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THE SAFEGUARDING OF CULTURAL PROPERTY IN TIMES OF WAR & PEACE

Andrea Cuning[†]

For whatever cause a country is ravaged, we ought to spare those edifices which do honor to human society, and do not contribute to increase the enemy's strength—such as temples, tombs, public buildings, and all works of remarkable beauty. It is declaring one's self an enemy to mankind, thus wantonly to deprive them of these monuments of art.¹

I. INTRODUCTION

This article will examine the development of the law regarding the protection of cultural property in the event of armed conflict and will argue that the contemporary law on the subject is inadequately enforced. Part II discusses the change in sentiment towards the taking of cultural property in an armed conflict from one of acceptance to one of moral condemnation. Part III reviews the Lieber Code, one of the first legal documents providing protection for cultural property during armed conflict. Part IV examines the influence that the devastation of WWII had on the development of the legal protection of cultural property in the event of armed conflict and will conclude that the Nazi pursuit of a pure Germanic culture is what led the international community to view the plunder of a nation's cultural property as cultural aggression. Part V discusses the 1954 Hague Convention. Part VI states the importance of defining cultural property. Part VII highlights some of the difficulties in enforcing the 1954 Hague Convention and the ancillary issues regarding

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1. EMMERICH DE VATTEL, *THE LAW OF NATIONS* 367 (Joseph Chitty ed., 1844).

enforcement of the 1907 Hague Convention. Part VII also discusses restitution of Nazi looted art and other cultural property through examples of how the 1954 Hague Convention has been influential and how it has not. Part VIII addresses the issue of how the protection of cultural property in the event of armed conflict has been differentiated from the protection of cultural property in peacetime and concludes that the dual-tracked approach is largely unnecessary. Part IX addresses the changes that the Second Protocol to the 1954 Hague Convention makes to the 1954 Hague Convention and it asserts that the Second Protocol is an improvement, but does not go far enough in terms of enforcement. Finally, Part X concludes that one agreement should incorporate customary international law and deem the destruction of cultural property, in the event of armed conflict or peacetime, to be an international crime. This agreement should subject the aggressor to the jurisdiction of the International Criminal Court or a similar enforcement body, which should also have the jurisdiction to order the return of cultural property or provide compensation for unjust taking to its owner, whether the aggressor is a nation or an individual person.

II. TO THE VICTOR GOES THE SPOILS

Historically, the sentiment regarding the status of cultural property in the event of armed conflict is summarized in the adage: "to the victor goes the spoils," meaning that the victorious party of a war or battle was entitled to pillage and loot the treasures of the defeated party.² This act of "plundering in time of war is ancient, timeless, and pandemic . . . The history of the world is in part the history of wars, and so it is easy to cite endless examples of 'spoils of war.'"³ One example of note is the conquest of the Roman Emperor Vespasian's son, Titus, who sacked Herod's Temple in Jerusalem in A.D. 70, and celebrated the conquest in a triumphal procession depicted in a relief on The Arch of Titus in Rome. The "[r]eliefs on the

2. The term "spoil" has its origin from

the Latin *spolium*, originally meaning the hide stripped from an animal, and later the arms or armor stripped from an enemy—hence, booty, prey, or spoil. In time, anything stripped or taken from a country after its defeat in war came to be known as "spoils." That use of the word is recorded as early as 1300 . . .

Jeanette Greenfield, *The Spoils of War*, in *THE SPOILS OF WAR* 34, 34 (Elizabeth Simpson ed., 1997).

3. *Id.*

arch illustrate the triumphal procession with explicit representations, including a depiction of the Menorah, one of the most important of the spoils" and it "was a symbol of the Roman victory in Judaea that would have been understood by all who saw it."⁴ Much later, Napoleon

led a campaign of conquest and "collecting" across the whole of Europe from 1796 until the end of his reign. His treasures filled the Musée Central des Arts (renamed the Musée Napoléon in 1803), later to become the Musée du Louvre Only after the military defeats of 1814 and the battle of Waterloo in 1815, and with the outcome of the Congress of Vienna, were many of the plundered masterpieces returned.⁵

The peace terms that Napoleon offered to nations invariably required the surrender of certain artwork and even at times included the cost of transportation.⁶ Many of Napoleon's spoils were returned after he was defeated. The return of these treasures by France evidenced a policy shift away from the idea of "to the victor goes the spoils." However, it is interesting to note that there is a distinction between "war booty" as opposed to the "spoils of war." That is to say that

[i]nternational law has recognized the seizure of some war material and war booty in pursuit of the conduct of war. But it has limited the right of confiscation, especially from private citizens. According to the regulations annexed to the 1907 Hague Convention, state-owned movable property found on the battlefield may be appropriated as "war booty." This is quite different from the

4. *Id.* at 34-35. Another example is as follows:

The Viking raid in 793 on the monastery on the Holy Island of Lindisfarne off the northeast coast of Britain is cited as the start of the Viking Age, which lasted nearly 300 years. The Norsemen, who came by sea, sent fear throughout Europe, and their name became synonymous with pillage. Their "smash-and-grab" raids gave rise to the myth that prayers were said in every church in Europe asking for deliverance from the "fury of the Northmen." They ranged far and wide in their distinctive vessels, even arriving at the Thames, where Olaf Haraldsson (later King of Norway) pulled down London Bridge in 1009, an event that gave rise to the children's song "London Bridge is Falling Down."

Id. at 35.

5. *Id.* at 35-36.

6. See Victoria A. Birov, *Prize or Plunder?: The Pillage of Works of Art and the International Law of War*, 30 N.Y.U. J. INT'L L. & POL. 201 (1997).

treasures we have been discussing. Looting and spoliation are precluded by the Hague Convention.⁷

The development of contemporary international law regarding the protection of cultural objects evolved over the nineteenth and twentieth centuries, but the idea of protecting cultural property "first emerged in Europe during the eighteenth century, most notably in the writings of Emheric de Vattel, a leading legal scholar."⁸ In his treatise, *The Law of Nations* (1758), Vattel "enunciated the basic principle: 'For whatever cause a country is ravaged, we ought to spare those edifices which do honor to human society.'"⁹ Vattel's assertion gained international acceptance after Napoleon's military campaigns in which many artworks were taken. In the 1815 Convention of Paris, "nations allied against Napoleon ordered the return of cultural property, either taken by France through force or acquired by it through treaty, to the countries of origin."¹⁰ However, the first written codification of cultural property protection came from the U.S. in the 1863 Instruction for the Government of Armies of the United States in the Field.

III. THE LIEBER CODE

One of the first legal documents to reference the protection of cultural property during armed conflict appears in the Instruction for the Government of Armies of the United States in the Field, also known as the "Lieber Code," prepared by Francis Lieber, and promulgated as General Order No. 100 by President Lincoln on April 24, 1863. Part 2 of the Lieber Code addresses Public and Private Property of the Enemy. The Lieber Code provides for the seizure of all public movable property.¹¹ However, it distinguishes private property from public property. Article 34 of the Lieber Code states:

As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to

7. Greenfield, *supra* note 2, at 38.

8. Lawrence M. Kaye, *Laws in Force at the Dawn of World War II: International Conventions and National Laws*, in *THE SPOILS OF WAR* 100, 100-05 (Elizabeth Simpson ed., 1997).

9. *Id.* (citing EMMERICH DE VATTEL, *THE LAW OF NATIONS* 367 (Joseph Chitty ed., 1844)).

10. Greenfield, *supra* note 2, at 38.

11. Instructions for the Government of Armies of the United States in the Field, promulgated as General Order No. 100 by Abraham Lincoln, April 24, 1863, art. 31 [hereinafter Lieber Code].

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 . . .¹²

Article 35 of the Lieber Code is significant in that it calls for the protection of classical works of art, libraries, scientific collections, or precious classical instruments “even when they are contained in fortified places whilst besieged or bombarded” and such works can thus be removed, seized and held by the conquering state until ultimate ownership is settled by a treaty of peace.¹³ Even further, the Lieber Code provides that private property can only be seized by way of military necessity.¹⁴ The Lieber Code is significant because it provided the foundation for subsequent agreements on the protection of cultural property when jeopardized by armed conflict. The Lieber Code served as the basis for the Declaration of the Conference of Brussels of 1874, which represents “the first international attempt to codify the rules for the protection of cultural property.”¹⁵ This Declaration was not accepted and never ratified; however, in “1880, the Institute of International Law, a private but influential body, utilized the Lieber Code and the work of the Conference of Brussels . . . to prepare its own codification of rules for land warfare, known as the Oxford Manual.”¹⁶ Thereafter, the Lieber Code gained more acceptance and many of its concepts were included and expanded upon in the 1899 and 1907 Hague Conventions, and further refined in the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.

The concern over protecting private property became more of an international concern as a nation’s capability to conduct war was increased by many of the effects of the industrial revolution and warfare became more violent and destructive.¹⁷

[The] international movement to reduce the destructiveness of war culminated in the two Hague Conventions which were concluded in 1899, and 1907. The 1899 and 1907 Hague Conventions produced a

12. *Id.* art. 34.

13. *Id.* art. 36.

14. *Id.* art. 38.

15. Kaye, *supra* note 8, at 101-02.

16. *Id.* at 102.

17. Captain Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. Rev. 277, 285 (1997).

codified international law of warfare. Similar provisions in both Conventions prohibited an invading army from pillaging, and required invaders to respect the laws of the conquered territory. These Conventions also prohibited the confiscation of private property. Finally, cultural objects and structures were protected under both conventions, and violations of the Conventions were subject to international sanctions. Military lawyers, however, must make note that both Conventions permitted the destruction of cultural sites and objects, if recognized under the necessities or exigencies of war.¹⁸

The first two Hague Conventions failed to prevent the widescale looting and pillage that occurred in WWI but they did "effect the return of cultural property plundered during that war."¹⁹ The Treaty of Versailles of 1919 provided for the enforcement of the two Hague Conventions and made it possible for nations to make a claim for the restitution of cultural property taken in prior conflicts, since no statute of limitations was recognized.²⁰ For example, the Treaty of Versailles required Germany to return to France all artwork and other objects taken by Germany in the course of the war of 1870-1871 and during WWI.²¹ Thus, although the first two Hague Conventions did not prevent the looting that took place in WWI and WWII, they did provide a framework for the restitution and repatriation of the stolen property afterwards.

The 1899 and 1907 Hague Conventions are often criticized as ineffective because they failed to prevent the widescale plundering of WWII, but it is important to note that the voluntary acquiescence of a nation to follow international law cannot be easily enforced, no matter what treaty is in place. Further, the acts of plunder committed in WWI and WWII were in violation of international law and this fact alone represents a monumental change from the "to the victor goes the spoils" norm of the past. Unfortunately, the devastation of WWII illustrated the need for an effective system of enforcement of cultural property protection given the development of new weapons enabling the destruction of more property than ever before. Moreover,

[n]ever before had objects been moved about on such a scale: not hundreds or thousands, but millions of objects of every description. Unprecedented, too, were the ideological, legal, and political

18. *Id.* at 286.

19. Kaye, *supra* note 8, at 102.

20. *Id.* at 102-03.

21. *Id.* at 103.

arguments put forth to justify the removals. And, for the first time in history, the armies of most of the belligerents had highly trained art specialists in their ranks, whose duty it was to secure and preserve movable works of art.²²

IV. THE INFLUENCE OF WORLD WAR II ON THE DEVELOPMENT OF THE LAW ON THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

WWII posed a unique threat to cultural property never before seen. Not only did the German Nazi regime loot and plunder the nations it conquered, it also had a mission to create a pure Germanic Empire.²³ This mission was set in motion “[f]rom the first day Hitler held office” as “he set about realizing his dream of a pure Germanic Empire. ‘Pure’ and ‘Germanic’ were the operative words, and art would not be exempt.”²⁴ Hitler’s idea was that

[t]he world must be purged of unsuitable works of art and the artists responsible for them. Hitler had no doubts about what was unacceptable: he disapproved of anything “unfinished” or abstract, such as the works of Vasily Kandinsky or Franz Marc . . . Camille Pissarro was unacceptable because he was Jewish, George Grosz and Kathe Kollwitz because they were leftist and antiwar.²⁵

Yet, “[a]lthough the Nazis found these ‘degenerate’ works unacceptable for home consumption, they were not unaware of their

22. Lynn H. Nicholas, *World War II and the Displacement of Art and Cultural Property*, in *THE SPOILS OF WAR* 39, 39-45 (Elizabeth Simpson ed., 1997).

23. *Id.*

24. *Id.* at 39. Also, it is interesting to note that

[p]ressure was put on the German art establishment as soon as Hitler came to power in 1933 and gradually increased. When, by 1937, the museums had not gotten rid of what they should, and indeed were actively resisting doing so, Hitler sent into the galleries committees of Nazi artists and theorists, who decided as they walked through what had to go.

Id.

25. *Id.* Also,

[i]t took even the Führer’s closest colleagues quite a while to understand just what he did want. Goebbels, for example, had decorated his dining room with watercolors by Emil Nolde, a Nazi sympathizer, but when Hitler came to Goebbels’s house, the Führer was not pleased, and Goebbels was forced to remove the pictures.

Id.

market value" and art dealers "in many countries took full advantage of the deaccessioning by the Nazi authorities, and the rejects ended up in collections worldwide."²⁶ Although the professional art community was disturbed by the activities in Germany, "the rest of Europe [was] more concerned with the protection of their great collections from the physical dangers of war" which they anticipated coming.²⁷ When war broke out in 1939,

evacuation of artworks began in earnest all over Europe Statues were taken down or barricaded behind bizarre structures of brick and sandbags. Venetian collections left the city in trucks precariously balanced on barges. In Amsterdam, Rembrandt's *The Night Watch* was rolled up and evacuated. Scenery trucks had to be requisitioned from the Comédie Française to take away from the Louvre Théodore Géricault's enormous *Raft of the Medusa* And, in a moment fraught with symbolism, the *Nike of Samothrace* was carefully lowered down the grand staircase of the museum.²⁸

The idea that certain works of art were "unsuitable" formed the basis for an excuse to destroy such works:

[o]nce in control of most of the continent of Europe, Hitler envisioned nothing less than the complete purification and rearrangement of its artworks in accordance with Nazi laws and theories. These operations were planned just as meticulously as the military ones and were carefully coordinated with them. There were four major, well-funded bureaucracies that concerned themselves exclusively with art matters, and they were backed by the full force of Nazi police and military organizations. Hitler's personal agency, the Sonderauftrag Linz, was established to build up a collection for a vast museum he intended to build in his hometown of Linz in Austria.²⁹

These bureaucracies amassed thousands of pieces of artwork of all kinds.³⁰

As the tide of the war shifted and the Allied armies closed in on Germany and bombed its cities, "all the confiscated and purchased art, plus the great German museum holdings, was moved into hundreds of bunkers, castles, churches, salt mines, and even cow

26. Nicholas, *supra* note 22, at 39-40.

27. *Id.* at 40.

28. *Id.* at 40.

29. *Id.* at 40-41.

30. *Id.* at 41.

sheds.³¹ Many of the hiding places for Germany's looted art were discovered by the armies of the Western Allies. Eventually, "monuments officers" were appointed to salvage and preserve these found works.³² These

monuments men found thousands of irreplaceable things in danger of destruction. British officers discovered hundreds of uncrated pictures from Berlin's Nationalgalerie in a mine at Grasleben. Göring's collection was found scattered all over Berchtesgaden, where he had taken it on his special trains. Monuments men were greeted there by the Reichsmarschall's curator, Walter Andreas Hofer, who gave them a tour of the collections. The Rothschild jewels turned up at Neuschwanstein, and the Holy Roman Regalia were found walled up in Nuremberg, which boasted elaborate underground bunkers filled with loot. Soviet art-specialist officers . . . found hundreds of similar caches.³³

The sorting and identifying of these vast quantities of art was a major undertaking. Collecting Points for the items were set up so that investigations into ownership could begin.³⁴ The next question was then what to do with

the huge amounts of art from so many different sources, acquired in so many different ways, and belonging to so many different nations. The Allies . . . had never formulated a definite policy on restitution. Agreement foundered on two issues: restitution in kind and the use of works of art as assets of reparation.³⁵

It became U.S. and British policy to return artwork to the country from which it had been taken.³⁶

The recipient nations then had to determine issues of private ownership and whether sales to the Nazis had been forced bargains.³⁷ Interestingly, the

impeccable German records often were useful in solving such problems, and many who had hoped to hide their sales to the Nazis, keep the money, and then reclaim their pictures were foiled by the evidence in these archives. In such cases the disputed objects

31. *Id.* at 42.

32. Nicholas, *supra* note 22, at 42-43.

33. *Id.* at 43.

34. *Id.* at 43.

35. *Id.* at 44.

36. *Id.*

37. *Id.*

usually reverted to the state. Most difficult was the problem of the so-called heirless property of all categories, principally confiscated from Jews. The American authorities in Germany eventually transferred responsibility for the disposition of these things to the Jewish Restitution Successor Organization, which distributed them to Jewish communities worldwide.³⁸

The Soviet policy was very different than the U.S. and British policy. The Soviets sent almost everything found back to the U.S.S.R. Later the U.S.S.R. changed its policy to some extent and "thousands of items were . . . returned to Poland, East Germany, Hungary and other East European countries. But many others . . . still remain in Russia."³⁹ Amidst all of the chaos of moving, classifying and trying to return these stolen works, many items "were stolen by civilians and military personnel and have been dispersed around the world . . . [and] [t]he fate of many thousands of objects still remains completely unknown."⁴⁰ The development of the law regarding the protection of cultural property in the event of armed conflict became even more of an international concern after WWII because of its great devastation and residual problems leftover from the conflict regarding the repatriation of cultural objects. Thus, the prior two Hague Conventions concerning the protection of cultural property formed the basis for the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, the "1954 Hague Convention."

V. THE 1954 HAGUE CONVENTION

The 1954 Hague Convention was drafted as a direct result of the heinous acts that occurred in WWII and attempted to address the issue of repatriating cultural property in order to prevent the reoccurrence of some of the same problems such as identifying the owner of certain cultural property. However, the Convention was not meant to have retroactive effect. The 1954 Hague Convention was originally signed by forty-five countries at its inception and presently, seventy-five countries have ratified or acceded to it. The United States and the United Kingdom did not ratify the 1954 Hague Convention "because of its restrictiveness and stretch beyond customary international law."⁴¹ The United States and United

38. Nicholas, *supra* note 22, at 44.

39. *Id.* at 45.

40. *Id.*

41. Kastenbergh, *supra* note 17, at 290.

Kingdom did sign the Declaration of London of 1943, however, which pronounced rules prospectively for a peace treaty yet to be signed with Germany. The declaration "was specifically addressed to neutral states, to warn them against suspect transactions," and "it made clear that looted objects were to be returned, even when they were in the hands of third parties whose title would normally have been protected by local law as to 'bona-fide' (good faith) acquirers."⁴² Although it became a type of common law in the WWII postwar period, it was only partially applied, or not applied for long. In short, "many postwar governments were in most difficult economic circumstances and distracted by major problems of reconstruction" and since the Declaration of London was not an international agreement and required implementing legislation, it was simply ineffective as anything more than a policy statement.⁴³

The 1954 Hague Convention shares many common principles with the Convention Respecting the Laws and Customs of War on Land, the "1907 Hague Convention," including the prohibition of theft and pillage of cultural property.⁴⁴ Also, the 1907 and 1954 Hague Conventions include the concept of protecting cultural property from

42. Lyndel V. Prott, *Principles for the Resolution of Disputes Concerning Cultural Heritage Displaced During the Second World War*, in *THE SPOILS OF WAR* 225, 225-230 (Elizabeth Simpson ed., 1997).

43. *Id.*

44. See Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, arts. 28, 47, 56, 36 Stat. 2277, 2303-09 [hereinafter 1907 Hague Convention]. Article 28 of the 1907 Hague Convention Regulations states: "The pillage of a town or place, even when taken by assault, is prohibited." Article 47 states: "Pillage is formally forbidden." Article 56 states:

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, and should be made the subject of legal proceedings.

Id. In comparison, the 1954 Hague Convention states in Article 4.3:

The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

See Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, done on May 14, 1954, art. 4.3, S. TREATY DOC. NO. 106-1, 249 U.N.T.S. 215 (entered in to force Aug. 7, 1956) [hereinafter 1954 Hague Convention].

unnecessary destruction in the event of armed conflict and the concept of military necessity (although it is more by implication in the 1907 Hague Convention).⁴⁵ The addition of enhanced protection for certain cultural property and making an inventory of cultural property entitled to special protection in Article 8 of the 1954 Hague Convention can be seen as the direct result of WWII in that one of the problems encountered by the international community after WWII was identifying the artwork taken by the Nazi regime and finding the works' owners. Thus, the introduction of an inventory of cultural property in the 1954 Hague Convention was intended to prevent this type of confusion in the future.

Unfortunately, the International Register of Cultural Property Under Special Protection has not been utilized to its full potential and has been widely criticized for being too restrictive. One often cited problem is that Article 8 requires that the property applying for protection be situated "an adequate distance from any large industrial centre or from any important military objective." The problem lies in the fact that most museums or monuments are located in centers of towns which are also industrial centers.

A major advance of the 1954 Hague Convention was expanding its protection in all armed conflicts and not just traditional wars. The development of the 1954 Hague Convention represents a continued

45. Article 27 of the 1907 Hague Convention Regulations states:

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.

See 1907 Hague Convention, *supra* note 44, art. 27 (emphasis added). Articles 4.1 of the 1954 Hague Convention states:

The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

See 1954 Hague Convention, *supra* note 44, art. 4.1. Article 4.2 states: "The obligations mentioned in paragraph 1 of the present Article may be *waived only in cases where military necessity imperatively requires such waiver.*" *Id.* art. 4.2 (emphasis added).

effort to enunciate a universally understood and accepted means of protecting cultural property from theft and destruction in the event of armed conflict. This effort has continued in the First and Second Protocols to the 1952 Hague Convention as well. Yet, many problems still exist in developing a body of special law for the protection of cultural property, namely, how to define what objects fall under the category of cultural property.

VI. DEFINING CULTURAL PROPERTY

One of the main differences between the 1907 and 1954 Hague Conventions is that the 1954 Hague Convention utilizes and defines the term "cultural property" for the first time in an international treaty, whereas the 1907 Hague Convention simply makes a distinction between public and private property, providing protection for private property and deeming institutions dedicated to religion, charity, education, and the arts and sciences as private property, even when State-owned. Since the 1954 Hague Convention does away with this distinction and cultural property is afforded special legal status under the Convention and by the international community, defining cultural property is important. This is especially true since nations may unilaterally deem an object to have cultural significance without scrutiny from the international community. Thus, attempts have been made in a number of international agreements to obtain a consensus on what is cultural property so that laws may properly address issues of the repatriation of cultural property.

Three major international agreements that define cultural property are the 1954 Hague Convention, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of November 14, 1970, the "UNESCO Convention," and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Property of June 24, 1995, the "UNIDROIT Convention." Article 1 of the Hague Convention defines cultural property as:

- (a) movable 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;

- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
- (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments."⁴⁶

The Hague Convention's definition of cultural property is interesting because it includes not just the object of cultural significance, but also the museum or place in which it is contained. This is due to the fact that the purpose of the Hague Convention is to prevent damage to cultural objects of significance during armed conflict. The Hague Convention imposes obligations on the contracting parties to protect cultural property by safeguarding it against foreseeable effects of armed conflict and refraining from any act of hostility directed against such property.⁴⁷

Article 1 of the UNESCO Convention defines cultural property as property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, literature, art or science and 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;

46. 1954 Hague Convention, *supra* note 44, art.1.

47. *Id.* at arts. 3-4.

- 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. archives, including sound, photographic and cinematographic archives;
- k. articles of furniture more than one hundred years old and old musical instruments.⁴⁸

The UNESCO Convention is similar to the Hague Convention in that they each require identification by the State of specific property subject to protection. However, the UNESCO Convention's definition is much more detailed in comparison to the Hague Convention's catch-all phrase of "other objects of artistic, historical or archaeological interest."⁴⁹ The two Conventions cover most of the same objects; however, the UNESCO Convention does not include museums or other places in which cultural property resides. The UNESCO Convention obliges signatory States to protect cultural property within its territory against the dangers of theft, clandestine export, and illicit export.

48. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *done on* Nov. 14, 1970, art. 1, 823 U.N.T.S. 231 (entered into force Apr. 24, 1972) [hereinafter UNESCO Convention]; *see also* 1954 Hague Convention, *supra* note 44, at art. 8.6; *see also* UNESCO Convention, art. 5(b).

49. 1954 Hague Convention, *supra* note 44, art.1.

Article 2 of the UNIDROIT Convention defines cultural property as "those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex."⁵⁰ The Annex contains the same elements listed in the UNESCO Convention. Thus, the UNIDROIT Convention definition of cultural property is the same as in the UNESCO Convention, except that the UNIDROIT Convention does not require a designation by each State of the property's importance, as does the UNESCO Convention.⁵¹ The focus of the UNIDROIT Convention is similar to that of the UNESCO Convention; however, the UNIDROIT Convention emphasizes the restitution and return of cultural objects that have been stolen or illegally exported.

The Hague Convention and UNESCO Convention require that signatories list the property that they believe falls under the definition of protected cultural property. In the case of the Hague Convention, this listing entitles the object to enhanced protection that it would not otherwise receive. The UNIDROIT Convention leaves the definition more open-ended in not requiring a list, and leaves it to the discretion of a State to determine what property falls within the definition of cultural property.

The UNESCO Convention is complimentary to the 1954 Hague Convention in that the two documents work together to protect cultural property in time of peace and in the event of armed conflict. Often the two agreements overlap due to the fact that most claims for repatriation of cultural property are brought in times of peace at the conclusion of an armed conflict and many countries that have not provided implementing legislation for the 1954 Hague Convention may have implemented the UNESCO convention regarding the return of stolen cultural property. Generally, a claim for the repatriation of cultural property is based upon the domestic anti-theft laws of the nation in which the claimant is seeking redress. The issue of enforcement of the 1954 Hague Convention is discussed further in Part VII.

In many ways the introduction of the term cultural property has been beneficial in further defining the type of property that nations desire to protect from destruction. In other ways the blanket term "cultural property," without reference to private or public (State) property, introduced some confusion into the law of cultural property

50. UNESCO Convention, art. 2.

51. See UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, Annex, 34 I.L.M. 1322.

protection in the area of enforcement. This is due in part to the fact that individuals are not granted rights under the 1954 Hague Convention unless their country ratifies and implements the Convention into domestic law. The fact that many signatory nations have not granted individuals direct domestic rights under the agreement has led many to criticize the 1954 Hague Convention for being "toothless," since individuals have had to resort to the existing domestic laws regarding the appropriation of stolen property in order to effect the return of property stolen during armed conflict. This is also supported by the fact that the 1907 Hague Convention imposes the obligation of paying compensation for the violations of the agreement by the individual acts of a nation's armed forces, whereas the 1954 Hague Convention does not.⁵² The effectiveness of the 1954 Hague Convention is still being questioned today; it is unclear whether the 1954 Hague Convention has truly addressed the problems that the 1907 Hague Convention failed to cure.

VII. ENFORCEMENT OF THE 1954 HAGUE CONVENTION

The 1954 Hague Convention was drafted to ameliorate some of the deficiencies in the 1907 Hague Convention. Most notably, the introduction of the inventory system addresses the problem nations had in identifying the cultural property stolen by the Nazis in WWII, so that in the event of future conflict, there would be a means of identifying objects and their owners. Unfortunately, it is not clear from recent examples that the 1954 Hague Convention has been much more successful than its predecessor, the 1907 Hague Convention, in preventing the destruction and theft of cultural property or in facilitating the repatriation of stolen cultural property.

Some recent armed conflicts have tested the effectiveness of the 1954 Hague Convention. In the Iran-Iraq War of the early 1980's, "Iraqi forces attacked cultural sites in Iran that were not listed on the

52. See 1907 Hague Convention, *supra* note 44, art. 3. "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." *Id.* The 1954 contains no such provision; however, Article 28 does impose sanctions for violations, but not compensation: "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." 1954 Hague Convention, *supra* note 44, art. 28.

International Register, but which had been noted to the 1972 World Heritage Convention by Iran.⁵³ Both Iran and Iraq ratified the 1954 Hague Convention and it was effective at the time of the conflict. Since the 1954 Hague Convention is largely self-enforcing, there was no way for the international community to stop Iraq's violations. Article 28 of the 1954 Hague Convention obligates contracting parties to prosecute and impose sanctions upon those who commit or order a breach of the Convention. In a sense, this is a mandate for universal jurisdiction over violators, since any contracting party may prosecute violations of the 1954 Hague Convention regardless of the nationality of the person committing the offense. However, there is no mechanism for forcing a nation to take such measures or to comply with the Convention itself. Thus, the 1954 Hague Convention is perceived as a "toothless" convention in the same manner that the 1907 Hague Convention was impotent in preventing the looting and pillage of WWII. However, the 1954 Hague Convention differs in that it has enjoyed more support than the 1907 Hague Convention. It is often argued that the principles set forth in the 1954 Hague Convention have become a reflection of customary international law.⁵⁴ An example of this is illustrated in the United States' actions in the Gulf War. Although the United States signed the 1954 Hague Convention, it never ratified it.

In the Gulf War, the United States and Coalition forces were faced with the decision of whether to attack an Iraqi military target (e.g. military aircraft) which was intentionally situated by the Sumerian temple, a historic building.⁵⁵ The decision was made that the target should only be attacked if it was an absolute necessity so the temple would not suffer any collateral damage.⁵⁶ Although the Coalition forces were not bound by the obligations of the 1954 Hague Convention, they acted in accordance with it, and they recognized the

53. Kastenberg, *supra* note 17, at 296. Also, Article 8.6 of the 1954 Hague Convention requires the entry of cultural property in the International Register of Cultural Property under Special Protection in order for it to be given special protection which grants the listed items a form of immunity from enemy attack, which can only be withdrawn for reasons listed in the convention. See 1954 Hague Convention, *supra* note 44, art. 8.6.

54. Kastenberg, *supra* note 17, at 302. "The 1954 Hague Convention is a reflection of the development of customary international law . . . [but the] Additional Protocol is not an accurate assessment on the law of war in regard to the protections which cultural properties should be afforded during armed conflict." *Id.*

55. *Id.* at 301.

56. *Id.*

Convention as “an advisory document.”⁵⁷ This example is significant in that it illustrates the international sensitivity to the issue of protecting cultural property in the event of armed conflict.

Additionally, it is notable that contemporary international law or custom regarding the protection of cultural property from destruction in the event of armed conflict is a reflection of the change in the attitude of nations towards cultural property. It is important that the 1954 Hague Convention address and prevent every instance of looting and pillage, but that such acts have come to be viewed as acts of “cultural aggression” that the international community condemns.⁵⁸

The development of the law reflecting this idea is thus mirrored in the 1954 Hague Convention and its First and Second Protocols. Although no international agreement can prevent a nation from willfully violating international law, the international community can condemn such violations, and more support translates to greater enforcement and adherence. One reason that Article 28 of the 1954 Hague Convention regarding sanctions has not led to the punishment of individual violators is that

several military conflicts of the last half century . . . have, for the most part, been terminated by cease-fire agreements which made it impossible to obtain personal jurisdiction over suspected war criminals. In two cases where unconditional surrender could have been imposed upon aggressor nations—Argentina’s seizure of the Falkland Islands, and Iraq’s seizure, by force of Kuwait—the victorious powers elected to permit the leadership that had committed the aggression to remain in power, and the aggressors therefore escaped prosecution and punishment.⁵⁹

In the case of Iraq’s invasion of Kuwait, numerous truckloads of Kuwaiti art were sent to Baghdad and the interiors of the Kuwait National Museum and the Museum of Islamic Art in Kuwait were burned, “presumably to cover evidence of the theft as well as to destroy the cultural identity of Kuwait.”⁶⁰ Both Iraq and Kuwait have signed and ratified the 1954 Hague Convention. Many objects were

57. *Id.* at 297.

58. See generally Hiram Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1 (2001).

59. Kastenberg, *supra* note 17, at 297.

60. Harvey E. Oyer III, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: Is It Working? A Case Study: The Persian Gulf War Experience*, 23 COLUM.-VLA J.L. & ARTS 49 (1999).

returned to Kuwait in 1991 under U.N. inspection. While Iraq's taking of the Kuwaiti cultural property appears to be a violation of the 1954 Hague Convention, Iraq has argued that it was acting in compliance with the agreement by "safeguarding" the objects from damage in accordance with Article 5 of the 1954 Hague Convention.⁶¹ The "safeguarding" excuse has been used in the past by the Nazis, and thus, most claims of safeguarding another country's cultural property from damage is highly suspect today. Nevertheless, many Mesopotamian scholars have defended Iraq's actions.⁶² In any event, whether Iraq was complying with Article 5 or returning what it had stolen in violation of the 1954 Hague Convention, Kuwait received much of its cultural property back. This result may be attributed to the overall international concern with protecting cultural property; whether under the 1954 Hague Convention or under customary international law, the outcome is similar.

A recent example of the enforcement of international humanitarian law regarding the protection of cultural property occurred following the cessation of hostilities in the former Yugoslavia.⁶³ The destruction of cultural property in the former Yugoslavia in the early 1990s was a form of cultural aggression that was akin to the Nazi's plan for the creation of a pure Germanic empire in that the Serbian expulsion of non-Serbs was a form of ethnic cleansing supported by the destruction of cultural property.⁶⁴ The destruction of cultural property in the former Yugoslavia was not simply due to collateral damage. For example, in Vukovar,

Serb-controlled Federal troops vandalized ancient and medieval sites as well as the eighteenth-century Eltz Castle, which contained a museum. The same troops attacked a complex of Roman villas in Split and inflicted damage on the sixteenth-century Fortress of Stara Gradiska In Dubrovnik, retreating Federal troops targeted the Renaissance arboreta, St. Ann Church, and the old city center, which is included on the World Heritage list.⁶⁵

The 1954 Hague Convention was invoked by Croatia in 1991 and a list of cultural property damaged since the civil war started was

61. *Id.*

62. *Id.*

63. Birov, *supra* note 6, at 220.

64. *Id.* at 221.

65. Abtahi, *supra* note 58, at 2.

sent to UNESCO's Director-Generale.⁶⁶ The UNESCO Director-Generale issued a statement urging Serbia to respect cultural property and a mission was sent to Yugoslavia in October 1991 to survey the damage. The only purpose the UNESCO observers served was to document the attacks and catalog the destruction.⁶⁷ A war crimes tribunal was established by the United Nations Security Council after cessation of hostilities in the former Yugoslavia.⁶⁸ The Statute of the International Tribunal for the Former Yugoslavia establishes that the destruction or damage to cultural property as a violation of laws or customs of war, but there is no reference to the 1954 Hague Convention.⁶⁹ There have been at least two indictments by the Tribunal under Article 3.⁷⁰

The Tribunal emphasized the link between the destruction of cultural property and the resulting harm to the individuals it represents.⁷¹ For example, the Tribunal "addresses crimes involving the destruction of a mosque because they harmed the Muslim population."⁷² This link is significant because there is a general tendency to "place crimes against cultural property below crimes against persons," but the Tribunal is making the destruction of cultural property a crime against persons.⁷³ By taking this approach, the Tribunal has in a sense elevated the level of protection afforded to cultural property because the 1954 Hague Convention does not provide for a specific enforcement mechanism to prosecute violators. This essentially leaves enforcement up to the contracting parties which can either prosecute violations vigorously or not at all. Unfortunately, the general approach has been the latter with a few exceptions. The former Yugoslavia, which is a signatory to the 1954

66. Karen J. Detling, *Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 MD. J. INT'L. L. & TRADE 41, 71 (1993).

67. *Id.* at 72-73.

68. Birov, *supra* note 6, at 220.

69. *Id.* at 221. See Report of the Secretary-General, Statute of the 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, U.N. Doc. S/25704 (1993).

70. Birov, *supra* note 6, at 222.

71. Abtahi, *supra* note 58, at 3.

72. *Id.*

73. *Id.*

Hague Convention, did not reference the Convention in the formation of the Tribunal.⁷⁴

In some ways, the 1954 Hague Convention has not been any more effective than its predecessor, the 1907 Hague Convention, in preventing the destruction of cultural property. On the other hand, the 1954 Hague Convention reflects the fact that nations are becoming increasingly concerned with the protection of cultural property both in armed conflict and peacetime. Even though enforcement of the 1954 Hague Convention, 1907 Hague Convention, and customary international law is inconsistent, there is a movement towards stricter enforcement. The Tribunal in the former Yugoslavia is one example, and the formation of the International Criminal Court through the 1998 Rome Statute of the International Court is another.⁷⁵ However, neither agreement addresses the issue of repatriation of cultural property stolen during times of armed conflict.

Individuals that lost artwork or other valuable cultural objects by theft during armed conflict have had to resort to the domestic laws of individual states regarding theft to make a claim for the return of their stolen property, which often involves a dispute over the statute of limitations for bringing such a claim. The victims of Nazi plunder in WWII cannot turn to the 1907 Hague Convention for assistance in enforcing the return of stolen art. This is one of the major shortcomings of both the 1907 and 1954 Hague Conventions. The UNESCO Convention was drafted as a counterpart to the 1954 Hague Convention to prevent theft or illegal export of cultural property in peacetime. The UNIDROIT Convention was also drafted to prevent the theft or illegal export of cultural property in peacetime. However, the UNESCO Convention and UNIDROIT Conventions are not useful to individuals unless implemented by national legislation.

74. See *The Autocephalous Greek Orthodox Church in Cyprus v. Willem O.A. Lans*, District Court of Rotterdam, Netherlands, Feb. 4, 1999 in which the Cypriot church brought a claim against a Dutch national under the Protocol to the 1954 Hague Convention in order to effect the return of a stolen icon. The Dutch court determined that the Protocol to the 1954 Hague Convention was not directly applicable with regard to the export of cultural property from occupied territory. This is the first case in which the Protocol was invoked by a party to a suit in private law.

75. Rome Statute of the International Criminal Court, art. 8, U.N. Doc. A/CONF. 183/9 (1998) [hereinafter Rome Statute]. Article 8 of the 1998 Rome Statute includes the extensive destruction and appropriation of property, not justified by military necessity, intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, provided they are not military objectives and the pillaging of a town or place within the definition of a war crime within the jurisdiction of the court.

VIII. THE DUAL-TRACKED APPROACH

An additional shortcoming of the 1954 Hague Convention is that although Article 3 requires contracting parties to safeguard their cultural property in time of peace, no specific requirements are referenced, essentially permitting parties to do nothing to safeguard their cultural property. As a result, there is no way to sanction a nation for its failure to safeguard cultural property. One notable example of this shortcoming recently occurred in Afghanistan.

The Kabul museum which contained Islamic art, Roman bronzes, Alexandrian glass, Chinese lacquerware, Indian ivories and an extensive Buddhist collection has been devastated over the past decade. The Afghan government's "restrictions on the trade of cultural property and its decision to claim excavated archeological material as state property did not protect the Kabul museum's collection. Factional fighting dispersed and destroyed it."⁷⁶ The history of the Kabul museum is tragic. In the past, as

Soviet troops withdrew and the country fell apart, the museum staff packed the collection into crates, the most valuable of which were moved to the presidential palace. In the years that followed, looting claimed over 70% of the museum collection - estimated at 100,000 artifacts - and fed an active Pakistani underground art-dealing network.⁷⁷

The remaining collection was transferred to the Kabul Hotel. When the Taliban took over Kabul in 1996, the looting largely stopped and the "new city masters placed guards around the museum, and the crates were moved from the Kabul Hotel to the Ministry of Information and Culture. In 1999, responding to international pressure to protect the art, the authorities threatened looters and vandals with amputation. Unfortunately, the Taliban's cultural enlightenment was brief."⁷⁸ In early 2001, the destruction began.

First, human figures in pictures were painted over. Then . . . the authorities ordered the destruction of all statues and non-Islamic shrines. The dynamiting of the huge Buddhas at Bamiyan seized most of the world's attention. But Taliban officials also vandalized the museum, smashing the remains of the collection with hammers

76. James Cuno, *The Whole World's Treasures*, THE BOSTON GLOBE, Mar. 11, 2001, at E7.

77. *The Country's Heritage Can't Easily be Reassembled*, THE ECONOMIST, Dec. 22, 2001, available at 2001WL 32306284.

78. *Id.*

and axes. The crates in the Ministry of Culture received the same treatment.⁷⁹

The Taliban leader Mullah Mohammed Omar commented:

In view of the fatwa [religious edict] of prominent Afghan scholars and the verdict of the Afghan Supreme Court it has been decided to break down all statues/idols present in different parts of the country. This is because these idols have been gods of the infidels, who worshipped them, and these are respected even now and perhaps maybe turned into gods again. The real God is only Allah, and all other false gods should be removed. Whoever thinks this is harmful to the history of Afghanistan then I tell them they must first see the history of Islam. Some people believe in these statues and pray to them If people say these are not our beliefs but only part of the history of Afghanistan, then all we are breaking are stones. The breaking of statues is an Islamic order and I have given this decision in the light of a fatwa of the ulema and the supreme court of Afghanistan. According to Islam, I don't worry about anything. My job is the implementation of Islamic order.⁸⁰

The international community was outraged by the campaign of cultural destruction executed by the Afghan government, yet nothing was done to prevent it. Philip Reeker, spokesman for the U.S. State Department, responded to the Taliban's comments by stating that:

[the] United States is distressed and baffled by this announcement by the Taliban. Their action directly contradicts one of Islam's basic tenets—tolerance for other religions. Deliberate destruction of statues and sculpture held as sacred by peoples of different faiths is incomprehensible, as is the Taliban's utter rejection of the treasures of Afghanistan's past. The United States joins the United Nations Special Mission to Afghanistan, the UN Economic and Social Council and other governments in urging the Taliban to halt this desecration of Afghanistan's cultural heritage.⁸¹

79. *Id.*

80. Comments by the Taliban, *Destructive Frenzy in Afghanistan*, ARCHAEOLOGY MAGAZINE, at www.archaeology.org/found.php?page=/online/news/afghanistan/taliban.html (last visited Oct. 31, 2003).

81. International Reactions, *Destructive Frenzy in Afghanistan*, ARCHAEOLOGY MAGAZINE, at www.archaeology.org/found.php?page=/online/news/afghanistan/international.html (last visited Oct. 31, 2003). The European Union response: "The EU strongly urges the Taliban leadership not to implement this deeply tragic decision which will deprive the people of Afghanistan of its rich cultural heritage." *Id.* French Foreign Ministry spokesman Bernard Valero: "The announcement by Mullah

Despite the pleas of the international community, the Taliban continued its destruction of Afghanistan's cultural property. Preventing the type of cultural destruction that occurred in Afghanistan is supposed to be addressed by international conventions. Yet for various reasons, these agreements have proved to be toothless against destruction of cultural property, whether in an armed conflict or peacetime. One solution to this problem has been proposed by the International Criminal Court, which would include the destruction of cultural property as a crime, thereby allowing prosecution of these types of criminals.⁸²

Mohammed Omar, supreme leader of the Taliban, that all pre-Islamic statues would be destroyed is appalling." *Id.* Representing the U.N., Kofi Annan stated:

the unique and irreplaceable relics of Afghanistan's rich heritage, both Islamic and non-Islamic, is the strongest foundation for a better, more peaceful and more tolerant future for all its people Destroying any relic, any monument, any statue will only prolong the climate of conflict. After 22 years of war, destruction and drought, there can only be one priority for the government: to rebuild the country, to renew the fabric of society, and to relieve the immense suffering and deprivation of the people of Afghanistan.

Comments from the United Nations, *Destructive Frenzy in Afghanistan*, ARCHAEOLOGY MAGAZINE, at www.archaeology.org/found.php?page=/online/news/afghanistan/un.html (last visited Oct. 31, 2003). UNESCO Director General Koichiro Matsuura states:

[they] carry a terrible responsibility before the people of Afghanistan and before history. The loss of the Afghan statues, and of the Buddhas of Bamiyan in particular, would be a loss for humanity as a whole. . . . Words fail me to describe adequately my feelings of consternation and powerlessness as I see the reports of the irreversible damage that is being done to Afghanistan's exceptional cultural heritage.

Id. Nancy Dupree representing the Society for the Preservation of Afghanistan's Cultural Heritage stated:

It is absolutely sickening. I can't believe what I'm hearing. You could not enter the Bamiyan Valley without being in awe of the creative dynamism of these figures. They belong to the whole world; they don't belong only to Afghanistan. Why spend money on an old building when the people need so much? These old buildings are Afghanistan's identity. And when you lose your identity, you've lost your soul.

Comments from Non-governmental Organizations, *Destructive Frenzy in Afghanistan*, ARCHAEOLOGY MAGAZINE, at www.archaeology.org/found.php?page=/online/news/afghanistan/nongov.html (last visited Oct. 31, 2003).

82. See Cuno, *supra* note 76.

There is a need for more coherence between agreements protecting cultural property whether in times of armed conflict or peace.

[The] dual-tracked approach has been criticized by commentators because it is illogical and creates confusion The problem is that conventions that address the peacetime protection of cultural property include no explicit reference to the 1954 Hague Convention nor the Hague Protocol, although it is undisputed that displacement of cultural property is probably greatest during armed conflict. This oversight may result in some jurisdictional overlap between various conventions since the 1954 Hague Convention contains obligations regarding the protection of cultural property during both peacetime and armed conflict.⁸³

This overlap does not truly add to the protection of cultural property. If a nation will not honor its obligations under one agreement, it probably will not do so under another. Further, the protection of cultural property in peacetime and the safeguarding obligation referenced in Article 5 of the 1954 Hague Convention oftentimes cannot be fulfilled because a nation does not have the financial or technical wherewithal to do so.

IX. THE SECOND PROTOCOL

The Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the "Second Protocol," addresses a few of the weaknesses in the 1954 Hague Convention. Namely, the Second Protocol elaborates upon Article 3 of the 1954 Hague Convention by providing examples of what measures must be taken during peacetime including: the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision of adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property.⁸⁴ The Second Protocol establishes a fund to provide financial or other assistance for contracting parties to safeguard their cultural property.⁸⁵ This provision has the potential of proving to be one of the

83. Birov, *supra* note 6, at 222.

84. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 5, 38 I.L.M. 769 (1999).

85. *Id.* at art. 29.

most helpful in the preservation of cultural property in peacetime. Thus, it has done more to assist with peacetime protection than either the UNESCO or UNIDROIT Conventions. This is due to the fact that many poor nations that do not have the financial resources to protect their cultural property may now have access to the fund established by the Second Protocol for such a purpose. Article 10 of the Second Protocol provides for enhanced protection of certain cultural property similar to the special protection granted under Article 8 of the 1954 Hague Convention, but the enhanced protection is more liberal in that there are no geographical restrictions and so the cultural property may be located in or near industrial centers. Most importantly, Article 15 of the Second Protocol outlines what are considered to be serious violations of the Protocol and requires the parties to adopt measures as necessary to establish these serious violations as criminal offences under their domestic law. Article 17 requires a party to prosecute an alleged offender or extradite such person, which extradition may be subject to the terms of an extradition treaty negotiated between the parties.

The obligation of prosecution of violations of the Second Protocol is an advancement in enforcing the obligations of protecting cultural property. This trend is very likely to continue as the law in this area develops through the formation of the International Criminal Court and establishment of other tribunals, such as the one utilized in the former Yugoslavia. The international sentiment towards cultural property protection has shifted from condoning the pillage and plunder of defeated nations to one of condemning cultural aggression. This shift may be partly due to the intentional destruction of cultural property in WWII with the purpose of inflicting harm to the people the objects represent.

X. CONCLUSION

International law regarding the protection of cultural property has changed dramatically over the past two hundred years. The shift from a belief that plundering a defeated enemy is a moral right to a belief that plunder is a form of cultural aggression is a significant development, the idea of which is still being refined. The destruction of cultural property in WWI and WWII has greatly influenced this development. The widespread destruction of cultural property during WWII and the manner in which the destruction was carried out was probably the turning point for how the international community viewed cultural property. For example, the 1954 Hague Convention

defined cultural property for the first time and granted it an elevated form of protection by preventing cultural property from becoming a military target, unless necessary. The 1954 Hague Convention did not solve all of the difficulties in protecting cultural property in the event of armed conflict as the post-war drafters would have liked. The 1954 Hague Convention could be enhanced by providing for specific enforcement mechanisms for dispute settlement and enforcement. For example, it could specifically reference the International Criminal Court and require that contracting parties submit to its jurisdiction, that the return of stolen property should be provided for individuals who had property stolen during the armed conflict, and that greater coherence between the 1954 Hague Convention, the UNESCO, and UNIDROIT Conventions should be established since they are protecting essentially the same property, but from different forms of harm.

The Second Protocol has addressed some of these issues. Namely, the obligation to enforce the Convention and the establishment of a fund to assist in safeguarding cultural property in peacetime, therefore, it should be ratified by all signatories to the 1954 Hague Convention. However, the Second Protocol still does not provide for a specific enforcement mechanism. Consequently, the underlying criticism of the 1954 Hague Convention as being "toothless" is still not completely cured by the Second Protocol.

By making the destruction of cultural property a war crime, the International Criminal Court has provided a means of enforcing customary law, which seems to be outpacing Hague law. One agreement could cover the protection of cultural property in peacetime and in the event of armed conflict. However, the International Criminal Court will not give retroactive effect to its defined crimes; therefore, the victims of Nazi looting and other similar thefts will still have to resort to enforcement through the applicable domestic law of the nation in which their stolen property currently rests.

In sum, one agreement should incorporate customary international law and deem the destruction of cultural property in the event of armed conflict or peacetime to be an international crime. The agreement should subject such a criminal to the jurisdiction of the International Criminal Court, or a similar enforcement body, which should also have the jurisdiction to order the return of cultural property to its owners or provide compensation for unjust taking, regardless of whether the owner is a State or an individual. Finally, the agreement should also have retroactive effect with no statute of limitation for bringing claims.