

Eternal Silence: the Destruction of Cultural Property in Yugoslavia

Karen J. Detling

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NOTES AND COMMENTS

ETERNAL SILENCE:¹ THE DESTRUCTION OF CULTURAL PROPERTY IN YUGOSLAVIA

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1. This phrase comes from a speech by Dr. Manfred Lachs, Judge at the International Court of Justice, when he said, "What I have in mind is the eternal silence created by the destruction of cultural property." Dr. Manfred Lachs, Judge at the International Court of Justice, Address at Thirtieth Anniversary Celebration of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (May 14, 1984), in *Information on the Implementation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict* 13 (1984) (on file with the United Nations Information Center, Washington, D.C.) [hereinafter 1984 Reports].

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The culture of nations is the most precious jewel [humankind] possesses. Not only the royal mausolea, not only mummies saved by history and accident; but real cultural monuments: towers, castles and churches—from stone tombs, the Stonehenge which had been built and rebuilt before the Mycenaean civilization began in Greece; developed in the ages of the Gothic, Renaissance, Baroque, up to yesterday.²

I. INTRODUCTION

During times of armed conflicts opposing parties traditionally have sought advantage by attacking each other psychologically. This strategy has taken a particularly brutal form during the war in the former Yugoslavia. Ethnic cleansing, the expulsion by Serbs of non-Serbian groups from territory occupied by the former, has taken its toll both physically and psychologically.³ The campaign to instill fear and separate people from their cultures has included the rape and purposeful impregnation of Muslim women by Serbs.⁴ These horrifying acts violate not only the women, but also their culture. Within the Muslim culture, rape is a particularly repulsive crime, causing great shame among the women and their families.⁵ In addition, the impregnation of the women is an attempt to impose Serb identity upon the Muslim culture.⁶

Referring to the rapes, the Bosnian Serb leader remarked that, “[i]t is a tragedy[,] [b]ut these dreadful things happen in all wars.”⁷ Like rape, the destruction of cultural property has a long history in

2. *Id.* at 12 (Lachs address).

3. Jonathan C. Randal, *Preserving the Fruits of Ethnic Cleansing*, WASH. POST, Feb. 11, 1993, at A34. One Bosnian Muslim commented that, “There are two stages of ‘ethnic cleansing’ and the most important is the first—in your mind.” *Id.*

4. Lance Morrow, *Unspeakable*, TIME, Feb. 22, 1993, 48, at 48. There are also reports of rapes by Croats and Muslims. *Id.* at 49. The use of rape constitutes “emotional scorched earth.” *Id.* at 50. For terrifying accounts of rape and impregnation see Robert Fisk, *Bosnia War Crimes: ‘The Rapes Went on Day and Night’*, INDEPENDENT, Feb. 8, 1993, available in LEXIS, Nexis Library. At one site, guards allegedly tested two women to confirm their claims of pregnancy before deciding not to rape them. *Id.*

5. *‘Shamed’ Muslims Killing Rape Victims*, CHI. TRIB., Feb. 10, 1993, available in LEXIS, Nexis Library.

6. Rape and impregnation “achieve ethnic cleansing through ethnic pollution.” Morrow, *supra* note 4, at 49.

7. *Id.* at 48-49.

warfare.⁸

[Belligerents] will seek to destroy this aesthetic arm of the enemy . . . or . . . they will try to neutralize, to sterilize it, by separating it from its living context. Equally, if art gives an aura of prestige to a city or a dynasty, rival cities or dynasties which set out to conquer and humble them, will seek also to destroy their 'myth' by depriving them of this aura⁹

Despite nearly universal agreement that cultural property is an inappropriate object of belligerent destruction, such heritage remains as vulnerable as ever, as a recent armed conflicts in the Persian Gulf¹⁰ and the former Yugoslavia tragically evidence. During the conflict in the former Yugoslavia, historical buildings, museums and their irreplaceable collections, churches, synagogues and archives have suffered destruction, damage and pillage.¹¹

8. For a brief history of the attack on cultural property and the development of customary international law to protect it see *infra* notes 59-68 and accompanying text.

9. Hugh Trevor-Roper, *The Plunder of the Arts of the Seventeenth Century*, in 1 LAW, ETHICS AND THE VISUAL ARTS 1-2 to 1-3 (John H. Merryman & Albert E. Elsen eds., 1979) [hereinafter VISUAL ARTS].

10. During the Iraqi occupation of Kuwait, the latter's cultural property suffered great devastation. Almost immediately after the invasion on August 2, 1990, Baghdad's director of museums arrived and, with several assistants, catalogued the inventory of the National Museum. Bob Drogin, *In 7 Months, Iraqis Stole 'The Very Soul' of Kuwait*, LOS ANGELES TIMES, Mar. 11, 1991, at A1. After looting part of the collection, the Iraqis set the museum complex ablaze. *Id.* Destroyed were irreplaceable vestiges of ancient Arab culture, including a 3,000 year-old Hellenic column from Fay-lakah Island and a fourteenth century engraved wooden door from Morocco, one of the museum's most important pieces. *Id.* In addition to the National Museum, the Iraqi forces destroyed the planetarium and looted university laboratories. William Gasperini, *Kuwait Zoo, Museums Assess Iraqi Damage*, CHRISTIAN SCI. MONITOR, Mar. 26, 1991, at 12. Fortunately, a portion of the National Museum's collection was on tour and located at the Walter's Art Gallery in Baltimore during the Gulf War. Louise Sweeney, *Kuwaiti Art Treasures Beyond Saddam's Grasp*, CHRISTIAN SCI. MONITOR, Jan. 15, 1991, at 13.

UNESCO sent a representative to assess the situation and is lending support to rebuild the devastated institutions. *Board Notes UNESCO Help to Kuwait, Suggests Further Action*, June 12, 1991 (Unesco News press release) (on file with the United Nations Information Center, Washington, D.C.) [hereinafter *Help to Kuwait*].

11. In Croatia, one of the break-away republics opposing the federal Yugoslav government, at least 467 cultural sites were damaged or destroyed by January 3, 1992, including 37 museums, 10 archives and 16 library buildings. INSTITUTE FOR PROTECTION OF CULTURAL PROPERTY, REPUBLIC OF CROATIA, CULTURAL MONUMENTS, HISTORICAL SITES AND CITIES DAMAGED AND DESTROYED DURING THE WAR IN CROATIA 1 (1992) [hereinafter Republic of Croatia report].

It is not merely the fate of cultural property during these conflicts that is disturbing. Rather, it is the fact that many of the "victims" were not unavoidable casualties, but were deliberately damaged or destroyed by opposing forces, despite international conventions that explicitly prohibit such actions. Furthermore, all of the combatants involved in the conflicts are parties to the conventions.¹² Specifically, three binding international agreements are most relevant: the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention),¹³ Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I)¹⁴ and Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II).¹⁵ This Comment focuses primarily on the first agreement, but also discusses the latter two.

The 1954 Hague Convention's apparent failure in the former Yugoslavia raises two questions: Were the Convention's protections applied? If so, what explains the wide-spread, deliberate destruction that has occurred? Simply put, are the provisions sufficient? Special questions arise in the Yugoslavian situation, which was an internal conflict and the first time the United Nations Educational, Scientific and Cultural Organization (UNESCO), which supervises the application of the Hague Convention, involved itself in a civil war.¹⁶

By February 5, 1992, Croatia estimated 784 historical monuments had been damaged or destroyed. Alan G. Artner, *Yugoslav Civil War Takes High Cultural Toll*, CHI TRIB., Mar. 6, 1992, at 1C.

12. During the early phases of the conflict, provisions in the conventions that addressed the protection of cultural property during internal conflicts applied. *See, e.g., infra* notes 189-195 and accompanying text.

Even after separation, Croatia and the other republics are likely bound by the conventions entered into by Yugoslavia. Under the Vienna Convention on Succession of States in Respect of Treaties, *opened for signature* Aug. 23, 1978, 17 I.L.M. 1488, the treaties would remain in force for the successor states. *Id.*, arts. 34 & 35, 17 I.L.M. at 1509. Yugoslavia is a party to this Convention. 25 I.L.M. 1640 (1986).

Even without the treaty, however, the successor states may manifest their intentions to be bound by the prior agreements. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 210 & cmt. g (1986). Croatia, for example, has appealed for assistance to UNESCO for the protection of its cultural property under the applicable convention. *See infra* note 211 and accompanying text.

13. May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

14. *Adopted* June 8, 1977, 16 I.L.M. 1391 [hereinafter Protocol I].

15. *Adopted* June 8, 1977, 16 I.L.M. 1442 [hereinafter Protocol II].

16. *Unesco Observers Leave for Yugoslavia*, UNESCOPRESSE, Nov. 29, 1991.

II. THE SCOPE OF CULTURAL PROPERTY

The belief that tangible forms of heritage deserve protection existed before either national or international code drafters attempted to define cultural property.¹⁷ For example, the Brussels Convention of 1874,¹⁸ the first international attempt to codify the laws of war,¹⁹ granted special protection to "institutions dedicated to religion, charity and education, the arts and sciences" and "historic monuments, works of art and science."²⁰ The Convention did not attempt to define cultural property more specifically. As conventions developed, however, drafters ventured more precise definitions of cultural property in two ways. First, they sought to list the types of physical items that would constitute cultural property. Second, they established parameters that accounted for the significance of the property.

A. *The Physical Scope of Cultural Property*

Culture is defined as "the customary beliefs, social forms and material traits of a racial, religious, or social group."²¹ It is the "material traits" that concern international law protecting cultural property. Obviously, nearly every object—clothing, advertisements, works of art, books—communicates something about the people who possess it. It is equally apparent, however, that the law cannot protect everything, especially in times of conflict. Thus, most conventions attempt to limit the scope of the cultural property deserving protection to objects of some special significance to a particular nation or the world.²²

The tension between an overinclusive or underinclusive definition of culture is illustrated by the debates of delegates who drafted Article 16 of Protocol II, which addresses the protections of cultural objects and places of worship during non-international armed conflicts.²³ Re-

17. For a history of the protection of cultural property see *infra* notes 57-91 and accompanying text.

18. Reprinted in *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 25 (Dietrich Schindler et al. eds., 1988) [hereinafter *ARMED CONFLICTS*].

19. *Id.* See also *infra* notes 73-77 and accompanying text. The resulting agreement was never ratified and thus had no force of law.

20. *ARMED CONFLICTS*, *supra* note 18, at 28.

21. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 314 (1986).

22. See, e.g., 1954 Hague Convention, *supra* note 13, art. 1, ¶ (a), 249 U.N.T.S. at 242 (stipulating that cultural property consists of "movable or immovable property of great importance to the cultural heritage of every people").

23. Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954,

ferring to "places of worship," a Report of Committee III (Working Group) notes, "[h]ere cultural heterogeneity may be the key, for among some peoples any place of worship may be part of the cultural heritage, while among others only some places of worship may be so described."²⁴

One of the most inclusive definitions of cultural property appears in the 1954 Hague Convention. That Agreement extends protection to

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 of books or archives or of reproductions of the property defined above . . . museums, large libraries and depositories of archives²⁵

Subsequent conventions have enhanced the definitions of specific cultural property. For example, the 1970 UNESCO Convention on the

it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

Protocol II, *supra* note 15, 16 I.L.M. at 1447.

Protocol II limits its scope to non-international conflicts that take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations

Id., art. 1(1), 16 I.L.M. at 1443. The Protocol excludes riots and "isolated and sporadic acts of violence." *Id.*, art. 1(2), 16 I.L.M. at 1443.

Article 19 of the 1954 Hague Convention also protects cultural property in the event of non-international armed conflict, *see infra* notes 189-195 and accompanying text, but appears to impose no limitations on the character of the internal conflict. 1954 Hague Convention, *supra* note 13, art. 19, 249 U.N.T.S. at 256; *see also* Waldemar A. Solf, *Cultural Property, Protection in Armed Conflict*, 9 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 68 (Rudolf Bernhardt ed., 1986).

24. THE LAW OF NON-INTERNATIONAL ARMED CONFLICT PROTOCOL II TO THE 1949 GENEVA CONVENTIONS 513 (Howard S. Levie ed., 1987) (recording the proceedings of the 1974-75 Geneva Diplomatic conference of the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts) [hereinafter *Proceedings*].

25. 1954 Hague Convention, *supra* note 13, art. 1, 249 U.N.T.S. at 242. Article 1 also protects "refuges intended to shelter, in the event of armed conflict, the movable cultural property . . . and centers containing a large amount of cultural property [defined in Article 1], to be known as 'centres containing monuments.'" *Id.*

Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property provides a much more detailed listing of cultural property.²⁶ While this Convention most likely would not apply to Serbian looting of cultural property from Croatia,²⁷ it clearly would apply to property taken in an international conflict, such as the Gulf War.²⁸

26. Nov. 19, 1970, art. 1, 823 U.N.T.S. 231, 234, 236 [hereinafter 1970 UNESCO Convention].

For the purpose of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science which belongs to the following categories:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs;
 - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections:
 - (i) postage, revenue and similar stamps, singly or in collections;
 - (j) articles of furniture more than one hundred years old and musical instruments.

27. "The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a *foreign power* shall be regarded as illicit." *Id.*, art. 11, 823 U.N.T.S. at 242 (emphasis added). The Yugoslav civil war does not involve a foreign power. Thus, items taken by the federal army and exported or sold apparently do not fall under the 1970 UNESCO Convention.

28. In fact, the personal representative of UNESCO Director-General Federico Mayor suggested that the organization send a mission to Kuwait to catalog the losses, so that it may request restitution under the 1970 UNESCO Convention. *Help to Kuwait*, *supra* note 10.

In addition, just as conventional law²⁹ often becomes accepted customary law,³⁰ definitions of cultural property from one convention may influence the assumptions regarding the scope of such property in other agreements. For example, the World Heritage Convention³¹ refined the definitions of "monuments," "groups of buildings," and "sites,"³² definitions to which the drafters of Protocol II later alluded.³³ More importantly, the World Heritage Convention narrowed the scope of protected cultural property by establishing the World Heritage List, which identifies particular cultural objects to be protected.³⁴

Despite these attempts at specificity, the 1954 Hague Convention,³⁵ the 1970 UNESCO Convention³⁶ and the World Heritage Con-

29. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 12 § 102(1)(b), (3).

30. *Id.* § 102(1)(a), (3).

31. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 11 I.L.M. 1358 [hereinafter World Heritage Convention].

32. *Id.* art. 1, 27 U.S.T. at 40-41, 11 I.L.M. at 1359.

Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

Groups of Buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

33. For example, during debates over the scope of the term "historic monuments" in Article 16 of Protocol II, a member of the Greek delegation pointed to the definition of monuments in the World Heritage Convention. Proceedings, *supra* note 24, at 511.

34. There are now 359 World Heritage Sites. *23 New Sites Inscribed on World Heritage List* (Dec. 16, 1991) (Unesco News press release) (on file with the United Nations Information Center, Washington, D.C.). United States cultural property inscribed on the World Heritage List includes: Independence Hall, the Statue of Liberty, Yellowstone, Grand Canyon National Park, La Forteleza and San Juan Historic Site in Puerto Rico, and Yosemite National Park. THE CHALLENGE TO OUR CULTURAL PROPERTY, WHY PRESERVE THE PAST? 246 (Yudhishtir Raj Isar ed., 1986) [hereinafter WHY PRESERVE THE PAST?]. One observer has expressed concern that less well-known cultural property, often located in smaller, poorer nations, may face resistance to placement on the List. EMIL ALEXANDROV, INTERNATIONAL LEGAL PROTECTION OF CULTURAL PROPERTY 58 & n.51 (1979).

35. "Any High Contracting Party may submit to the Director-General of [UNESCO] an application for the entry in the Register of certain refuges; centres containing monuments or other immovable cultural property situated within its

vention³⁷ each ultimately delegates responsibility for identifying cultural property to be protected to individual nations. Unfortunately, few states have taken advantage of these opportunities to protect their heritage.³⁸

B. Cultural Nationalism versus Cultural Internationalism

In addition to establishing the categories of property to receive protection, international law also confers protection based on the relative importance of cultural objects. This hierarchy may depend to some extent on whether the drafters of a convention perceive cultural objects as "material traits" of national heritage or of world culture. The more global the approach, the more exclusive the inventory of objects qualifying as protected cultural property. For example, while the Basilica of the Assumption³⁹ may reflect the culture of the city of Baltimore, the state of Maryland and perhaps the United States, it may not be of "great importance to the cultural heritage of every people."⁴⁰ This conflict arose at the debates to Article 16 of Protocol II. As noted previously, some delegates believed that all "places of worship" reflected the culture of peoples, while others insisted that only a subset of such loca-

territory."

Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 14, 249 U.N.T.S. 270, 278 [hereinafter 1954 Hague Convention Regulations].

36. The 1970 UNESCO Convention applies only to cultural objects categorized in article 1 that have been "specifically designated by each State." 1970 UNESCO Convention, *supra* note 26, 823 U.N.T.S. at 234.

37. Every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the [World Heritage] list provided for in paragraph 2 of the Article. World Heritage Convention, *supra* note 31 art. 11, ¶ 1, 27 U.S.T. at 43, 11 I.L.M. at 1361.

38. For example, the UNESCO Director-General, Federico Mayor, has expressed dissatisfaction with the relatively few states ratifying the 1954 Convention and placing property under special protection. *Report by the Director-General of the Reinforcement of UNESCO's Action for the Protection of the World Cultural and Natural Heritage*, UNESCO Exec. Bd., 140th Sess., at 2-3, UNESCO Doc. 140 EX/13 (1992).

39. The cathedral was designed by Benjamin Henry Latrobe and constructed between 1805 and 1818. Latrobe, who also designed the Virginia State Capitol with Thomas Jefferson, and the Bank of Pennsylvania in Philadelphia, based his design for the cathedral, in part, on the Paris Pantheon. R. FURNEAUX JORDAN, *A CONCISE HISTORY OF WESTERN ARCHITECTURE* 278-79 (1969).

40. 1954 Hague Convention, *supra* note 13, art. 1(a), 249 U.N.T.S. at 242.

tions represented the "cultural heritage of peoples."⁴¹

The debate between proponents of cultural nationalism and cultural internationalism rages most intensely with respect to the trade and theft of cultural property. However, the distinction between the two points of view is also reflected in the conventions that protect international cultural property from other dangers, such as war. For that reason, this Comment will briefly review the major positions.

1. Cultural Nationalism

Cultural nationalists argue that because cultural property helps to define a people and their society, giving its members a link to their past, that property must remain within the nation.⁴² Uprooting or destroying the material traits of a nation or group⁴³ devastates not only the culture, but the people as well. This fear of cultural deprivation appears to have been realized in the former Yugoslavia. Croatian culture existed long before the state of Yugoslavia, and much of what the federal army has destroyed during the civil war dates from the thirteenth century and before.⁴⁴

41. Proceedings, *supra* note 24, at 513.

42. John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1911-13 (1985) [hereinafter *Elgin Marbles*]. See also John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1195-96 (1989)

[Art] links group members to their ancestors and heirs thereby both satisfying a basic need for identity and symbolizing shared values. What some groups see as a cultural artifact, other groups see as a living thing which enables them to achieve confidence in themselves and thus, able to imagine the future. *Id.* at 1195.

43. Within a group, "[members] of the group identify themselves—explain who they are—by reference to their membership in the group; and their well-being or status is in part determined by the well-being or status of the group." Moustakas, *supra* note 42, at 1193-94 (quoting Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 148 (1976)).

A group may or may not coincide with a nation. In the case of the former Yugoslavia, grouphood relates to the various ethnic groups, which may be identified, although not perfectly, with the republics Bosnia-Herzegovina, Croatia, Serbia and Slovenia. This identification is natural due to the fact that Yugoslavia was a man-made collection of diverse ethnic groups. Indeed, much of the cultural property destroyed during the civil war was built by Croats, Bosnians and Serbians long before Yugoslavia existed.

44. For example, portions of the Assumption Church in Varazdin date from the thirteenth to the eighteenth centuries. On September 19, 1991, it was demolished and burned to the ground. Republic of Croatia report, *supra* note 11, at 55. It is, of course, possible to argue that Yugoslavia assimilated Croatian culture and cultural property during the 72 years of that nation's existence.

Among international conventions to protect cultural property, the 1970 UNESCO Convention clearly espouses a nationalist stance.⁴⁵ While it recognizes the value in the interchange of cultural property,⁴⁶ the Convention states that "cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting."⁴⁷ Consequently, the Convention places the onus upon nations to protect their cultural property from theft and damage.⁴⁸

2. Cultural Internationalism

While conceding the importance of cultural property to a particular nation or group, cultural internationalists assert that those objects also represent a shared world heritage. As such, cultural property may be severable from its nation of origin,⁴⁹ and in fact should serve as "missionary art,"⁵⁰ to spread knowledge and appreciation of the culture abroad.⁵¹ Because they believe that the purpose of exporting cultural property is to teach, the internationalists presuppose that the material

45. See John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 842-46 (1986) [hereinafter *Two Ways of Thinking*].

46. "[T]he interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations. . . ." 1970 UNESCO Convention, *supra* note 26, preamble, 823 U.N.T.S. at 232.

47. *Id.*

48. See *id.*

49. *Two Ways of Thinking*, *supra* note 45, at 847. Cultural internationalists do not, however, generally support looting or the dismemberment of an object. See *id.* at 848-49.

50. *Elgin Marbles*, *supra* note 42, at 1920 n.124. In order to educate the world about the particular culture, however, the cultural property must be available for viewing and study. Thus, cultural internationalists would not support the claims of an acquiring nation that warehoused cultural objects. See *id.* at 1920-21.

51. Professor Merryman believes that such export of cultural property does not deprive the members of the nation or group which it represents the opportunity to study the objects. Studies, pictures and reproductions of the property still allow contact with the cultural property. *Id.* at 1913. Of course, one may argue that the property could remain in its nation of origin and be equally accessible to other nations through studies, pictures, etc.

A classic example of missionary art are the marble friezes taken from the Parthenon by Lord Elgin. While there remains great debate about the legality and morality of the acquisition and retention of the marbles, they undoubtedly awakened a great interest in Greek culture in Great Britain. See generally *Elgin Marbles*, *supra* note 42; Moustakas, *supra* note 42.

will be available for study and viewing, and that its possessors will demonstrate respect for it. Thus, if either of these presumptions is invalid, the transported object does not serve its goal and may in fact be in great danger.⁵²

The 1954 Hague Convention, the only international convention to deal squarely with the protection of cultural property during armed conflicts, justifies its existence on international culturalism grounds, declaring that:

damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world [and] that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection⁵³

On the other hand, Protocols I and II do not take an explicit stand on the question of heritage. Rather, they prohibit "acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples."⁵⁴ At least one delegate to the drafting convention of Protocol II appeared unclear about the approach the agreement should take.⁵⁵ Finally, as its title implies, the World Heritage Convention adopts an internationalist approach.⁵⁶

52. There is a great deal of concern that movable cultural property that was looted from Croatia will either be destroyed or thoughtlessly sold. Marcus Tanner, *Herculean Task Aimed at Saving Treasure Trove*, INDEPENDENT, Dec. 28, 1991, at 9.

53. 1954 Hague Convention, *supra* note 13, 249 U.N.T.S at 240.

54. Protocol I, *supra* note 14, art 53, 16 I.L.M. 1414; Protocol II, *supra* note 15, art. 16, 16 I.L.M. 1447 (emphasis added).

55. A Greek delegate stated that the "aim of [Article 53 of Protocol I and Article 16 of Protocol II] was to protect historic monuments and places of worship which constituted the cultural heritage of a people against all hostile acts That would cover unique architectural masterpieces of inestimable value in relation to the history of the country concerned and the culture of its people." Proceedings, *supra* note 24, at 511 (emphasis added). At another point in the debate, however, the same delegate recognized that internal armed conflicts threatened many of the "world's treasures." *Id.* at 515.

56. See World Heritage Convention, *supra* note 31, preamble, 27 U.S.T. at 40, 11 I.L.M. at 1358.

[D]eterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world,

III. DEVELOPMENT OF CURRENT INTERNATIONAL LAW PROTECTING CULTURAL PROPERTY

The recent devastation to cultural property in Croatia, Bosnia, Serbia and Kuwait, while abhorrent, is not unprecedented in the history of armed conflicts. In fact, throughout history, such ruin has occurred frequently. Principles, laws and treaties designed to protect these cultural treasures have evolved slowly, perhaps because the destruction of cultural property was considered an unfortunate, but expected, casualty of war.

A. Customary International Law

Customary international law is that standard of conduct that develops over time such that nations accept it as general practice and as legally binding.⁵⁷ Although customary law exists apart from conventional law,⁵⁸ the former is not necessarily incompatible with the latter. If a convention merely codifies existing customary law, the same rules bind non-parties to the agreement.⁵⁹ Additionally, should conventional law, even when it develops or modifies prior customary law, become regarded widely and accepted by nations not parties to the agreement, its rules create customary law binding upon the non-party states.⁶⁰

Customary law regarding cultural property originally permitted belligerents nearly unlimited right to pillage and destroy both public and private property.⁶¹ Cultural objects began to benefit from greater

...
[T]he existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong,

...
[P]arts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole,

...
57. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 12, § 102 & cmt. b, cmt. c. See also Robin C. Frazier, Note, *Kamibayashi v. Japan: Denying POW's Compensation*, 15 MD. J. INT'L L. & TRADE 111, 121 (1991).

58. Frazier, *supra* note 57, at 120.

59. Oscar Schachter, *International Law in Theory and Practice*, 178 RECEUIL DES COURS 91-92 (1982-V).

60. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 12, § 102 cmt. f.

61. See Stanislaw E. Nahlik, *International Law and the Protection of Cultural*

appreciation during the Renaissance and Enlightenment.⁶² By 1758, in fact, Swiss jurist Emeric de Vattel had condemned the unnecessary destruction of enemy property.⁶³

Devastation and destructions and seizures motivated by 'hatred and passion' however are clearly *unnecessary* and wrong; doubly wrong, indeed, if they also destroy some of the common property of mankind — its inheritance from the past, or its means of subsistence and enrichment in the present.⁶⁴

Despite such sentiments from Vattel and other scholars, and perhaps some agreement by military leaders, destruction and pillage of cultural property continued. During Napoleon's conquest of Europe, for example, he ordered his forces to loot valuable pieces of cultural property from conquered nations to fill the Louvre.⁶⁵ This action was condemned internationally, as was the British bombardment of Washington and other American cities in 1814.⁶⁶

By the mid-nineteenth century, however, customary international law clearly insulated the arts and sciences from the destruction that accompanied war.⁶⁷ Such devastation had been considered unsuitable for churches and other religious items, even prior to the Renaissance.⁶⁸ These broad categories of cultural property, namely, buildings and objects related to art, science and religion, were thus the first items protected under conventional international law.

B. Conventional International Law

The prototype for international conventional law protecting cultural property, and codifying the laws of war generally, was a national code. Promulgated in 1863, the Instructions for the Government of Armies of the United States in the Field, popularly known as the Lieber

Property in Armed Conflicts, 27 HASTINGS L.J. 1069, 1070-71 (1976).

62. *Id.* at 1071.

63. GEOFFREY BEST, HUMANITY IN WARFARE 65 (1980) (citing EMERIC DE VATTEL, *LE DROIT DES GENS, OU, PRINCIPES DE LA LOI NATURELLE; APPLIQUEE A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* 291, 292-93 (1758)); *see also* Nahlik, *supra* note 61, at 1071 n.8.

64. BEST, *supra* note 63, at 65.

65. Nahlik, *supra* note 61, at 1071. *See also* VISUAL ARTS, *supra* note 9, at 1-28 to 1-41.

66. Nahlik, *supra* note 61, at 1071.

67. *Id.* at 1071-72.

68. *Id.* at 1071.

Code, bound only United States troops.⁶⁹ The Lieber Code protected cultural property by classifying it as "private" and thus off-limits to appropriation by victorious troops.⁷⁰ Such property embraced "churches . . . 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 character⁷¹ . . . classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes."⁷²

The scope of cultural property expanded somewhat in the first international agreement concerning warfare - the 1874 Brussels Conference.⁷³ That agreement protected "institutions dedicated to religion . . . the arts and sciences, works of art and science, historic monuments," held warring parties responsible for marking their protected landmarks and implied that such property was not immune from attack if used for military purposes.⁷⁴ Although never ratified and therefore not binding, the Conference hoped to "serve as a basis for an ulterior exchange of ideas."⁷⁵ The impact of the Conference can be seen in the 1954 Hague Convention, which waives protection to cultural property if used for military purposes⁷⁶ and which provides for the marking of protected

69. General Order No. 100, promulgated Apr. 24, 1863, in ARMED CONFLICTS, *supra* note 18, at 3.

70. *Id.* at 8.

71. *Id.*

72. *Id.*

73. ARMED CONFLICTS, *supra* note 18, at 25.

74. *Id.* at 28, 29.

Art. 8. 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 or destruction of, or wilful damage to institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities.

Art. 17. In such cases [of sieges or bombardments] all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, . . . 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 by distinctive and visible signs to be communicated to the enemy beforehand.

75. *Id.* at 27.

76. If one of the High Contracting Parties commits, in respect of any item of cultural property under special protection, a violation of the obligations under Article 9 [concerning the use of such property or its surroundings for military purposes] the opposing Party shall, so long as this violation persists, be released from the obligation to ensure the immunity of the property concerned.

property.⁷⁷

Six years later, the Institute of International Law borrowed from the Brussels Conference when it adopted the Laws of War on Land (Oxford Manual).⁷⁸ The Oxford Manual specifically stated that it had not sought to progress the rules of war, but rather simply had codified the existing customary law as guidance for belligerents.⁷⁹ In terms of cultural property, the Manual required only that parties spare, if possible, buildings dedicated to religion, art and science.⁸⁰

Subsequent conventions regarding the laws of war adopted similar definitions of cultural property. Thus, the 1899 Convention with Respect to the Laws and Customs of War on Land protected buildings devoted to religion, science and charity.⁸¹ A subsequent 1907 convention only slightly extended the scope of protection.⁸²

By 1923, international law recognized the impact of air warfare and updated the Hague Conventions in the Rules of Air Warfare.⁸³ Articles 25 and 26 of the Rules significantly emphasized protection of

1954 Hague Convention, *supra* note 13, art. 11, ¶ 1, 249 U.N.T.S. at 248.

77. *Id.*, art. 6, 249 U.N.T.S., at 244 ("In accordance with the provisions of Article 16, cultural property may bear a distinctive emblem so as to facilitate its recognition.").

78. The Laws of War on Land, *adopted*, Sept. 9, 1880, *reprinted in* ARMED CONFLICTS, *supra* note 18, at 35.

79. *Id.* at 36-37 ("Rash and extreme rules will not, further, be found therein. The Institute has not sought innovations in drawing up the *Manual*; it has contented itself with stating clearly and codifying the accepted ideas of our age so far as this appeared allowable and practicable.").

80. *Id.* at 41.

81. July 29, 1899, 32 Stat. 1803, T.S. No. 403. The 1899 Convention reads, in pertinent part:

Art. 27. In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity . . . provided they are not used at the same time for military purposes.

The besieged should indicate these buildings or places by some particular and visible signs which should previously be notified to the assailants.

82. Convention with Respect to the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539.

Art. 27. In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, and science, . . . *historic monuments* . . . 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.

(emphasis added to denote difference in language between 1899 and 1907 conventions).

83. *Drafted* Dec. 1922-Feb. 1923, *reprinted in* ARMED CONFLICTS, *supra* note 18, at 139.

cultural property by providing for zones of protection around monuments in addition to inspection committees.⁸⁴ Although never ratified, the Rules of Air Warfare clearly foreshadowed the 1954 Hague Convention, which provides for zones of protection and inspection committees.⁸⁵

84. *Id.* at 143.

Art. 25. In bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science, . . . [and] historic monuments, . . . provided such buildings, objects or places are not at the time used for military purposes. Such buildings, objects and places *must* by day be indicated by marks visible to aircraft

Art. 26. The following special rules are adopted for the purpose of enabling states to obtain more efficient protection for important historic monuments situated within their territory, provided they are willing to refrain from the use of such monuments and surrounding zone for military purposes, and to accept a special regime for their inspection.

(1) A state shall be entitled, if it sees fit, to establish a zone of protection round such situated in its territory. Such zones shall in time of war enjoy immunity from bombardment.

. . . .

(8) An inspection committee consisting of three neutral representatives accredited to the state adopting the provisions of this article, or their delegates, shall be appointed for the purpose of ensuring that no violation is committed of the provision of paragraph 7 [prohibiting a state from utilizing the monuments and zones for any military purpose]

85. The 1954 Hague Convention provides for similar protections of cultural property located near strategic military areas.

If any cultural property mentioned in paragraph 1 of the present Article is situated near an important military objective as defined in the said paragraph, it may nevertheless be placed under special protection if the High Contracting Party asking for that protection undertakes, in the event of armed conflict, to make no use of the objective and particularly, in the case of a port, railway station or aerodrome, to divert all traffic therefrom

1954 Hague Convention, *supra* note 13, art. 8, ¶ 5, 249 U.N.T.S. at 240. The Regulations to the Convention specify the personnel involved in these protective measures.

As soon as any High Contracting Party is engaged in an armed conflict to which Article 18 [governing international armed conflict] applies:

(a) It shall appoint a representative for cultural property situated in its territory; if it is in occupation of another territory, it shall appoint a special representative for cultural property situated in that territory;

(b) The Protecting Power acting for each of the Parties in conflict with such High Contracting Party shall appoint delegates accredited to the latter

(c) A Commissioner-General for Cultural Property shall be appointed to such High Contracting Party

While international conventions had protected cultural property since 1874, it was not until 1935 that nations drafted an agreement that specifically addressed such heritage. The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact) was a Pan-American agreement whose purpose was the "universal adoption of a flag . . . in order thereby to preserve in any time of danger all nationally and privately owned unmovable monuments which form the cultural treasure of peoples."⁸⁶ Specifically, the Roerich Pact provided that "historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered neutral, and as such respected and protected by belligerents,"⁸⁷ unless used for military purposes.⁸⁸

Another convention, addressing only the protection of cultural property, was drafted by the International Office of Museums, under the League of Nations.⁸⁹ This work was interrupted by the second world war, a conflict that witnessed wanton devastation and looting of cultural property.⁹⁰ In response, post-war international law recognized

1954 Hague Convention Regulations, *supra* note 35, art. 2, 249 U.N.T.S. at 270, 272.

86. Apr. 15, 1935, 49 Stat. 3267.

87. *Id.* art. 1.

88. *Id.* (Article 5 provides that "the monuments and institutions mentioned in Article 1 shall cease to enjoy the privileges recognized in the present Treaty in case they are made use of for military purposes.").

89. Nahlik, *supra* note 61, at 1076.

90. Germany first attacked London and, later in "Baedeker Raids" during April 1942, other British towns such as Bath, Exeter and Norwich. German press claimed that the attacks targeted art and historic monuments, as well as residential districts. Allied destruction of towns such as Nuremberg, Dresden, Bonn and Cologne were equally devastating to cultural property, but explained by Britain as necessary to hit military and other legitimate objectives. J. M. SPAIGHT, AIR POWER AND WAR RIGHTS 286-94 (3d ed. 1947).

Regarding the bombing of Nuremberg, a contemporary newspaper account lamented, "The old part of Nuremberg, the ancient walled city, the first medieval thing in Germany, has been all but obliterated. The venerable church of St. Sebaldus still smouldered when we entered. It and St. Lorenz and the Frauenkircher, a trinity of noble churches, are in ruins as is also the Rathaus."

THE TIMES (London), May 4, 1945, *in id.* at 294.

Another commentator, however, had expressed the contrary and always competing view, "Better the sight of one extra company of British troops returning safe and sound from the war than the prospect of seeing the Rathaus at Lubeck in one piece when the fighting ends."

THE DAILY MIRROR, July 7, 1943, *in id.*, at 293.

The war crimes trials at Nuremberg included the prosecutions of those who looted and destroyed cultural property throughout Europe. VISUAL ARTS, *supra* note 9, at 1-43 to 1-63. Recently, the United Nations has called for war crimes prosecutions in the

the need for a comprehensive international agreement to protect cultural property during armed conflicts.⁹¹ Thus was born the 1954 Hague Convention.

IV. THE HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT⁹²

A. Provisions

While the 1954 Hague Convention protects property during armed conflicts, it relies upon the peacetime actions of individual states to accomplish this goal. For example, countries must "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."⁹³ A part of this peacetime preparation must include education of the armed forces and preparation of military regulations concerning cultural property.⁹⁴ Finally, special protection⁹⁵ may be granted to a limited amount of cultural property "of very great importance."⁹⁶ This property may not be situated near locations of military or industrial importance, or the Party must agree to make no use of the strategic area during an armed conflict.⁹⁷ Protected cultural property may be marked with the

Yugoslav conflict. Thomas L. Friedman, *Leading the U.S. into the Balkans, on Tiptoes*, N.Y. TIMES, Feb. 28, 1993, § 4, at 1. It remains to be seen whether, should such trials occur, they would include prosecution for the destruction of cultural property.

91. ARMED CONFLICTS, *supra* note 18, at 525.

92. There are actually four instruments that comprise the "Hague Convention":

1. Final Act of the Conference, May 14, 1954, 249 U.N.T.S. 215.

2. The Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240; with Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 270.

3. Protocol for Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358.

4. Resolutions Adopted by the Conference, May 14, 1954, 249 U.N.T.S. 236.

93. 1954 Hague Convention, *supra* note 13, art. 3, 249 U.N.T.S. at 242.

94. *Id.* art. 7, 249 U.N.T.S. at 246.

95. *Id.*

96. *Id.* art. 8, 249 U.N.T.S. at 246, 248. Special protection is granted once the property is entered on the International Register of Cultural Property under Special Protection maintained by UNESCO. *Id.* art. 8, ¶ 6, 249 U.N.T.S. at 248. Unfortunately, few nations have taken advantage of this special protection. 1984 Reports, *supra* note 1, at 6, 9, 11.

97. 1954 Hague Convention, *supra* note 13, art 8, ¶¶ 1, 5, 249 U.N.T.S. at 246,

“distinctive emblem of the Convention.”⁹⁸

In the event of an armed conflict, the High Contracting Parties must “undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties.”⁹⁹ Such respect prohibits any use of the property or its surroundings that exposes it to damage or destruction.¹⁰⁰ Additionally, a Party may not direct an act of hostility¹⁰¹ or reprisal¹⁰² against the property. Finally, a Party must prevent “theft, pillage or misappropriation . . . [and] acts of vandalism” of cultural property.¹⁰³

Cultural property, including that under special protection, may lose its immunity in the face of military necessity. Imperative military necessity waives a Party’s obligations under Article 4, section 1, that is the duty to refrain from activities that expose the property to damage and from those directing hostilities against the property.¹⁰⁴ Property under special protection may lose its immunity in “exceptional cases of unavoidable military necessity.”¹⁰⁵

Should the armed conflict be of an international nature, the 1954 Hague Convention Regulations provide for three very important responses: 1) each High Contracting Party engaged in the armed conflict must appoint a representative for cultural property, 2) each Party’s Protecting Power must appoint delegates accredited to the Party and 3) UNESCO must appoint a Commissioner-General for Cultural Property from a list of individuals maintained by UNESCO.¹⁰⁶ The Commissioner-General and delegates monitor violations of the Convention and seek to end such breaches.¹⁰⁷ In addition, the Commissioner-General

248.

98. *Id.* art. 6, art 16 (describing the emblem), art. 17 (explaining use of the emblem), 249 U.N.T.S. at 244, 246, 252, 254.

99. *Id.* art. 4, ¶ 1, 249 U.N.T.S. at 242, 244.

100. *Id.*

101. *Id.*

102. *Id.* art. 4, ¶ 4, 249 U.N.T.S. at 244.

103. *Id.* art. 4, ¶ 3, 249 U.N.T.S. at 244.

104. *Id.* art. 4, ¶¶ 1, 2, 249 U.N.T.S. at 242-44.

105. *Id.*, art. 11, ¶ 2, 249 U.N.T.S. at 250. Whether or not such a necessity exists is determined by the officer commanding a force. *Id.*

106. 1954 Hague Convention Regulations, *supra* note 35, art. 2, 249 U.N.T.S. at 270, 272.

107. *Id.* arts. 5-6, 249 U.N.T.S. at 272, 274.

Art. 5. The delegates of the Protecting Powers shall take note of violations of the Convention, investigate, with the approval of the Party to which they are accredited, the circumstances in which they have occurred, make representations locally to secure their cessation and, if necessary, notify the Commissioner-General of such violations. They shall keep him informed of their activities.

may appoint inspectors or experts for special missions.¹⁰⁸ Under Article 23 of the Convention itself, any High Contracting Party may request UNESCO technical assistance to organize the security of cultural property or in any way implement the Convention.¹⁰⁹

B. History of Implementation

1. Middle East

The full protection of the Convention has been invoked only once in its nearly forty-year history.¹¹⁰ During the 1967 war, Israel occupied territory in Syria, Jordan (Jerusalem), Lebanon and Egypt (Gaza Strip). Each of these sites, especially the old city of Jerusalem and the archaeological sites of Tyre in Lebanon, quickly attracted concern for the resident cultural property. Because the war and resulting occupations constituted international conflicts¹¹¹ under Article 5¹¹² and Article

Art. 6. 1. The Commissioner-General for Cultural Property shall deal with all matters referred to him in connexion with the application of the Convention, in conjunction with the representative of the Party to which he is accredited and with the delegates concerned.

2. He shall have powers of decision and appointment in the cases specified in the present Regulations.

3. With the agreement of the Party to which he is accredited, he shall have the right to order an investigation or to conduct it himself.

4. He shall make any representations to the Parties to the conflict or to their Protecting Powers which he deems useful for the application of the Convention.

108. *Id.* art. 7, 249 U.N.T.S. at 274.

109. 1954 Hague Convention, *supra* note 13, art. 23, 249 U.N.T.S. at 258.

Art. 23. 1. The High Contracting Party may call upon [UNESCO] for technical assistance in organizing the protection of their cultural property, or in connexion 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 programme and by its resources.

2. The Organization is authorized to make, on its own initiative, proposals on this matter to the High Contracting Parties.

110. 1984 Reports, *supra* note 1, at 9.

111. For a criticism of this conclusion, see James A. R. Nafziger, *UNESCO-Centered Management of International Conflict Over Cultural Property*, 27 HASTINGS L. J. 1051, 1058-59 (1976).

112. 1954 Hague Convention, *supra* note 13, art. 5(1), 249 U.N.T.S. at 244. Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.

18¹¹³ of the 1954 Hague Convention, UNESCO accredited two Commissioners-General in 1967, one to Israel and the other to the Arab states of Egypt, Jordan, Lebanon and Syria.¹¹⁴ When UNESCO terminated the mandates of the Commissioners-General in 1977, negotiations began regarding their replacements.¹¹⁵ Despite the supervision of UNESCO under the 1954 Hague Convention, the occupied countries continued to report damage to cultural property.

Concern arose in 1967 that Israeli excavations threatened the physical support of various Moslem structures of historical and religious significance,¹¹⁶ in particular the walls of the Haram Esh-Sharif, which in turn endangered the Al Aqsa Mosque, the Moslem Museum, the El-Fakhariyya Minaret¹¹⁷ and the Dome of the Rock.¹¹⁸ As a result, the Security Council requested that Israel cease all such excavations¹¹⁹ and UNESCO reminded the country of its obligations under the 1954 Hague Convention.¹²⁰

The UNESCO Executive Board offered the Parties technical assistance under Article 23 to implement the 1954 Hague Convention.¹²¹ The Board offer of "technical" assistance included "[seeking] the

113. Article 18 applies to "declared war or . . . any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them." *Id.*, art. 18, ¶ 1, 249 U.N.T.S. at 254.

114. 1967 U.N.Y.B. 852, U.N. Sales No. E.68.I.1. *See also* 1984 Reports, *supra* note 1, at 6.

115. 1984 Reports, *supra* note 1, at 6.

116. Nafziger, *supra* note 111, at 1052.

117. 1971 U.N.Y.B. 182, U.N. Sales No. E.73.I.1; 1981 U.N.Y.B. 316, U.N. Sales No. E.84.I.1.

118. Nafziger, *supra* note 111, at 1052. According to Islam, the Dome of the Rock marks the site where Muhammad ascended to heaven. For Jews, it is the place where Abraham prepared to sacrifice his son Isaac. 3 ENCYCLOPAEDIA BRITANNICA (MICROPAEDIA) 612 (1974). Together with the Al-Aqsa Mosque it is the third holy place of Islam. 1 ENCYCLOPAEDIA BRITANNICA (MICROPAEDIA) 463 (1974).

119. The Security Council adopted several resolutions. *See, e.g.*, S.C. Res. 252, at 9 U.N. Doc. S/INF/23/Rev. 1 (1968). Resolution 252 states, in part:

The Security Council

. . . .

2. *Considers* that all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem are invalid and cannot change that status;

3. *Urgently calls upon* Israel to rescind all such measures already taken and to desist forthwith from taking any further such action which tends to change the status of Jerusalem;

120. Nafziger, *supra* note 111, at 1061.

121. *Id.* at 1062.

means of ensuring the rigorous and effective application of the said Convention."¹²² Both Israel and the Arab nations, however, construed the offer in a limited sense, that is an offer of scientific support, and rejected UNESCO's proposal to assist them in settling disputes.¹²³ The Director-General has, however, sent a personal representative to monitor the situation.¹²⁴ Excavation has continued along the wall of the Haram Esh-Sharif.¹²⁵

2. Cambodia

In June of 1970, in the wake of the U.S. invasion, Cambodia requested UNESCO technical assistance under Article 23¹²⁶ of the 1954 Hague Convention.¹²⁷ In response, the Director-General of UNESCO sent a mission to that country during June and July of that year.¹²⁸ The mission suggested that a special corps of personnel was necessary to protect Cambodia's cultural property.¹²⁹ It also urged the construction of concrete shelters for movable cultural property and the marking of other property with the Hague emblem under Article 6.¹³⁰ Further consultant missions were planned to remove vulnerable cultural property from museums and to develop a long-range protection plan.¹³¹

The success of the Convention in Cambodia is unclear. By 1975, much of the country was in ruins.¹³² More recently, UNESCO launched a campaign to preserve and restore Angkor Wat, perhaps the most important cultural site in the country.¹³³

122. *Id.*

123. *Id.*

124. *Jerusalem and the Implementation of 25 C/Resolution 3.6: Report by the Director-General*, UNESCO Exec. Bd., 135th Sess., Provisional Agenda Item 5.3.1, at 2, U.N. Doc. No. 135 Ex/11 (1990).

125. *Id.* at 3-4.

126. *See supra* note 109.

127. *Information on the Implementation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict* 7, U.N.E.S.C.O. Doc. CC/MD/41 (1979) (on file with the Library of Congress) [hereinafter 1979 Reports].

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. WALTER LAFEBER, *AMERICA, RUSSIA AND THE COLD WAR 1945-1980* 269 (4th ed. 1980).

133. *Unesco Launches Appeal for Preservation of Angkor*, UNESCO-PRESSE, Feb. 2, 1992. Angkor was the religious and government center of the Khmer kings from the ninth to the thirteenth century. The site evidences more than 300 years of architectural and artistic development. 1 *NEW ENCYCLOPAEDIA BRITANNICA* 885 (1974). The city was abandoned sometime between the thirteenth and the sixteenth centuries. Angkor

3. Other

Requests for UNESCO technical assistance under Article 23 have been rare. Rather, in most conflicts, the Director-General has merely reminded the parties of their obligations under the Convention. For example, during hostilities in December 1971, the Director-General telegraphed India and Pakistan, both High Contracting Parties,¹³⁴ concerning their duties under the Agreement.¹³⁵ Again, in July 1974, he reminded Cyprus and Turkey of their obligations, especially those under Article 4¹³⁶ to respect cultural property.¹³⁷

In the 1980s, the Iran-Iraq War and the invasion of Afghanistan prompted the Director-General's concern.¹³⁸ In the former conflict, he advised both belligerents of their duties under Article 4.¹³⁹

Despite the international character of the conflicts from Cambodia to Afghanistan, the protections of Article 2 of the Regulations have never been fully implemented. While a former Director-General implied that this dereliction rests upon the shoulders of the High Contracting Party belligerents,¹⁴⁰ the text of the Convention clearly states otherwise.

Article 2 of the Regulations provides that once a High Contracting Party enters an armed conflict, the Protecting Powers of each

Wat, considered perhaps the most important of the city's temples, was built between 1113 and 1150. *Id.* at 886. The site was maintained by monks and was an important pilgrimage location. *Id.* Exploration and restoration of the site began after the 1863 establishment of French colonial power. *Id.*

134. 1979 Reports, *supra* note 127, at 8-9.

135. *Id.*

136. 1954 Hague Convention, *supra* note 13, art. 4, 249 U.N.T.S. at 244.

137. 1979 Reports, *supra* note 127, at 7.

138. In Afghanistan, a report to the Secretary-General of the United Nations urged that UNESCO be charged with responsibility for protecting that country's cultural property under the 1954 Hague Convention. 1986 U.N.Y.B. 754-55, Sales No. E.90.1.1.

139. 1984 Reports, *supra* note 1, at 7-8.

140. While lamenting the fact that few Parties to the Convention have registered property for special protection under Article 8 or requested Article 23 technical assistance, former Director-General Amadou-Mahtar M'Bow stated:

On the occasion of a number of armed conflicts between States Parties, or of conflicts not of a generally recognized international character, my predecessors and myself have reminded the parties of the need for applying the provisions of the Convention and have mentioned the possibility of Unesco's technical cooperation.

Amadou-Mahtar M'Bow, former Director-General of UNESCO Address at the Thirtieth Anniversary Celebration of the 1954 Hague Convention (May 14, 1984), *in id.* at 11.

party *shall* appoint delegates and a Commissioner-General *shall* be appointed for each High Contracting Party.¹⁴¹ The only responsibilities placed upon the High Contracting Party are to appoint a representative for cultural property¹⁴² and to agree upon the choices for delegates and Commissioner-General.¹⁴³ Should the parties fail to agree on a Commissioner-General, they must request that the President of the International Court of Justice appoint that position, pending agreement by the Parties.¹⁴⁴ While Parties could derail the protections by refusing to consent to the appointed Commissioner-General, it does not appear that the protections under Article 2 of the Regulations were even minimally applied, except in the Middle East conflict.

V. YUGOSLAVIA

A. *Background of War*

On December 1, 1918, Serbia united with Croatia and Slovenia to form Yugoslavia out of the extinct Austro-Hungarian Empire.¹⁴⁵ Croatia, which had declared its own independence the previous October 28,¹⁴⁶ joined the union, although concerned about Serbian refusal to assure Croatian and Slovenian equality with Serbia.¹⁴⁷ Enmity between the Croats and Serbs raged during the years between the world wars, with Croatia eventually seeking assistance from Mussolini.¹⁴⁸ Despite attempts at a working relationship between Croats and Serbs, the country could not strengthen itself adequately to resist German occupation.¹⁴⁹ During the post-war years under Tito, Croat-Serb hostility was suppressed,¹⁵⁰ but by his death in May 1980, Croatian nationalism was

141. 1954 Hague Convention Regulations, *supra* note 35, art. 2, 249 U.N.T.S. at 270, 272.

142. *Id.* art. 2, ¶ (a), 249 U.N.T.S. at 270.

143. *Id.*, arts. 3-4, 249 U.N.T.S. at 272.

144. *Id.* art. 4, ¶ 2, 249 U.N.T.S. at 272.

Should the Parties fail to reach agreement within three weeks from the beginning of their discussions on this point, they shall request the President of the International Court of Justice to appoint the Commissioner-General who shall not take up his duties until the Party to which he is accredited has approved his appointment.

145. H. STUART HUGHES, *CONTEMPORARY EUROPE: A HISTORY* 113 (5th ed. 1981).

146. *Id.*

147. *Id.*

148. *Id.* at 337.

149. *Id.*

150. Isabelle Lagun, *Yugoslav's Ethnic Conflict Poses Threat to the Stability of Europe*, 13 U.N. OBSERVER & INT'L REP. 3 (Oct. 1991).

again stirring.¹⁵¹ With the easing of Communist controls after 1989, the old enmity flared again, and culminated when Croatia declared independence on June 25, 1991.¹⁵² Bosnia followed suit in December of the same year.¹⁵³

B. Destruction of Cultural Property

One of the earliest pieces of cultural property damaged in the war was the Fortress at Stara Gradiska, a sixteenth century bastion that guarded passage across the Sava River.¹⁵⁴ The Fortress flew the protective flag of Article 17 of the Hague Convention.¹⁵⁵ The Convention's emblem marked several other sites that fell victim to Serbian-controlled federal forces.¹⁵⁶

Archaeological sites protected under Article 1¹⁵⁷ also suffered damage. In Vukovar, locations dating to 2150 B.C.¹⁵⁸ and medieval times¹⁵⁹ were damaged by federal armed forces attacks, as was a complex of Roman villas in Split.¹⁶⁰

151. HUGHES, *supra* note 145, at 558.

152. Lagun, *supra* note 150, at 3.

153. *Serb-Led Presidency Drafts Plan for New and Smaller Yugoslavia*, N.Y. TIMES, Dec. 26, 1991, at A10.

154. Republic of Croatia report, *supra* note 11, at 9. The Roof of the structure was hit by a missile on August 17, 1991.

155. *Id.* 1954 Hague Convention, *supra* note 13, art. 17, ¶ 2, 249 U.N.T.S. at 254.

156. Examples include:

Isle of Lokrum. A Benedictine monastery stood on this site in the eleventh century. French occupied the area in the 1800s and Austrian Archduke Maximilian converted part of the monastery into a castle and park. The monastery was shelled on November, 8, 1991. Republic of Croatia report, *supra* note 11, at 12.

Sponza-Divona Palace, Dubrovnik. Built between 1515-1522 in Gothic-Renaissance style, the palace facade and roof were hit by cannon shells from the Yugoslav navy on October 23, 1991, and damaged again on December 6. *Id.* at 16.

The remains of a Cistercian Abbey in Topusko where a church or monastery has stood since at least 1192, suffered damage in a mortar attack. *Id.* at 26. Throughout the autumn of 1991, paramilitary groups and later the Yugoslav army and airforce shelled the old city of Vukovar. The city along the Danube contained archaeological sites from Neolithic times, as well as medieval and Turkish buildings. *Id.* at 40.

157. *See supra* text accompanying note 25.

158. Vucedol Archaeological Site, containing Copper Age culture bore shell damage. Republic of Croatia report, *supra* note 11, at 9.

159. Ancient cemeteries—necropolises—suffered damage. *Id.* at 41.

160. Air raids on a nearby runway created craters up to one meter in depth. *Id.* at

Sacred buildings accounted for the most frequent targets of damage and destruction in Croatia.¹⁶¹ The Renaissance St. Ann Church in Dubrovnik burned to the ground following an attack on October 27, 1991.¹⁶² A similar fate awaited the Assumption Church in Osijek.¹⁶³ Another Osijek church, St. Dimitrius, fell to retreating federal troops who set it ablaze with incendiary bullets.¹⁶⁴ Churches that survived lost their inventories to looters.¹⁶⁵ Sadly, cemeteries did not avoid desecration.¹⁶⁶

Among civilian structures of cultural importance, irreplaceable traces of Croatian culture have vanished at the hands of the federal forces. The Eltz Castle in Vukovar, built in the eighteenth century in late Baroque-Classical style and which contained the Vukovar City Museum, was damaged and later burned to the ground.¹⁶⁷ Likewise, arboreta in Dubrovnik, which dated from the sixteenth century and which Lord Byron admired,¹⁶⁸ burned, consuming specimens of five hundred-year-old flora.¹⁶⁹

Sites of more recent Croatian history perished also. For example, the ZAVNOH Memorial in Karlovac, where the Antifascist Council for National Liberation of Croatia met in 1944, succumbed to attack.¹⁷⁰ Also destroyed was an important site of the Yugoslav labor movement.¹⁷¹

The brunt of the federal attack in Croatia, however, fell on Du-

11.

161. *Id.* at 2. As of January 3, 1992, 57 churches and monasteries had been destroyed, 74 were heavily damaged and 52 slightly damaged. Many others had been damaged, but were inaccessible to determine the extent of the devastation. *Id.*

162. *Id.* at 21.

163. *Id.* at 34-35.

164. *Id.* at 39.

165. At the 15th Century Gothic St. Mary Church in Vocin, trucks carried away the inventory. *Id.* at 9.

166. The Jewish cemetery in Osijek, the oldest such cemetery in northwestern Croatia, was damaged by mortar shells in October and November 1991. *Id.* at 34. A Dubrovnik Jewish cemetery dating from 1678 also received shell damage. *Id.* at 47. The Eltz Tomb Chapel in the Vukovar graveyard, dating from 1909, was destroyed by mortar shells. *Id.* at 59-60.

167. *Id.* at 10.

168. Anna Somers, *The Arts: A Culture in the Crossfire*, DAILY TELEGRAPH, Oct. 15, 1991, at 119.

169. Republic of Croatia report, *supra* note 9, at 22.

170. The ZAVNOH later became a supreme government body of Croatia and some of its positions have been incorporated in the new constitution of the Republic of Croatia. *Id.* at 26.

171. Worker's Centre, Vukovar. *Id.* at 40-41.

brovnik, especially its old city center.¹⁷² The old city, a tourist attraction on the Adriatic Sea, is included on the World Heritage List, along with another historic coastal town, Split.¹⁷³ Beginning on October 14, 1991, the federal forces shelled the old city center,¹⁷⁴ which was of no strategic value.¹⁷⁵ On December 6, 1991, another destructive shelling began; by its end 30% of the old city was in ruin or greatly damaged, and another 10% was ablaze.¹⁷⁶

With the spread of hostilities to Bosnia-Herzegovina, cultural property in that territory also fell prey to destruction. Heavy damage has been wrought in Bascarsija, the historic center of Sarajevo.¹⁷⁷ In addition, Stari Most, the historic center of Mostar, and dating from the sixteenth century, has also received damage.¹⁷⁸

Serbia also claims that property meaningful to its culture has fallen to attacks by Croatians. The Serbs, for example, appealed to the United Nations concerning damage to the Jasenovac memorial complex at the site of the former Ustasha concentration camp.¹⁷⁹

It has been clear to Croatians, Bosnians, Serbs and other observers that their heritage has not been an inevitable casualty of the fighting, but rather the victim of deliberate attack by opposing forces. Two reasons may explain the Serbs' motivation for these violations of the 1954 Hague Convention. First, Serbs control the federal forces,¹⁸⁰ and thus may direct age-old animosity against Croatian and Bosnian cultural property. The civil war continues the bitter ethnic conflicts among the Croats, Bosnian-Muslims and the Serbs,¹⁸¹ and destruction of opponents' cultural property may be a particularly gratifying way to avenge

172. For a brief discussion of Dubrovnik's history and cultural importance, see Jean d'Ormesson, *S.O.S. Dubrovnik; Yugoslavia's City Under Siege*, UNESCO COURIER, Mar. 1993, available in LEXIS, Nexis Library.

173. WHY PRESERVE THE PAST?, *supra* note 34, at 246.

174. Republic of Croatia Report, *supra* note 11, at 1.

175. *New Artillery Assault Launched on Historic Dubrovnik*, AGENCE FRANCE PRESSE, Oct. 25, 1991, available in LEXIS, Nexis Library.

176. *Dubrovnik Heavily Attacked Report Unesco Observers*, UNESCOPRESSE, Dec. 13, 1991.

177. *Review of the Application of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954)*, UNESCO Executive Committee 140th Sess., Provisional Agenda Item 5.5.3, at 2, U.N. Doc. 140 Ex/26 (1992) [hereinafter *Review of the Application of the Convention*].

178. *Id.*

179. *Yugoslav Government Sends Memorandum to UN and Others on "Genocide" in Croatia*, BBC, Feb. 3, 1992, available in LEXIS, Nexis Library.

180. *Fighting Rages in Dubrovnik as Third Session of EC Talks Open*, AGENCE FRANCE PRESSE, Oct. 25, 1991, available in LEXIS, Nexis Library.

181. See *supra* notes 145-153 and accompanying text.

old wrongs.¹⁸² Second, several of the sites which the federal government targeted in Croatia were tourist attractions. Destruction of these locations deprives an independent Croatia of both prestige and tourist dollars.¹⁸³

In response to charges of deliberate destruction and violation of international law, the federal government claimed its attacks were justified under military necessity. In particular, Serbs alleged that Croats sought shelter in historic monuments and established military installations there.¹⁸⁴ Such use, if true, may have allowed the government to attack the sites under imperative military necessity.¹⁸⁵ Indeed, such use by the Croats or Bosnians would itself have violated their obligation to respect cultural property.¹⁸⁶ In addition, Serbs alleged that Croats themselves bombed some of the sites.¹⁸⁷ Again, such Croatian hostility directed against cultural property would violate Article 4 of the Convention.¹⁸⁸

C. *International Protection in Internal Conflicts*

1. Article 19

The 1954 Hague Convention's Article 19 extends protection to cultural property during armed conflicts not of an international character,¹⁸⁹ but requires only that the combatants adhere to Article 4 provisions respecting cultural property.¹⁹⁰ That is, combatants must not expose cultural property to danger nor direct hostility against it except under imperative military necessity.¹⁹¹ In addition, they must protect it from pillage and vandalism, and may not direct reprisals against it.¹⁹²

The supervision of delegates and Commissioners-General provided

182. A spokesperson for the organization Art Restoration for Culture and Heritage remarked that, "The army is trying to obliterate every trace of Croatian culture. It's an attack on history itself." Tanner, *supra* note 52, at 9.

183. Telephone Interview with Rebecca Anderson, Program Administrator, World Monuments Fund (Jan. 22, 1992).

184. William H. Honan, *Dubrovnik, Cultural Hostage in Yugoslav Turmoil*, N.Y. TIMES, Dec. 2, 1991, at C14.

185. 1954 Hague Convention, *supra* note 13, art. 4, ¶ 2, 249 U.N.T.S. at 244.

186. *Id.* art. 4, ¶ 1, 249 U.N.T.S. at 242, 244.

187. *Yugoslav Army Rejects Authenticity of Report*, UPI, Dec. 5, 1991, available in LEXIS, Nexis Library.

188. *See supra* note 13, art. 4, 249 U.N.T.S. at 242, 244.

189. *Id.* art. 19, 249 U.N.T.S. at 256.

190. *Id.*

191. *See supra* note 104 and accompanying text.

192. *Id.*

under Article 2 of the Regulations¹⁹³ do not apply to Article 19 conflicts.¹⁹⁴ Thus, combatants in an internal conflict involving a High Contracting Party may only request assistance under Article 23.¹⁹⁵ The appointment of delegates and Commissioners-General obviously appeared too invasive of a nation's sovereignty.

2. The Law of Internal Conflicts

International law has limited outside involvement in the armed conflicts of another nation, since such involvement inherently intrudes upon the domestic affairs of the latter.¹⁹⁶ In fact, third party intervention, or premature recognition of a rebelling party, constituted a violation of customary international law.¹⁹⁷ Prior to the nineteenth century, customary law recognized a state of war only between sovereign nations,¹⁹⁸ as a result of which the customary laws of war did not apply to internal conflicts.¹⁹⁹

Third parties chafed at these restrictions on internal armed conflicts, since the effects of such confrontations did not remain within the borders of the afflicted nation.²⁰⁰ As a result of this frustration, customary international law developed the doctrine of belligerent recognition.²⁰¹ Recognition of rebelling parties by the incumbent government triggered the laws of war and allowed foreign entities to assist the government or the rebels.²⁰² Such rights, however, rarely arose under the doctrine, as incumbent governments naturally were loathe to recognize

193. See *supra* note 106 and accompanying text.

194. 1954 Hague Convention Regulations, *supra* note 35, art. 2, 249 U.N.T.S. at 270. ("As soon as any High Contracting Party is engaged in an armed conflict to which Article 18 of the Convention applies . . ."). Article 18 applies in the "event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, . . . all cases of partial or total occupation of the territory of a High Contracting Party . . ." 1954 Hague Convention, *supra* note 13, art. 18, ¶¶ 1-2, 249 U.N.T.S. at 254.

195. See *supra* note 104.

196. K. Edwin Kilgore, Comment, *Law of War—Geneva Convention Signatories Clarify Applicability of Laws of War to Internal Armed Conflict*, 8 GA. J. INT'L & COMP. L. 941 (1978).

197. LINDA B. MILLER, *WORLD ORDER AND LOCAL DISORDERS: THE UNITED NATIONS AND INTERNAL CONFLICTS* 22 n.20 (1967).

198. Kilgore, *supra* note 196, at 941.

199. *Id.* at 942 (discussing neutrality).

200. *Id.*

201. *Id.* See also MILLER, *supra* note 197, at 22 n.20.

202. Kilgore, *supra* note 196, at 942-43. MILLER, *supra* note 197, at 22 n.20.

groups that threatened their existence.²⁰³

With the advent of the United Nations, new questions arose concerning internal conflicts.²⁰⁴ In fact, excluding the U.N. from such conflicts appeared to contradict the very reason for the organization's existence—to preserve international peace and security.²⁰⁵ International security suffers in the wake of civil wars and other internal armed conflicts, as third parties seek to protect or advance their interests.²⁰⁶ For example, the European Community expressed apprehension that changes in the Yugoslavian border would rekindle old boundary disputes with adjacent countries and encourage separatist groups in other nations.²⁰⁷ The post-war concern with human rights also prompted some international involvement in the internal affairs of nations.²⁰⁸

Despite more lenient attitudes toward internal conflicts, international law remains guarded. Conventions and treaties generally are careful to stipulate that international community involvement does not grant recognition to the rebelling parties.²⁰⁹ In addition, the full protections and obligations of conventions often do not apply to internal conflicts.²¹⁰

3. Protection under the Convention in the Yugoslav Conflict

Croatia invoked the 1954 Hague Convention on August 31, 1991, and directed to the UNESCO Director-General a list of cultural property damaged since the civil war commenced in June.²¹¹ In response, UNESCO Director-General Federico Mayor issued statements on September 17²¹² and September 27, 1991,²¹³ urging the parties to respect

203. Kilgore, *supra* note 196, at 942.

204. MILLER, *supra* note 197, at 11.

205. U.N. CHARTER art. 1, ¶ 1.

206. MILLER, *supra* note 197, at 19.

207. Lagun, *supra* note 150, at 3.

208. George Abi-Saab, *Wars of National Liberation and the Laws of War*, in *INTERNATIONAL LAW, A CONTEMPORARY PERSPECTIVE* 410 (Richard Falk et al. eds., 1985).

209. 1954 Hague Convention, *supra* note 13, art. 19, ¶ 4, 249 U.N.T.S. at 256. ("The application of the preceding provisions shall not affect the legal status of the parties to the conflict.")

210. See Kilgore, *supra* note 196, at 944 & n.21.

211. Somers, *supra* note 168, at 119. This invocation of the Convention most likely occurred under an Article 23 request for assistance in the implementation of the Convention. 1954 Hague Convention, *supra* note 13, art. 23, 249 U.N.T.S. at 258.

212. *Statement on the Situation in Yugoslavia*, UNESCOPRESSE, Sept. 27, 1991.

213. *Unesco Director-General Calls For Respect for Yugoslav Cultural Heritage*, UNESCOPRESSE, Oct. 4, 1991.

their cultural property. This response was too late and too little for Croatians, who believed that the destruction of their heritage deserved a quicker and more substantive reaction.²¹⁴ The desired response did not arrive until October 7, 1991, when Mayor expressed the intent to send a mission to Yugoslavia.²¹⁵

That mission surveyed the damage from October 28 to November 2, 1991.²¹⁶ At its completion, Mayor announced the dispatch of a permanent observer to Dubrovnik to inventory the damage and develop a restoration plan.²¹⁷ Both Croatia and the federal Yugoslav government consented to the mission and promised protection to the observers.²¹⁸ Those observers arrived on November 29, 1991,²¹⁹ just in time to witness the savage December 6 attack upon Dubrovnik.²²⁰ Despite UNESCO inability to prevent such attacks, the observers' presence permitted reports of the assault and damage to be transmitted immediately to the Director-General.²²¹ Mayor telegraphed the Yugoslav Secretary of Defense to demand a cessation to the attack and to plead for the government's respect of cultural property and the Hague flags.²²²

New observers left for a one-month mission to Dubrovnik on January 17, 1992.²²³ In July of that year, while destruction of the city continued, UNESCO appealed again for negotiations to protect Dubrovnik and prepared to send another delegation.²²⁴ Yet just as a truce appeared to be holding in Croatia, concern arose for cultural property in Bosnia.²²⁵

214. Somers, *supra* note 168, at 119.

215. *Appeal by Mr. Federico Mayor for the Protection of Yugoslav Sites on the World Heritage List, Especially Dubrovnik and Split*, UNESCO/PRESSE, Oct. 18, 1991.

216. *Unesco Flies its Banner over Dubrovnik*, Nov. 9, 1991 (press release) (on file with the United Nations Information Center, Washington, D.C.).

217. *Id.*

218. *Id.*

219. *Unesco Unfurls its Banner in Dubrovnik*, UNESCO/PRESSE, Dec. 6, 1991.

220. *See supra* note 176 and accompanying text. *See also Dubrovnik's Black Friday: Unesco Observers Eyewitness Account*, UNESCO/PRESSE, Feb. 7, 1992 [hereinafter *Black Friday*].

221. *Black Friday*, *supra* note 217. The observers travelled about the old city during the attack, recording damage, which they transmitted to Mayor.

222. *Id.*

223. *Id.* at 3.

224. *Declaration by the Director-General on Dubrovnik*, UNESCO/PRESSE, July 31, 1992.

225. Andrej Gustinic, *Three Die but Shaky Ceasefire Holds in Bosnia*, REUTERS LIBRARY. REP., Mar. 29, 1992, available in LEXIS, Nexis Library.

VI. CONCLUSION—WHAT WENT WRONG?

The Netherlands recently called upon UNESCO to re-evaluate the 1954 Hague Convention, partly as a result of the Gulf War and the conflict in the former Yugoslavia.²²⁶

Did the 1954 Hague Convention fail to protect cultural property in the Yugoslav conflict? Certainly, the Croatian government received the assistance available to it under Article 23 of the Convention. That is, it requested and received assistance in the implementation of the Convention.²²⁷ Yet the observers who arrived served only to catalog the atrocities.

One weakness of the Convention is that it allows Parties to direct hostilities against cultural property under imperative military necessity.²²⁸ This loophole leaves a Party much discretion, without direction as to the scope of "imperative."²²⁹ Does a sniper in a church tower constitute imperative military necessity to bombard the entire church? Such discretion is not permitted under Protocol II.²³⁰ The recent appeal to re-evaluate the 1954 Hague Convention recognizes the need to examine the provision for military necessity.²³¹

In addition, the Convention does not provide for restitution or adequate sanctions.²³² The former were incorporated in a separate Protocol,²³³ which parties could accept or reject independently of the convention. The Protocol requires High Contracting Parties to return exported cultural property to the territory of origin.²³⁴ Sanctions are delegated to the criminal jurisdiction of each party.²³⁵ Thus, sanctions are inconsistently applied²³⁶ and, worse yet, may not be implemented. This possibility may be more likely in an internal armed conflict, where the victorious party is unlikely to prosecute its members who violated the Convention. The sanctions defect may also receive attention in any re-evaluation of the 1954 Hague Convention.

226. *Review of the Application of the Convention*, *supra* note 177, at 2, 4.

227. *See supra* note 109 and accompanying text.

228. 1954 Hague Convention, *supra* note 13, art. 4, ¶ 2, 249 U.N.T.S. at 244.

229. Nahlik, *supra* note 61, at 1085-86.

230. Protocol II, *supra* note 15, art. 16, 16 I.L.M. at 1447.

231. *Review of the Application of the Convention*, *supra* note 177, at 6.

232. *See* ALEXANDROV, *supra* note 34, at 57 & n.50.

233. *See supra* note 92.

234. *Id.* ¶ 3, 249 U.N.T.S. at 360. UNESCO planned to request the return of looted Kuwaiti cultural property under this article of the Regulations. *Help to Kuwait*, *supra* note 10.

235. 1954 Hague Convention, *supra* note 13, art. 28, 249 U.N.T.S. at 260.

236. Nahlik, *supra* note 61, at 1083-84.

Under Article 19 armed conflicts, the weaknesses of the Convention are magnified.²³⁷ In those cases, responsibility for implementing the agreement rests solely upon the shoulders of the Parties, who must request assistance from UNESCO under Article 23. This limited assistance is due to international law's fear of intruding upon the sovereignty of the High Contracting Party. Yet the regulations providing Commissioners-General for international conflicts are no more intrusive than the parties requesting assistance.²³⁸ Under Article 2 of the Regulations, a High Contracting Party can refuse to accept the proposed Commissioner-General to be accredited to that Party. Thus, the Party still retains control and could effectively veto UNESCO involvement by refusing to consent to the proposed Commissioner-General. Nevertheless, such a condition does not wait for the High Contracting Party to request assistance, but initiates the process of protecting cultural property. Although a Party may not initiate a request for assistance, it is more likely to agree to such aid if offered and if a response is required. In addition, failure to provide a full level of protection contradicts the Convention's assertion that damage to the cultural property of one country weakens the heritage of the world, and that this heritage demands international protection.

Calls for an increased right of UNESCO intervention have arisen recently. In its request for a re-evaluation of the 1954 Hague Convention, the Netherlands raised the issue of "whether UNESCO should be given greater powers of initiative and more adequate means of intervention in the event of cultural property being destroyed during an armed conflict."²³⁹ A similar proposal concerning the Convention for the Protection of the World Cultural and Natural Heritage has been

237. The Netherlands has suggested that,

[w]ays and means to improve the protection and safeguarding of cultural property during an armed conflict of a non-international character must be studied and assessed. It is our intention to stress this particular aspect, also in the light of the almost universally expressed intention during the latest General Conference to strengthen the safeguarding and protective competences of an organization like UNESCO.

Review of the Application of the Convention, supra note 226, at 5.

238. There is criticism that this procedure is too time consuming to deal with anything but slowly developing conflicts. ALEXANDROV, *supra* note 34, at 51-52. The same complaint has been lodged against the Convention for the Protection of the World Cultural and Natural Heritage. *Revision of the Convention for the Protection of the World Cultural and Natural Heritage*, UNESCO Exec. Bd. 139th Sess., Provisional Agenda Item 4.7.1, at 2, U.N. Doc. 139 Ex/29 (Apr. 8, 1992) [hereinafter *Revision*].

239. *Review of the Application of the Convention, supra* note 177, at 5.

advanced by Italy.²⁴⁰ The suggestion is guided by a view that when a country places its cultural property on the convention's World Heritage List, "should underline the fact that the State has renounced its exclusive hold on the site and agrees to share responsibility for it with the international community."²⁴¹

Yet the most shocking explanation for the destruction of cultural property in the former Yugoslavia is that the parties simply do not care enough. In fact, UNESCO cited High Contracting Party apathy as the major defect in the Convention.²⁴² Especially under the conditions of a civil war, where parties seek to strike at the psychology of the opponent, the ability of the Convention to prevent abuses of cultural property may be nearly impossible.

Karen J. Detling

240. *Revision*, *supra* note 238, at 2.

241. *Id.*

242. 1984 Reports, *supra* note 1, at 8.

