth Geneva Convention.¹¹⁵ The Mostar Bridge linked the Muslim and Croat communities in Mostar and was a symbol of the cross-cultural character of Bosnia and Herzegovina.¹¹⁶ Article 147 of the Fourth Geneva Convention considers the extensive destruction of property not justified by military necessity to be a grave breach of the Convention.¹¹⁷

112. Director-General of UNESCO, Federico Mayer, address at the opening of the Diplomatic Conference Concerning the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague (Mar. 15, 1999).

113. The distinctive emblem of the 1954 Hague Convention takes the form of 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. According to Article 17, the distinctive emblem repeated three times may be used only as means of identification of (a) immovable cultural property under special protection; (b) the transport of cultural property under the conditions provided for in Articles 12 and 13; and (c) improvised refuges, under the conditions provided for in the Regulations for the execution of the Convention.

114. Birov, *supra* note 74, at Section B Part II (monuments flying the large blue and white flag of the 1954 Hague Convention were intentionally attacked).

115. Lippman, *supra* note 19, at Part X (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)).

116. *Id.*

117. Geneva Convention relative to the Protection of Civilian Person in Time of War, art. 147, Aug. 12, 1949:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or

Radovan Karadzic and Ratko Mladic, both high profile cases, have been indicted for the destruction of cultural property in former Yugoslavia by the ICTY. The original indictment reads:

Since April 1992 to the end of May 1995, in the territory of the Republic of Bosnia and Herzegovina controlled by the Bosnian Serb military and police, including areas where no military conflict was ongoing, there has been widespread and systematic damage to and destruction of Muslim and Roman Catholic sacred sites.¹¹⁸

The indictment states that by these acts and omissions, Radovan Karadzic and Ratko Mladic committed a violation of the laws or customs of war (destruction or willful damage to institutions dedicated to religion) as recognized by Articles 3(d), 7(1) and 7(3) of the statute of the Tribunal.¹¹⁹

serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

118. Original Indictment of Mladic and Karadzic, UN International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, July 25, 1995.

119. *Id.* at Count 6 (Destruction of Sacred Sites), para. 39 (Article 3(d) states that seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; Article 7(1) states that a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime; and Article 7(3) holds that the fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about

The 1954 Hague Convention, according to Article 1, only applies to property “of great importance to the cultural heritage of every people.”¹²⁰ This strict adherence to the ‘cultural internationalist’¹²¹ approach can be seen as inadequate with respect to religious property in the former Yugoslavia, such as the Muslim and Roman Catholic sacred sites referenced in the Karadzic and Mladic indictment. The “institutions dedicated to religion” covered by Article 3(d) of the ICTY statute would not be covered by Article 1 of the 1954 Hague Convention for they are not of international significance. By focusing on the heritage of all mankind, it becomes easy to disregard the needs of the communities that the property in question was originally designed to serve.¹²² While this is undoubtedly an issue, it could also be argued that rather than trying to extend the ambit of the Convention, it would be more useful to focus on the enforcement of its current provisions.

Just as the 1907 Hague Regulations were shown to be inadequate during World Wars I and II, the 1954 Hague Convention was proven inadequate by the conflict in the former Yugoslavia. The 1954 Hague Convention was not adhered to in practice; therefore, the problems clearly rested with enforcing the Convention and the doctrine of military necessity. Without an adequate enforcement mechanism, its provisions are largely theoretical. The widespread abuse of the notion of imperative military necessity coupled with the inability to enforce sanctions enabled the systematic cultural cleansing in the former Yugoslavia. This conflict has forced the international community to address these two main weaknesses of the 1954 Hague Convention.

to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof).

120. Convention for the Protection of Cultural Property, *supra* note 59, at art. 1.

121. Mose, *supra* note 111, at 89 (“Cultural internationalism...” thus countries serve merely as custodians of cultural property found within their borders).

122. *Id.* at pt. IV.

SECTION IV – THE SECOND PROTOCOL TO THE 1954 HAGUE CONVENTION

In 1991, the Netherlands issued a review of the 1954 Hague Convention.¹²³ As a consequence of this initiative, the Director-General of UNESCO formally commissioned a review of the Convention.¹²⁴ Professor Patrick Boylan of the International Council for Museums was appointed to carry out the task to identify measures for improving the 1954 Hague Convention.¹²⁵ The review was published in 1993, and made a number of recommendations.¹²⁶ The Government of the Netherlands compiled these recommendations into a new draft treaty called the Lauswolt Document.¹²⁷ Twenty governmental experts in 1997 at UNESCO headquarters in Paris examined this document.¹²⁸ A notable omission from the document was the recommended change in the military necessity exception. Several of the governments objected to this omission.¹²⁹ In 1997, the Government of the Netherlands offered to host a Diplomatic Conference to transform the Lauswolt Document into an international treaty.¹³⁰ There were two further meetings of governmental experts representing the States party to the 1954 Hague Convention and a final preparatory meeting in Vienna in May 1998.¹³¹ That meeting identified five key areas to be addressed by the Second Protocol: (1) the institutional aspects, (2) the precautionary measures to be taken in peacetime, (3) the ‘military necessity’ exception, (4) the system of special protection, and (5) individual criminal

123. Review of the application of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954), UNESCO doc. 140 EX/26, Paris, September 11, 1992, at 6.

124. BOYLAN, *supra* note 23, at 19.

125. *Id.*

126. *Id.*

127. Hladik, *supra* note 85.

128. Henckaerts, *supra* note 72.

129. For example, Croatia, Czech Republic and Slovenia, all of whom wished to see the exception removed completely.

130. Henckaerts, *supra* note 72.

131. *Id.*

responsibility.¹³²

The Diplomatic Conference on the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict took place in The Hague from March 15 to 26, 1999, and resulted in the adoption of the Second Protocol to the 1954 Hague Convention. The Second Protocol supplements the 1954 Hague Convention and only applies to the States that ratified it.

A significant institutional development was the creation, under Article 24 of the Second Protocol, of the Committee for the Protection of Cultural Property in the Event of Armed Conflict. It is composed of twelve experts, qualified in the fields of cultural heritage, defense or international law. The members are elected by the State Parties, according to the equitable geographical distribution principle, whereby members are representative of the different regions and cultures of the world.¹³³ The functions of the Committee include developing guidelines for the implementation of the Second Protocol, granting, suspending or canceling enhanced protection for cultural property and establishing, maintaining and promoting the list of cultural property under enhanced protection.¹³⁴ The Second Protocol states in its Article 37(2) that State Parties must submit a Report to the Committee, every four years, on the implementation of its provisions.

The Committee is charged with, among other duties, the management of a fund based on voluntary contributions from State Parties for the protection of cultural property, notably peacetime preparatory work.¹³⁵ Furthermore, there are specific guidelines as to what measures States can take in peacetime. This is in contrast to the 1954 Hague Convention which expressed the requirement

132. *Id.*

167. *Id.* at art. 24(3).

168. *Id.* at art. 27.

135. Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, March 26, 1999, art. 29, *available at*

http://www.unesco.org/culture/laws/hague/html_eng/protocol2.shtml (last visited Feb. 22, 2004).

that States take such measures as they consider appropriate, but it did not provide any further guidance.¹³⁶ The measures contained in the Second Protocol include the preparation of inventories, the planning of emergency measures, and the preparation for the removal of movable cultural property.¹³⁷

Professor Boylan identified the lack of a definition of military necessity contained in Article 4 of the 1954 Hague Convention as a serious weakness in the protection afforded to cultural property.¹³⁸ While the Second Protocol was an addition to the Convention and could not remove the concept entirely, it nevertheless sought to add meaning and substance to the concept to prevent its abuse.

The approach taken in the Second Protocol as it relates to the 1954 Hague Convention mirrored that of the 1977 Additional Protocol I as it relates to the Geneva Conventions of 1949. Attacks were to be limited to military objectives.¹³⁹ This concept is codified in Article 52 (2) of the 1977 Additional Protocol I.¹⁴⁰ Such an approach allows necessary attacks within strict humanitarian limits. States that are not party to the 1977 Additional Protocol I, including the United States, affirmed the customary law nature of the provision regarding military objective during the 1999 Diplomatic Conference on the Second Protocol to the 1954 Hague Convention.¹⁴¹ This illustrates how the 1999 Conference sought to

136. *Id.* at art. 3.

137. *Id.* at art. 5.

138. BOYLAN, *supra* note 23, at 54.

139. Second Protocol to the Hague Convention, *supra* note 133, at art. 6.

140. Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 52(2), June 8, 1977:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

141. Henckaerts, *supra* note 72 at 4.

reaffirm certain rules of humanitarian law while developing new rules.¹⁴²

There are two clear criteria to the concept of military objective that emerged at the 1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.¹⁴³ First, the nature, location, purpose or use of the object has to be such that it makes an effective contribution to military action. Second, the military advantage has to be definite in the circumstances ruling at the time. The concept, therefore, incorporates the idea of military necessity and balances it with humanitarian needs.

The Second Protocol also clarified the meaning of ‘imperative’ as it relates to military necessity and requires that no other alternative exist.¹⁴⁴ The decision maker of a situation of imperative military necessity must be an officer commanding a force equivalent to a battalion or smaller if circumstances do not permit otherwise.¹⁴⁵ Protection is enhanced because the notion of military objective is used to define the exception of military necessity. The rule that only military objectives can be targeted is now part of military manuals and military training worldwide.¹⁴⁶

While cultural property cannot be a military objective because of its nature or purpose, there was some debate at the 1999 Conference on the Second Protocol to the Hague Convention of 1954 concerning the issue of the location of cultural property. Article 27 of the 1907 Hague Regulations makes it clear that what turns property into a military objective is not its location but its

142. *Id.*

143. *Id.*

144. Second Protocol to the 1954 Hague Convention, *supra* note 133, at art. 6(a)(ii) (a waiver on the basis of imperative military necessity may only be invoked to direct an act of hostility against cultural property when and for as long as . . .there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective).

145. *Id.* at art. 6(c) (the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise).

146. Henckaerts, *supra* note 72, at 5.

use.¹⁴⁷ The idea of ‘use’ was addressed by the word ‘function’ in the Second Protocol.¹⁴⁸ The principle remains the same: the general protection governing cultural property may be waived if that property has, by its ‘function’, become a military objective. However, Article 13 of the Second Protocol to the 1954 Hague Convention, governing the loss of enhanced protection for cultural property, states that such protection may be suspended when the property has, by its ‘use’ become a military objective.¹⁴⁹ Thus, is there a lower standard implied in the word ‘function’? Or could ‘function’ contain the idea of location, so that, for example, if a cultural object such as a historic wall was blocking the path of an army, could it be destroyed because it is functioning, by its location, as a military objective?¹⁵⁰ It is only by a stretch of the imagination that ‘function’ could cover location.¹⁵¹ The word ‘function’ clearly requires an active role on the part of the holder of the cultural property. The property could only be made into a military objective through use. Indeed, the diplomats have been criticized for confusing the issue with examples that bear little relation to the reality on the battlefield.¹⁵² The mere location of pyramids in Egypt or temples in Greece could never serve as a pretext to attack those objects. The overall consistency and clarity of the Second Protocol to the 1954 Hague Convention regarding the meaning and scope of imperative military necessity ought to

147. Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, art. 27, Oct. 18, 1907 (all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments. . . provided they are not being used at the time for military purposes).

148. *Id.* at art. 6(a) (a waiver on the basis of imperative military necessity pursuant to Article 4 Paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as: (i) that cultural property has, by its function, been made into a military objective)

149. *Id.* at art. 13(1)(a).

150. This specific example given by the Canadian delegation at the 1999 Diplomatic Conference.

151. Henckaerts, *supra* note 72, at 6.

152. *Id.* at 7.

have been the priority.

The most significant change to the 1954 Hague Convention has been the creation of the system of enhanced protection for cultural property that effectively replaces the old system of special protection. The inadequacies of the system of special protection contained in the 1954 Hague Convention have been outlined in this paper. The Second Protocol removes the requirements of distance from an industrial center or military objective in line with the development of technology that allows for more accurate targeting.¹⁵³ Also, the means of lodging objections to applications have been curtailed in order to de-politicize the process of protection.¹⁵⁴ These changes are a clear response to events in the former Yugoslavia. Dubrovnik's presence on the list of World Heritage Sites contributed towards helping to preserve its historic center and it further defines what is considered under enhanced protection. Cultural property under enhanced protection loses its protection if it has, "by its use, becomes a military objective."¹⁵⁵ This is a clear improvement on the requirement of unavoidable military necessity. In fact, the difference between cultural property under enhanced protection and cultural property under general protection can now be confirmed.

153. The Convention for the Protection of Cultural Property, *supra* note 59, at art. 8(1)(a):

That there may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict provided that they are situated at an adequate distance from any large industrial enter or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication.

154. Regulations for the Execution of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, at art. 14 (any High Contracting Party may, by letter addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization, lodge an objection to the registration of cultural property).

155. Second Protocol to the Hague Convention, *supra* note 133, at art. 13(1)(b).

The 1954 Hague Convention seemed to imply a lower standard of protection for cultural property under general protection than for cultural property under special protection. However, the Second Protocol makes it clear that there is no higher standard of protection for cultural property under enhanced protection.¹⁵⁶ Both are protected unless, by their use or function, they become military objectives. So what then is the difference between them? The difference lies with the defender's obligations rather than with the attacker's. The defender has the right to convert cultural property under general protection into a military objective by its function. In the case of enhanced protection, the defender has no right to convert it into a military objective. Destruction of cultural property on lists like the World Heritage list that are under enhanced protection, is a serious violation of the Second Protocol.¹⁵⁷

While the 1954 Hague Convention provided for individual criminal responsibility for breaches of the Convention, the effectiveness of such a provision was undermined by the lack of a list of specific offenses that could give rise to criminal sanctions. The Second Protocol develops international humanitarian law in this respect by detailing five acts that constitute serious violations under its Article 15: (1) making cultural property under enhanced protection the object of attack, (2) using cultural property under enhanced protection or its immediate surrounding in support of an action, (3) extensive destruction or appropriation of cultural property protected under the Convention and Protocol II, (4) making cultural property protected under the Convention and Protocol II the object of attack, and (5) theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property protected under the Convention.¹⁵⁸

The first three offenses listed in Article 15 of the Second Protocol correspond to grave breaches of the Geneva Conventions

156. There are minor differences in the level of command at which an attack can be ordered.

157. Second Protocol to the Hague Convention, *supra* note 133, at art. 15 (such an offence would correspond to a grave breach of the Geneva Conventions).

158. *Id.*

and Additional Protocol I of 1977.¹⁵⁹ The last two are considered to be serious violations of the 1954 Hague Convention and Second Protocol.¹⁶⁰ They were recognized as war crimes by the Statute of the International Criminal Court (hereinafter “ICC”), and were included at the suggestion of the ICRC.¹⁶¹ The ICRC sought to ensure that the two offenses would result in prosecutions for war crimes by specifically providing for such action. The principle of permissive universal jurisdiction for war crimes applies to these offenses since States may establish universal jurisdiction, but are not compelled to do so.¹⁶²

There is a duty upon State Parties to the Second Protocol to introduce domestic legislation providing for the punishment for the above offenses.¹⁶³ Also, there is a duty on State Parties to try persons charged with these offenses under the doctrine of universal jurisdiction. This means that jurisdiction must be established even when an offense is committed by a non-national, outside the territory of the State, if the suspected offender is present within the State’s boundaries. The Chairman of the Working Group on Chapter IV of the Second Protocol described these provisions as a major achievement, as all elements to form a coherent system of prosecution and extradition are included.¹⁶⁴ The Second Protocol also develops international humanitarian law in that it provides a balance between the criminal responsibility of both the attacker and the defender, whereas the Additional Protocol I of 1977 assigned responsibility only to the attacker.¹⁶⁵

The United States succeeded in its application for an exception to universal jurisdiction for nationals not party to the Second

159. Henckaerts, *supra* note 72, at 11.

160. Second Protocol to the Hague Convention, *supra* note 133, at art. 15 (Serious Violations of this Protocol).

161. Henckaerts, *supra* note 72, at 11.

162. *Id.* at 12.

163. *Id.* at art. 17.

164. Horst Fischer, *Presentation of the Results of the Working Group on Chapter 4*, UNESCO Doc. HC/1999/INF.5, March 25, 1999, at 2.

165. Henckaerts, *supra* note 72, at 11.

Protocol.¹⁶⁶ However, the effect of this exception has been softened and the States may establish jurisdiction over such nationals under applicable national law or customary international law.

The Second Protocol also outlined the precautionary measures to attack to be taken by State Parties in its Article 7.¹⁶⁷ In addition to doing everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention, the provision requires that each Party to the conflict take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental damage to cultural property protected.¹⁶⁸ State Parties must refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property which would be excessive in relation to the concrete and direct military advantage anticipated.¹⁶⁹

The Second Protocol, like the 1954 Hague Convention, applies to both international and non-international conflicts.¹⁷⁰ The Statute

166. Second Protocol to the Hague Convention, *supra* note 133, at art. 16(2)(b):

Except in so far as a State which is not Party to this Protocol may accept and apply its provisions in accordance with Article 3 paragraph 2, members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a State which is a Party to this Protocol, do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them.

167. Second Protocol to the Hague Convention, *supra* note 133, at art. 7

168. Second Protocol to the Hague Convention, *supra* note 133, at art. 7(a) and (b).

169. *Id.* at art.7(c). Furthermore, under Article 7(d)(i) and (ii), an attack must be cancelled or suspended if it becomes apparent that the objective is cultural property protected under Article 4 of the Convention, or that that the attack may be expected to cause incidental damage to cultural property which would be excessive in relation to the concrete and direct military advantage anticipated.

170. The Convention on Cultural Property, *supra* note 59, at art. 19; Second Protocol to the Hague Convention, *supra* note 133 at art. 4.

of the ICC gives the ICC jurisdiction over war crimes committed against cultural property in both international and non-international conflicts.¹⁷¹ As mentioned, the initiative for the Second Protocol came largely out of the destruction of cultural property during the conflict in the former Yugoslavia. Cultural property is considered the “heritage of all mankind.”¹⁷² The Second Protocol confirms this cultural internationalist approach to cultural property protection.

The major shortcomings of the 1954 Hague Convention identified by Professor Boylan were examined and effectively resolved by the Second Protocol. The institutional aspects and the precautionary measures to be taken in peacetime were addressed. The Convention as it pertains to the ‘military necessity exception’ was brought into line with major developments in international humanitarian law, notably the 1977 Additional Protocol I to the Geneva Conventions. The flawed regime of special protection was supplemented and effectively replaced by a more sophisticated regime of enhanced protection. The Second Protocol provides a list of specific offenses that could give rise to individual criminal sanctions, strengthening the enforcement mechanisms of the 1954 Hague Convention.

CONCLUSION

Respect for another’s cultural heritage is respect for

171. Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, July 17, 1998, at art. 8(2)(e)(iv):

War crimes means other serious violations of the laws and customs applicable in armed conflicts not of an international character within the established framework of international law, namely... Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.

172. The Convention for the Protection of Cultural Property, *supra* note 59, at Preamble (being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind).

our joint humanity. It is the thread of our common being, an achievement of peacetime, a reminder that conflict, however terrible, is transient and will end with a return to calm and the chance to build a lasting culture of peace.¹⁷³

While each successive instrument of international law governing the protection of cultural property has addressed the shortcomings of its predecessor, the similarity running through all of the legislation is that it has not succeeded in preventing the widespread destruction of cultural property when armed conflicts occur. There are two conclusions that can be drawn from this.

The first is that the legislation is not effective enough. The Hague Regulations were inadequate when faced with the systematic looting of art treasures by the Nazis. At the Nuremberg trials, it was declared that the protection of cultural property formed part of customary international law. Nevertheless, there was still no coherent system of protection. The subsequent 1954 Hague Convention addressed this problem; however, difficulties remained with the enforcement of its provisions. The military necessity exception, coupled with the lack of a specific list of violations that would give rise to criminal sanctions, meant that the Convention proved unable to cope with grave instances of violations, particularly in relation to the conflict in the former Yugoslavia. The Second Protocol addresses these shortcomings, and it would seem that now cultural property will be effectively protected. The preservation of cultural property will be achieved through enforcement and implementation of the international norms.

The Second Protocol came into effect on March 9, 2004. UNESCO Director-General Koïchiro Matsuura welcomed the fact that the Second Protocol “comes into force just as the international community is celebrating the half-century of the Convention’s

173. Former Director-General of UNESCO, Federico Mayer, address at the opening of the Diplomatic Conference Concerning the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague (Mar. 15, 1999).

existence.”¹⁷⁴ Twenty years earlier, at the thirtieth anniversary of the 1954 Hague Convention, UNESCO cited High Contracting Party apathy as the major defect in the Convention.¹⁷⁵ If this is still the case, the Second Protocol will have little effect, not because its rules are not strong enough, but because the interest is not there. Nevertheless, extensive media coverage in April 2003 of the national and international efforts to guard the contents of the Baghdad Museum against looters would suggest that the world maintains a keen interest in protecting cultural heritage in wartime.

Perhaps international legislation has not protected cultural property in time of conflict because more of the focus is on the protection of lives. This is the reality of war, and despite the protection provided by international humanitarian law, war is always accompanied by a breakdown in the social and legal structure of the State. International humanitarian law seeks to ensure that minimum standards are observed. Similarly, the 1954 Hague Convention and its Protocols represent minimum protections for cultural property. If war cannot be prevented, it may seem that the destruction of cultural property cannot be prevented. Nevertheless, it is hoped that as international humanitarian law incrementally erodes the impunity of wartime, the regime governing cultural property will equally gain wider acceptance.

174. A New International Instrument to Enhance the Protection of Cultural Property in Times of War, UNESCOPRESSE March 9, 2004.

175. Information on the Implementation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1984), at 8.