

# UNESCO AND THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

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*The paper examines the role of UNESCO in the creation, application and development of international legal rules and the protection of cultural property in the event of armed conflict. The main part of the analysis is related to UNESCO's relation with the most important convention in this field: the 1954 Hague Convention for the protection of cultural property in the event of armed conflict and its two protocols. The historical development of international legal rules concerning this problem is presented, as well as recent novelties relating to the international prosecution of crimes against cultural property and the possible actions which UNESCO can take has in this context. The relation between UNESCO and other international legal instruments and organizations in the protection of cultural property in the event of armed conflict is analyzed as well.*

*Key words: UNESCO, protection of cultural property, armed conflict*

## 1. INTRODUCTION

The recent armed conflicts in Afghanistan and Iraq have highlighted the numerous problems with which the international community and national authorities are confronted while trying to protect cultural property during armed conflict.

The purpose of this paper is to examine the role of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in the protection of cultural property in the event of armed conflict, i.e. the role of UNESCO in the

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creation, coordination and application of different instruments. The analysis will cover aspects of the legal and historical context within which UNESCO has been operating for almost sixty years.

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UNESCO is widely recognized as the central institution for the protection of cultural property in the event of armed conflict and this paper will explore the reasons and circumstances in which this supposed centrality has been developing. Special attention will be given to the nature of relations between UNESCO and the different international instruments and institutions in this field such as the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict (1954 Hague Convention) and its two Protocols. Finally, the latest development concerning “crimes against culture” will be mentioned, as well as the way in which UNESCO is responding to the challenges concerning the latest phenomena in the area of the protection of cultural property - the intentional destruction of cultural property after the end of hostilities, as witnessed in the case of the destruction of the Buddhas of Bamiyan.

The analysis will be done mostly by examining how the role of UNESCO is changing in relation to different instruments and institutions and through the clarification of different aspects of its role in the historical context. The position of the paper is that UNESCO’s role in the protection of cultural property in the event of armed conflict is significant, but not central, due to the diversity of the different factors involved.

## 2. CONCEPTUAL AND TERMINOLOGICAL ISSUES AND UNESCO’S GENERAL MANDATE FOR THE PROTECTION OF CULTURAL PROPERTY

The first problem that arises in an attempt to assess UNESCO’s role in the protection of cultural property in the event of armed conflict is the fact that different definitions of cultural property are used in different UNESCO instruments. The main criterion for determining cultural property protected under the 1954 Hague Convention is the standard of “*great importance* to the cultural heritage of every people”,<sup>1</sup> while the 1970 Convention on the Means

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<sup>1</sup> Art.1, The Convention for the Protection of Cultural Property in the Event of Armed Conflict, opened for signature on 14 May 1954, entered into force on 7 August 1956,

of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>2</sup> (1970 Convention) mentions only “importance” as the main criterion and basically leaves to every state party to determine the extent of that importance. The situation is further complicated with the definition of cultural property under the 1972 Convention for the Protection of the World Natural and Cultural Heritage<sup>3</sup> (1972 Convention), which introduces the criterion of “outstanding universal importance”. The common approach is that the cultural property protected under the 1972 Convention certainly meets the criterion for the protection under the 1954 Hague Convention.<sup>4</sup> This terminological ambiguity has significant influence on the understanding of UNESCO’s role in the system for the protection of cultural property in the event of armed conflict. Namely, it is generally acknowledged that Art. I para 2.c) of the UNESCO Constitution<sup>5</sup> gives UNESCO “the general right of cultural initiative”.<sup>6</sup> That means that UNESCO is able to offer its services and to take an initiative toward (state) parties whenever it finds necessary. Toman explains that the international community “gave UNESCO the right to take cultural initiatives, such as formulating recommendations, adopting international conventions, offering its services, making proposals and giving advice”.<sup>7</sup> He

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available at: [http://portal.unesco.org/en/ev/php-URL-D=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201html](http://portal.unesco.org/en/ev/php-URL-D=13637&URL_DO=DO_TOPIC&URL_SECTION=201html), Website visited on 16 February 2009.

<sup>2</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, opened for signature on 14 November 1970, entered into force on 24 April 1973, available at: [http://portal.unesco.org/en/ev/php-URL-D=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201html](http://portal.unesco.org/en/ev/php-URL-D=13637&URL_DO=DO_TOPIC&URL_SECTION=201html), Website visited on 16 February 2009.

<sup>3</sup> Convention for the Protection of the World Natural and Cultural Heritage, opened for signature on 16 November 1972, entered into force on 17 December 1975, available at: [http://portal.unesco.org/en/ev/php-URL-D=13005&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201html](http://portal.unesco.org/en/ev/php-URL-D=13005&URL_DO=DO_TOPIC&URL_SECTION=201html), Website visited on 16 February 2009.

<sup>4</sup> More in: K. Chamberlain, ‘*War and Cultural Heritage*’, Institute for Art and Law, 2004, at 28-30.

<sup>5</sup> Constitution of the United Nations Educational, Scientific and Cultural Organization, opened for signature 16 November 1945, T.I.A.S, No.1580, 4 U.N.T.S. 275, available at: [http://portal.unesco.org/en/ev/php-URL-D=15244&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201html](http://portal.unesco.org/en/ev/php-URL-D=15244&URL_DO=DO_TOPIC&URL_SECTION=201html), Website visited on 16 February 2009.

<sup>6</sup> More in: J. Toman, ‘*The Protection of Cultural Property in the Event of Armed Conflict*’, UNESCO and Dartmouth Publishing Company Limited, 1996, at 258-259.

<sup>7</sup> Toman, *supra* note 6, at 259.

points out that, while performing these rights, UNESCO “must remain aloof from politics so as to avoid confrontations”.<sup>8</sup> It seems that by giving this right to UNESCO the international community tried to conciliate two different approaches: one which gives UNESCO the right to act independently and actively,<sup>9</sup> and the second which accentuates the role of UNESCO as an intragovernmental organization that is part of the United Nations System.

Already in these initial approaches the different conceptions for the protection of cultural property can be observed. Merryman termed these different conceptions as the “national” and the “international” conception.<sup>10</sup> The national conception accentuates the role and significance of cultural property primarily for nations of origin of the cultural property, while the international conception accentuates the role and significance of cultural property for the international community as a whole. Following this division, the 1954 Hague Convention represents a clear expression of the international conception.

UNESCO’s general mandate for the protection of cultural property (including the protection of cultural property in the event of armed conflict) is based on Art. I. paragraph 2.c) of the UNESCO Constitution.<sup>11</sup> Its main organs; the General Conference, Director-General and Executive Board, perform the main role in the protection of cultural property in the event of armed conflict.<sup>12</sup>

### 2.1. Internal UNESCO division of duties concerning implementation and promotion of the 1954 Hague Convention

Activities relating to the duties concerning the implementation and promotion of the 1954 Hague Convention could be principally divided among UNESCO’s organs to those which are performed by the International Standards and Legal Affaires Section (which is part of UNESCO’s Division on

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<sup>8</sup> *Ibid.*

<sup>9</sup> This ‘independent approach’ was strongly criticized by UK representatives at the 1954 Conference from the position of the protection of state sovereignty and authority, see Toman, at 259-260.

<sup>10</sup> More in: J. H. Merryman: ‘*The two ways of thinking about cultural property*’, *American Journal of International Law*, Vol. 80, No. 4, 1986, at 831-853.

<sup>11</sup> Constitution of the UNESCO, *supra* note 5.

<sup>12</sup> For a more detailed explanation of the responsibilities of UNESCO’s organs see: Constitution of UNESCO, *supra* note 4.

Cultural Heritage) and those performed by UNESCO's Director-General and Secretariat.

The most important duties of the International Standards and Legal Affairs Section generally include dealing with the international legal protection of cultural heritage, which comprises administration of the 1954 Convention and its two Protocols, but also the 1970 Convention.<sup>13</sup>

The duties of UNESCO's Director-General under the 1954 Hague Convention include the following:

- management of the Special Protection, which includes entering the new protected sites into the International Register of Cultural Property under Special Protection, management of the Register of Cultural Property under Special Protection (based on Art. 8 of the 1954 Hague Convention and Chapter II of the Regulations for the Execution of the Convention)
- offering UNESCO's services to parties in conflict not of an international character (Art.19)
- offering UNESCO's services in the conciliation procedure (Art. 22 and Chapter I of the regulations for its execution)
- providing UNESCO's technical assistance to the State Parties in organizing the protection of their cultural property, or in connection with any other problem arising from the application of the Convention or the Regulations for its execution and also offering its own proposals (Art. 23)
- providing official translations of the 1954 Hague Convention and of the Regulations for its execution to the State Parties (Art. 26. para 1)
- requesting that the State Parties forward to the Director-General their reports concerning measures that are being taken, prepared or contemplated in fulfilment of the Convention and of the Regulation for its execution (Art. 26. para 2)
- convening (with the approval of the Executive Board) a meeting of States Parties' representatives with the purpose of studying problems concerning the application of the Convention and of the Regulation for its execution (Art. 27)

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<sup>13</sup> More in: J. Hladik, 'UNESCO's activities for the implementation and promotion of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols', in: Protection of Cultural Property in the Event of Armed Conflict, Report on the Meeting of Experts, International Committee of the Red Cross, Geneva, 2002, at 57.

- performing of the depositary functions related to the ratification of the Convention (Art. 31), accession to the Convention (Art. 32), denunciation of the Convention (Art. 37) and notifications (Art. 38).

### 3. AN ANALYSIS OF UNESCO'S RIGHTS AND RESPONSIBILITIES UNDER PROVISIONS OF THE 1954 HAGUE CONVENTION - THEORY AND PRACTICE

As the Art.19. paragraph 3. of the 1954 Hague Convention recognizes the right of UNESCO to offer its services to belligerent parties, it actually enables UNESCO to play an active role in trying to protect cultural property also in the event of armed conflict which is not of an international character.<sup>14</sup> In this kind of conflict, parties that feel unsatisfied with the involvement of UNESCO cannot object that the organization is interfering in its internal affairs. Although the role of UNESCO in the field of the protection of cultural property in the event of armed conflicts is often compared with the role of the International Committee of the Red Cross (ICRC) in relation to the victims of the armed conflicts, the institutional difference between ICRC as an organization governed by Swiss law and UNESCO has to be acknowledged at the same time.<sup>15</sup>

One of the most important provisions of the 1954 Hague Convention is articulated in Art. 23, particularly in the notion of UNESCO's "technical assistance" which may be offered to parties upon their request. Even more important is paragraph 2 of Article 23 under which UNESCO is authorized to make proposals on its own initiative. This provision actually corresponds to the previously mentioned UNESCO's general right to cultural initiative and provides UNESCO with the necessary flexibility and even creativity while performing its duties in this field.

What does it mean in practice? During the last 50 years, UNESCO's technical assistance had taken various forms.<sup>16</sup> According to Toman, the following are the most common forms of UNESCO technical assistance:

- assistance provided to the State Parties for the establishment of national committees

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<sup>14</sup> More in: Chamberlain, *supra* note 4, at 72-73; Toman, *supra* note 6, at 210-216.

<sup>15</sup> *Ibid.* The relation between UNESCO and the ICRC is the subject of section 5.

<sup>16</sup> Toman, *supra* note 6, at 260-269.

- affixing of distinctive emblems on distinctive monuments
- compilation of records of protected property
- construction of refuges and other technical forms of protection
- preparation of protective packing
- protection against fire or the effects of bombardment
- advice to the Parties concerning any particular problem.<sup>17</sup>

There were numerous occasions of the application of this provision. Some of them are:

- 1956 and 1957 mission in Egypt and Israel (at the request of the Parties)
- 1969 appeal to the governments of Honduras and El - Salvador
- 1971 appeal to India and Pakistan
- 1974 appeal to the Cyprus and Turkey
- 1980 appeal to Iraq and Iran
- 1982 mission to Lebanon.<sup>18</sup>

It is worth adding that the Director-General developed the practice of appointing personal representatives in cases where it is not possible to appoint a Commissioner-General.<sup>19</sup> Exercising this power, in 1985 and 1986 the Director-General of UNESCO sent two personal representatives to Iran and Iraq in 1985 and 1986 respectively. This practice proved appropriate during the armed conflict in Croatia in 1991, when the Director-General sent his representatives to the military and civil authorities. Also with the beginning of the siege and attacks on Dubrovnik in October 1991 he appointed two permanent observers.<sup>20</sup>

### 3.1. Statistical data, First Protocol to the 1954 Hague Convention and related instruments

Analysing the application of Art. 26 para. 2 of the 1954 Hague Convention is important since it shows the attitude of the State Parties towards their treaty obligations and towards UNESCO. By the virtue of this provision, the State

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<sup>17</sup> *Ibid.*, at 261.

<sup>18</sup> Toman, *supra* note 6, at 264 - 265.

<sup>19</sup> More in: Hladik, *supra* note 13, at 59; Toman, *supra* note 6, at 264 - 267.

<sup>20</sup> More about UNESCO's involvement in the safeguarding of Dubrovnik in 1991 in: Toman, *supra* note 6, at 266-267; also in: D. Meyer, 'The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law', Boston University International Law Journal, Vol. 11, 1993, at 378-381.

Parties are requested to forward to the Director-General their reports concerning measures being taken, prepared or contemplated in fulfilment of the Convention and of the Regulations for the Execution of the 1954 Convention. The Parties are obliged to submit these reports at least every four years. According to the available 1995 data, only 29 out of 87 parties submitted their reports, and the reports differ considerably in their content and quality.<sup>21</sup> The older data are similar: 15 reports in 1962, 20 in 1967 and 1970, 17 in 1979, 24 in 1983, and 25 in 1989.<sup>22</sup> These statistical data suggest that some of the most serious shortcomings of the 1954 Hague Convention are problems of implementation and enforcement of its provisions, which will be discussed in the next chapter.

Prior to moving on to that analysis, the most important provisions and issues related to the First Protocol to the 1954 Hague Convention (First Protocol) need to be briefly discussed. The First Protocol was adopted together with the Convention in 1954, but as a separate instrument.<sup>23</sup> The most important obligations imposed on States parties to the Protocol are:

- if a State Party to the Protocol is occupying a territory during an armed conflict, it is required to prevent the export of cultural property from that territory
- if such property is exported, any State Party into whose territory it is imported is obliged to seize it
- at the end of the conflict, the property is to be returned to the competent authorities of the territory previously occupied.<sup>24</sup>

Already at the 1954 Hague Conference there was a strong opposition to incorporation of the provisions prohibiting trafficking of movable cultural property from occupied territories. This attitude led finally to the drafting of a separate Protocol, the First Protocol, designed to deal with these types of issues.<sup>25</sup> It is regrettable that today the First Protocol is probably the most ineffective international instrument for the protection of cultural property.

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<sup>21</sup> According to the data from Chamberlain, *supra* note 4, at 83-84.

<sup>22</sup> According to the data from Toman, *supra* note , at 281-282.

<sup>23</sup> More in: P. J. O'Keefe, 'The First Protocol to the Hague Convention fifty years on', *Art, Antiquity and Law*, Vol. 9, issue 2, June 2004, at 99-116. The text of the First Protocol is available at: [http://portal.unesco.org/en/ev/php-URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201html](http://portal.unesco.org/en/ev/php-URL_DO=DO_TOPIC&URL_SECTION=201html), Website visited on 16 February 2009.

<sup>24</sup> O'Keefe, *supra* note 23, at 100.

<sup>25</sup> More in: P. J. Boylan, 'Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict', UNESCO, 1993, at 99-101.



According to Boylan “the almost universal ignoring by actual or potential importing countries of the principles of the 1954 Hague Protocol is one of the most serious breaches of the fundamental principles and objectives of the 1954 Convention, and all High Contracting Parties should be asked to review their policy and practice in this respect”.<sup>26</sup> Carducci is arguing that the reason behind this is the simple fact of reluctance on the big part of the international community towards dealing with the restitution, what is a main purpose of the First Protocol.<sup>27</sup> O’Keefe points out the fact that the First Protocol “was too often ignored in comparison to the more high profile 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property (1970 Convention) and UNIDROIT 1995 Convention on Stolen or Illegally Exported Cultural Property 1995 (1995 Convention)”.<sup>28</sup>

Not only Carducci’s position, but also the problems that lead to the adoption of the First Protocol as a separate instrument, reveal that the problem of the protection of cultural property in the event of armed conflict is undeniably connected with the problem of the restitution and that their division into two separate instruments was not a particularly good solution. Carducci’s observation about the reluctance of many countries in dealing with restitution is also shared by Prott who states that the 1970 Convention was developed “without great enthusiasm from the art market States”.<sup>29</sup>

It also needs to be mentioned that the 1970 Convention, apart from reinforcing the provisions in the First Protocol, also requires from the contracting parties to regard as illicit not only the export of such property, but also the transfer of ownership.<sup>30</sup>

The adoption of the 1970 Convention and its relation to the 1954 Hague Convention is helpful for the understanding of the problem of inflation of different international instruments with similar functions, which have not proven

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<sup>26</sup> Boylan, *supra* note 25, page 101.

<sup>27</sup> G. Carducci, ‘*L’obligation de restitution des biens culturel et des objets d’art en cas de conflit armé*’, *Revue Générale de Droit International Public* 289, 2000, at 340, quoted in: O’Keefe, *supra* note 24, at 109.

<sup>28</sup> O’Keefe, *supra* note 24, at 109.

<sup>29</sup> L. V. Prott, ‘*UNESCO Celebrates Thirtieth Anniversary of Its Convention on Illicit Traffic*’, *International Journal of Cultural Property*, Vol. 9, No. 2, 2000, at 347.

<sup>30</sup> K. Chamberlain, ‘*The Protection of Cultural Property in the Event of Armed Conflict*’, Vol. 8, issue 3, *Art, Antiquity and Law*, 2003, at 228.

to be very effective. The opinion of Browne, with which this author mostly agrees, is that "conventions are too often the easy way out for governments, who are content to sign up to them without giving proper thought as to how they intend to fulfil the obligations that they entail".<sup>31</sup> On the other hand, Prott's opinion about the wide and positive influence of the 1970 Convention commands attention as well.<sup>32</sup> Prott supports her argument with the fact that the 1970 Convention has positively influenced important non-governmental organizations (NGOs) such as the International Council of Museums (ICOM), as well as museums, auction houses and even some art collectors in their dealing with cultural property which is the subject of the 1972 Convention.<sup>33</sup>

### 3.2. Enforcement of the 1954 Hague Convention and the question of sanctions

While the weak enforceability of international treaties is inherent in international law, it is also considered to be the most symptomatic weakness of the 1954 Hague Convention.<sup>34</sup>

The 1954 Hague Convention is supposed to be a self-enforcing convention,<sup>35</sup> which means, in effect, that all of the enforcement mechanisms depend on the

<sup>31</sup> A. Browne, *UNESCO and UNIDROIT: 'The Role of Conventions in Eliminating the Illicit Art Market'*, *Art, Antiquity and Law*, Vol. 7, issue 1, 2002, at 381-383.

<sup>32</sup> L. V. Prott, *supra* note 29, at 348.

<sup>33</sup> *Ibid.* Among others, Prott gives the examples of the adoption of the Code of Ethics in conformity with the provisions of the 1970 Conventions by the International Council of Museums. Prott is stating further that under the influence of the 1970 Convention, auction houses have changed their conditions of sale to put buyers on notice when there is something clearly suspicious or legally doubtful about the title of a seller.

For a more detailed analysis of the 1970 and 1995 Convention see: J. N. Lehman, *'The continued Struggle with Stolen Cultural Property: The Hague Convention, the UNESCO Convention, and the UNIDROIT Draft Convention'*, *Arizona Journal of International and Comparative Law*, Vol. 14, 1997, at 527-549; P. Lalive, *'A Disturbing International Convention: UNIDROIT'*, *Art, Antiquity and Law*, Vol. 4, 1999, at 219-228.

<sup>34</sup> More in: Meyer, *supra* note 20, at 349-350; V. Birov, *'Prize or Plunder: The Pillage of Works of Art and the International Law of War'*, *New York University Journal of International Law and Politics*, Vol. 30, 1997-1998, at 233-236.

<sup>35</sup> Harvey E. Oyer III, *'The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict - Is it Working? A Case Study: The Persian Gulf War Experience'*, *Columbia - VLA Journal of Law & The Arts*, Vol. 23, 1999-2000, at 54.

good will of the State Parties. According to Oyer III, the three most important self-enforcing mechanisms in the 1954 Hague Convention are:

- 1) The Contracting Parties are required to appoint, during peacetime, specialist personnel within their armed forces whose job is to facilitate the protection of cultural property during armed conflict.<sup>36</sup>
- 2) Each Contracting Party is required, also during peacetime, to introduce regulations and instructions to its armed forces that ensure that the provisions of the convention are observed.<sup>37</sup>
- 3) Each Contracting party is required to 'foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples'.<sup>38</sup>

UNESCO's constitutional competences to enforce its instruments are very limited. Actually, UNESCO can only act primarily through its instruments which have different normative value: conventions, recommendations and declarations.<sup>39</sup> Conventions are international legally binding instruments defining rules, not binding *ex-se*, but for those states which accept, accede, approve, ratify or succeed to them.<sup>40</sup> They are adopted by a two-thirds majority of states attending the General Conference of UNESCO.<sup>41</sup> Recommendations are the instruments "in which the General Conference formulates principles and norms for the international regulation of any particular question and invites Member-States to take whatever legislative or other steps may be required - in conformity with the constitutional practice of each state and the nature of the question under consideration - to apply the principles and norms aforesaid within their respective territories".<sup>42</sup> Unlike conventions, recommendations are adopted by a simple majority.<sup>43</sup> Declarations are instruments defining norms,

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> More in: 'UNESCO's Standard - setting instruments', UNESCO, 1982, pp. XIII-XIV; also in: F. Shyllon, *International Standards for Cultural Heritage: an African Perspective*, Art, Antiquity and Law, Vol. 5, 2000, at 170-171.

<sup>40</sup> J. Hladik, 'The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage', Art, Antiquity and Law, Volume 9, 2004, at 217.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

which are not subject to ratification.<sup>44</sup> Like recommendations, they set forth universal principles to which the community of states wished to attribute the greatest possible authority and to afford the broadest possible support.<sup>45</sup> They differ essentially from recommendations in that they convey a high-level moral message.<sup>46</sup> It is clear that with the exception of conventions, all other UNESCO's legal instruments are different "soft-law" instruments which are not enforceable in any way.

It seems also that the options of UNESCO to act through enforcement mechanisms in the protection of cultural property under the 1954 Hague Convention seems seriously undermined by the non-existence of a standing committee, whose primary task would be to supervise the implementation of the 1954 Hague Convention. As it will be shown in the next section, this impediment is partially solved regarding the State Parties that accepted the II Protocol to the 1954 Hague Convention, which entered into force in 2004 and provided the establishment of the Committee for the Protection of Cultural Property in the Event of Armed Conflict.

While considering UNESCO enforcement possibilities, it is also important to point out that according to its Constitution; UNESCO also has possibilities for establishing sanctions in the performing of its duties. Francioni and Lenzerini distinguish three types of sanctions that UNESCO can initiate:<sup>47</sup>

- 1) suspending a member of the Organization, who was previously suspended from the exercise of the rights and privileges of membership of the UN, upon request of the UN, from the rights and privileges of the membership of UNESCO.<sup>48</sup>
- 2) expulsion from the UN, which automatically ceases a member's UNESCO membership.<sup>49</sup>
- 3) suspension of the voting right in the UNESCO General Conference when the total amount of contributions due from the state exceeds the total amount

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<sup>44</sup> *Ibid.* Naturally, the term "declaration" is used in the specific context of UNESCO's standard-setting instrument and it is not related with the fact that in general some declarations may reflect the development or even codification of customary law.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> More in: F. Francioni and F. Lenzerini, 'The destruction of the Buddhas of Bamiyan and International Law', *European Journal of International Law*, Vol 14, No. 4, at 639 - 642, 2003.

<sup>48</sup> Art. II para.4 of the UNESCO Constitution, *supra* note 5.

<sup>49</sup> Art. II para. 5 of the UNESCO Constitution, *supra* note 5.

of contributions payable by it for the current year and the immediately preceding calendar year.<sup>50</sup>

Although UNESCO's possibilities to impose sanctions seem very limited, practice has shown that UNESCO did not hesitate much in using these options, at least during the 60's and 70's. In 1964 UNESCO imposed various sanctions against Portugal, which were not interrupted until 1974, although some countries objected that UNESCO did not have the base for it in its Constitution and therefore exceeded its constitutional possibilities.<sup>51</sup> The sanctions were explained by the need to safeguard the principal values of the Organization which were endangered by "the policy of apartheid and racial discrimination".<sup>52</sup> Similar measures were taken by UNESCO against Southern Rhodesia in the 1960s for the same reason, as well as against South Africa in 1964 and Israel in 1968 because Israel's actions were interpreted as aiming to modify the cultural identity of the city of Jerusalem.<sup>53</sup> The case of sanctions against Israel raised strong debate about the legality of UNESCO's sanctions. UNESCO defended its position by evoking "exceptional importance of the cultural property in the Old City of Jerusalem, particularly of the Holy Places, not only for the countries directly concerned but for all humanity, on account of their exceptional cultural, historical and religious value".<sup>54</sup> For the proponents of these sanctions, they were legitimate in the broader context because Israel did not respect the common a value of the Organization of which it was a member. Francioni and Lenzerini argue that "the only condition for such sanctions to be lawful is that they are decided by the General Conference, the organ that represents all member States".<sup>55</sup>

On the other hand, Nafziger<sup>56</sup> considered UNESCO's constitutionally unfounded sanctions in the case of Israel as completely inappropriate and even

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<sup>50</sup> Art. IV para. 8(b) of the UNESCO Constitution, *supra* note 5.

<sup>51</sup> Francioni and Lenzerini, *supra* note 47, at 640.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> Res. 3422 of 1972, in UNESCO, Records of the General Conference, Seventeenth Session, Paris, vol.1, Resolution, Recommendations, at 61, quoted from Francioni and Lenzerini, *supra* note 47, at 641.

<sup>55</sup> Francioni and Lenzerini, *supra* note 47, at 640-642.

<sup>56</sup> J.A.Nafziger, 'UNESCO-Centered Management of International Conflict Over Cultural Property', *Hastings Law Journal*, Vol.27, 1975-1976, at 1051-1067.

more as “self-defeating and legally questionable”.<sup>57</sup> The same author recommended that UNESCO should employ in this case the “techniques of dispute settlement such as conciliation and mediation rather than resorting to adversary proceedings resulting in unenforceable injunctions”.<sup>58</sup> This case certainly influenced UNESCO’s approach in imposing sanctions because UNESCO’s actions in the 80s - mostly in the Middle East - were more moderate in approach than its sanction policy in the 60s and the beginning of the 70s.<sup>59</sup> The 90’s and especially the beginning of the 21<sup>st</sup> century confronted UNESCO with new challenges in this field.

### 3.3. The Second Protocol to the 1954 Hague Convention

The level of destruction of cultural property at the beginning of the 90’s, especially during the Gulf War and the war in Croatia and Bosnia and Herzegovina, accelerated the rethinking of the effectiveness of the 1954 Hague Convention. The Netherlands’ Government and UNESCO funded the “Review of the Convention for the protection of Cultural Property in the Event of Armed Conflict” (Boylan Review) which had been undertaken by Patrick J. Boylan in 1993.<sup>60</sup> This review was the basis of several expert meetings that took place in the following years and resulted in the “Lauswolt Document”. This was a new draft treaty which served as a basis for the diplomatic conference organized by UNESCO and convened by the Netherlands’ Government in The Hague from 15<sup>th</sup> to 26<sup>th</sup> March 1999.<sup>61</sup> The conference resulted in The Second Protocol to the 1954 Hague Convention (Second Protocol).<sup>62</sup>

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<sup>57</sup> Nafziger, *supra* note 56, at 1066.

<sup>58</sup> *Ibid.*, at 1067.

<sup>59</sup> For the UNESCO actions in 80’s see: Meyer, *supra* note 20, at 365-368.

<sup>60</sup> Boylan, *supra* note 25.

<sup>61</sup> More in: J-M. Henckaerts, ‘*New rules for the protection of cultural property in armed conflict: the significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*’, Protection of Cultural Property in the Event of Armed Conflict - Report on the Meeting of Experts, International Committee of the Red Cross, Geneva, 2002, at 27-55.

<sup>62</sup> The text of the Second Protocol is available at: [http://portal.unesco.org/en/ev/php-URL-D=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201html](http://portal.unesco.org/en/ev/php-URL-D=13637&URL_DO=DO_TOPIC&URL_SECTION=201html), visited on 16 February 2009.

*a) Significance and novelties of the Second Protocol*

Since the Second Protocol is supposed to supplement and enhance the 1954 Hague Convention, a State can become a party to the Second Protocol only if it is a party to the 1954 Hague Convention. If compared to the 1954 Hague Convention, the most important changes which the Second Protocol introduced are the following:

- determining detailed preparatory measures which have to be undertaken in peacetime including the creation of the new category of protection - that of enhanced protection (Art. 5, Art.10-14)
- more stringent determination of the “military necessity clause” (Art. 6)
- more precise determination of the sanctions for serious violations committed against the Protocol’s provisions (Art. 15-21)
- more precise definition of the protection of cultural property in armed conflicts not of an international character (Art. 22)
- creation of the implementation and supervision body - Committee for the Protection of Cultural Property in the Event of Armed Conflict (Art. 24-28)
- creation of the Fund for the Protection of Cultural Property in the event of Armed Conflict (Art. 29)
- establishment of the conciliation procedure (Art. 35-36).

Among these various changes introduced by the Second Protocol, due to its relation with UNESCO, the functions of the Committee for the protection of Cultural Property in the Event of Armed Conflict (Committee) and of The Fund for the Protection of Cultural Property in the Event of Armed Conflict (Fund) will be additionally examined.

*b) Committee*

As already mentioned before, the creation of the Committee is an expression of attempts to establish a body which would supervise and enhance the implementation of the Convention, i.e. the Second Protocol. The Committee will be composed of twelve members who are experts in the field of protection of cultural heritage (Art. 24. para 1 and 4) and it will represent an equitable representation of the different regions and cultures of the world (Art. 3. para 3).

The most important functions of the Committee are (Art. 27):

- to grant, suspend or cancel enhanced protection for cultural property
- to establish, maintain and promote the List of Cultural Property under Enhanced Protection
- to monitor and supervise the implementation of the Protocol
- to consider and comment on the reports on the implementation of the Protocol submitted to it by the Parties every four years.<sup>63</sup>

A state party to the Protocol may request the Committee to provide (Art. 32):

- international assistance for cultural property under enhanced protection, and
- assistance with respect to the preparation, development or implementation of the laws, administrative provisions and measures for the enhanced protection of cultural property pursuant to Article 10, paragraph (b).<sup>64</sup>

The Committee is obliged to co-operate with the Director-General of UNESCO (Art. 27, para 2.) and it “shall be assisted by the Secretariat of UNESCO which shall prepare the Committee’s documentation and the agenda for its meetings and shall have the responsibility for the implementation of its decisions” (Art. 28).

*c) The Fund for the Protection of Cultural Property in the Event of Armed Conflict (The Fund)*

The second institutional novelty of the Second Protocol is the establishment of the Fund. Like the Committee, the Fund is established in close cooperation with UNESCO (Art. 29) and it is constituted in conformity with the provisions of the financial regulations of UNESCO (Art. 29, para 2).

The resources of the Fund will consist of (Art. 29, para 4):

1. voluntary contributions made by the Parties
2. contributions, gifts or bequests made by:
  - other States
  - UNESCO or other organizations of the United Nations system
  - other intergovernmental or non-governmental organizations and
  - public or private bodies or individuals

<sup>63</sup> ‘Protection of Cultural Property in the Event of Armed Conflict, Report on the Meeting of Experts’, International Committee of the Red Cross, Geneva, 2002, at 169-170.

<sup>64</sup> *Ibid.*



3. any interest accruing on the Fund's resources
4. the funds raised by collections and receipts from events organized for the benefit of the Fund, and
5. all other resources authorized by the guidelines applicable to the Fund".<sup>65</sup>

It is also determined that "disbursements from the Fund will be used only for such purposes as the Committee decides in accordance with the guidelines provided by the Meeting of the Parties, with a view to granting financial assistance primarily in support of:

- preparatory measures to be taken in peacetime
- emergency, provisional or other measures to protect cultural property during armed conflicts or of recovery after the end of hostilities".<sup>66</sup>

It seems that when compared with the 1954 Hague Convention, the Second Protocol represents an improvement of the legal possibilities for the protection of cultural property in the event of armed conflict. The analysis presented earlier shows that many deficiencies of the 1954 Hague Convention and the First Protocol have been amended, for example the imprecise provisions about measures of safeguarding in time of peace and the imprecise determination of the military necessity clause. Also, two new institutions are introduced, the Committee and the Fund. The planned enhancement of the protection of the cultural property in the event of armed conflict will continue to be dependent primarily on the practice of the States which will opt either to respect or not respect the provisions of the Second Protocol. At this time it is premature to judge whether the Second Protocol is successful or not in practice since it entered into force in March 2004.<sup>67</sup> However it is a fact that many influential countries like the USA and Great Britain are still not members even of the 1954 Hague Convention.<sup>68</sup> One of the tests of the effectiveness of the Second Protocol will be the amount of voluntarily contributions to the Fund. This will serve as proof of the seriousness of the Member Parties, but also of the international com-

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<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *I.e.* five years after adoption. The Second Protocol has 33 State Parties according to the data from 27 February 2009, source: [http://portal.unesco.org/en/ev/phpURLD=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201html](http://portal.unesco.org/en/ev/phpURLD=13637&URL_DO=DO_TOPIC&URL_SECTION=201html), Website visited on 27 February 2009.

<sup>68</sup> In 2003 and 2004 there were some announcements that the UK will ratify the 1954 Hague Convention and its two Protocols, but until today that did not realize. See Chamberlain, *supra* note 4, page xi.

munity as a whole in helping to enhance the protection of cultural property in the event of war.

#### 4. UNESCO AND OTHER INTERNATIONAL INSTRUMENTS FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

##### 4.1. The 1972 Convention for the Protection of the World Cultural and Natural Heritage

Although the purpose of the 1972 Convention is not primarily related to the protection of cultural property in the event of armed conflict,<sup>69</sup> this convention also contains some provisions which are relevant to the protection of cultural property in the event of armed conflict.<sup>70</sup> Already in the Preamble of the 1972 Convention, the need for protection of cultural and natural heritage in the event of armed conflict is expressed. It was already mentioned in section 2 that the definition of cultural property in the 1972 Convention is different from the related definition of cultural property in the 1954 Hague Convention.<sup>71</sup> The 1972 Convention established the protection of cultural property objects included in the World Heritage List<sup>72</sup> and provided for the establishment of the World Heritage Committee.<sup>73</sup> The World Heritage Fund, also founded by the 1972 Convention, actually served as the main model for some solutions reached in the Second Protocol, such as the Committee and the Fund. One of the functions of the World Heritage Committee is to establish, keep up to date and publish the List of the World Heritage in Danger (List).<sup>74</sup> One of the reasons for putting certain property on the List is the outbreak or the threat of an armed conflict.<sup>75</sup>

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<sup>69</sup> Its main purpose is the protection and preservation of the cultural and natural objects and sites of outstanding value, Art.1 *supra* note 3.

<sup>70</sup> See: M. Sersic, 'Protection of Cultural Property in time of Armed Conflict', Netherlands Yearbook of International Law, Vol. 27, 1996, at 30-32.

<sup>71</sup> The definition of the cultural property in the 1972 Convention is narrower than this in the 1954 Hague Convention - only the immovable property is protected.

<sup>72</sup> Art. 11, *supra* note 3.

<sup>73</sup> Art. 8, *supra* note 3.

<sup>74</sup> Art.11, para 4., *supra* note 3.

<sup>75</sup> Toman, *supra* note 6, at 370.

The importance and interrelatedness of the two conventions was clearly visible during UNESCO's action for safeguarding Dubrovnik, when both conventions were invoked in the appeal and actions of UNESCO's Director-General, and when the Old City of Dubrovnik was put on the List.<sup>76</sup> The need for closer co-ordination among different international conservation instruments was also recognized during the seventeenth session of the World Heritage Committee in Cartagena, Colombia in 1993, when concrete recommendations were accepted.<sup>77</sup>

#### **4.2. The Hague Regulations, the Convention concerning the Bombardment of Naval Forces in Time of War, the Geneva Conventions and the 1977 Additional Geneva Protocols**

Although the Hague Regulations and the 1977 Additional Geneva Protocols are not directly related to UNESCO, we feel we should mention them briefly while analyzing problems of the protection of cultural property in the event of armed conflict both because of their importance for the protection of cultural property in the event of armed conflict and their importance in international humanitarian law.

##### *a) The Hague Regulations and the Convention concerning the Bombardment of Naval Forces in Time of War*

One of the first international instruments that dealt with the protection of cultural property during wartime were the 1899/1907 Hague Regulations. These important instruments of international humanitarian law clearly "impose

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<sup>76</sup> More in: Toman, *supra* note 6, at 266-267; Meyer, *supra* note 20, at 378-381.

<sup>77</sup> The World Heritage Committee concluded that it will invite the representatives of the intergovernmental bodies under related conventions to attend its meetings as observers while the UNESCO Secretariat was obliged to appoint a representative to observe meetings of the other intergovernmental bodies upon receipt of an invitation. The UNESCO Secretariat was obliged as well to ensure through the World Heritage Centre appropriate co-ordination and information sharing between the Committee and other conventions, programmes and international organizations related to the conservation of cultural and natural heritage. Toman, *supra* note 6, at 375.

a duty on parties to take measures to spare buildings dedicated to art, science and religion, on condition that they are not being used at the time for military purposes”.<sup>78</sup> According to the Hague Regulations “seizure and destruction of or wilful damage to movable works of art and science as well as to institutions of the aforementioned character and historical monuments is forbidden and should be the subject of legal proceedings”.<sup>79</sup> The main difference between the 1899 and 1907 versions is in the inclusion in the 1907 regulations of “historic monuments” in the category of protected objects.<sup>80</sup>

The 1907 Hague Convention concerning the Bombardment of Naval Forces in Time of War (1907 Convention) is also important because it contains the provision which requires that all necessary measures be taken to spare, as far as possible, historic monuments and edifices devoted to worship, art and science, on the understanding that they are not being used at the same time for military purposes.<sup>81</sup>

#### *b) Geneva Conventions and the 1977 Additional Geneva Protocols*

The four Geneva Conventions are the most important instruments of international humanitarian law concerning the protection of persons involved in armed conflicts.<sup>82</sup> For the protection of cultural property in the event of armed

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<sup>78</sup> Regulations respecting the laws and customs of war on land annexed to the IV Hague Convention Respecting the Laws and Customs of War on Land, Art. 27.

<sup>79</sup> *Ibid.*, Art. 56.

<sup>80</sup> See: Sersic, *supra* note 70, at 6.

<sup>81</sup> *Ibid.*, Art 5. para 1.

<sup>82</sup> For a detailed explanation of the significance of the Geneva Conventions and 1977 Protocols in the international protection of cultural property in the event of armed conflict see: Sersic, *supra* note 70, at 19-30; Chamberlain, *supra* note 30, at 211-218; generally about the 1977 Protocols in: ‘*Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*’, the International Committee of the Red Cross, 1987; See: Greenwood, ‘*Customary Law Status of the 1977 Geneva Protocols*’, Essays in Honor of Frits Kalshoven, Astrid J. Delissen & Gerard J. Tanja eds., 1991, 93-114; ‘*The Sixth Annual American Red Cross-Washington College of the Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*’, American University Journal of International Law and Politics, Vol. 2, 1987, 415 - 431; G. H. Aldrich, ‘*Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*’, The American Journal of International Law, Vol.85, 1991, 1-20;

conflict, the most important is Art. 53 of the Fourth Geneva Convention which prohibits any destruction by the occupying power of real or personal property belonging to private persons, state, other public authorities, social or cooperative organizations, which also includes cultural property. According to Art. 52 of Additional Protocol I the destruction of civilian property is prohibited, and so are attacks or reprisals on civilian objects. Similarly to the previous example, cultural property falls within its scope as civilian property.

Article 53 of Additional Protocol I specifically prohibits the destruction of cultural property in the event of armed conflict, without prejudice to the 1954 Hague Convention, as well as Article 16 of Additional Protocol II.<sup>83</sup> Art. 38 of Additional Protocol I *inter alia* prohibits the improper use of the protective emblem of cultural property. Chamberlain points out that Art. 53 of Additional Protocol I needs to be regarded as representing customary international law.<sup>84</sup>

It is obvious from the previous sections that the 1954 Hague Convention and the 1972 Convention are deeply interrelated. This is formally visible in the model-influence of the 1972 Convention for the Second Protocol, but even more so in the similar purpose of these instruments - the protection of cultural property in peace (mainly the 1972 Convention) and in war time (mainly the 1954 Hague Convention) and its protocols. UNESCO has a significant role according to the provisions of these instruments, but that naturally cannot be said at all for the Hague Regulations, the 1907 Convention, the Geneva Conventions and the 1977 Additional Geneva Protocols, which are all very important instruments of the international humanitarian law, but also significant instruments in the protection of cultural property in the event of armed conflict.

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<sup>83</sup> Art. 53 of the Additional Protocol I: Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and of other relevant international instruments, it is prohibited:

- a) to commit any act of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of the people;
- b) to use such objects in support of the military effort;
- c) to make such objects the objects of reprisals.

<sup>84</sup> Chamberlain, *supra* note 30, at 218;

## 5. UNESCO AND THE INTERNATIONAL COMMITTEE OF THE RED CROSS

Among other international organizations related to the different aspects of the protection and preservation of cultural property,<sup>85</sup> the International Committee of the Red Cross (ICRC) has a special place in the protection of cultural property in the event of armed conflict, due to its tradition and significance within the international system.<sup>86</sup>

Since one of the mandate duties of the ICRC is the promotion of the principles of international humanitarian law, the ICRC has already significantly contributed to the protection of cultural property in time of armed conflict. When the ICRC established the Advisory Service on International Humanitarian Law (Advisory Service) in 1996, the protection of cultural property in the time of armed conflict was one of its priority concerns.<sup>87</sup>

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<sup>85</sup> Other important international organizations dealing with different aspects of the protection and conservation of cultural property are:

- 1) The International Law Association (ILA) is one of the oldest international NGOs concerned with the "study, elucidation and advancement of international law..." ILA works mainly through its committees. One of the ILA's committees is the Cultural Heritage Committee. More at: <http://www.ila-hq.org>, Website visited on 16 February 2009.
- 2) International Council on Museums and Sites (ICOMOS), is an international NGO "dedicated to the conservation of the World's historic monuments and sites". More at: <http://www.icomos.org>, Website visited on 16 February 2009.
- 3) International Council of Museums (ICOM), is "an international organization of museums and museum professionals which is committed to the conservation, continuation and communication to society of the world's cultural and natural heritage....". More at: <http://icom.museum/organization.html>, Website visited on 16 February 2009.
- 4) The International Committee of the Blue Shield (ICBS) has a mission "to work for the protection of the world's cultural heritage by co-ordinating operations to meet and respond to emergency situations". More at: <http://www.ifla.org/blueshield.htm>, Website visited on 16 February 2009.

<sup>86</sup> General information about the functions of the ICRC available at: <http://www.icrc.com>, Website visited on 16 February 2009.

<sup>87</sup> See: M. T. Dutli, 'National implementation of international humanitarian law, the work of the ICRC Advisory Service and the protection of cultural property, including strategies for the ratification of the relevant humanitarian law treaties', Protection of Cultural Property in the Event of Armed Conflict, Report on the Meeting of Experts, ICRC, 2002, at 69-77.

According to Dutli, the activities of the Advisory Service include:

- establishment of bilateral contacts with the national authorities
- organization of national and regional seminars and meetings of experts
- providing of technical assistance on draft legislation
- drawing up of draft legislation and other national documents
- exchanging information and producing publications.<sup>88</sup>

The Advisory Service has an important role in promoting the universality of the humanitarian law treaties, promoting repression of war crimes and encouraging the establishment of national humanitarian law bodies or committees.<sup>89</sup>

Among the practical projects initiated by the ICRC, the publishing of the 'fact-sheet' containing a summary of all the instruments related to the protection of cultural property in the event of armed conflict is of particular importance, due to its dual aim. On the one hand, its purpose is to provide the government officials in charge of humanitarian law with an overview of the main international obligations with respect to cultural property. On the other hand, the fact-sheets constitute a means of facilitating dissemination of the relevant instruments to target groups. The second practical publication of the ICRC is the 'ratification kit' which contains model ratification covering different options.<sup>90</sup>

Another activity of the ICRC is the establishment of the National Committees for the implementation of humanitarian law.<sup>91</sup> The role of these committees is to advise the national authorities and to support their efforts in incorporating the treaties of international humanitarian law into domestic legal orders. Many of these committees, technically supported by the Advisory Service act at the same time as UNESCO's National Committees entrusted with the national implementation of international obligations regarding the protection of cultural property.<sup>92</sup> These National Committees play an important role in the Advisory Service's creation of the database of national legislation regarding the implementation of international humanitarian law.<sup>93</sup> Clearly, such a database is of crucial importance for the preparation of specific action plans for assisting a particular country.

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<sup>88</sup> Dutli, *supra* note 87, at 70.

<sup>89</sup> *Ibid.*, at 73-74.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*, at 72.

<sup>92</sup> *Ibid.*, at 73.

<sup>93</sup> *Ibid.*

The interrelatedness of the activities of the ICRC and UNESCO is further reflected in the ICRC's expert participation in the drafting of the Second Protocol, where some important solutions were reached on the ICRC's proposal.<sup>94</sup> At the International Conference on the Protection of Cultural Property in September 2002, the ICRC was recognized as an institution with an important advisory role regarding the application of the 1954 Hague Convention and its two protocols.<sup>95</sup> Another example of the successful co-operation with UNESCO is the joint organization of training seminars on international humanitarian law and the cultural heritage protection law for targeted groups in the participant countries and for targeted domestic representatives (for instance, military officers, civil servants, law-makers, NGO representatives, scholars).<sup>96</sup> Expert meetings, organized by the ICRC and attended by the representatives of UNESCO are a further example of productive co-operation between the two organizations.

## 6. CRIMES AGAINST CULTURAL PROPERTY, THE ICTY AND THE ICC

The recent developments in the international criminal law that have taken place through the establishment and practice of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) and the International Criminal Court (ICC) have revealed paramount progress in the international criminal responsibility related to the crimes committed against culture and cultural property. The process of establishing international criminal responsibility in this field could be traced to the aftermath of the World War II and the Nuremberg Trial.

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<sup>94</sup> The final text of Article 4 of the Second Protocol is based on the proposals of the ICRC and Austria.

<sup>95</sup> S. Schorlemer, 'Legal Changes in the Regime of the Protection of Cultural Property in the Event of Armed Conflict', *Art, Antiquity and Law*, Vol. 9, issue 1, 2004, at 73.

<sup>96</sup> First of such kind of seminars was held in Tashkent, Uzbekistan in 1995, the second in capital cities of three trans-Caucasian countries in 1996 and the third in Kathmandu, Nepal in 1997, more in: Hladik, *supra* note 13, at 60 - 61.



### 6.1. Individual criminal responsibility for crimes against cultural property during the Nuremberg Trial

Individual criminal responsibility for crimes committed against cultural property was clearly established during the Nuremberg Trial in 1946. The gravest crimes and plundering of cultural property during the World War II were committed by specially organized Nazi military units - *Einsatzstab Rosenberg*. This name has become a synonym for the worst plundering of art works in the modern history.<sup>97</sup> The Nuremberg trials resulted, *inter alia*, in several convictions for the pillage of the cultural property, recognized as violating both the customary international law and the 1907 Hague Regulations. As an expression of individual criminal responsibility, Alfred Rosenberg was found guilty of having committed a war crime of destruction and pillage of cultural property. His conviction marked an important precedent for the later development of the international criminal law in this field. Apart from him, a number of less well-known defendants had been prosecuted for the crimes of pillage and/or destruction of the cultural property.<sup>98</sup> Birov expressed doubt about the Nuremberg precedent stating that "certain countries presiding over proceedings, such as the former Soviet Union, participated in their own cultural pillage - removing countless German cultural objects from their occupation zone in retaliation for Hitler's destruction of cultural heritage in Russia".<sup>99</sup>

### 6.2. Further development of the individual criminal responsibility considering crimes against culture after World War II

The 1954 Hague Convention has restated the emergence of individual criminal responsibility for crimes against cultural property. Still, due to its

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<sup>97</sup> Einsatzstab Rosenberg brought 29 large shipments of plundered art to Germany and plundered 21 903 works of art from Western Europe alone. The scope of the plundering is more understandable if consider that "thirty - nine volumes of photographs of the most valuable objects of art created by the Einsatzstab to catalog the pillaged art collection." Birov, *supra* note 34, at 210, more in: L. H. Nichols, *The Rape of Europa: the Fate of Europe's Treasures in the Third Reich and the Second World War*, Macmillan, 1994.

<sup>98</sup> Birov, *supra* note 34, at 211.

<sup>99</sup> *Ibid.*

vagueness, the most important provision in that respect, that of Art. 28, have never had any practical value.<sup>100</sup>

The intensity of the crimes against cultural property that occurred during the war in Croatia and Bosnia and Herzegovina in the period 1991 - 1995, stimulated various proposals for the prosecution of the persons responsible for the wilful destruction of cultural property during wartime.<sup>101</sup> Furthermore, the development of individual criminal responsibility for crimes against cultural property in the jurisprudence of ICTY contributed to a more precise definition of violations and sanctions for crimes against cultural values in the Second Protocol.<sup>102</sup> The next section proceeds to examine this point more in detail.

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<sup>100</sup> Art. 28: "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present convention".

<sup>101</sup> In 1996 NATO had suggested recognition of the wilful damaging or destruction of cultural property during wartime as the violation of the 1954 Hague Convention and as a war crime subject to international and States' tribunals, see: 'Final Communiqué on Cultural Heritage Protection in Wartime and in State of Emergency, adopted at the Krakow Conference NATO - Partnership for Peace', 18-21 Juni 1996, quoted in Schorlemer, *supra* note 95, at 59; International Law Commission's 'Draft Code of Crimes Against the Peace and Security of Mankind' from 1996 in Art. 20 (e)(iv) includes as a war crimes all acts of "seizure of, or destruction of or wilful damage done to all institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of arts and science", quoted in Hladik, *supra* note 40, at 227.

<sup>102</sup> Chapter IV, Criminal responsibility and jurisdiction, contains detailed provisions on: Serious violations of this Protocol (Art. 15), Jurisdiction (Art. 16), Prosecution (Art. 17), Extradition (Art. 18), Mutual legal assistance (Art. 19), Grounds for refusal (Art. 20), Measures regarding other violations (Art. 21). The Second Protocol clarified the vague provisions of the 1954 Hague Convention by determining which five acts are requiring criminal sanction. These crimes are: extensive destruction, appropriation, theft, pillage or misappropriation or acts of vandalism directed against cultural property protected by the Convention (Art. 15). See also: Schorlemer, *supra* note 90, at 61-62.

### 6.3. ICTY<sup>103</sup>, ICC<sup>104</sup> and individual criminal responsibility for the crimes of destruction of cultural property

According to Abtahi, the provisions of the ICTY Statute concerning the protection of the cultural property could be divided into three categories:

- a) grave breaches of the Geneva Conventions of 1949
- b) violations of the laws or custom of war
- c) crimes against humanity, particularly persecution on political, racial and religious grounds.<sup>105</sup>

In the ICTY Statute and in its case law, three types of protective measures for cultural property can be identified:

- direct protection
- indirect protection
- protection *a posteriori*.<sup>106</sup>

The *direct protection* measures are based on the Art. 3(d) of the Statute of the ICTY Statute.<sup>107</sup> They criminalize the “destruction or wilful damage to institutions dedicated to religion, destruction or wilful damage to institutions dedicated to religion or education, and seizure, destruction or wilful damage

<sup>103</sup> The ICTY is established upon decision of the Security Council, pursuant to Chapter VII of the UN Charter for the persecution of persons responsible for serious violations of International Humanitarian Law committed in the territory of the former Yugoslavia since 1 January 1991. According to its Statute, ICTY has jurisdiction to prosecute natural persons for grave breaches of the Geneva Convention of 1949, violations of the laws and customs of war, crimes against humanity and genocide. See the text of the statute at: [www.un.org/icty/basic/statut/statute.htm](http://www.un.org/icty/basic/statut/statute.htm), Website visited on 16 February 2009.

<sup>104</sup> The International Criminal Court is established by the Rome Statute, which is open for signature on 17 July 1998, entered into force on 1 July 2002. General information about the ICC and the text of the Rome Statute at: <http://www.icrc-cpi/int.about.html>, Website visited on 16 February 2009.

<sup>105</sup> H. Abtahi, ‘*The Protection of Cultural Property in Times of Armed Conflict: The Practise of the International Criminal Tribunal for the Former Yugoslavia*’, Harvard Human Rights Journal, Vol. 14, 2001, at 9.

<sup>106</sup> *Ibid.*

<sup>107</sup> Art. 3(d): The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:  
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.

done to institutions dedicated to religion".<sup>108</sup> Abtahi argues that the cultural property protection under Art. 3(d) is mainly sufficient.<sup>109</sup>

*The Indirect protection* measures afford protection indirectly, through the protection of civilian objects and through the punishment of the crime of persecution.<sup>110</sup> The protection measures of this type are based on the Art. 2(d) of the ICTY Statute.<sup>111</sup> Some judgements of the ICTY were based, *inter alia*, on the infringement of this type of protection measures.<sup>112</sup>

*Protection a posteriori* deals with the results of the theft or illegal export of cultural property.<sup>113</sup>

<sup>108</sup> Abtahi, *supra* note 105, page 10.

<sup>109</sup> First, it has a wide scope because it applies to both international and non-international armed conflicts. Second, the element of the intent is broadly interpreted. Third, unlike other provisions of the Statute, it refers directly to cultural property. Nevertheless, this type of protection encounters a number of obstacles, mainly due to the qualification of the sites relating to cultural property, in: Abtahi, *supra* note 105, at 11.

<sup>110</sup> Abtahi, *supra* note 105, at 13.

<sup>111</sup> Art 2(d): The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:....

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. in: Abtahi, *supra* note 105, at 14.

<sup>112</sup> The Kordic Trial Judgment, (Prosecutor v. Dario Kordic and Mario Cerkez) No. IT-95-14/2-T, available at: <http://www.un.org/icty/kordic/trialc/judgment/contents.htm>, Website visited on 16 February 2009. This judgment described two distinct situations where the extensive destruction of the cultural property constitutes a grave breach. The first situation is where the property destroyed is of a type accorded general protection under the Geneva Conventions of 1949, regardless of whether or not it is situated in occupied territory. The second situation is where the property destroyed is accorded protection under the Geneva Conventions of 1949, on account of its location in occupied territory but only if destructions is not justified by military necessity and occurs on a large scale. in: Abtahi, *supra* note 105, at 16.

In the Naletilic Trial Judgment (Prosecutor v. Mladen Naletilic and Vinko Martinovic) No. IT-98-34/T, available at: <http://www.un.org/icty/naletilic/trialc/judgment/contents.htm>, Website visited on 16 February 2009, the Chamber considered in paragraph 605 that a crime under Article 3 (d) of the Statute has been committed when:

- i) the general requirements of Article 3 of the Statute are fulfilled;
- ii) the destruction regards an institution dedicated to religion;
- iii) the property was not used for military purposes;
- iv) the perpetrator acted with the intent to destroy the property.

in: Hladik, *supra* note 40, at 224.

<sup>113</sup> Abtahi, *supra* note 105, at 28-30.

The most relevant case law of ICTY *i.e.* the judgments in *Prosecutor v. Miodrag Jokic* and *Prosecutor v. Pavle Strugar* reveal that the ICTY considers crimes of destruction of cultural property most seriously. Moreover, it seems to be prepared to base some of its judgments almost exclusively on these grounds.<sup>114</sup>

In my view, these examples of the ICTY judgments are of great significance for the protection of the cultural property in wartime for several reasons:

1) they show that international instruments for the protection of the cultural property during wartime have been significantly improved in the last decade,

2) they reveal that the enforcement and sanctions mechanisms of international law for the protection of the cultural property could be effective,

3) they create a precedent which could bare quite some importance for the further development of international law in this field.<sup>115</sup>

The statute of the ICC contains provisions similar to those of ICTY. The provisions of the ICC include, among others, serious violations of the laws and customs of war as “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives”.<sup>116</sup>

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<sup>114</sup> See: *Prosecutor v. Miodrag Jokic*, case No. IT-01-42/1-S, available at: <http://www.un.org/icty/jokic/trialc/judgement/jok-sj040318e.htm>, Website visited on 16 February 2009. In this case, the defendant was convicted on the basis of the three protected interests: life and integrity of the victims, protection of the civilian objects and protection of the cultural property during the attack on the historic centre of Dubrovnik in 1991. The attack on the historic centre of Dubrovnik in 1991 was also the ground of the indictment in the case *Prosecutor v. Pavle Strugar*, case No. IT-01-42-T, available on: <http://www.un.org/icty/strugar/trialc1/judgement/str-tj050131e.htm>, Website visited on 16 February 2009.

The defendant was found guilty on the two grounds: first - attack on civilians, as violation of the laws of customs of war and second - destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science, also as a violation of the laws or customs of war.

<sup>115</sup> Of course, the significance and the relative success of the ICTY as an *ad-hoc* international tribunal should not be overestimated, especially with regard to the fact that its mandate is limited to the events in the ex-Yugoslavia after 1 January 1991.

<sup>116</sup> Art. 2. b) ix of the Rome Statute, which entered into force on 4 July 2002, available at: [http://www.icc-cpi/int/library/about/officialjournal/Rome\\_Statute\\_12070](http://www.icc-cpi/int/library/about/officialjournal/Rome_Statute_12070), Website visited on 16 February 2009;

The above described developments in international criminal law considering the destruction of cultural property in the event of armed conflict may be the most appropriate answer to the difficult questions of enforcement and sanctions regarding the international instruments for the protection of cultural property in the event of armed conflict. To repeat, the interrelatedness of all of the instruments and institutions designed for the protection of cultural property in the event of armed conflict is rather obvious. The somewhat more precise understanding of the provisions about sanctions and enforcement contained in the Second Protocol was in part enabled by the emerging practice of the ICTY supported that approach. In turn, the more precise and detailed understanding of the provisions about individual criminal responsibility in the Second Protocol have effect on the emerging practice of the ICTY. The judgements of ICTY in this field are mostly based on the alleged violations of the international legal instruments, the most cited of which are the 1954 Hague Conventions and its Protocols and the 1949 Geneva Conventions. Likewise, it is safe to say that the ICC Statute would probably not have criminalized violence against cultural property without practice and development of all mentioned instruments and institutions.

## 7. FURTHER DEVELOPMENT: THE CASE OF BUDDHAS OF BAMIYAN AND UNESCO'S DECLARATION CONCERNING THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE

In the beginning of March 2001, one of the most barbaric acts against cultural property occurred: The Taliban authorities in Afghanistan completely destroyed the great rock sculptures of the Buddhas of Bamiyan.<sup>117</sup> The destruction of the Bamiyani sculptures was carefully prepared and announced to world-media. The appeals of the UN, UNESCO, ICOMOS and other organizations were ignored and the great Buddhas sculptures had been destroyed following a cynical, fundamentalist statement of the "Afghan Supreme Court", quite clearly based on expressions of religious hatred.<sup>118</sup>

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<sup>117</sup> For the detailed discussion about destruction of the Buddhas of Bamiyan and International law see: Francioni and Lenzerini, *supra* note 47.

<sup>118</sup> *Ibid.*, at 626.

The destruction of the Great Buddhas<sup>119</sup> was an unprecedented event that revealed, *inter alia*, how all international instruments regarding protection of the cultural property could be painfully ineffective and ignored dead letters. The destruction of the Great Buddhas is even more worrying due to the fact that it happened in the times when some significant achievements in the international legal protection of cultural property in the time of armed conflict seemed to have been obtained (the adoption of the Second Protocol, ICTY practice establishing individual criminal responsibility for the destruction of cultural property).

It seemed obvious that despite of UNESCO's appeals and efforts for saving the Bamiyani Buddhas from destruction,<sup>120</sup> there was also a clear need for a normative reaction in respect of the situation that exposed the ineffectiveness of the existing international instruments.

Having in mind this aim, the UNESCO Expert Meeting was held in Bruxelles in December 2002.<sup>121</sup> During the discussions at the UNESCO's 31<sup>st</sup> Session

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<sup>119</sup> According to the Francioni and Lenzerini, the new features in the pathology of State behaviour toward cultural heritage could be summarized as following:

“First, unlike traditional war damage to cultural heritage, which affects the enemy's property, the demolition of the Buddhas of Bamiyan concerns the Afghan Nation's heritage.... Second, the purpose of the destruction was not linked in any way to a military objective, but inspired by the sheer will to eradicate any cultural manifestation of religious or spiritual creativity that did not correspond to the Taliban view of religion and culture. Third, the modalities of the execution differ considerably from other similar instances of destruction in the course of recent armed conflicts.....In the case of the Afghan Buddhas, demolition was carefully planned, painstakingly announced to the media all over the world, and cynically documented in all its phases of preparation, bombing and ultimate destruction.

Fourth, to the knowledge of the authors, this episode is the first planned and deliberate destruction of cultural heritage of great importance as act of defiance of the United Nations and of the international community.....

Fifth, the destruction of the Buddhas and other significant collections of pre - Islamic Afghan art took place as an act of narcissistic self - assertion against the pressure of the Director General of UNESCO, Ambassador Matsuura, of his special envoy to Kabul, ambassador LaFranche, and of the UN Secretary General Kofi Annan, who all pleaded with the Taliban to reconsider their disgraceful decision to proceed with the destruction of all the statues in the country”. in: Francioni and Lenzerini, *supra* note 47, at 620- 62.

<sup>120</sup> See: Hladik, *supra* note 40, at 216.

<sup>121</sup> In the category of the UNESCO's meetings, the Bruxelles meeting fell into category VI of UNESCO meetings (expert committees). Such meetings are set up on an *ad hoc* basis. Their main aim is “to submit suggestions or advice to the Organization on the prepara-

in 2003, it was stressed that “any normative action in this area should be developed respecting existing international law and the sovereignty of States”.<sup>122</sup> Even more significant is the remark reflecting the attitude of the most states towards the UNESCO: “UNESCO’s role in this domain should be that of an educator rather than that of censor”.<sup>123</sup> Choosing a soft - law instrument, the UNESCO Secretariat prepared a draft of declaration following discussion and proposals at the Brussels Expert Meeting,<sup>124</sup> which served as a basis for adopted text of declaration.

The final legal response of the UNESCO was the adoption of the Declaration Concerning the Intentional Destruction of Cultural Heritage (Declaration) on 17 October, 2003.<sup>125</sup>

### 7.1. An analysis of Declaration

The Declaration, which contains only nine articles represents the response of the international community to this newest threat to cultural property in the time of armed conflict and provides a model of UNESCO’s answer to the challenge of adjusting to the new circumstances in the protection of cultural property.

The preamble of the declaration refers to different international instruments for the protection of cultural heritage in the event of armed conflict as well as to the UNESCO’s general mandate for the protection of cultural property.

Article 2 is important since it defines the scope of application of the provision - it “which addresses intentional destruction of cultural heritage, as well as of natural heritage when linked to cultural heritage, in peace time as well in the event of armed conflict”.<sup>126</sup> What is novel is the inclusion of the protection

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tion or implementation of its programme in a particular field or on any other matters within its purview. They submit their findings in the form of a report to the Director - General, who decides what use shall be made of them.” In: Hladik, *supra* note 40, at 218.

<sup>122</sup> Hladik, *supra* note 40, at 218.

<sup>123</sup> *Ibid.*, at 218.

<sup>124</sup> *Ibid.*, at 219.

<sup>125</sup> [http://portal.unesco.org/culture/en/ev.php@URL\\_ID=17126&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php@URL_ID=17126&URL_DO=DO_TOPIC&URL_SECTION=201.html), Website visited on 16 February 2009.

<sup>126</sup> *Ibid.*



of cultural heritage together with the natural heritage in this provision, as well as the *ratione temporis* scope of the article which relates to both peacetime and wartime.

The second paragraph of this article is crucial “because it focuses on ‘intentional destruction’ (as an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity), in a manner which constitutes an unjustifiable offence to the principles of humanity and dictates of public conscience”.<sup>127</sup>

This manner of destruction is related “to particularly odious acts and not to extend it to all acts of destruction of cultural heritage”.<sup>128</sup>

The various measures to refrain from intentional destruction of cultural heritage contained in Art. 3, include an appeal to the states to become parties to the 1954 Hague Convention and its two protocols. It is clear that except of serving to its purpose of creating the protective measures in the cases of intentional destruction of cultural property, the drafters of the Declaration also intended to enhance the effectiveness of the existing international instruments in this field.

Article 6<sup>129</sup> is another crucial article because it provides for the State responsibility in the case of the intentional destruction of the cultural heritage

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<sup>127</sup> Hladik, *supra* note 40, at 224. The author also states that this, second paragraph of the Article 2 is inspired by the “Martens clause,” *i.e.* important principle of international humanitarian law, and quotes T. Meron who in his article ‘*The Martens clause, principles of humanity and dictates of public conscience*’, *American Journal of International Law*, Vol. 94, No. 1, pages 87-88, states: “It is generally agreed that the clause means, at the very least, that the adoption of a treaty regulating particular aspects of the law of war does not deprive the affected persons of the protection of those norms of customary international law that were not included in the codification. The clause thus safeguards customary law and supports the argument that what is not prohibited by treaty may not necessarily be lawful. It applies to all parts of international humanitarian law, not only to belligerent occupation. It argues for interpreting international humanitarian law, in case or doubt, consistently with the principles of humanity and the dictates of public conscience.”

<sup>128</sup> *Ibid.*, at 225.

<sup>129</sup> Article 6: States that intentionally destroy or intentionally fail to take the necessary measures to prohibit, prevent, stop and punish any intentional destruction of cultural heritage of great importance for humanity, including such cultural heritage which is of special interest for the community directly affected by such destruction, bear the responsibility for such destruction. The responsible State should provide reparation in the form of restoration when technically feasible, or compensation as a measure of last resort.

of great importance and for the reparation by the responsible State either in the form of restoration or compensation.<sup>130</sup>

Article 7 which calls for the establishing of the individual criminal responsibility actually make the establishment of this jurisdiction subject to two conditions:

- a) jurisdiction must be established in accordance with international law
- b) it relates only to the destruction of cultural heritage “of great importance for humanity, including such cultural heritage which is of special interest for the community directly affected by such destruction”.<sup>131</sup>

On the other hand, still concerning Article 7, para.1, “the last provision is important in that it relates to any destruction and not only to the destruction of cultural heritage of greatest importance for humanity, including such cultural heritage which is of special interest for the community directly affected by such destruction”.<sup>132</sup>

As it is the case with other international instruments, the draft proposal of the Declaration contained some even more uncompromisory solutions which were changed in a final version of Declaration.<sup>133</sup> Hladik’s assessment of the “Contribution of the Declaration to a Better Protection of Cultural Heritage”<sup>134</sup> states that the Declaration will contribute to better protection of cultural heritage in the following ways:

- by covering intentional destruction of cultural heritage, including cultural heritage linked to a natural site both in peace-time and wartime, thus avoiding the traditional dichotomy between international humanitarian law instruments, applicable essentially (but not exclusively) during hostilities, and purely cultural heritage protection law instruments, applicable principally in peacetime (but again not exclusively...)
- by addressing “intentional destruction” partly on the basis of the Martens clause and of a key element - *the manner of destruction* which is defined by two

<sup>130</sup> The provision on compensation corresponds to the philosophy of draft Article 36 of the draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001) providing for the obligation of the responsible State “to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.” Hladik, *supra* note 40, at 227.

<sup>131</sup> Hladik, *supra* note 40, at 227.

<sup>132</sup> *Ibid.*, at 228.

<sup>133</sup> More in: *ibid.*, at 228-231.

<sup>134</sup> *Ibid.*, at 234.

disjunctive conditions: (i) it must constitute a violation of international law: or (ii) an unjustifiable offence to the principles of humanity and dictates of public conscience, if not already governed by fundamental principles of international law;

- it provides for concrete measures to combat intentional destruction of cultural heritage;
- it encourages States to conform their wartime conduct (including the case when they are Occupying Powers) with customary international law and the principles and objectives of international agreements and UNESCO recommendations on the protection of cultural heritage during hostilities.<sup>135</sup>

The importance and informal value of the Declaration does not lie only in the fact that the international community with the UNESCO at the forefront only formally reacted to the barbaric event of destruction of the cultural heritage of the great importance. Its strength is also in the fact that the principles contained in the Declaration are almost undoubtedly principles and values shared by almost *all* States. In that acknowledgement lies the hope that they will be respected more than other instruments of international law which are not welcomed so overwhelmingly by the states and which proved not to be very effective in the early May of 2001. Looking at all this evidence, it could be argued that the UNESCO acted in this case with the maximum of its possibilities as it could act as an intergovernmental organization.

## 8. CONCLUSION

The role of the UNESCO in the protection of cultural property in the event of armed conflict needs to be understood realistically. In other words, it should be seen within the scope determined by the UNESCO constitution, its general mandate, mandate given to it by the various international instruments and universally accepted practice of UNESCO. The present analysis, as well as the UNESCO practices in the 60's and 70' make it clear that the organization "has the teeth", *i.e.* enforcement and sanctions possibilities, but also that these possibilities need to be employed carefully and moderately, always bearing in mind the long - term effects of their use.

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<sup>135</sup> *Ibid.*, at 234-235.

The role of the UNESCO in relation to the main international instrument for the protection of cultural property in the event of armed conflict, the 1954 Hague Convention, was likewise strengthened with the adoption of the Second Protocol, especially due to the creation of the Committee and the Fund. Furthermore, closer co-operation among various instruments and institutions concerned with the protection of cultural property is necessary for improving their effectiveness, as was shown with the example of the relation between the 1954 Convention and the 1972 Convention. In institutional terms, the successful co-operation and common projects between UNESCO and ICRC can serve as a positive example. When assessing the role of UNESCO in this field, one should also bear in mind the existence of a whole range of important conventions relating to the armed conflict and already some customary law, which are not significantly influenced by the UNESCO.

The creation of the ICC and especially the practice of the ICTY regarding the development of the individual criminal responsibility reflect further significant achievements in this area. The abundant practice of the ICTY shows that the high standards of the protection of cultural heritage already exist at the international level. The duty of all responsible international (including of course UNESCO) and national institutions is to help, within the scope of their mandates and resources, to implement these principles further on both the international and national level.

The intentional destruction of the cultural heritage of great importance that occurred in Afghanistan in the case of the Great Bamiyani Buddhas, unfortunately confirmed a general shortcoming of law: sometimes not even the best laws and common effort of the international community cannot prevent destruction motivated by irrational hatred and intolerance. In any case, the reactions of UNESCO in this last case were probably the most UNESCO could do respecting its role as an intergovernmental organization and the limits of possibilities under different mandates. Therefore, the Declaration Concerning the Intentional Destruction of Cultural Heritage is a welcome step in the further development of the protection of cultural property in the event of armed conflict and the role of the UNESCO in their creation is a useful example of UNESCO's activity in this field.

## Sažetak

Robert Mrljić \*

UNESCO I ZAŠTITA KULTURNIH DOBARA  
U SLUČAJU ORUŽANOG SUKOB

*Uloga UNESCO-a u nastajanju, provedbi i razvoju međunarodnih pravila vezanih uz zaštitu kulturnih dobara u slučaju oružanog sukoba je analizirana u povijesnom kontekstu. Autor je analizi pristupio polazeći prvenstveno od odredbi samog "ustavnog akta" UNESCO-a, te Konvencije za zaštitu kulturnih dobara u slučaju oružanog sukoba iz 1954. godine i njezinih protokola. Razvitak i provedba pravila u ovom području u značajnoj mjeri ovise upravo o ovoj međunarodnoj organizaciji, ali pokazano je da postoji i čitav niz drugih međunarodnih instrumenata i organizacija s kojima je UNESCO u većoj ili manjoj povezan i na koje više ili manje utječe. Značajan doprinos razvoju međunarodnog prava u ovom kontekstu predstavljali su usvajanje II. Protokola Konvencije za zaštitu kulturnih dobara u slučaju oružanog sukoba 1999. godine, praksa Međunarodnog suda za zločine počinjene na području bivše Jugoslavije, te Deklaracija u vezi namjernog uništavanja kulturne baštine iz 2003. Autor zaključuje da uloga UNESCO-a u zaštiti kulturne baštine treba pristupiti realistično, uvijek vodeći računa o nadležnosti i mogućnostima koje su UNESCO-u dane odredbama različitih međunarodnih instrumenata. Na isti način treba pristupiti i pitanju sankcija koje su UNESCO-u na raspolaganju u slučaju nepoštivanja odredbi, u prvom redu, Konvencije za zaštitu kulturnih dobara u slučaju oružanog sukoba i njenih dvaju protokola.*

*Ključne riječi: UNESCO, zaštita kulturnih dobara, oružani sukob*

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## Zusammenfassung

Robert Mrljić\*\*

### DIE UNESCO UND DER SCHUTZ VON KULTURGUT BEI BEWAFFNETEN KONFLIKTEN

*Dieser Beitrag analysiert die Rolle der UNESCO in der Entstehung, Durchführung und Fortschreibung der völkerrechtlichen Regeln zum Schutz von Kulturgut bei bewaffneten Konflikten im historischen Kontext. Die Analyse setzt in erster Linie bei den Bestimmungen der "Verfassung" der UNESCO, der Konvention zum Schutz von Kulturgut bei bewaffneten Konflikten aus dem Jahr 1954 und deren Protokollen an. Die Fortschreibung und Durchsetzung der Regeln auf diesem Gebiet hängen wesentlich von dieser internationalen Organisation ab, doch gibt es, wie gezeigt wird, eine ganze Reihe anderer völkerrechtlicher Instrumente und Organisationen, mit denen die UNESCO mehr oder weniger verknüpft ist und auf die sie mehr oder weniger Einfluss übt. Einen wesentlichen Fortschritt für die Entwicklung des Völkerrechts stellten in diesem Bereich die Verabschiedung des Zweiten Protokolls zum Haager Abkommen für den Schutz von Kulturgut bei bewaffneten Konflikten aus dem Jahre 1999, die Rechtsprechung des Internationalen Strafgerichtshofes für Ex- Jugoslawien sowie die UNESCO-Erklärung über die vorsätzliche Zerstörung von Kulturerbe aus dem Jahre 2003 dar. Der Autor kommt zu dem Schluss, dass die Rolle der UNESCO für den Schutz des Kulturerbes realistisch einzuschätzen sei und immer unter Berücksichtigung der Zuständigkeiten und Möglichkeiten, die durch die verschiedenen völkerrechtlichen Instrumente dieser internationalen Organisation eingeräumt wurden. Auf dieselbe Art und Weise sollte auch die Frage der Sanktionen behandelt werden, die der UNESCO im Falle der Missachtung dieser Regeln, vornehmlich der Konvention zum Schutz von Kulturgut bei bewaffneten Konflikten und ihrer beiden Protokolle zur Verfügung stehen.*

*Schlüsselwörter: UNESCO, Schutz von Kulturgut, bewaffneter Konflikt*

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