

September 2001

Preserving Cultural Property: Our Public Duty: A Look at How and Why We Must Create International Laws That Support International Action

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Sarah Eagen, *Preserving Cultural Property: Our Public Duty: A Look at How and Why We Must Create International Laws That Support International Action*, 13 Pace Int'l L. Rev. 407 (2001)

DOI: <https://doi.org/10.58948/2331-3536.1217>

Available at: <https://digitalcommons.pace.edu/pilr/vol13/iss2/7>

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COMMENT

PRESERVING CULTURAL PROPERTY: OUR PUBLIC DUTY: A LOOK AT HOW AND WHY WE MUST CREATE INTERNATIONAL LAWS THAT SUPPORT INTERNATIONAL ACTION

Sarah Eagen

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I. INTRODUCTION

The significance of cultural property is now widely recognized due to the extensive legal discussion that has occurred on its behalf for the past twenty to thirty years. Particular areas of interest have been: preventing theft and the illicit importing and exporting of cultural property, repatriating those who have been wrongfully deprived of their artistic treasures, and preserving the world's cultural resources. This note will primarily be concerned with the latter topic. Specifically, it will examine the international efforts that have been made in regards to the protection and preservation of cultural property.

A look at Western history reveals that preserving historical and artistic property was seen as a public duty as early as the fifteenth century.¹ However, most regulations did not begin to

¹ See *LYNDEL V. PROTT & P.J. O'KEEFE, LAW AND THE CULTURAL HERITAGE* 8 (1984).

recognize it as a public duty until the middle of the nineteenth century. Specifically, such regulations began to develop in response to periods of armed conflict and were meant to provide guidance for military troops that were engaged in battle.² Gradually, regulations, and then laws began to expand in scope and finally international treaties that supported the protection of cultural property in times of war and peace began to emerge. This note supports the view and argues that these international treaties are all based on the premise that preservation of cultural and natural resources is a public duty.

Although international treaties pertaining to cultural property acknowledge a public duty to protect and often express good-faith intent for doing so, these treaties are currently insufficient because they cannot be readily implemented. This inadequacy applies to both treaties that apply in times of war and those that apply in times of peace. During times of war the threat to cultural property is self-evident because destruction is a likely result of war. But, during times of peace, threats to the preservation of cultural property may not be so obvious. Important facts that should be considered are pollution, maintenance, security, restoration methods, traffic/road construction, landscapes/vegetation, climate, tourism, and public use/misuse.³

The Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) has made efforts to encourage preservation of non-moveable cultural and natural resources at a local level, but more needs to be done in order to effectuate positive results.⁴ In other words, in order for preservation to work, international and local efforts need to collaborate. But, if local standards are not adequately effective, then there needs to be a viable alternative in order to protect cultural property that is at risk. This is when international protective assistance becomes necessary. However, recognizing the necessity of protective assistance is not enough, rather a comprehensive and executable plan needs to

² For example, The Lieber Code of 1863 and the Convention with Respect to the Laws and Customs of War on Land. See RICHARD SHELLY HARIGAN, LIEBER'S CODE AND THE LAW OF WAR (1983); Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, art. 56, 32 Stat. 1803.

³ See Convention Concerning the Protection of World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37 [hereinafter World Heritage Convention].

⁴ See *id.*

be developed on its behalf. In this note I examine the strengths and weaknesses of the international efforts that have been made in regards to the protection and preservation of cultural property during times of war and peace. Not only do I suggest that the existing international laws need to be improved, but I argue that until such a step is taken, cultural property throughout the world is exposed to unnecessary risks of damage and destruction.

It is a common belief that cultural property is neglected due to lack of interest or appreciation.⁵ However, the cause of neglect is usually lack of financial resources, not lack of interest.⁶ Implementing a plan of protective assistance is particularly challenging in resource rich and less developed nations, which lack financing and solid protective regimes. Due to this fact, assisting nations should not have the authority to remove cultural property from source nations, unless all parties agree that removal is in the best interests of the objects, whether temporary or permanent. This note will emphasize the need for developing an international standard of preservation and protective assistance that will be especially beneficial for such countries. In addition, although mostly immovable property will be discussed, it is argued that an international standard of preservation should be applied to moveable objects of cultural property as well.

Within the framework of recognizing cultural property preservation as a duty, this note will discuss existing international laws and offer suggestions for how they can be more successfully implemented. Part II defines "cultural property" and examines why its protection and preservation matters. Part III discusses the popular debate between cultural nationalism and cultural internationalism and how it figures into a discussion on preserving cultural property. It has been argued that the debate creates a structure that is too rigid, and that perhaps a happy medium between these two concepts would better serve the interests of protecting cultural objects.⁷ Part IV examines

⁵ See Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033, 1065 (1993).

⁶ See *id.*

⁷ See *id.* at 1058.

the historical development of the concept of preservation as a duty, and will trace its origin and development throughout history. Part V examines the various laws, national and international, that exist relating to the protection of cultural objects during times of war. Part VI examines existing international cultural property laws that apply during times of war and peace and discusses their shortcomings. Particular emphasis is placed on the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention)⁸ and the World Heritage Convention. Part VII considers the contributions that non-profit organizations have made and continue to make for protecting cultural and natural resources. Part VIII critiques some of the approaches that have been previously suggested by others who have written on the topic of international protection of cultural property, and finally part IX suggests some improvements that should be made in order to effectuate the implementation of existing international cultural property laws.

II. WHAT IS CULTURAL PROPERTY AND WHY DOES IT MATTER?

It has been said that "cultural property is analogous to a multi-colored afghan, interwoven with pieces of philosophy, politics, and law."⁹ To that definition I would add the category of social history, for cultural property can show how individuals and cultures once lived, and thought. Cultural property is of such importance to people and their countries because it helps to explain and represent their past. In other words, we can learn about history by examining and studying cultural property, but in addition as a people we can form an identity from the accomplishments that have occurred in the past, and exist today in the form of cultural objects.¹⁰ Accordingly, "the mate-

⁸ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Convention].

⁹ Michael J. Reppas, *The Deflowering of the Parthenon: A Legal and Moral Analysis on why the "Elgin Marbles" must be Returned to Greece*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 911, 925 (1999).

¹⁰ See *THE TRAIN* (Metro Goldwyn Mayer 1964). This classic John Frankenheimer film provides an interesting view on how artistic achievements from the past can unite a people and create a sense of identity. Although fictional in some respects, the film tells the story of how various French citizens came together in order to prevent a train loaded with stolen art work from crossing the French border and entering Germany. It was realized that once the works of art

rial objects through which the highest achievements of the human spirit are embodied must therefore be treasured,"¹¹ as well as those objects that simply help to define who we are and how we live as a people.

Uniformly defining what qualifies as "cultural property" has proven to be a slightly difficult task for the relevant international conventions. This can be seen in the inconsistencies that exist in the definitions of cultural property in the Hague Convention, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention), the World Heritage Convention, and the 1995 Convention on the International Return of Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention).¹² The Hague Convention defines cultural property to include immovable as well as moveable property that is of significant importance to the cultural heritage of all people.¹³ Examples of cultural property include religious and secular monuments of architecture, art or history; archaeological sites; groups of buildings that are artistically and historically significant; scientific materials and collections; manuscripts; and collections of books or archives.¹⁴

The 1970 UNESCO Convention takes a different approach in defining cultural property by requiring that an object must be "specifically designated by each State" as cultural property that is to be protected.¹⁵ In other words, if a cultural object has not been designated as cultural property by its host state, then it will not receive protection under the 1970 UNESCO Conven-

left France, they would likely be lost to the people of France, as well as the rest of the world.

¹¹ PROTT & O'KEEFE, *supra* note 1, at 8.

¹² See Hague Convention, *supra* note 8; Convention on the Means of Prohibiting and Preventing the Illicit Import and Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention]; World Heritage Convention, *supra* note 3; Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention].

¹³ See Hague Convention, *supra* note 8.

¹⁴ See *id.*

¹⁵ See 1970 UNESCO Convention, *supra* note 12, art.1. "For the purposes 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. . . ." *Id.*

tion.¹⁶ The World Heritage Convention splits cultural property into two categories, and then lists certain types of objects that qualify under each category.¹⁷ Under this treaty cultural property can be considered as either cultural heritage or natural heritage, however, the items at issue must be non-moveable.¹⁸ Examples of items of cultural heritage include monuments and buildings of historic, artistic or scientific value, and archaeological sites of universal historical, anthropological, and aesthetic value.¹⁹ Examples of items of natural heritage include geological and physiographical formations, areas that are the habitat of endangered species of animals and plants that are considered of universal importance to science and conservation, and natural sites that are scientifically valuable as well as areas of natural beauty.²⁰

Although not directly relevant to international preservation law, the UNIDROIT Convention offers still a different defi-

¹⁶ For a categorical breakdown of the types of property that can be designated as cultural property see Article 1, which recognizes the following:

(A) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological 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 collection; (I) postage, revenue, and similar stamps, singly or in collection; (J) archives, including sound, photographic and cinematographic archives; [and] (K) articles of furniture more than one hundred years old and old musical instruments.

Id. art. 1.

¹⁷ See World Heritage Convention, *supra* note 3.

¹⁸ See *id.* See also Marilyn E. Phelan, *The Unidroit Convention on Stolen or Illegally Exported Cultural Objects Confirms a Separate Property Status for Cultural Treasures*, 5 VILL. SPORTS & ENT. L.J. 31, 43 (1998).

¹⁹ See World Heritage Convention, *supra* note 3, art. 1.

²⁰ See *id.* art. 2.

nition of cultural property that some argue is more comprehensive than that of the 1970 UNESCO Convention.²¹ The Convention employs the same categories that are used by the 1970 UNESCO Convention, but eliminates the requirement that a state must designate a particular item as cultural property in order for it to receive protection.²² The UNIDROIT Convention appears to acknowledge more readily that cultural property belongs to and is significant to everyone, rather than just the nation where it is currently situated.²³ This now leads us into a discussion of the two prevailing theories that frame most discussions concerning cultural property—cultural nationalism and cultural internationalism.

III. CULTURAL NATIONALISM AND CULTURAL INTERNATIONALISM: THE DEBATE

The cultural nationalism and cultural internationalism debate was asserted by Professor John H. Merryman during the 1980s.²⁴ It can best be understood when applied to a discussion of the Elgin Marbles, which were removed from Greece almost 200 years ago by Lord Elgin.²⁵ To this day the Marbles remain

²¹ See Ana Šljivic, *Why do you think it's yours? An Exposition of the Jurisprudence Underlying the Debate Between Cultural Nationalism and Cultural Internationalism*, 31 GEO. WASH. J. INT'L L. & ECON. 393, 398-99 (1997-98); see generally Phelan, *supra* note 18.

²² See *id.*; UNIDROIT Convention, *supra* note 12.

²³ See Phelan, *supra* note 18.

²⁴ See John Henry Merryman, *Thinking about the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985).

²⁵ See Reppas, *supra* note 9. For a discussion on the history of the Marbles, see generally JEANETTE C. GREENFIELD, *THE RETURN OF CULTURAL TREASURES* (1989); Merryman, *supra* note 24.

Elgin removed. . . portions of the frieze, metopes, and pediments [from the Parthenon.] The frieze, a three-foot-high horizontal band carved in low relief, originally extended 524 feet around the Parthenon's main inner chamber and depicted the Panathenaic Procession. Elgin acquired approximately 247 feet of the frieze. The metopes, a series of 92 four-foot square panels sculpted in high relief, surrounded the top of the Parthenon's outer colonnade and recounted historical and mythical battles. Elgin acquired fifteen metopes, predominately from the south side Lapith and Centaur series. The pediments, the low triangles at the ends of the building formed by the pitch of the roof, were filled with a series of sculptures in the round. Elgin acquired seventeen pedimental figures. In addition, he collected assorted architectural fragments from the Parthenon.

Merryman, *supra* note 24, at 1883-84.

in England, despite Greece's repeated requests for their return.²⁶

Professor Merryman argues that "everyone has an interest in the preservation and disposition of the [Elgin] Marbles; the matter does not touch only on Greek and English interests. The Marbles are the cultural heritage of all mankind."²⁷ The idea that the Marbles represent the heritage of all men and women is based upon the preamble of the Hague Convention, which states that "cultural property belonging to any people whatsoever is the cultural heritage of mankind."²⁸ It is this sense of ownership and interest by all people that forms the basis of the concept of cultural internationalism.

Professor Merryman divides cultural internationalism into three considerations: preservation, integrity, and distribution.²⁹ He argues that out of the three, preservation takes priority.³⁰ In relation to the Marbles, the argument goes forth that the Marbles should be where they are best protected. Merryman claims that the proper place for the Marbles is in London because there they are located in a museum and are not exposed to the polluted conditions in Athens.³¹ For years this claim has been persuasive, but recently it has been revealed that the Marbles were damaged due to over-cleaning in the 1930s, and as a result portions of their coloring are unnatural.³² Now the debate has become more intense in regards to whether the Marbles should be returned to Athens, considering that Greece has built a separate facility next to the Parthenon in which to house and protect them.³³

²⁶ See generally Ann P. Prunty, *Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing its Marbles*, 72 GEO L.J. 1155 (1984).

²⁷ Merryman, *supra* note 24, at 1916.

²⁸ *Id.* at 1916; Hague Convention, *supra* note 8.

²⁹ See Merryman, *supra* note 24.

³⁰ See *id.* at 1917.

³¹ See *id.* at 1919.

³² See T.R. Reid, *Greco-British Marbles Match; Museum's Goof said to Strip Patina from Pilfered Parthenon Statuary*, THE WASHINGTON POST, July 29, 1998 at A15; Reppas, *supra* note 9, at 938 (referencing Nigel Reynolds, *Cleaning "Scarred" Elgin Marbles British Museum kept "Act of Artistic Vandalism" Secret for more than 60 Years*, DAILY TELEGRAPH (LONDON), June 11, 1998 at 43).

³³ See Helena Smith, *After 23 Years, Greece Runs Low on Patience with Acropolis Project*, CHICAGO SUN TIMES, May 10, 1998; Reppas, *supra* note 9, at 938.

The second consideration is for the integrity of the cultural property, or for the "restoration of the parts of dismembered masterpieces."³⁴ Merryman argues that because preservation is most important, it should outweigh considerations of integrity for the Marbles because there is a concern that the smog conditions in Athens will damage them if they are returned to Greece.³⁵ But, as stated earlier, Greece has built a separate facility that is located next to the Parthenon, which is the original site of the Marbles.³⁶ Therefore, Merryman's argument does not appear as strong in light of this fact.

Finally, Merryman argues that distribution is an important criterion to consider when deciding whether the Marbles should be returned to Greece.³⁷ Distribution can be explained as the access that the public will have to the Marbles. Merryman argues that "all of mankind [should have] a reasonable opportunity for access to its own and other people's cultural achievements."³⁸ He suggests that the public has greater access to the Marbles in London, but it can be argued that this assertion is questionable, because many people visit and vacation in Greece.

In contrast, cultural nationalism is simply the belief that cultural property should remain with the people who created it because it is a part of their identity.³⁹ In other words, it is an argument based on principles of retention.⁴⁰ Hence, in relation to the Marbles, the argument would be that "the Marbles belong in Greece because they are Greek."⁴¹ Merryman criticizes this form of reasoning and labels it as "sentimentalist."⁴²

Another way of looking at the cultural nationalist viewpoint is in light of human rights issues. The Native American Graves Protection and Repatriation Act (NAGPRA) has been

³⁴ Merryman, *supra* note 24, at 1918.

³⁵ *See id.*

³⁶ *See* Reppas, *supra* note 9, at 917, 934.

³⁷ *See* Merryman, *supra* note 24, at 1919.

³⁸ *Id.*

³⁹ *See generally* Douglas N. Thomason, *Rolling Back History: The United Nations General Assembly and the Right to Cultural Property*, 22 CASE W. RES. J. INT'L L. 47 (1990).

⁴⁰ *See generally* John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477 (1988).

⁴¹ Merryman, *supra* note 24, at 1911.

⁴² *Id.* at 1912.

used to illustrate this point. Under the Act, "human rights [are] the basis for allowing tribal determinations [,] regarding disposition of remains and objects [,] to prevail."⁴³ This argument can be deemed nationalist because it considers the relationship of cultural objects to the identity of a culture to be so important, that protecting and repatriating those objects are considered to be human rights issues.

Roger Mastalir suggests that there is a "zone of agreement" between internationalists and nationalists.⁴⁴ He argues that both schools of thought recognize the "fundamental importance of [the] preservation of cultural property."⁴⁵ For internationalists, preservation means physically protecting cultural objects from such occurrences as deterioration and destruction.⁴⁶ For nationalists, however, preservation or protection "may mean that the objects are so much a part of the cultural identity of a people or nation that they must remain in or be returned to that country even if the physical safety of the objects cannot be assured."⁴⁷ Mastalir argues that because preservation is seen as "fundamental" by both internationalists and nationalists, proposals for such a task must take into account the "dichotomous" meaning that preservation has for both schools of thought.⁴⁸ Ultimately he suggests that determining the "best interests" of cultural property must involve aspects of both internationalist and nationalist thought.

IV. PRESERVATION AND ITS PLACE IN HISTORY

Consciousness concerning the preservation of the past can be traced back to the times of the Italian Renaissance.⁴⁹ As early as 1425, the Pope expressed concern for the preservation of historical monuments.⁵⁰ Specifically, in that year a papal decree was issued that ordered the demolition of buildings that

⁴³ Mastalir, *supra* note 5, at 1062.

⁴⁴ See *id.* at 1045.

⁴⁵ *Id.*

⁴⁶ See *id.*

⁴⁷ *Id.* at 1046.

⁴⁸ See *id.*

⁴⁹ See PROT & O'KEEFE, *supra* note 1, at 34; Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1148 (1990).

⁵⁰ See PROT & O'KEEFE, *supra* note 1, at 34.

were considered to be of danger to ancient monuments.⁵¹ In 1462 more papal action was taken when Pope Pius II issued a Papal Bull that was intended to protect historical monuments.⁵² Additionally, a growing awareness of the value of the past can be seen in the general cultural ideas of the Renaissance. For example, the famous painter Raphael expressed great concern for protecting the culture of earlier times when he wrote a letter to Pope Leo X circa 1519, expressing remorse for the loss of valuable historical items due to the mass construction that was occurring in Rome at that time.⁵³ However, although the Renaissance era set up a new found sense of appreciation for cultural achievements, most regulation during this time period proved to be of little effect.⁵⁴ But, this new "awareness" did not go to waste, for it proved to be influential in later years.⁵⁵

Joseph L. Sax argues that Raphael's letter, which was published in 1733, was influential on Abbe Gregoire, a member of the French government during the revolutionary year of 1794.⁵⁶ Gregoire had been asked by other members of the government to develop a response to a proposal to destroy all Latin inscriptions, as unrevolutionary, on a number of historical statues.⁵⁷ Gregoire used this opportunity to examine a larger, and more important question: "Why should caring for paintings, books, and buildings be a concern of a nation?"⁵⁸ He answered this question by attempting to depoliticize historical works and claimed that "national objects which, belonging to no one, are the property of all."⁵⁹ In other words, Gregoire asserted the concepts of "common property" and "common heritage," which are terms that are frequently used today.⁶⁰ But more impor-

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See Sax, supra* note 49, at 1148 (referring to A DOCUMENTARY HISTORY OF ART 289-96 (E. Hold ed. 1957)).

⁵⁴ *See id.* at 1149.

⁵⁵ *See id.*

⁵⁶ *See id.* at 1143.

⁵⁷ *See id.* at 1143-44.

⁵⁸ *Id.* at 1144.

⁵⁹ *Sax, supra* note 49, at 1158 (quoting H. GREGOIRE, OEUVRES DE L'ABBE GREGOIRE 277 (KRAUS-THOMPSON ORGANIZATION, LTD. 1977)).

⁶⁰ *See Sax, supra* note 49, at 1158.

tantly, Gregoire asserted the idea that preserving the past should be seen as a public duty.

Sir John Lubbock also viewed preserving the past as a duty of the public.⁶¹ On February 7, 1873, Lubbock, who was a member of the Maidstone Parliament in England, submitted "A Bill to Provide for the Preservation of Ancient National Monuments."⁶² The Bill created a commission that would have the authority to designate antiquities that it considered to be important, as ancient monuments.⁶³ The owners of any designated monuments⁶⁴ would be obligated to notify the government, "and offer it the monument for purchase, before undertaking construction on the site. If the government decided not to exercise its right of purchase then, the owners were free to go forward with their [plans.]"⁶⁵ Under the Bill, the owners were entitled to full compensation for their property. Inhabited dwellings, as well as gardens and parks were exempt from the Bill's coverage.⁶⁶ Although the Bill was highly opposed and did not pass before being stripped of some of its most important provisions, the concept the Bill set forth was novel in that it authorized protective public intervention "if an owner set out to destroy what virtually everyone agreed should be preserved."⁶⁷ Hence, one could argue that Lubbock sought "to establish the principle that the government did not have merely a right to protect ancient monuments by the expenditure of money, but rather [it] had a *duty* to do so."⁶⁸

⁶¹ See Joseph L. Sax, *Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England*, 78 CAL. L. REV. 1543 (1990) [hereinafter *Stonehenge*]; Simon Halfin, *The Legal Protection of Cultural Property in Britain: Past, Present and Future*, 6 J. ART. & ENT. L. 1 (1995).

⁶² *Stonehenge*, *supra* note 61, at 1545.

⁶³ See *id.* at 1547.

⁶⁴ "Almost all the sites in question—including celebrated ones like Stonehenge—were privately owned, and they had no legal protection whatever." *Id.* at 1546.

⁶⁵ *Id.* at 1547.

⁶⁶ See *id.*

⁶⁷ *Stonehenge*, *supra* note 61, at 1549.

⁶⁸ *Id.* at 1554 (emphasis added).

V. THE LAW OF WAR AND CULTURAL PROPERTY

Official provisions pertaining to the protection of cultural property first began to appear during times of war.⁶⁹ One of the first examples of such a provision is the Lieber Code of 1863.⁷⁰ The Lieber Code was created by Francis Lieber, who was a professor of history at Columbia University.⁷¹ The Code essentially was a draft of the rules that soldiers were to follow during the American Civil War.⁷² The Code was approved by President Lincoln and was adopted by Henry Wager Halleck, the General-in-Chief of the Union forces, and was later published as General Orders no. 100.⁷³ Although the Code did provide for the protection of cultural property, overall it was meant primarily to deal with the general concepts of war. However, the Brussels Conference of 1874 and the Hague Conventions of 1899 and 1907 did adopt the ideas set forth in the Lieber Code and expanded

⁶⁹ See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 833 (1986) [hereinafter *Two Ways of Thinking*]; John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT'L L. & POL. 1, 2-3 (1998) [hereinafter *Free International Movement*].

⁷⁰ See *Free International Movement*, *supra* note 69, at 2.

⁷¹ See *id.*

⁷² See *id.*

⁷³ Relevant Text Follows:

Article 34: As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property in the sense of paragraph 31 [authorizing seizure of enemy public property]; but it may be taxed or used when the public service may require it.

Article 35: Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

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

Id. at 2-3 (quoting RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* (1983)).

upon them by making offenses committed against cultural objects in times of war, a crime punishable under national laws.⁷⁴

In the 1930s more countries began to express an international interest in protecting cultural property.⁷⁵ As a result, the Treaty on the Protection of Artistic and Scientific Institutions and Monuments of 1935, or the Roerich Pact was created. Simply stated, the Treaty declared cultural property to be neutral during times of war.⁷⁶ In 1939, this Treaty was superseded by the League of Nations Draft Declaration and a Draft International Convention for the Protection of Monuments and Works of Art in Time of War, which consisted of representatives from the governments of Greece, the Netherlands, the United States, Spain, and Belgium.⁷⁷ However, World War II and its aftermath proved that much still needed to be done in order to protect cultural property throughout the world.⁷⁸ Nazi forces destroyed and stole a great deal of cultural property throughout Europe, and to this day, many of the pieces that were wrongfully taken have still not been recovered.⁷⁹ In response to the destructive and reprehensible behavior of military troops during World War II, the Hague Convention was adopted on May 14, 1954.⁸⁰

⁷⁴ See Two Ways of Thinking, *supra* note 69, at 834 (The Brussels Convention was never made into law); Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, art. 56, 32 Stat. 1803; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 56, 36 Stat. 2277; Karen Goepfert, *The Decapitation of Rameses II*, 13 B.U. INT'L L.J. 503, 517-18 (1995).

⁷⁵ See Two Ways of Thinking, *supra* note 69, at 835.

⁷⁶ See Treaty on the Protection of Artistic and Scientific Institutions and Monuments, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 279; Two Ways of Thinking, *supra* note 69, at 835.

⁷⁷ See Two Ways of Thinking, *supra* note 69, at 835.

⁷⁸ See Catherine Foster, *Stolen Art as War Booty: Hostages or Harbingers of Peace?*, The Christian Science Monitor, Feb. 8, 1995, at The U.S. p.1 (where it states that "the greatest organized looting of cultural property in modern history occurred during World War II").

⁷⁹ See generally Owen C. Pell, *The Potential For a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 J. ART & ENT. LAW 27 (1999); Kelly Diane Walton, Note, *Leave No Stone Unturned: The Search For Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 549 (1999); Victoria A. Birov, Note, *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, 210-13 (1998).

⁸⁰ See Hague Convention, *supra* note 8.

The Hague Convention acknowledged the importance of cultural treasures to source nations as well as other countries around the world. Essentially, the Convention adopted the premise that cultural property belongs to all of mankind throughout the world, and should rightfully be protected in times of armed conflict.⁸¹ Stated another way, the Convention acknowledges a worldwide interest in cultural property regardless of any individual source nation's interest in that particular property.⁸² From this Convention one can detect the beginnings of an international concept of worldwide ownership of cultural treasures. Additionally, the Hague Convention "incorporated the idea of individual responsibility for offenses against cultural property."⁸³ Specifically, the Hague Convention provides that "[t]he 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."⁸⁴

VI. EXAMINING THE INTERNATIONAL CULTURAL PROPERTY CONVENTIONS: HOW EFFECTIVE ARE THEY?

A. *Protection During Times of War*

The Hague Convention of 1954 was designed primarily to provide guidelines that would initiate the protection of cultural property during times of armed conflict.⁸⁵ Although the Hague has been successful in increasing awareness of the significance

⁸¹ The Hague Convention was formed under the auspices of the United Nations Education, Scientific, and Cultural Organization (UNESCO), which was created in 1946. A portion of UNESCO's preamble to its constitution reads as follows: "[T]he wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfill in a spirit of mutual assistance and concern. . . ." For more information visit: <http://www.unesco.org/general/eng/about/constitution/pre.shtml>. See *id.*

⁸² See Sljivic, *supra* note 21, at 417.

⁸³ Goepfert, *supra* note 74, at 518.

⁸⁴ Hague Convention, *supra* note 8, art. 28.

⁸⁵ See *id.* art. 3. Article 3 also called for the safeguarding of property in times of peace in case war broke out in the future: "The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate." *Id.*

of cultural property, developing the concept of common cultural property, and criminal liability for parties who disregard the provisions of the treaty, it has not been particularly successful in times of war.⁸⁶ Essentially, it has functioned more in a theoretical sense and has not rendered itself easily to application when needed.⁸⁷ For example, it has been said that "[w]hile carting off or destroying a country's cultural heritage has always been a part of warfare, it has become especially common in the 20th century because of a heightened sense of nationalism."⁸⁸ Examples of this can be seen in Iraq and Kuwait during the Gulf War, and in the former Yugoslavia during the early 1990s in the Serbo-Croatian War.⁸⁹

1. *The Gulf War*

Although the Hague Convention produced relatively positive results during the Gulf War,⁹⁰ there were some problems with its implementation. Specifically, Iraq, who was a party to the Convention, misused Article 4 in order to justify the re-

⁸⁶ See Sljivic, *supra* note 21; Birov, *supra* note 79; Two Ways of Thinking, *supra* note 69; M. Catherine Vernon, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT'L L. 435 (1994); Jennifer N. Lehman, *The Continued Struggle with Stolen Cultural Property: The Hague Convention, The Unesco Convention, and the Unidroit Draft Convention*, 14 ARIZ. J. INT'L & COMP. L. 527 (1997).

⁸⁷ See Miriam Horn, *The Vanishing Past*, U.S. NEWS AND WORLD REPORT, Sept. 21, 1992, at p. 80 (where it states that "the Hague Convention has been largely ineffectual since its inception. . .").

⁸⁸ Foster, *supra* note 78, at 1 (quoting Dr. Jonathan Petropoulos, Assistant Professor of History at Loyola College in Baltimore, MD). Examples of such practices include the looting and vandalizing of the Cambodian Angkor temples by the Khmer Rouge, as well as the bombing and looting of the National Museum in Kabul, Afghanistan, in 1994. One should note, however, that Afghanistan is currently not a party to the Hague Convention.

⁸⁹ See also, Birov, *supra* note 79, at 234-38; Lehman, *supra* note 86, at 535-38; Vernon, *supra* note 86, at 442-44.

⁹⁰ The most strident application of the Convention occurred when the United States chose not to attack the ancient temple of Ur. . . The Pentagon's Report to Congress justified the decision in the following terms: "positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed the aircraft out of action, thereby limiting the value of their destruction. . .when weighed against the damage to the temple."

Birov, *supra* note 79, at 234 (emphasis added). See also, Charles Kuralt, *Few Treasures of Islamic Art Saved From Kuwait*, CBS NEWS TRANSCRIPTS, Feb. 3, 1991 (where the city of Ur and its relation to a nearby Iraqi air base is discussed).

moval of approximately 17,000 to 20,000 cultural objects from museums and palaces in Kuwait.⁹¹ Iraq claimed that "military necessity" forced it to remove valuable cultural objects from Kuwait and take them into Baghdad, in order to protect the items from military destruction.⁹² When confronted by UNESCO, the Iraqi foreign minister promised the United Nations that all cultural property that had been removed from Kuwait, would be returned.⁹³ In order to see that Iraq carried through on its promise, "UNESCO did the *most* it could by publicizing Iraq's violations and gathering information regarding the stolen artifacts. [However,] the crucial aspect of the campaign's success. . . resulted from political pressure applied by the [United Nations] Security Council and the United States."⁹⁴ Fortunately, Iraq eventually returned the objects it had removed from Kuwait, but it did so under the supervision of the United Nations Security Council and the United States.⁹⁵ As a result, one is left wondering, had the United States not helped UNESCO in the implementation of the Hague Convention, would Iraq have cooperated?⁹⁶ Jennifer N. Lehman noted that additional problems occurred when approximately 4000 cul-

⁹¹ See Ken Fireman, *A Heritage Nearly Obliterated by War*, *NEWSDAY*, Mar. 26, 1991 at 51 (The Kuwaiti National Museum was "systematically looted by the Iraqis"—after roughly 20,000 items were taken from the museum, the interiors of various galleries were either burned or damaged in other ways); Sarah Gauch, *Kuwait Museum Remains a Casualty of the Gulf War*, *THE WASHINGTON TIMES*, June 8, 1992 at A9 (Some of the objects taken/ and or destroyed include: a collection of ancient coins, 17th and 18th century accounts from some of the first European travelers to Arabia, paintings of some of the first Kuwaiti artists to study at the Cairo Academy of Fine Arts, and Nomadic gold jewelry and golden swords); Foster, *supra* note 78, at 1 (Iraq sent art experts to Kuwait to remove cultural property from museums and palaces); *Iraq Begins to Return Stolen Kuwaiti Art Treasures*, *CHICAGO TRIBUNE*, Sept. 17, 1991 at 4 (Kuwait claims that Iraq stole 17,000 artifacts, mostly from the National Museum and the House of Islamic Antiquities).

⁹² See Paul Meyers, *The Gulf War: Priceless Islamic Art Collection found to be "Safe" in Baghdad*, *THE GUARDIAN*, Feb. 22, 1991 at 3.

⁹³ See *Iraqi Raiders*, *THE WASHINGTON POST*, June 15, 1991 at A22.

⁹⁴ Birov, *supra* note 79, at 236 (emphasis added); see also, *Iraqi Raiders*, *supra* note 93.

⁹⁵ See *Iraq Begins to Return Stolen Kuwaiti Art Treasures*, *supra* note 91; Birov, *supra* note 79, at 235.

⁹⁶ This question is particularly interesting in light of the fact that the United States has not ratified the Hague Convention of 1954. However, the United States claims that it has accepted most of the Convention's principles and continues to instruct its armed forces to follow various portions of the provisions of the Convention. See Lehman, *supra* note 86, at 536.

tural objects were stolen from Iraqi museums in the postwar chaos that followed the Gulf War.⁹⁷ Some reports indicate that these items eventually began to appear on the art markets of New York and London.⁹⁸

2. *The Serbo-Croatian War*

Unfortunately, implementing the Hague Convention was close to impossible during the Serbo-Croatian War in the early 1990s. UNESCO tried desperately to save the monuments and churches in Bosnia and Croatia by marking these objects with the blue and white flags of the Hague Convention, which are supposed to guarantee protection in times of war.⁹⁹ However, Yugoslavian troops ignored the flags, and in some cases deliberately attacked the cultural property that was marked with them.¹⁰⁰ It seems as if the flags functioned as incentives for destruction, rather than as deterrents.¹⁰¹ In 1991 and 1992 more than 700 cultural objects that were marked with the Hague Convention flags were damaged or destroyed.¹⁰² In Dubrovnik, a medieval city that was a site on the World Heritage List, as many as thirty percent of the city's historical buildings were destroyed in warfare, despite the fact that they were

⁹⁷ See *id.* at 537 (citing *Stolen Artifacts from Iraq for Sale, Plunder from Gulf War Showing up in Art Markets*, SAN FRANCISCO EXAMINER, Mar. 22, 1992 at A4).

⁹⁸ See *id.*

⁹⁹ See Amy E. Schwartz, *Can We Shield Art from War*, THE WASHINGTON TIMES, June 23, 1993 at A17; *Yugoslavia: UNESCO Urges Warring Forces to Leave Dubrovnik*, INTER PRESS SERVICE, Oct. 15, 1991; *Targeting Croatia's Culture is War Crime*, THE NEW YORK TIMES, Oct. 28, 1991.

¹⁰⁰ See *The Sacking of Croatia*, THE NEW YORK TIMES, Sept. 22, 1991 at sec. 4, p. 16, col. 1. See also *Dubrovnik Sustains Heavy Damage, Vance Furious*, AGENCE FRANCE PRESSE, Dec. 7, 1991 (where it states that President Bush imposed economic sanctions upon Yugoslavia for its extreme behavior. Specifically, Bush withdrew Yugoslavia's special trade status under a program called the Generalized System of Preferences).

¹⁰¹ See Alan G. Artner, *Yugoslav Civil War takes High Cultural Toll*, available at 1992 WL 4459965 ("One clearly could see the flags hanging on cultural property that was under bombardment. It was blatant cultural destruction"); Schwartz, *supra* note 99 ("At least one conservation expert - Bonnie Burnham. . . suggests that such designations may even function as incentives").

¹⁰² "In the past year, more than 700 Croatian and Bosnian monuments have been damaged or destroyed. Most were marked with the blue and white flag of the 1954 Hague Convention, which guarantees wartime protection of cultural property." Horn, *supra* note 87, at 80.

marked with the flags of the Hague Convention.¹⁰³ In light of the efforts that were made to save these cultural objects, how could such military tactics have been employed and carried out by the Yugoslavian troops?¹⁰⁴ As Victoria Birov notes, “[t]he destruction of Dubrovnik demonstrates that although the Hague Convention may present a useful framework for protecting cultural property, it is of little use when belligerents specifically wish to destroy the other side’s cultural identity.”¹⁰⁵ Clearly, more needs to be done in furthering the effective implementation of the Hague Convention, for as the Serbo-Croatian War illustrates, the current provisions can essentially be rendered ineffective by the will of the parties involved.¹⁰⁶

3. *Why Isn’t the Hague Convention Working?*

Perhaps the most obvious flaw of the Convention is its overly broad deference to “military necessity” when parties at war wish to dismiss their duties to protect cultural property. Specifically, the Convention provides that “[t]he obligations [to protect the cultural heritage of mankind]. . . may be waived only in cases where military necessity imperatively requires such a waiver.”¹⁰⁷ The obvious question appears to be, what exactly is “imperative military necessity?” During World War II General Eisenhower gave the following statement: “Nothing can stand against the argument of military necessity. That is an accepted principle. *But* the phrase ‘military necessity’ is sometimes used where it would be more truthful to speak of *military convenience* or even of *personal convenience*.”¹⁰⁸ Therefore, there is a potential for abuse when nations invoke the concept of military necessity during armed conflict. It has also been argued that “in practice, field commanders can be expected to place other values higher than cultural preservation and to translate them

¹⁰³ See *Dubrovnik Sustains Heavy Damage*, *supra* note 100.

¹⁰⁴ See *id.*; Birov, *supra* note 79, at 238.

¹⁰⁵ Birov, *supra* note 79, at 238

¹⁰⁶ See generally Schwartz, *supra* note 99; Karen J. Detling, *Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 MD. J. INT’L L. & TRADE 41 (1993).

¹⁰⁷ Hague Convention, *supra* note 8, art.4.

¹⁰⁸ JOHN HENRY MERRYMAN & ALBERT E. ELSÉN, LAW, ETHICS, AND THE VISUAL ARTS 35 (1987) (emphasis added).

into 'military necessity.'"¹⁰⁹ Very few people would argue that cultural property should be saved over human lives,¹¹⁰ but many people do believe that cultural property should not be put at risk or sacrificed unless absolutely necessary.¹¹¹ The Hague Convention needs to work on creating a more tightly drawn definition of "military necessity" that cannot be so easily abused and manipulated by the parties to whom the Convention is applicable.¹¹² For example, creating a list of criteria that must be met, would be helpful.

Additionally, the Convention needs to work on becoming more than the collective effort of the intent of various nations to protect the cultural heritage of the world. It needs to become a treaty that actually has a way to implement its guidelines, rather than a theoretical treatise that professes good faith intent to protect.¹¹³ This note does not begin to suggest that such

¹⁰⁹ Two Ways of Thinking, *supra* note 69, at 838.

¹¹⁰ See, e.g., William H. Honan, *Dubrovnik, Cultural Hostage in Yugoslav Turmoil*, THE NEW YORK TIMES, Dec. 2, 1991 at C14 (where Professor George Tomashevich, a professor of Anthropology at the State University of Buffalo, states that "Cultural monuments, even the most precious, can be restored, but a human life that is lost cannot be. I am not saying we should neglect cultural monuments, but what is more important is the brutalization of human life"). See also Artner, *supra* note 101 (where the author states that "loss of memory is perhaps less grievous than loss of life, but the memory of a people is embodied in buildings and monuments that give a sense of culture. When they are destroyed, the culture goes with them"). But see Sir Harold Nicolson (1886-1968), a British author and statesman, who stated the following:

It is to my mind absolutely desirable that [works of major artistic value] should be preserved from destruction, even if their preservation entails the sacrifice of human lives. I should assuredly be prepared to be shot against a wall if I were certain that by such a sacrifice I could preserve the Giotto frescoes; nor should I hesitate for an instant (were such a decision ever open to me) to save St. Mark's even if I were aware that by so doing I should bring death to my sons. I should know that in a hundred years from now it would matter not at all if I or my children had survived; whereas it would matter seriously and permanently if the Piazza at Venice had been reduced to dust and ashes either by the Americans or ourselves.

MERRYMAN & ELSER, *supra* note 108, at 37-39 (quoting Sir Harold Nicolson, *Marginal Comment*, SPECTATOR, Feb. 25, 1944).

¹¹¹ See Hague Convention, *supra* note 8.

¹¹² See also Victoria Birov *supra* note 79, at 241 (who argues "since the military necessity exception to the 1954 Hague Convention has been improperly used to evade legal responsibilities vis-à-vis cultural property, it needs either to be completely eliminated or narrowly confined.")

¹¹³ Victoria Birov has suggested that a committee similar to the World Heritage Committee could help with implementation during times of war. See *id.* at

a task is an easy one, for if it were, it likely would have been done by now. But, this note does argue that until the Hague Convention makes some changes that will help its ideals to become more easily implemented, the Convention itself is a false guarantee of security and protection that has a great potential to be ineffective in times of need.

B. *Protection in Times of Peace*

1. *The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention)*

In contrast to the Hague Convention, the 1970 UNESCO Convention argues for the protection of cultural property from the perspective of national retention.¹¹⁴ Specifically, the Convention favors leaving cultural property within its source nation. For example, the Preamble 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."¹¹⁵ Accordingly, the Treaty only permits source nations to designate cultural objects that they deem worthy of international protection.¹¹⁶ This means that non-source nations are subject to the judgment of source nations where the international protection of cultural property is concerned. A more effective system of protection would result if non-source nations could take part in designating particular pieces as cultural property that needs to be preserved. Under the Convention as it stands, the world risks losing its heritage to the poor judgment or, in most cases, the lack of financial and technological resources of host nations.

244-46. See also Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 I.L.M. 769 (1999)(where the Convention has acknowledged the "necessity to supplement [the provisions of the Convention] through measures to reinforce their implementation").

¹¹⁴ See 1970 UNESCO Convention, *supra* note 12; Two Ways of Thinking, *supra* note 69, at 846.

¹¹⁵ 1970 UNESCO Convention, *supra* note 12, preamble.

¹¹⁶ See 1970 UNESCO Convention, *supra* note 12.

Although the 1970 UNESCO Convention views cultural property from a nationalist stance, arguments can be made that it does acknowledge a duty to protect cultural objects not just for the benefit of source nations, but for the entire world.¹¹⁷ Specifically, the preamble states that "the 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."¹¹⁸ Additionally, John Henry Merryman argues that the following language from the Convention obliges source nations to care for cultural property that is located within their territories.¹¹⁹ "It is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine, excavation, and illicit export."¹²⁰

2. *The Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention)*

The World Heritage Convention acknowledges that "parts 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."¹²¹ It attempts to establish "an effective system of collective protection of [non-moveable] cultural and

¹¹⁷ See Two Ways of Thinking, *supra* note 69, at 844.

¹¹⁸ 1970 UNESCO Convention, *supra* note 12.

¹¹⁹ See Two Ways of Thinking, *supra* note 69, at 844.

¹²⁰ See also Article 5, paragraphs (c) and (d) which state as follows:

To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions: (c) promoting the development or the establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops. . .) required to ensure the preservation and presentation of cultural property; (d) organizing the supervision of archaeological excavations, ensuring the preservation "in situ" of certain cultural property, and protecting certain areas reserved for future archaeological research.

1970 UNESCO Convention, *supra* note 12, art. 5; Two Ways of Thinking, *supra* note 69, at 844.

¹²¹ World Heritage Convention, *supra* note 3, preamble.

natural heritage of outstanding universal value.”¹²² However, this program of “collective assistance” is not to take the place of any action by the State concerned, but rather “will serve as an effective complement thereto.”¹²³ Additionally, the Convention provides for the creation of a World Heritage List, a World Heritage List in Danger, as well as a World Heritage Committee. The World Heritage List is formed from the submission of inventory lists of cultural property by source nations.¹²⁴ A site can only be placed on the list by its source nation.¹²⁵ The World Heritage Committee is an intergovernmental committee comprised of fifteen “States Parties” to the Convention, who are elected by all nations that are a party to the Convention.¹²⁶ The Committee is supposed to help implement international assistance in preserving cultural property by considering requests for assistance and deciding what forms of assistance will be given.¹²⁷

Although the World Heritage Convention acknowledges the value of non-moveable cultural and natural property in the international arena, it fails to provide a method of implementation that does not depend upon the consent of source nations. Under the Convention, international assistance in preserving cultural objects can only occur after a source nation has “requested” assistance from the World Heritage Committee. In addition, only source nations get to designate which cultural objects are worthy of international protection.¹²⁸ M. Catherine Vernon correctly notes that “while these are applaudable programs. . .they are restricted to impetus from the territorial state. Despite the treaty’s regard for the world’s heritage, the world receives no rights or protection; only States have such rights.”¹²⁹ In addition, she notes that the Convention is weak in its financial aspects because it allows State parties to opt out of paying their dues to support the World Heritage Fund, which provides the financial resources for international protective as-

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See id.* art. 11.

¹²⁵ *See id.*

¹²⁶ *See id.* art. 8.

¹²⁷ *See* Vernon, *supra* note 86, at 469.

¹²⁸ *See* World Heritage Convention, *supra* note 3, art. 3.

¹²⁹ Vernon, *supra* note 86, at 470.

sistance.¹³⁰ Therefore, although the World Heritage Convention suggests a positive intent to protect the cultural property throughout the world, like the Hague Convention, it is idealistic in some respects. Until interested non-source nations have a voice in making decisions concerning the preservation of cultural objects, both Conventions for the most part remain ineffective, and provide a false sense of security that the historical and artistic treasures of the world are being adequately protected.

C. *Cultural Property Located in Countries That Do Not Acknowledge International Preservation Laws*

Perhaps the most frustrating question in an international preservation law discussion is, how can we protect property that is located in a country that does not acknowledge international preservation law? This problem is best illustrated by the mass destruction of statues that occurred in Afghanistan in March, 2001.¹³¹ Specifically, on March 1, the Taliban movement "began the systematic destruction of all statues from Afghanistan's rich cultural past because they had been declared un-Islamic."¹³² Considered most significant, were two Buddha statues ranging from 120 to 175 feet in height, which were positioned on a cliff overlooking the city of Bamiyan.¹³³ Both statues were destroyed despite the pleas of the international

¹³⁰ See *id.* at 470-71; World Heritage Convention, *supra* note 3, art. 16. Paragraph (1) states that "the States Parties to this Convention undertake to pay regularly, every two years, to the World Heritage Fund, contributions, the amount of which, in the form of a uniform percentage applicable to all States, shall be determined by the General Assembly of States Parties to the Convention. . . ." Paragraph (2) states "However, each State referred to in Article 31 or in Article 32 of this Convention may declare, at the time of the deposit of its instruments of ratification, acceptance or accession, that it shall not be bound by the provisions of paragraph 1 of this Article." Articles 31-32 concern ratification and accession procedures. See World Heritage Convention, *supra* note 3, arts. 16, 31-32.

¹³¹ See *Taliban Begins Destruction of all Afghan Statues*, http://www.pcpafg.org/news/Afghan_News/year2001/2001_02_26/Taliban_begins_destruction_of_all_Afghan_Statutes.shtml

¹³² *Id.*

¹³³ See Amir Shah, *Taliban Official Boasts of Destruction of Giant Ancient Buddha Statues*, CHICAGO TRIBUNE, Mar. 4, 2001 at C8; Barry Bearak, *Over World Protests, Taliban are Destroying Ancient Buddhas*, THE NEW YORK TIMES, Mar. 4, 2001, at sec. 1, p. 10, col. 3.

community.¹³⁴ The New York Metropolitan Museum of Art even offered to take the statues and preserve them.¹³⁵ However, the ruling Taliban refused to cooperate, claiming that the mass destruction was ordered because the Islamic religion does not condone idolatry.¹³⁶ Unfortunately, the Taliban was not willing to recognize that the heritage of the Afghan people is rooted in Buddhism. Historically speaking, "Afghanistan has been a crossroads for Europe, India and China. Great conquerors have come through its mountains, as have traders, ideas and religions. Islam [only spread to the region and] supplanted Buddhism more than 1,000 years ago."¹³⁷ Sadly, now any physical evidence of Afghanistan's Buddhist past has been lost due to the destructive efforts of a radical form of leadership that has only gained political recognition in three other countries throughout the world.¹³⁸

The fate of the Afghan Bamiyan Buddhas was a tragic one, and one is left wondering, how can such occurrences be prevented in the future? Clearly, incentives of some sort must be made in order to encourage countries to acknowledge international preservation laws. These incentives can take many different forms, but in underdeveloped countries, economic incentives will likely be most effective. Although it is questionable whether such a radical political movement as the Taliban would have ever responded to such incentives, it is possible that other countries might. Hence, pressure must be applied upon those countries that harbor our cultural heritage, but fail to recognize any duty to protect these cultural items.

VII. FUNDING AND ASSISTANCE BY PRIVATE NON-PROFIT ORGANIZATIONS

Although international cultural property laws remain flawed, many countries have received assistance in protecting their cultural objects from such non-profit organizations as the World Monuments Fund (WMF).¹³⁹ Established in 1965, The

¹³⁴ See Amir Shah, *It's Too Late to Save Huge Buddhas, Taliban Says; Pleas Continue as Job is Said to be 80% Done*, CHICAGO TRIBUNE, Mar. 11, 2001 at C13.

¹³⁵ See Shah, *Taliban Official Boasts of Destruction*, *supra* note 133.

¹³⁶ See Shah, *It's Too Late to Save Huge Buddhas*, *supra* note 134.

¹³⁷ Bearak, *supra* note 133.

¹³⁸ See *Taliban Begins Destruction of all Afghan Statues*, *supra* note 131.

¹³⁹ <http://www.worldmonuments.org>

WMF is a private, non-profit, New York based organization that has independent affiliates in Britain, France, Italy, Portugal, and Spain.¹⁴⁰ Under president Bonnie Burnham, the WMF attempts to "safeguard the heritage of our extraordinary past achievements by encouraging the restoration and preservation of monuments of exceptional artistic, historical, and cultural significance throughout the world."¹⁴¹ Additionally, the WMF hopes to "foster the exchange of technical expertise in the areas of material conservation, restoration methodologies, historical interpretation, financial procedures and education as they relate to heritage conservation."¹⁴² Activities of the organization include "documentation and surveys, field research, training, strategic planning, fundraising, and advocacy."¹⁴³ While working with public and private-sector partners, the World Monuments Fund has developed restoration projects in over sixty-nine countries throughout the world.¹⁴⁴

In 1995, due to a five million-dollar commitment over five years by the American Express Philanthropic Program, the WMF was able to establish the World Monuments Watch.¹⁴⁵ The Watch is "a global initiative to spur and catalyze worldwide action to protect and preserve monuments in peril."¹⁴⁶ The Watch creates and publishes a list of what it considers to be the one hundred most endangered sites in the world, and in turn encourages preservation efforts at those sites. Roughly six million dollars has been raised from the private sector for sites that were a part of the 1996/7 and 1998/9 lists.¹⁴⁷ Additionally, governments have also begun to contribute to sites on the Watch list due to the initiative of the private sector.¹⁴⁸ Overall, the WMF and the Watch have gathered and contributed a great deal of money in order to effectuate the preservation of our cultural resources throughout the world.

¹⁴⁰ <http://www.worldmonuments.org/html/programs/aboutwmf.html>

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *See id.*

¹⁴⁵ <http://www.home3.americanexpress.com/corp/philanthropy/wmf.asp>

¹⁴⁶ *Id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

VIII. A LOOK AT SOME OF THE APPROACHES FOR PRESERVING CULTURAL PROPERTY

A. *Protective Intervention*

M. Catherine Vernon suggests that international organizations as well as other states should be able to intervene in order to protect (not remove) endangered non-moveable cultural property that is located within the territorial boundaries of a state that is not adequately preserving its cultural heritage.¹⁴⁹ Specifically, she takes an internationalist stance and argues that such property should be considered as "common cultural property," and therefore should be protected by all other parties who are interested.¹⁵⁰ However, she notes that under the current international legal regime, "the concept of common cultural property [can be considered] a mere legal fiction," because existing international laws are based on a nationalistic view and principles of territorial sovereignty.¹⁵¹ Not only does Vernon note the overall weaknesses of the international treaties pertaining to cultural property, but she also presents an argument which will be summarized here in three parts, that helps to explain why the existing laws are not as effective as they could or should be.

First, Vernon suggests that too much emphasis has been placed on the concept of territorial sovereignty in relation to the protection of cultural property.¹⁵² Specifically, she argues that political and territorial boundaries are of little relevance because "culture is neither normally nor historically derived from a territory; rather, culture develops from the societal traditions of people."¹⁵³ Additionally, she suggests that the concept of "intervention" has already become prevalent in the international realm because underdeveloped countries often need assistance in order to maintain or achieve economic and social order. She also argues that territorial sovereignty is not the best medium through which to protect cultural property because states "are

¹⁴⁹ See Vernon, *supra* note 86, at 436.

¹⁵⁰ See *id.* at 437.

¹⁵¹ See *id.*

¹⁵² See *id.* at 446-48. See generally Thomason, *supra* note 39 (for background information on the concept of territorial sovereignty).

¹⁵³ Vernon, *supra* note 86, at 446. See also Two Ways of Thinking, *supra* note 69 (Merryman also argues from an internationalist point of view).

becoming too big to respond to the needs of people [,] and too small to respond to the globalization of capital or the challenges of militarization and environmental collapse."¹⁵⁴

Second, Vernon counters the nationalist, or national patrimony argument by noting some of its weaker points.¹⁵⁵ Because states where cultural property is located regulate the access to and protection of such property, other states are left without a voice in deciding how the property should be preserved.¹⁵⁶ Under such a system, the world can essentially be cut off from exposure to, and input regarding cultural property that many would argue is the heritage of all men and women, simply because the law of situs controls.¹⁵⁷ Additionally, Vernon argues that although an isolationist focus by states in protecting their cultural property is understandable in light of problems with the illicit import and export of cultural property, such a focus can in turn harm cultural property.¹⁵⁸ Specifically, by isolating common cultural property, it is difficult to detect when host states are not doing an adequate job of protecting such property.¹⁵⁹ Instead, Vernon argues that a balancing of interests must occur, and host nations must acknowledge a "dual accountability" both to its own cultural heritage, as well as to the cultural heritage of all of mankind.¹⁶⁰

Third, Vernon attempts to show how a plan of protective intervention could be implemented by comparing it to the United Nations Convention on the Law of the Sea (UNCLOS).¹⁶¹ UNCLOS treats the seabed, ocean floor, and subsoil as immune from national jurisdiction, and instead as a part of the world's cultural heritage.¹⁶² Unlike other international con-

¹⁵⁴ Vernon, *supra* note 86, at 448 (quoting R.B.J. WALKER, ONE WORLD, MANY WORLDS: STRUGGLES FOR A JUST WORLD PEACE 165 (1988)).

¹⁵⁵ See Vernon, *supra* note 86, at 449-54.

¹⁵⁶ See *id.* at 450.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.* at 452.

¹⁵⁹ See *id.* at 453.

¹⁶⁰ See *id.*

¹⁶¹ U.N. Doc. A/CONF. 62/122 (1982) as amended in U.N. Doc. A/CONF. 62/122/Corr. 3 (1982) and A/CONF. 62/122 Corr. 8 (1982), *reprinted in* 21 I.L.M. 1261 (1982); Vernon, *supra* note 86, at 471.

¹⁶² See Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National jurisdiction, G.A. Res. 4355, 25 U.N. GAOR Supp. (No. 28), at 24, U.N. Doc. A/8028 (1970).

ventions addressing cultural property, UNCLOS considers underwater cultural heritage to be universally owned because the land on which it resides can be considered as the "common property of mankind."¹⁶³ Since 1982, UNCLOS has functioned as the governing body of law regarding underwater cultural property (archaeological sites, minerals etc.) and has treated all cultural property found beyond a twelve-mile zone from land as deserving of international protection.¹⁶⁴ Vernon notes that although the proposal for a Seabed Authority to operate as the international force in protecting underwater cultural property was not adopted under UNCLOS, the treaty did permit international involvement in the protection of underwater sources.¹⁶⁵

Other legal authorities have suggested a multi-jurisdictional approach for under-water cultural property.¹⁶⁶ Under this approach, the waters of the seas would not be open to just anyone, such as "users and exploiters," but rather access would be internationally administered for the "common good."¹⁶⁷ There would be twenty four-mile contiguous zones over which the coastal state would have primary, but not exclusive control.¹⁶⁸ Therefore, if preservation problems arose, other states would have a right to become involved in protecting the underwater cultural property that was at issue. Vernon argues that "a similar concept could be applied above ground as well, subordinating territorial rights of states to an overriding international law of protection and intervention for scientific purposes, effectively administered by an international authority."¹⁶⁹

Vernon's argument makes sense theoretically, but is difficult, if not impossible to implement under our current system of

¹⁶³ Vernon, *supra* note 86, at 473; Anastasia Strati, *Deep Seabed Cultural Property and the Common Heritage of Mankind*, 40 INT'L & COMP. L.Q. 859, 865 (1991)(referencing UNCLOS art. 303).

¹⁶⁴ See Vernon, *supra* note 86, at 473.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.* at 473-74 (referencing L.F.E. Goldie, *A Note on Some Diverse Meanings of "The Common Heritage of Mankind,"* 10 SYRACUSE J. INT'L L. & COM. 69, 87 (1983)).

¹⁶⁷ See *id.* at 474.

¹⁶⁸ See *id.*

¹⁶⁹ *Id.*

international cultural property law.¹⁷⁰ Vernon acknowledges and argues that present international laws need to place less emphasis on territorial sovereignty and more emphasis on access and preservation, but at the same time she does not develop a plan to show how such a goal can be achieved. Without proper incentives, it is unlikely that territorial sovereignty will ever lose its dominant role in international property law. In fact, she states:

[T]his Note argues only for the recognition of rights of intervention. Once accepted as a norm whose time is due, international effort and cooperation can ultimately develop a framework for the use of diplomatic and non-military intervention by an apolitical, international body that has clearly delineated which properties are to be considered common culture, and what protective action is necessary.¹⁷¹

Vernon is correct in arguing that a right of protective intervention is warranted, but it is unlikely that international law will be able to recognize such a right when it has no plan as to how to implement such a right. Most people would not contest the idea that just because something should be a certain way, does not mean that it will or can necessarily be so. In addition, a solution that includes the protection of moveable property as well as non-moveable property must be developed. Thus, Vernon's argument needs to be expanded upon and recommendations regarding the implementation of her ideas need to be put forth.

B. *The Transfer of Technology*

Roger Mastalir recommends a method of preservation that is based on a "zone of agreement" between both the "cultural" and "property" aspects of cultural property.¹⁷² Specifically, he argues that in order to effectively preserve cultural property, it is necessary to acknowledge the "cultural aspect" of cultural property, which is based on human rights principles, and the

¹⁷⁰ See also A. Sljivic, *supra* note 21, at 418 (where it states "[t]he problem with this view is that it is questionable whether the notion of a cultural heritage of mankind can be implemented under current norms of international law").

¹⁷¹ Vernon, *supra* note 86, at 439.

¹⁷² See Mastalir, *supra* note 5, at 1074-75; see also Sljivic, *supra* note 21, at 424-25.

"property" aspect of cultural property, which is the actual physical protection of cultural property.¹⁷³ Mastalir argues that source nations are more concerned with the "cultural" aspect, while acquisitive nations are primarily concerned with the "property" aspect, or the preservation of cultural property.¹⁷⁴ But, he notes that "despite the differences in their views of the matter, acquisitive nations and source nations agree on a zone of common concern that involves the preservation of cultural property."¹⁷⁵ Mastalir suggests that an international plan for preserving cultural property could be based upon the international plan that was used to protect the global environment.¹⁷⁶ Under that plan, developed countries provided technological and financial assistance to less developed countries that did not have the necessary means to protect and preserve their surroundings.¹⁷⁷

Mastalir argues that if a similar solution was applied the cultural property context, "[it] is likely to have much more certain, tangible, and immediate benefits for acquisitive nations."¹⁷⁸ In assessing the effectiveness of his plan, Mastalir suggests that there is a direct precedent for the transfer of technology and funds.¹⁷⁹ Specifically, he looks at Articles 13 and 19 of the World Heritage Convention, which provide for financial assistance from the World Heritage Fund in order to assist in implementing conservation plans for national sites that are listed on the World Heritage List and that are being maintained at agreed upon levels of protection.¹⁸⁰ More importantly, he notes that the incentive for developed nations to provide assistance to less developed countries for protecting their environment is access to natural resources.¹⁸¹ Likewise, he suggests that the same incentive could apply in a cultural property context, meaning, "the incentive for acquisitive nations to transfer to source nations technology and funds to protect cultural prop-

¹⁷³ See Mastalir, *supra* note 5, at 1074-75.

¹⁷⁴ See *id.* at 1074.

¹⁷⁵ *Id.* at 1074-75.

¹⁷⁶ See *id.* at 1075.

¹⁷⁷ See *id.*

¹⁷⁸ *Id.*

¹⁷⁹ See Mastalir, *supra* note 5, at 1088.

¹⁸⁰ See *id.*

¹⁸¹ See *id.* at 1088-89.

erty is also access to the resources of the source nation. . .[including] cultural property, [such as] archaeological sites and monuments."¹⁸²

Mastalir's plan has merit. Indeed, technology and financial assistance must be transferred to countries without the appropriate means to protect their cultural resources. Additionally, incentives such as increased access, and exchange/lending programs could facilitate the involvement of non-source nations with the proper financial resources.¹⁸³ But, under his plan a mechanism still needs to be developed within the existing international laws that would permit non-source nations to assist source nations in need, even if those source nations did not request assistance. Also, Articles 13 and 19 of the World Heritage Convention, suggest that although international law supports the transfer of technology and funds, they also show that no agreement has been reached as to how such a transfer is possible unless the source nations deem such assistance to be necessary.¹⁸⁴ Although his plan does shed light on the value of the services that are being provided by all of the non-profit organizations that are currently involved in protecting cultural property, such as the World Monuments Fund, it needs further development in order to function effectively in the public international sphere.

This note offers some suggestions as to how international cultural property preservation law can become more easily and effectively implemented. In doing so, it will touch on some of the ideas asserted by Vernon and Mastalir, and will offer one option for getting around a problematic part of each of their arguments—giving other nations the power to assist source nations in need.

IX. WHAT CAN BE DONE TO IMPROVE INTERNATIONAL CULTURAL PROPERTY PRESERVATION LAWS?

A. *Ending the War/Peace Split*

Overall, this note has emphasized that there is a public duty to protect the cultural heritage of mankind. This duty is

¹⁸² *Id.* at 1089.

¹⁸³ See Mastalir, *supra* note 5, at 1083.

¹⁸⁴ See World Heritage Convention, *supra* note 3, arts. 13 & 19.

not a new concept, but rather can be traced back to the times of the Renaissance, and possibly earlier. Today, this duty can be seen in the current international treaties that exist in order to protect cultural objects. Hence, international laws have acknowledged that cultural property deserves protection in times of war and peace.

Upon examining the relevant international treaties, one can see that UNESCO treats cultural property preservation differently during times of war than in times of peace. This seems odd and inefficient considering both the Hague Convention and the World Heritage Convention share the same goals. Despite the immediacy that a wartime situation creates, armed conflict does not appear to create any reasons different from those in times of peace as to why cultural property should be protected. The World Heritage Convention provides an expansive definition of cultural property, although it excludes moveable property,¹⁸⁵ while the Hague Convention gives a more narrowly

¹⁸⁵ Articles 1 and 2 of the World Heritage Convention define "cultural property" as follows:

Article 1 defines "cultural heritage":

- 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 of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

Article 2 defines "natural heritage":

- Natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
- Geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
- Natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation, or natural beauty.

World Heritage Convention, *supra* note 3, arts. 1 & 2.

tailored definition.¹⁸⁶ Why the difference? In fact, the 1970 UNESCO Convention, although concerned with the illicit movement of cultural objects, provides an even more expansive definition of cultural property than the World Heritage Convention because it pertains to moveable property.¹⁸⁷ However, the Hague Convention, which also applies to moveable property, does not define cultural property in such expansive terminology.

Perhaps it is easier to understand why some cultural objects might receive priority over others during times of war,¹⁸⁸ but it is not so easy to see why certain cultural objects do not deserve any protection during times of armed conflict. Victoria Birov even goes so far as to say that it is "absurd" to define cultural property more narrowly during times of war.¹⁸⁹ Because the Hague and World Heritage Conventions both acknowledge a public duty to protect and preserve our cultural past, it would make more sense for these two treaties to collaborate with one another. Although, the Hague treaty must develop methods of implementation that work under times of crisis, such as armed conflict, both Conventions otherwise share the same goals and accordingly should work together.

¹⁸⁶ Article 1 of the Hague Convention defines "cultural property" as follows:

- (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 property defined in subparagraph (a);
- (c) centers containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as "centers containing monuments."

Hague Convention, *supra* note 8, art. 1.

¹⁸⁷ See 1970 UNESCO Convention, *supra* note 12, art. 13.

¹⁸⁸ For example, the Pantheon in Rome versus a hand made bowl dating from the 12th century.

¹⁸⁹ See Birov, *supra* note 79, at 247.

B. *What Exactly is "Military Necessity?"*

The Hague Convention needs to define what it means by "military necessity." Under the current Treaty, parties to the Convention are allowed too much leeway in defining what they think "military necessity" ought to be. This problem is illustrated by the looting that occurred in the museums of Kuwait during the Gulf War, as well as by the mass destruction that occurred during the Serbo-Croatian War. This note does not suggest that cultural property should be valued over the lives of military troops or other human beings. But, it does argue that guidelines need to be established in order to assist individuals in deciding whether a particular situation really requires the destruction of cultural objects due to "necessity."

It has also been argued that the "military necessity" exception is no longer needed due to modern weapons technology.¹⁹⁰ Victoria Birov argues that there is no longer the same feeling of "inability to protect cultural property because of the types of weapons utilized [, such as during World War II, because] the use of technically sophisticated military equipment and weapons has given belligerents the ability to minimize collateral damage to cultural artifacts."¹⁹¹ John Henry Merryman also notes that "military necessity is a relic of an age that treated aggressive war as a legitimate instrument of national policy. . . ."¹⁹² Hence, due to changes in accepted norms of warfare strategy, Merryman argues that the "military necessity" exception is outdated.

The best way to add boundaries to the "military necessity" exception would be by creating a list of criteria that must be met in order for the exception to be applicable. Examples of factors that should be considered as criteria include: the immediacy of the situation, available alternatives, and the threat to human life that might be avoided if the cultural property at issue were used for military purposes, or was destroyed. Until such guidelines are established, the "military necessity" exception remains an outlet that can be easily utilized and possibly abused by countries that are engaged in acts of warfare.

¹⁹⁰ See *id.* at 242.

¹⁹¹ *Id.*

¹⁹² Two Ways of Thinking, *supra* note 69, at 840-41.

C. *Diminishing the Emphasis Placed on Territorial Sovereignty in the Cultural Property Context*

The Hague Convention clearly takes an internationalist view in terms of the value it attaches to cultural objects. Specifically it states:

[D]amage 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] the preservation of the cultural heritage is of great importance *for all peoples of the world* and that it is important. . . this heritage should receive *international protection*.¹⁹³

It can also be argued that the World Heritage Convention holds similar views. Specifically it states:

[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*. . . [and] the 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.¹⁹⁴

However, the World Heritage Convention, unlike the Hague Convention, is built upon procedural rules that only permit the source nations of cultural property to decide whether that property is worthy of protection.

Perhaps the largest weakness in the World Heritage Convention is the power it gives source nations to determine the fate of cultural objects within their national territories. Under the Convention, non-source nations have no authority to ensure that cultural objects are being protected.¹⁹⁵ Although the concept of territorial sovereignty is firmly established throughout the world as a method of establishing power, political independence, and maintaining order, its use does not make sense in the context of cultural property preservation. M. Catherine

¹⁹³ Hague Convention, *supra* note 8, preamble (emphasis added).

¹⁹⁴ World Heritage Convention, *supra* note 3, preamble (emphasis added). UNESCO has also written a number of different recommendations pertaining to the preservation of cultural and natural resources. For more information visit: <http://www.unesco.org>

¹⁹⁵ See *id.* arts. 3, 6, 16.

Vernon states that "current national boundaries often have no connection or alignment with the peoples that inhabited the land in past centuries and left cultural clutter as evidence of their existence. Culture is defined by linguistic, religious, or other criteria, not by an artificially placed boundary line."¹⁹⁶ The language of the Hague Convention also appears to support the belief that national boundary lines should not determine whether a party has a right to take part in the preservation of cultural objects. After all, the Hague Treaty states that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind."¹⁹⁷

However, territorial sovereignty is not going to diminish in international law unless there are incentives for it to do so. Theoretically it makes sense for national boundaries to have virtually no role in the rights of cultural property preservation, but such a step will not occur easily. Incentives such as increased profits from tourism and guarantees that permanent removal of cultural objects will not occur, will likely need to be made in order to "get the ball rolling" so to speak.

Although national boundaries are likely to remain a force in international cultural property laws, efforts must be made to decrease the amount of power that source nations have under these laws, by giving non-source nations a voice in preservation decisions. Additionally, a right of action at some level must be acknowledged, because the current international treaties illustrate that positive intent is of little use until it can be implemented. Until such steps are taken, the fate of our cultural heritage remains in the hands of, and at the discretion of host nations.

D. *Giving Non-Source Nations a Voice: Implementing the World Heritage Convention*

The World Heritage Convention would be a more effective treaty if it authorized the creation of a "watch committee" that was not only permitted to respond to requests for assistance by source nations, but that could act independently in determining and overseeing the preservation of cultural objects. Such a com-

¹⁹⁶ Vernon, *supra* note 86, at 446-47 (referring to Thomas C. Carey, *Self-Determination in the Post-Colonial Era: Case of Quebec*, 1 AM. SOC. INT'L L.J. 47 (1977)).

¹⁹⁷ Hague Convention, *supra* note 8.

mittee would have the "police power" to investigate and keep tabs on cultural objects located within member nations, and could make appropriate recommendations as to how preservation can be achieved. The committee would be able to notify a nation of particular items that are at risk of damage or destruction, so that the nation could direct its own efforts toward preserving those particular items. If resources were scarce, then source nations would need to inform the committee that it is unable to protect the items at risk without the assistance of the Convention. Accordingly, a nomination could then be made by the watch committee for the cultural property at issue to be included on the World Heritage List, and then efforts could be directed toward raising funds and gathering individuals skilled in conservation techniques¹⁹⁸ to provide assistance.

Additionally, funding could possibly come from non-profit organizations such as the World Monuments Fund. It is important to note that the "watch committee" would not replace the World Heritage Committee, but rather, it would function as a complement to the overall regime that has been established by the Convention. Essentially, the "watch committee" would be an apparatus that would have the power to visit, monitor, and investigate cultural property located in countries that are party to the Convention.

Of course, additional changes would need to be made to the Convention in order for the creation of a "watch committee" to be possible. As it currently reads, the Convention only provides for protection of cultural items that are included on the World Heritage List.¹⁹⁹ This means that items that are not nominated by source countries for inclusion on the List are not entitled to protection under the Convention. Additionally, those items that have been nominated, but have not been accepted for inclusion on the List by the World Heritage Committee, are also not entitled to protection. In order for a "watch committee" to be suc-

¹⁹⁸ The "watch committee" could also utilize the skills of organizations that are already currently involved with the Convention. For example, under Article 14 the following organizations may assist the World Heritage Committee if their services are requested: The International Centre for the Study of the Preservation and the Restoration of Cultural Property (the Rome Centre), The International Council of Monuments and Sites (ICOMOS), and the International Union for Conservation of Nature and Natural Resources (IUCN).

¹⁹⁹ See World Heritage Convention, *supra* note 3, art. 20.

cessful, the language of the Convention would have to be modified so that the committee would have the power to nominate cultural items for inclusion on the World Heritage List. As a result, preservation efforts could be extended toward items that the committee considers to be in need of protection.

Some may argue that such a change is not possible because source nations will not want to give up the power they currently have in nominating cultural items they feel are deserving of protection. However, source nations will not lose their nominating powers under the changes that are suggested in this note. Instead, source nations will only share their powers of nomination with an elected policing committee that has to adhere to a set of guidelines which have been created by all countries that are party to the Convention. In other words, the "watch committee" will not be able to act arbitrarily in making its nominations, but rather it will have to comply with the guidelines that have been specifically created for the committee's operations. Additionally, due to the findings and suggestions of the committee, source nations may be provided with an incentive to nominate cultural objects themselves, rather than waiting for the committee to nominate them to be included on the World Heritage List.

1. *Breaking It Down: How Could Such a Plan Work?*

The "watch committee" would be composed of individuals from the different parties to the Convention, as well as experts from around the world who are educated in all aspects of historical property preservation. In order to assist the committee in making decisions, a set of guidelines pertaining to preservation and dangerous conditions of cultural objects would be drawn up, and all state parties would need to agree upon them before they were put into effect. Such a device would likely make host nations feel protected in the sense that the "watch committee" would be forced to adhere to guidelines that have already been established, rather than arbitrarily using its own discretion. The "watch committee" would have the authority to inform nations that they are housing cultural objects that need their attention, and accordingly these source nations would need to respond to the requests of the committee. If the source nation does not have adequate resources to protect the cultural objects,

then it must notify the committee, so that efforts can be made to provide assistance. Since all nations to the Convention will have agreed to the preservation guidelines by which the "watch committee" is acting, it is unlikely that many nations would fail to respond to committee requests, and would instead request assistance when necessary.²⁰⁰

Such a committee would help to eliminate the problems that are faced when arguments of "protective intervention" are made. Although such arguments are noble, they are essentially constrained until international treaties such as the World Heritage Convention decrease the emphasis they place on territorial sovereignty and national boundaries. In the meantime, the development of a "watch committee" subject to agreed upon guidelines could help to keep the world informed about which cultural objects are at risk, while at the same time effectuating preservation efforts.

2. *Signs of Support*

Italy supported a similar proposal when it suggested that "U.N. inspectors. . . monitor the world's cultural heritage. . . [and that] the international community be given a share of responsibility for cultural sites [that are] included on the World Heritage List."²⁰¹ Specifically, Italy's plan gave UNESCO officials the power to enter sovereign territories in order to see whether member nations were complying with the provisions of the World Heritage Convention.²⁰² However, the proposal was greatly opposed by a number of member nations, and accordingly was withdrawn.²⁰³ The nations that opposed Italy's proposal were concerned about giving up their authority over their own nation as well as their cultural objects. However, had a special committee, whose members were elected by party states, been created to implement specific previously approved guide-

²⁰⁰ See *id.* arts. 15 through 18 for a discussion of preservation funding under the Convention.

²⁰¹ Paul Taylor, *Italy Proposes U.N. Cultural Heritage Inspectors*, THE REUTER LIBRARY REPORT, May 14, 1992.

²⁰² "UNESCO should be granted powers enabling it to check on the application of the 1972 World Heritage Convention." *Id.*

²⁰³ See Vernon, *supra* note 86, at 444 (referencing *Italy Drops Scheme for Monuments Inspectors*, THE REUTER LIBRARY REPORT, May 22, 1992).

lines addressing acceptable cultural property conditions, Italy's proposal might have received more support.

X. CONCLUSION

International cultural property laws reveal positive intent by participating countries to protect and maintain the cultural heritage of mankind. However, despite this intent, an overall weakness exists in the current international laws because they cannot be easily implemented. The primary source of this problem is the emphasis that international laws place on territorial sovereignty, which in turn gives source nations the upper hand in making important preservation decisions. Additionally, it does not appear that source nations will lose the power they currently have anytime soon, if ever, because countries do not want to give up sovereign power over their own territories or property located within these territories. Despite these facts, developing new ways to insure cultural property protection cannot come to a standstill—our cultural heritage is too important and it is our public duty to see that this heritage lasts. Cultural objects help to educate us about mans' prior achievements and they also provide a foundation that helps to explain who we are as a people. M. Catherine Vernon correctly notes that "we must continue to aspire toward the ideal, the 'model code' of cultural protection laws [, pertaining to times of war and peace,] on an international basis."²⁰⁴ This means that research must continue, and efforts must be made to resolve the problems that exist within our current international system. Until a solution is developed and agreed upon, we risk losing significant pieces of our cultural past.

²⁰⁴ Vernon, *supra* note 86, at 479.