

Can the 1954 Hague Convention Apply to Non-state Actors?: A Study of Iraq and Libya

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SUMMARY

INTRODUCTION	403
I. HISTORY OF PROTECTION FOR CULTURAL PROPERTY	405
II. THE 1954 HAGUE CONVENTION AND ITS PROTOCOLS.....	408
A. <i>First Protocol</i>	411
B. <i>Second Protocol</i>	411
III. WEAKNESSES OF THE HAGUE CONVENTION AND ITS PROTOCOLS	413
IV. APPLICATION OF THE HAGUE CONVENTION TO NON-STATE ACTORS: A STUDY OF IRAQ AND LIBYA	415
A. <i>The Looting of the Iraq Museum</i>	415
B. <i>The Legal Framework for Applying the Hague Convention to Non-state Actors</i>	418
C. <i>The Conflict in Libya</i>	422
CONCLUSION	425

INTRODUCTION

In early 2011, violent uprisings swept through Northern Africa.¹ In Libya, the uprisings turned into an extended armed conflict between the Libyan government

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1. Fredrick Kunkle, *Demonstrations Sweep Middle East, Sparking Violence in Syria and Yemen*, WASH. POST, Apr. 8, 2011, http://www.washingtonpost.com/world/demonstrations-sweep-middle-east-sparking-violence-in-syria-and-yemen/2011/04/08/AFd5dz3C_story.html.

and U.N.-backed rebel forces, finally resulting in the overthrow of the Libyan government led by Muammar el-Qaddafi.² The increasing violence led the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Committee of the Blue Shield³ to issue statements in March urging both the Libyan government and the coalition forces to protect Libya's cultural property.⁴ The Blue Shield asked both sides to respect the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention), to which Libya is a signatory party.⁵ The Blue Shield statement is notable because it exhorts "all parties involved" in the conflict (which presumably includes the Libyan rebel group, a non-state actor) to respect an international treaty even though only state parties are traditionally bound by treaties. UNESCO later issued another statement calling on "the parties involved in the armed conflict in Libya to ensure the protection" of specific cultural sites.⁶ Since the number of conflicts involving non-state actors is growing,⁷ the groups' statements raise the question of whether international treaties like the Hague Convention can be used to bind not only state actors, but non-state actors as well.

For the Hague Convention to effectively protect cultural property, it must apply to non-state actors in non-international armed conflicts. To achieve this goal, the Hague Convention's application to non-state actors must be strengthened and clarified. In this Note, I examine the 1954 Hague Convention, focusing particularly on the application of the Convention to non-state actors. Part I outlines the development of laws protecting cultural property. Part II examines the important provisions of the 1954 Hague Convention and its Protocols, while Part III discusses the weaknesses of the Convention. The second half of the Note addresses the application of the Hague Convention to non-state actors, looking particularly at the looting of the Iraqi National Museum and the armed conflict in Libya. Part IV(A) examines whether the United States had a duty to prevent the looting of the National Museum of Iraq. Part IV(B) discusses the legal framework for applying the Hague Convention to non-state actors, and Part IV(C) uses an analysis of the armed conflict in Libya to further explore the implications of extending duties under the Hague Convention to non-state actors.

2. Kareem Fahim & David D. Kirkpatrick, *Jubilant Rebels Control Much of Tripoli*, N.Y. TIMES, Aug. 21, 2011, <http://www.nytimes.com/2011/08/22/world/africa/22libya.html>.

3. The International Committee of the Blue Shield is an organization that coordinates and strengthens international efforts to protect cultural property at risk of destruction in armed conflicts. Blue Shield, *Blue Shield's Network Website*, <http://www.blueshield-international.org> (last visited Jan. 25, 2012).

4. Press Release, The Int'l Comm. of the Blue Shield, *Blue Shield Statement on Libya* (Mar. 14, 2011), <http://icom.museum/press-releases/press-release/article/blue-shield-statement-on-libya-14-march-2011.html>; *Director-General Urges Military Forces Engaged in Libya to Refrain from Endangering Cultural Heritage*, UNESCO WORLD HERITAGE CONVENTION (Mar. 23, 2011), <http://whc.unesco.org/en/news/730> [hereinafter *Director-General Statement to Forces Engaged in Libya*].

5. Director-General Statement to Forces Engaged in Libya, *supra* note 4; *see States Parties to the Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Regulations for the Execution of the Convention*, UNESCO, <http://erc.unesco.org/cp/convention.asp?KO=13637&language=E> (last visited Jan. 13, 2012) [hereinafter *States Parties to the 1954 Hague Convention*] (documenting Libya's ratification of the 1954 Hague Convention on Nov. 19, 1957).

6. *The Director-General Calls for the Protection of the Old Town of Ghademes*, UNESCO PRESS (June 14, 2011), http://www.unesco.org/new/en/media-services/single-view/news/the_director_general_calls_for_the_protection_of_the_old_town.

7. Andreas Wenger & Simon Mason, *The Growing Importance of Civilians in Armed Conflict*, CSS ANALYSES IN SECURITY POL'Y, Dec. 2008, at 1, 1.

I. HISTORY OF PROTECTION FOR CULTURAL PROPERTY

For centuries, war has been conducted with the view that “to the victor goes the spoils.”⁸ Pillage and destruction were generally seen as unavoidable consequences of war.⁹ Throughout the centuries, however, there have been some who have viewed art and cultural property as deserving of special protection, including the Greek historian Polybius, who observed that “[n]o one can deny that to abandon oneself to the pointless destruction of temples, statues and other sacred objects is the action of a madman.”¹⁰ Additionally, Cicero, the Roman philosopher, established a distinction between ordinary spoils of war and artistic decoration, asserting that the former could be legally looted while the latter could not.¹¹

While some early thinkers believed cultural property merited heightened protection, looting and destruction of art and architecture during war persisted for centuries.¹² Hugo Grotius wrote in 1625 that armed violence, including destruction of enemy property, was permissible as long as the end pursued in war was just.¹³ Grotius believed, however, that reason compelled sparing “those things which, if destroyed, do not weaken the enemy, nor bring gain to the one who destroys them,” including art and religious property.¹⁴

Emer de Vattel, writing in the eighteenth century, was one of the first to recommend unique protection for cultural property.¹⁵ While Vattel recognized that the law of war allowed states to appropriate an enemy nation’s property,¹⁶ he urged that cultural property be spared:

For whatever cause a country is ravaged, we ought to spare those edifices which do honour to human society, and do not contribute to the

8. Andrea Cuning, *The Safeguarding of Cultural Property in Times of War & Peace*, 11 TULSA J. COMP. & INT’L L. 211, 212 (2003).

9. *See id.* (noting the historic sentiment that the victorious party to a conflict “was entitled to pillage and loot the treasures of the defeated party”).

10. JIŘÍ TOMAN, *THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT* 4 (1996).

11. Margaret M. Miles, *Cicero’s Prosecution of Gaius Verres: A Roman View of the Ethics of Acquisition of Art*, 11 INT’L J. CULTURAL PROP. 28, 31 (2002).

12. *See* Wayne Sandholtz, *The Iraqi National Museum and International Law: A Duty to Protect*, 44 COLUM. J. TRANSNAT’L L. 185, 203–04 (2005) (stating that by the mid-1700s, some thinkers “took the position that, though international law permitted plunder, cultural monuments enjoyed a unique and protected status”); TOMAN, *supra* note 10, at 3–7 (explaining that in antiquity the “destruction of cultural property was then considered an inevitable consequence of war,” the “situation in the Middle Ages was not very different,” and “[d]uring the wars at the time of the French Revolution, the booty of war included *objets d’art* and scientific objects”).

13. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 599–600 (Francis W. Kelsey trans., Clarendon Press 1925) (1625).

14. *Id.* at 751.

15. Cuning, *supra* note 8, at 214 (citing Lawrence M. Kaye, *Laws in Force at the Dawn of World War II: International Conventions and National Laws*, in *THE SPOILS OF WAR* 100, 100–05 (Elizabeth Simpson ed., 1997)).

16. EMER DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY* 567 (Knud Haakonssen et al. eds., Thomas Nugent, trans., Liberty Fund, Inc. 2008) (1758) (“We have a right to deprive our enemy of his possessions, of every thing which may augment his strength and enable him to make war.”).

enemy's strength,—such as temples, tombs, public buildings, and all works of remarkable beauty. What advantage is obtained by destroying them? It is declaring one's self an enemy to mankind, thus wantonly to deprive them of these monuments of art and models of taste¹⁷

Vattel acknowledged, however, that these cultural edifices could be destroyed if so dictated by the “necessity and maxims of war.”¹⁸

The first codification of laws concerning cultural property was prepared by Francis Lieber in the *Instructions for the Government of Armies of the United States in the Field* (Lieber Code).¹⁹ In 1863, President Lincoln commissioned Lieber, a law professor at Columbia University, to draft a code of military conduct for the Union Army during the Civil War.²⁰ While Article 31 of the Lieber Code acknowledges that victorious armies have the right to seize all public movable property,²¹ Article 34 explicitly provides for protection of “property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge . . . museums of the fine arts, or of a scientific character”²² As the first wartime code of conduct to explicitly provide for protection of cultural property, the Lieber Code was very influential in Europe and “provided the foundation for subsequent agreements on the protection of cultural property,” including the 1899 and 1907 Hague Conventions.²³

The 1899 Hague Convention with Respect to the Laws and Customs of War on Land was “[t]he first formal international treaty providing some protection for cultural property.”²⁴ Articles 28 and 47 prohibit pillaging, and Article 56 provides that all property of the arts and sciences will be treated as private property and that the seizure or destruction of such property is prohibited.²⁵ The 1907 Hague Convention soon followed and provided for the protection of “buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected”²⁶ While the 1899 and 1907

17. *Id.* at 571.

18. *Id.*

19. U.S. War Dep't, *Instructions for the Gov't of Armies of the United States in the Field*, Gen. Orders No. 100 (1863) [hereinafter *Lieber Code*]; see also ROGER O'KEEFE, *THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT* 18 (2006) (noting that Lieber's instructions were “the first codification of the laws of war,” and that Lieber states in art. 22 “[t]he principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit”) (internal quotation marks omitted); Cuning, *supra* note 8, at 214 (“One of the first legal documents to reference protection of cultural property during armed conflict appears in the *Instruction for Government of Armies of the United States in the Field*, also known as the ‘Lieber Code.’”).

20. Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 *GEO. J. INT'L L.* 245, 253 (2006).

21. *Lieber Code*, *supra* note 19, art. 31.

22. *Id.* art. 34.

23. Cuning, *supra* note 8, at 215.

24. KEVIN CHAMBERLAIN, *WAR AND CULTURAL HERITAGE* 9 (2004).

25. Hague Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land arts. 28, 47, 56, July 29, 1899, 32 Stat. 1803, 1 Bevans 247, available at <http://www.icrc.org/ihl.nsf/FULL/150>.

26. Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 27, Oct. 18, 1907, 36 Stat. 2277, 1

Hague Conventions were significant because they were the first international treaties addressing cultural property protection, the catastrophic destruction in World War I and World War II exposed the weaknesses of the Conventions and illuminated the need for stricter prohibitions against the destruction of cultural property.

World War I brought widespread damage to cultural property and historical sites.²⁷ The extent of the damage was due in part to claims of military necessity by both sides, as well as to new aerial bombardment technology.²⁸ Belgium and France took the brunt of the destruction, which included the shelling of Rheims Cathedral and the burning of the University of Louvain library.²⁹ The 1899 and 1907 Hague Conventions were largely ignored during the war, but they were referenced in negotiations surrounding the Treaty of Versailles to help return artworks plundered during the conflict.³⁰

Allied forces made greater attempts to protect cultural property in World War II than they did in World War I. General Eisenhower issued two sets of orders instructing U.S. forces to protect cultural heritage as much as possible, except when it “would result in the loss of human life.”³¹ The Allied forces created special officer units to help locate, protect, and later return cultural objects and monuments to their original owners.³² Despite these efforts, World War II still saw the “[l]argest destruction and displacement of cultural sites and objects” ever known.³³ The Nazis ignored the 1899 and 1907 Hague Conventions and established a system for looting art throughout the occupied countries.³⁴ In Eastern Europe, the Nazis looted monuments, religious buildings, museums, and libraries, while in Western Europe they focused particularly on seizing art from private collections owned by Jews.³⁵ Art deemed unworthy of transportation back to Germany (particularly art from Eastern Europe) was destroyed.³⁶

History has highlighted the need for stronger protection of cultural property during war. The looting and destruction of art and cultural objects in World War I

Bevans 631, [hereinafter 1907 Hague Convention], available at <http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument>.

27. Sandholtz, *supra* note 12, at 209.

28. CHAMBERLAIN, *supra* note 24, at 9–10.

29. Sandholtz, *supra* note 12, at 209–10.

30. See Lawrence M. Kaye, *Laws in Force at the Dawn of World War II: International Conventions and National Laws*, in THE SPOILS OF WAR 100, 102 (Elizabeth Simpson ed., 1997) (“Enforcement of the provisions of the Hague Convention was rigorously implemented in the Treaty of Versailles of 1919.”); Cuning, *supra* note 8, at 216 (“[A]lthough the first two Hague Conventions did not prevent the looting that took place in WWI and WWII, they did provide a framework for the restitution and repatriation of the stolen property afterwards.”).

31. Gerstenblith, *supra* note 20, at 258; see also TOMAN, *supra* note 10, at 20 (discussing the orders issued by General Eisenhower).

32. Gerstenblith, *supra* note 20, at 258; TOMAN, *supra* note 10, at 20.

33. Gerstenblith, *supra* note 20, at 258.

34. *Id.*

35. O’KEEFE, *supra* note 19, at 80–83.

36. See *id.* at 82 (“German occupation of the Soviet Union brought with it the vicious premeditated devastation of historic, artistic and religious buildings and sites. In an order of 10 October 1941 . . . Field Marshal von Reichenau declared that ‘[n]o treasures of history and art in the East are of the slightest consequence’. German forces systematically destroyed, usually after stripping them, churches, cathedrals, monasteries, synagogues, palaces, museums, libraries, archives, cityscapes, townscapes and villages across the Ukraine, Byelorussia and western Russia.”).

and World War II in particular inspired an international effort to implement greater protection for cultural property.³⁷ This effort culminated in the drafting of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict in 1954.³⁸

II. THE 1954 HAGUE CONVENTION AND ITS PROTOCOLS³⁹

In 1950, UNESCO's Director-General held a meeting of experts "to prepare a draft convention on the protection of cultural property in the event of armed conflict."⁴⁰ The draft attempted to strike a balance between "maximising participation in the convention and maximising the protection it afforded."⁴¹ The draft resulted in the formulation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Regulations for the Execution of the Convention.⁴² The Convention and a separate optional protocol called the First Protocol were adopted in The Hague on May 14, 1954.⁴³ The Hague Convention currently has 123 high contracting parties, and the First Protocol has 100.⁴⁴

The Hague Convention rests on the principle that cultural property is valuable to all of mankind, not just to the citizens of the country where the property resides.⁴⁵ The preamble to the Convention states that "damage to [any] cultural property . . . means damage to the cultural heritage of all mankind, since each [group of] people makes its [own] contribution to the culture of the world."⁴⁶

Chapter I of the Convention contains general provisions that apply to all cultural property.⁴⁷ Article 1 of Chapter I defines cultural property as "movable or immovable property of great importance to the cultural heritage of every people."⁴⁸ Cultural property also includes "buildings whose main and effective purpose is to preserve or exhibit . . . cultural property" and "centres containing a large amount of cultural property."⁴⁹ The drafters of the Convention believed that part of the failure

37. TOMAN, *supra* note 10, at 21–22.

38. *Id.* at 23.

39. The following discussion of the 1954 Hague Convention and the First and Second Protocols is intended to cover only the main substantive provisions included therein. For a complete discussion of the Convention, see generally TOMAN, *supra* note 10, and CHAMBERLAIN, *supra* note 24.

40. O'KEEFE, *supra* note 19, at 92–93.

41. *Id.* at 93.

42. *Id.*; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, S. TREATY DOC. NO. 106-1 (1999), 249 U.N.T.S. 215 (entered into force Aug. 7, 1956) [hereinafter 1954 Hague Convention], available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20249/volume-249-I-3511-English.pdf>.

43. O'KEEFE, *supra* note 19, at 93–94; 1954 Hague Convention, *supra* note 42; Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, S. TREATY DOC. NO. 106-1 (1999), 249 U.N.T.S. 358, [hereinafter First Protocol], available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20249/volume-249-I-3511-English.pdf>.

44. *States Parties to the 1954 Hague Convention*, *supra* note 5; *States Parties to the Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, <http://erc.unesco.org/cp/convention.asp?KO=15391&language=E> (last visited Jan. 13, 2011), [hereinafter *States Parties to the First Protocol to the 1954 Hague Convention*].

45. CHAMBERLAIN, *supra* note 24, at 24.

46. 1954 Hague Convention, *supra* note 42, pmbl.

47. *Id.* arts. 1–7.

48. *Id.* art. 1.

49. *Id.*

of the 1899 and 1907 Hague Conventions was the overly ambitious definition of objects that should be afforded protection.⁵⁰ They sought a narrower definition of protected objects so that those objects could receive a “higher standard of protection.”⁵¹ Article 1, therefore, defines cultural property as property of “great importance” to humanity,⁵² though it is up to each state to decide which property is of “great importance.”

Article 3 imposes an affirmative duty on the high contracting parties to implement peacetime measures to protect their own cultural property, requiring the parties to “prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.”⁵³ Article 3 does not specify the measures to be taken by the parties, and therefore gives each party a large amount of discretion in protecting cultural property within its borders. The country that holds the cultural property, however, “remains accountable to . . . [the international] community for the safeguarding of such property.”⁵⁴

Article 4 contains two of the more controversial provisions in the Hague Convention. While paragraph 1 imposes a duty on high contracting parties to respect cultural property by refraining from using historic sites or areas surrounding cultural objects for military purposes, paragraph 2 provides that this duty may be waived in cases of “military necessity.”⁵⁵ The Convention does not contain a definition of military necessity, meaning that it is up to each state to decide whether military circumstances warrant the destruction of cultural property. The inclusion of Article 4 was the subject of serious debate at the 1954 conference with many countries concerned about the potential for abuse.⁵⁶ Other countries argued that the addition of the military necessity exception was the only way to make the Hague Convention militarily “applicable” and that its inclusion would encourage more countries to ratify the Convention.⁵⁷ The final provision regarding military necessity represents a compromise between these two camps, and it allows parties to destroy cultural property only in times of *imperative* military necessity.⁵⁸

The second controversial provision of Article 4 is contained in paragraph 3, which states that the parties “undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”⁵⁹ This provision did not receive much attention before the Iraq War but has now become one of the key provisions for evaluating whether international law has been violated during armed conflict.⁶⁰ It has attained greater importance in recent years because looting of archaeological sites and

50. O'KEEFE, *supra* note 19, at 101.

51. *Id.*

52. 1954 Hague Convention, *supra* note 42, art. 1.

53. *Id.* art. 3.

54. TOMAN, *supra* note 10, at 61.

55. 1954 Hague Convention, *supra* note 42, art. 4.

56. CHAMBERLAIN, *supra* note 24, at 38 (noting the claim that “‘military necessity’ does not amount to much more than ‘military convenience’”); O'KEEFE, *supra* note 19, at 122–23.

57. TOMAN, *supra* note 10, at 75–76.

58. 1954 Hague Convention, *supra* note 42, art. 4(2).

59. *Id.* art. 4(3).

60. Gerstenblith, *supra* note 20, at 263.

museums has become one of the main threats to cultural property.⁶¹ Paragraph 3 applies to looting by local citizens, and it imposes an obligation on parties to protect cultural property by preventing such looting.⁶²

While Chapter I of the Convention applies to all cultural property, Chapter II applies to cultural property that is placed under “special protection.”⁶³ The system of special protection is designed to provide greater protection for a limited number of refuges that shelter moveable cultural property as well as centers containing monuments and other immovable cultural property.⁶⁴ Article 8 provides that special protection must only be awarded to property that is regarded as being “of very great importance.”⁶⁵ Two conditions must be fulfilled for property to be placed under special protection: (1) the protected property must be “situated at an adequate distance from any large industrial centre or from any important military objective;” and (2) the property must not be “used for military purposes.”⁶⁶ Special protection is granted once the cultural property is entered into the International Register of Cultural Property under Special Protection.⁶⁷ Article 9 gives immunity to property under special protection.⁶⁸

The success of the special protection provision has been limited.⁶⁹ Many countries are reluctant to register their property because of the practical difficulties they experience from the application of Article 8, and only a small number of countries have actually registered property for special protection.⁷⁰ The eligibility criteria for special protection are extremely difficult to satisfy, the procedure to obtain special protection is arduous, and the extra protection that is given to listed objects is minimal in practice.⁷¹ In the end, listing objects for special protection is simply not worth the effort for many countries.

Article 28 provides the sanctions for violating the Convention, stating that contracting parties will take “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.”⁷² This provision is problematic because: (1) it does not explain exactly which violations of the Convention can be prosecuted; (2) it does not provide the mental intent required to punish a violation; and (3) it does not establish minimum or maximum penalties for violations.⁷³ The vagueness of Article 28 hinders uniform application of the Article because its interpretation is up to the individual state.⁷⁴

61. O'KEEFE, *supra* note 19, at 132.

62. 1954 Hague Convention, *supra* note 42, art. 4(3).

63. *Id.* arts. 8–11.

64. *Id.* art. 8(1).

65. *Id.*

66. *Id.*

67. *Id.* art. 8(6).

68. 1954 Hague Convention, *supra* note 42, art. 9.

69. TOMAN, *supra* note 10, at 108.

70. *Id.* at 109.

71. O'KEEFE, *supra* note 19, at 141.

72. 1954 Hague Convention, *supra* note 42, art. 28.

73. Roger O'Keefe, *Protection of Cultural Property Under International Criminal Law*, 11 MELB. J. INT'L L. 339, 363 (2010).

74. CHAMBERLAIN, *supra* note 24, at 89.

A. First Protocol

The First Protocol to the 1954 Hague Convention was executed at the same time as the main convention and concerns the status of movable cultural property.⁷⁵ The First Protocol was meant to address the systemic pillaging of art from occupied territories during World War II.⁷⁶ Section I provides that an occupying power has a duty to prevent the exportation of cultural property from the occupied territory.⁷⁷ Additionally, parties must return any cultural property that has been exported from the occupied country.⁷⁸ Section II requires that any cultural property transported from one party to another party for safekeeping during armed conflict must be returned to the country of origin at the end of the conflict.⁷⁹

The First Protocol has been almost universally disregarded by contracting parties.⁸⁰ There are practically no examples of parties restricting the movement of cultural property from areas affected by armed conflict because, in part, nations dislike the interference such obligations impose on their art markets.⁸¹ Nevertheless, the First Protocol has become increasingly significant in recent years as illicit removal has emerged as one of the main threats to cultural property.⁸²

B. Second Protocol

The effectiveness of the 1954 Hague Convention was called into question in the early 1990s during the Gulf War, when Iraq took Kuwaiti cultural objects back to Iraq for “safekeeping,”⁸³ and during the war in the former Yugoslavia, when the Old City of Dubrovnik suffered extensive destruction from shelling.⁸⁴ In 1991, UNESCO and the Netherlands commissioned a study to assess the effectiveness of the 1954 Hague Convention and to see whether it needed to be amended.⁸⁵ The study, conducted by Professor Patrick Boylan, found that the problems surrounding the 1954 Hague Convention resulted from “failure in the application of the *Convention* and *Protocol* rather than of inherent defects in the international instruments themselves.”⁸⁶ While Boylan anticipated that amendments to the Convention might

75. See First Protocol, *supra* note 43, para. 1 (“Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property . . .”).

76. TOMAN, *supra* note 10, at 337.

77. First Protocol, *supra* note 43, para. 1.

78. *Id.* para. 3.

79. *Id.* para. 5.

80. See Gerstenblith, *supra* note 20, at 266 (“[T]here seems to be no example of a nation that is a party to the Protocol taking action under the Protocol to prohibit trade in cultural objects removed from occupied territory.”).

81. TOMAN, *supra* note 10, at 349; Gerstenblith, *supra* note 20, at 266.

82. O’KEEFE, *supra* note 19, at 196.

83. See TOMAN, *supra* note 10, at 349 (explaining that although most of the objects Iraq took from Kuwait were eventually returned, Iraq’s intentions in taking the objects were suspicious to many in the international community).

84. Sandholtz, *supra* note 12, at 218–19.

85. PATRICK J. BOYLAN, REVIEW OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (1993), <http://unesdoc.unesco.org/images/0010/001001/100159eo.pdf>.

86. *Id.* para. A.2.

be necessary in the long term, he asserted that the “over-riding priority” should be achieving greater recognition of and participation in the Convention.⁸⁷ Boylan then recommended a number of practical steps to increase awareness of the Convention and improve its effectiveness.⁸⁸

In 1999, the Diplomatic Conference on the Second Protocol to the Hague Convention met in The Hague.⁸⁹ The Second Protocol, incorporating many of the recommendations of the Boylan Report, was adopted without a vote and was signed immediately by twenty-seven states.⁹⁰ Currently, there are sixty signatory parties to the Second Protocol.⁹¹ The Second Protocol functions as a supplement to, rather than an amendment of, the provisions of the Convention.⁹² The Hague Convention remains the basic text, and a state can remain a party to the Hague Convention without becoming a party to the Second Protocol.⁹³ The only provision of the Protocol that supplants the Hague Convention is the section providing for enhanced protection of certain cultural objects and sites.⁹⁴ This provision replaces the system of special protection implemented under the Hague Convention.⁹⁵

The Second Protocol provides “enhanced protection” for cultural property under three conditions: (1) the property “is cultural heritage of the greatest importance for humanity;” (2) the property “is protected by adequate domestic legal and administrative measures . . . ensuring the highest level of protection;” and (3) the property is “not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.”⁹⁶ Cultural property that meets these criteria must then be referred to the Committee for the Protection of Cultural Property in the Event of Armed Conflict, and, if approved, it will be included in the List of

87. *Id.* para. A.4.

88. *Id.* paras. B–F.

89. Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, Mar. 15–26, 1999, *Summary Report* (June 1999), <http://unesdoc.unesco.org/images/0013/001332/133243eo.pdf> [hereinafter UNESCO Conference on the Second Protocol].

90. Jean-Marie 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*, INT’L REV. OF THE RED CROSS, No. 835 (Sept. 30 1999), available at <http://www.icrc.org/eng/resources/documents/misc/57jq37.htm>; see also *States Parties to the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, <http://portal.unesco.org/la/convention.asp?KO=15207&language=E&order=alpha> [hereinafter *States Parties to the Second Protocol to the 1954 Hague Convention*].

91. *States Parties to the Second Protocol to the 1954 Hague Convention*, *supra* note 90.

92. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 2, Mar. 26, 1999, 38 I.L.M. 769, 2253 U.N.T.S. 172 [hereinafter Second Protocol], available at http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html.

93. See UNESCO Comm. for the Protection of Cultural Property in the Event of Armed Conflict, Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, paras. 10–11, CLT-09/CONF/219/3 REV.3 (Nov. 24, 2009) [hereinafter Guidelines for the Second Protocol], available at <http://unesdoc.unesco.org/images/0018/001867/186742E.pdf> (“The Second Protocol does not affect the rights and obligations of the High Contracting Parties to the Convention.”).

94. *Id.*; Second Protocol, *supra* note 92, art. 4(b).

95. Guidelines for the Second Protocol, *supra* note 93, I.C para. 10.

96. Second Protocol, *supra* note 92, art. 10.

Cultural Property under Enhanced Protection.⁹⁷ Once it is designated as warranting enhanced protection, cultural property receives total immunity⁹⁸ unless it is later used as a military objective.⁹⁹ While the Hague Convention's program of special protection was limited because it only applied to refugees sheltering cultural property and centers containing monuments and other immovable property, the Second Protocol's system of enhanced protection expands the scope of protection and can be applied to all cultural property.¹⁰⁰

Article 6 of the Second Protocol also increases protection for cultural property in times of war because it more clearly defines the term "military necessity."¹⁰¹ A waiver on the basis of military necessity can only be made when (1) "that cultural property has, by its function, been made into a military objective;" and (2) "there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective."¹⁰² Additionally, the decision to invoke military necessity may only be made by a commanding officer.¹⁰³

The Second Protocol also clarifies the instances in which individuals can be prosecuted for harming cultural property.¹⁰⁴ Article 15 defines five acts against cultural property that require criminal sanctions, and Article 16 requires parties to establish them as criminal offenses under their domestic law.¹⁰⁵ Finally, Article 22 applies the Second Protocol to non-international armed conflicts.¹⁰⁶

While the Second Protocol served as an important clarification of many of the principles of the Hague Convention, it was not the panacea that many hoped it would become. Many of the weaknesses of the Hague Convention remain even after the implementation of the Second Protocol.

III. WEAKNESSES OF THE HAGUE CONVENTION AND ITS PROTOCOLS

The development of the 1954 Hague Convention has been extremely significant in the ongoing attempt to protect cultural property; however, it has considerable shortcomings. The primary weakness of the Convention and its protocols, as with most international law, is the lack of effective enforcement mechanisms. The 1954 Convention included practically no sanctions for non-compliance, and the Second Protocol, though instituted partly to improve enforcement, did not do much better. There is no central enforcement body provided for in the Convention, leaving compliance and enforcement up to each individual state.¹⁰⁷ The Convention relies

97. *Id.* art. 11.

98. *Id.* art. 12.

99. *Id.* art. 13(1)(b). Cultural property may also lose its enhanced protection under specifications listed in Article 14. *Id.* art. 13(1)(a).

100. *Id.* art. 10.

101. *Id.* art. 6.

102. Second Protocol, *supra* note 92, art. 6(a).

103. *Id.* art. 6(c).

104. *Id.* art. 15.

105. *Id.* arts. 15–16.

106. *Id.* art. 22.

107. Harvey E. Oyer III, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict—Is it Working? A Case Study: The Persian Gulf War Experience*, 23 COLUM.-VLA J.L. & ARTS 49, 56 (1999).

“on national laws and ad hoc criminal tribunals to prosecute individuals” for destroying cultural property, but these authorities generally do not deter “improper use or destruction of cultural property.”¹⁰⁸ Without sanctions from other parties for non-compliance, state parties can violate the Convention “whenever they deem it expedient to do so.”¹⁰⁹ An additional weakness is the lack of sanctions for states that fail to protect their own cultural property in times of peace. Article 3 requires state parties to safeguard their own cultural property during peacetime, but does not include any specific requirements.¹¹⁰ The lack of requirements effectively allows states to do nothing to protect their cultural property, and very few states have undertaken any significant measures during peacetime to ensure protection for cultural property.¹¹¹

Another weakness of the Hague Convention is its vagueness. The Convention requires states to “respect cultural property,” but it does not describe what that entails.¹¹² The Convention’s broad language means that states can manipulate the meanings of the words to suit their own ends and can “avoid the spirit of the instruments by asserting their compliance with the literal meaning of the words.”¹¹³

A third weakness, which is the subject of the second part of this Note, is the uncertainty over whether the Hague Convention applies to non-state actors. It is clear that the Convention binds the states that become parties to the Convention.¹¹⁴ It can be argued, however, that the Convention enjoys a broader application, creating obligations for non-state parties and actors. As I discuss in more detail below, Article 19 of the Convention and Article 22 of the Second Protocol provide that the Convention will be applicable in non-international armed conflicts.¹¹⁵ Article 19 in particular indicates that the Convention could be interpreted as applying to non-state actors.¹¹⁶ With the increasing frequency of conflicts involving non-state actors, it is important that the potential application to non-state actors provided for in Article 19 be broadened and strengthened so that the Hague Convention remains a relevant tool by which to protect cultural property.

108. Matthew Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE H.R. & DEV. L.J. 153, 161 (2005).

109. Oyer, *supra* note 107, at 56.

110. 1954 Hague Convention, *supra* note 42, art. 3.

111. See Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT’L L. 213, 216–17 (2007–2008) (“[E]ven the [Convention’s] relatively light peacetime obligations . . . seem to enjoy only limited compliance among secure and peaceful states.”).

112. 1954 Hague Convention, *supra* note 42, art. 4; Second Protocol, *supra* note 92, art. 6.

113. Posner, *supra* note 111, at 218.

114. 1954 Hague Convention, *supra* note 42, art. 4; Second Protocol, *supra* note 92, art. 3.

115. 1954 Hague Convention, *supra* note 42, art. 19; Second Protocol, *supra* note 92, art. 22.

116. 1954 Hague Convention, *supra* note 42, art. 19.

IV. APPLICATION OF THE HAGUE CONVENTION TO NON-STATE ACTORS: A STUDY OF IRAQ AND LIBYA

A. *The Looting of the Iraq Museum*

In March 2003, U.S. troops entered Iraq;¹¹⁷ by early April, they reached Baghdad.¹¹⁸ As U.S. forces fought to subdue the Iraqi resistance, mobs of Iraqi citizens looted the National Museum of Iraq.¹¹⁹ The looting continued from April 9 to April 12.¹²⁰ Although original reports put the number of stolen artifacts at 170,000,¹²¹ the final estimates indicated that closer to 13,500 artifacts, including forty major pieces, had been looted.¹²²

Shortly after the looting began, Raid Abdul Ridhar Muhammad, the curator of the museum, approached a group of U.S. troops and asked them to protect the museum from looters.¹²³ A tank and five soldiers returned with Muhammad to the museum and fired above the heads of the looters, driving them away.¹²⁴ The U.S. troops left after half an hour, however, and the looters returned, threatening Muhammad and taking away anything they could carry.¹²⁵

The looting of the National Museum was a cultural tragedy for Iraq and for the international community. Iraq has been referred to as the “cradle of civilization,” having witnessed both the innovation of agriculture and the development of writing.¹²⁶ The National Museum housed “one of the finest collections of antiquities

117. David E. Sanger & John F. Burns, *Threats and Responses: The White House; Bush Orders Start of War on Iraq; Missiles Apparently Miss Hussein*, N.Y. TIMES, Mar. 20, 2003, at A1, available at <http://www.nytimes.com/2003/03/20/world/threats-responses-white-house-bush-orders-start-war-iraq-missiles-apparently.html>.

118. Dexter Filkins, *A Nation at War: In the Field, First Marine Division; Little Resistance Encountered as Troops Reach Baghdad*, N.Y. TIMES, Apr. 5, 2003, <http://www.nytimes.com/2003/04/05/world/nation-war-field-first-marine-division-little-resistance-encountered-troops.html>.

119. Colonel Matthew Bogdanos, Dep’t of Def., Briefing on the Investigation of Antiquity Loss from the Baghdad Museum, (Sept. 10, 2003), (transcript available at www.defense.gov/transcripts/transcript.aspx?transcriptid=3149); Michael Slackman, *Ancient Wonders Are History as Mob Plunders Iraq Museum*, L.A. TIMES, Apr. 13, 2003, <http://articles.latimes.com/2003/apr/13/news/war-museum13>.

120. Bogdanos, *supra* note 119.

121. John F. Burns, *Pillagers Strip Iraqi Museum of Its Treasures*, N.Y. TIMES, Apr. 13, 2003, <http://www.nytimes.com/2003/04/12/international/worldspecial/12CND-BAGH.html>.

122. See Bogdanos, *supra* note 119 (estimating that nearly 3,500 artifacts had been recovered and slightly over 10,000 were still missing).

123. Burns, *supra* note 121.

124. *Id.*

125. *Id.*

126. See Harriet Crawford, *The Dawn of Civilization*, in THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD: THE LOST LEGACY OF ANCIENT MESOPOTAMIA 50, 53–57 (Milbry Polk & Angela M.H. Schuster eds., 2005) (detailing the introduction of farming in Iraq); Robert D. Biggs, *The Birth of Writing, The Dawn of Literature*, in THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD: THE LOST LEGACY OF ANCIENT MESOPOTAMIA 105, 106–07 (Milbry Polk & Angela M.H. Schuster eds., 2005) (“It has long been held that the world’s first writing was invented in Mesopotamia sometime around 3300 or 3200 B.C.—although recent carbon-14 dates have placed its origins between 3400 and 3300 B.C.”); Frank Rich, *And Now: ‘Operation Iraqi Looting’*, N.Y. TIMES, Apr. 27, 2003, <http://www.nytimes.com/2003/04/27/arts/and-now-operation-iraqi-looting.html> (calling Iraq the “cradle of our civilization”).

in the world.”¹²⁷ The devastation of Iraq’s cultural property outraged the international community, and it led many to question whether the United States had violated a duty to protect the National Museum.¹²⁸ The United States justified its failure to protect the National Museum on grounds of military necessity, citing a need to protect the infrastructure of Iraq.¹²⁹ The United States prioritized dismantling the remnants of Saddam Hussein’s regime and protecting the Ministry of Oil over guarding the National Museum.¹³⁰ In the days following the looting, the Bush Administration was particularly nonchalant about the devastation inflicted on Iraq’s cultural heritage. At a press conference on April 11, Defense Secretary Donald Rumsfeld made light of the looting, saying:

The images you are seeing on television you are seeing over, and over, and over, and it’s the same picture of some person walking out of some building with a vase, and you see it 20 times, and you think, “My goodness, were there that many vases?” (Laughter) “Is it possible that there were that many vases in the whole country?”¹³¹

As anger over the looting of the National Museum grew, the Bush Administration took a more conciliatory stance, acknowledging that the looting caused irretrievable losses to Iraq’s cultural heritage and emphasizing that the United States would cooperate with international efforts to return the stolen property to Iraq.¹³²

The U.S. failure to protect the National Museum led to an international debate about whether the United States had a duty to protect the museum under the 1954 Hague Convention.¹³³ While the United States had signed the Convention at its inception, Congress did not ratify it until 2009.¹³⁴ The main reason for non-ratification by the United States was that, during the Cold War, the United States

127. Slackman, *supra* note 119.

128. Constance Lowenthal & Stephen Urice, *An Army for Art*, N.Y. TIMES, Apr. 17, 2003, <http://www.nytimes.com/2003/04/17/opinion/an-army-for-art.html> (“The American and British forces are clearly to blame for the destruction and displacement of [Iraq’s] cultural treasures.”); *see also* Frank Rich, *supra* note 126 (“America stood idly by while much of the heritage of [Iraqi] civilization—its artifacts, its artistic treasures, its literary riches and written records—was being destroyed”); Kenneth Baker, *At a Loss Over Theft of Artifacts; Calamity Should Have Been Foreseen*, S.F. CHRON., Apr. 17, 2003, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/04/17/DD263009.DTL> (indicting U.S. forces for neglecting a letter from the Archaeological Institute of America imploring the United States to take precautions against raids on Iraqi museums).

129. Douglas Jehl & Elizabeth Becker, *Experts’ Pleas to Pentagon Didn’t Save Museum*, N.Y. TIMES, Apr. 16, 2003, <http://www.nytimes.com/2003/04/16/world/a-nation-at-war-the-looting-experts-pleas-to-pentagon-didn-t-save-museum.html>.

130. *See* Thurlow, *supra* note 108, at 176 (“The United States ultimately deemed protecting the cultural heritage of the Iraqi people of lesser importance than dismantling the remnants of the Ba’athist regime, securing Saddam Hussein’s palaces and the Oil Ministry, and making the city safe for American soldiers.”).

131. Donald H. Rumsfeld, Sec’y of Def., and Gen. Richard B. Myers, Chairman of the Joint Chiefs of Staff, U.S. Dep’t of Defense, Department of Defense News Briefing (Apr. 11, 2003) (transcript available at www.defense.gov/transcripts/transcript.aspx?transcriptid=2367).

132. Sandholtz, *supra* note 12, at 200.

133. *See generally id.* at 190–95 (outlining the reaction to the U.S. failure to safeguard the National Museum by commentators, press, national governments, and nongovernmental organizations).

134. *Id.* at 230 (stating that the United States signed the 1954 Hague Convention at the conclusion of the conference on May 14, 1954); *States Parties to the 1954 Hague Convention*, *supra* note 5 (documenting the United States’ ratification of the Convention in 2009).

2012] CAN THE 1945 HAGUE CONVENTION APPLY TO NON-STATE ACTORS? 417

was concerned that ratifying the Convention would limit its options in the event of a nuclear war.¹³⁵ The United States was concerned that the Kremlin would be “designated for special protection,” constraining the ability of the United States to conduct nuclear war against the Soviet Union.¹³⁶

In any event, the United States was not a party to the Hague Convention at the time of the looting of the Iraqi National Museum. One would assume, therefore, that the United States was under no obligation to protect Iraq’s cultural property. In determining the United States’ duties in Iraq, however, one must also consider whether the 1954 Hague Convention has become part of customary international law.

Customary international law is “a general practice accepted as law” that requires “the existence of . . . two elements, namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed . . . as a matter of law (*opinio juris sive necessitatis*).”¹³⁷ The actions of the United States indicate that the 1954 Hague Convention has entered into customary international law. For the United States, the most compelling evidence that it accepts the duties imposed by the Hague Convention is that it signed the Convention in the first place. While the United States did not ratify the Convention for fifty-five years, being a signatory party illustrates acceptance of the general principles of the Convention. The United States also followed the provisions of the Convention in practice during the years before ratification. For example, in the first Gulf War, the United States refrained from firing on two MiG aircraft that Iraq had placed next to the Sumerian temple of Ur.¹³⁸ Additionally, the United States has trained its military personnel in the provisions of the Hague Convention, and those provisions are incorporated into U.S. military war manuals.¹³⁹ The Army Field Manual states that the customary law of war “will be strictly observed by United States forces” and that the “customary law of war is part of the law of the United States and, insofar as it is not inconsistent with any treaty to which this country is a party . . . is binding upon the United States, citizens of the United States, and other persons serving this country.”¹⁴⁰ The practice of the United States has been to follow the provisions of the Hague Convention, even though the United States did not formally ratify the treaty until 2009.¹⁴¹

135. Sandholtz, *supra* note 12, at 230.

136. *Id.* at 231.

137. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. OF THE RED CROSS 175, 178 (2005) (quoting Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031).

138. Sandholtz, *supra* note 12, at 234.

139. See UNESCO, *National Implementation of the Penal Provisions of Chapter 4 of the Second Protocol of 26 March 1999 to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, 43–50, CLT/CIH/MCO/2002/PI/H/1 (Mar. 29, 2002), available at <http://unesdoc.unesco.org/images/0015/001586/158681e.pdf> (explaining that while the United States is not a party to the Hague Convention, it has incorporated Chapter 4 of the Second Hague Protocol into the Uniform Code of Military Justice); David Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law*, 11 B.U. INT’L L. J. 349, 372 (1993) (“The United States armed forces have received training in the provisions of the 1954 Convention for many years.”).

140. U.S. DEP’T OF THE ARMY, THE LAW OF LAND WARFARE para. 7(c) (1956), available at <http://www.afsc.army.mil/gc/files/fm27-10.pdf>.

141. Marion Forsyth, *Casualties of War: The Destruction of Iraq’s Cultural Heritage as a Result of U.S. Action During and After the 1991 Gulf War*, 14 DEPAUL-LCA J. ART. & ENT. L. & POL’Y 73, 88

The main question surrounding the conduct of the United States toward the National Museum of Iraq has been whether the United States was under any obligation to prevent the looting. As previously discussed, the United States had not ratified the 1954 Hague Convention by 2003, which would make it appear that the United States was not bound by its provisions. However, key provisions of the Hague Convention are regarded as part of customary international law.¹⁴² If this is the case, the United States would be under an obligation to refrain from destroying Iraq's cultural property, and, under Article 4(3) of the Convention, to "undertake to prohibit, prevent, and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property."¹⁴³

This question of whether the United States was obligated to prevent the looting of the National Museum has received much attention in the last eight years, with most scholars agreeing that the United States had a duty to prevent the looting, even though it was carried out by non-state actors.¹⁴⁴ What has received less attention, however, is the question of whether the 1954 Hague Convention also imposes a duty on non-state actors to protect cultural property.

B. The Legal Framework for Applying the Hague Convention to Non-state Actors

The question of the applicability of the 1954 Hague Convention to conflicts involving non-state actors has grown in importance in recent years as the frequency of non-international armed conflicts involving non-state actors has increased. This indicates the need for the Hague Convention to clearly bind non-state actors and to apply to non-international armed conflicts.

One of the reasons for development of the Second Protocol to the 1954 Hague Convention was to clarify the provisions protecting cultural property in these non-international armed conflicts.¹⁴⁵ Article 19(1) of the Convention applies the provisions relating to respect for cultural property to the parties involved in non-international armed conflicts.¹⁴⁶ Article 22(1) of the Second Protocol expands the scope of application in non-international armed conflicts by stating that all of the

(2004).

142. Roger O'Keefe, *Protection of Cultural Property*, in *The HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 443–53 (Dieter Fleck ed., 2008) (explaining that Article 4 paragraphs 1 and 2 are customary international law applicable in international and non-international armed conflicts and that Article 4 paragraph 3 is customary international law in international armed conflict and is "more likely than not . . . consonant with custom in non-international armed conflict").

143. 1954 Hague Convention, *supra* note 42, art. 4(3).

144. See, e.g., Courtney Campbell, *Arts and Arms: An Examination of the Looting of the National Museum of Iraq*, 32 B.C. INT'L & COMP. L. REV. 423, 437 (2009) ("If the United States had accepted its obligation under either international treaty or customary law, it could have exercised more care in protecting Iraq's cultural property."); Thurlow, *supra* note 108, at 179 ("[T]he initial decision to refrain from intervening in the looting at the National Museum, and at numerous cultural sites across Iraq, comported with American policy standards. In Iraq, however, the United States learned that intentionally destroying cultural sites is often conflated with negligently failing to prevent their destruction."); Sandholtz, *supra* note 12, at 239–40 (concluding that "[i]f American practice amounts to an acceptance of the obligations contained in the key portions of the 1954 Hague Convention . . . then it follows that at least those rules have attained the status of customary international law").

145. See UNESCO Conference on the Second Protocol, *supra* note 89, para. 33 (stating that a "large number of states welcomed the provisions" aimed at protecting cultural heritage in non-international conflict).

146. 1954 Hague Convention, *supra* note 42, art. 19(1).

provisions of the Second Protocol will apply “in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties.”¹⁴⁷ As a result, the Second Protocol applies equally to both international and non-international armed conflicts.¹⁴⁸

While the purpose of the Second Protocol was to clarify the Hague Convention, both agreements retain a lack of clarity in that neither the Convention nor the Second Protocol defines “non-international armed conflict.”¹⁴⁹ However, Article 22(2) limits the application of the Second Protocol, stating that it “shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.”¹⁵⁰ In effect, “[n]on-international armed conflicts are distinct from international armed conflicts on the one hand . . . and internal disturbances and tensions on the other.”¹⁵¹ In his commentary on Article 3 to the Geneva Conventions, Jean Pictet provides a useful rubric for distinguishing “armed conflicts” from internal disturbances.¹⁵² Characteristics of an armed conflict include:

- (1) That the Party in revolt . . . possesses an organized military force [and] an authority responsible for its acts
- (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
- (3)(a) That the [legal] Government has recognized the insurgents as belligerents; or . . . claimed for itself the rights of a belligerent; or . . . that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.¹⁵³

While these criteria are useful in determining the character of a conflict, Pictet is quick to point out that this list is not exhaustive, and does not preclude the application of international law to conflicts that do not fulfill any of the listed conditions.¹⁵⁴

Through Article 22, the Second Protocol expands the application of cultural property protections to non-international conflicts.¹⁵⁵ However, there is still a question of whether the Hague Convention can bind non-state actors at all.¹⁵⁶ While

147. Second Protocol, *supra* note 92, art. 22(1); *see also* Dieter Fleck, *The Law of Non-International Armed Conflicts*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW*, *supra* note 142, at 605, 623 (The Second Protocol “extended all provisions of the [1954 Hague Convention] to non-international armed conflicts, thus further amplifying its scope of application.”).

148. Fleck, *supra* note 147, at 623.

149. 1954 Hague Convention, *supra* note 42; Second Protocol, *supra* note 92.

150. Second Protocol, *supra* note 92, art. 22(2).

151. Fleck, *supra* note 147, at 616.

152. I THE GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY, art. 3, at 49–50 (Jean Pictet ed., 1952) [hereinafter PICTET COMMENTARY].

153. *Id.*

154. *Id.*

155. Second Protocol, *supra* note 92, art. 22.

156. *See* Thomas Desch, *Problems in the Implementation of the Convention from the Perspective of International Law*, in *PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT—A CHALLENGE IN PEACE SUPPORT OPERATIONS* 1, 1 (Edwin R. Micewski & Gerhard Sladek eds., 2002) (The provisions of the Hague Convention applicable to non-international conflicts “give rise to the question of the binding effect of treaty provisions on non-State actors and the practical and legal problems

Article 22 would seem to directly bind non-state armed groups, treaties are generally only binding on signatory parties, and the 1954 Hague Convention was not open to signature by non-state groups.¹⁵⁷ The question then becomes whether the Convention can legally bind third parties.¹⁵⁸ The Vienna Convention on the Law of Treaties addresses the application of treaties to third parties.¹⁵⁹ Articles 34 through 36 provide that a treaty can create obligations for a third party if two conditions are met: (1) “the contracting parties must have intended the treaty to grant such rights or impose such obligations on third parties”; and (2) “a third party must accept the rights or obligations.”¹⁶⁰

The first condition requires a determination of whether the high contracting parties to the Hague Convention and the Second Protocol intended the provisions to apply to non-state actors. Looking solely at the text, it would seem that the contracting parties did not intend to extend obligations to third parties. Article 19(1) of the Hague Convention states that “each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention.”¹⁶¹ By using a lowercase *p* when referring to the “parties to the conflict,” Article 19(1) seems to include both state parties and third parties.¹⁶² While Article 22 of the Second Protocol expands the scope of application regarding non-international armed conflicts, it only uses Parties (with a capital *P*) when referring to the obligations created under the Protocol.¹⁶³ Additionally, Article 1 of the Second Protocol defines “Party” as “a State Party to this Protocol.”¹⁶⁴ This seems to limit the application of the Second Protocol by excluding the possibility of application to third parties.

Such an interpretation of the application of the Second Protocol is logical; however, this interpretation has been contradicted by Jean-Marie Henckaerts, who observed the drafting of the Second Protocol.¹⁶⁵ Henckaerts explained:

Although Article 22 of the Second Protocol does not spell it out as clearly as it could have, the Protocol applies to all parties to a non-international armed conflict, whether governmental or insurgent forces. This was clearly acknowledged at the final plenary session. A certain confusion arose

involved in the attempt to communicate with irregular forces.”).

157. See Andrew Clapham, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement 3* (Feb. 1, 2010) (draft for comment), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636 (“It is clear that the exclusion of armed groups from the normal treaty-making process and their subsequent inability to become parties to the relevant treaties means that alternative regimes have had to be adopted.”).

158. See Antonio Cassese, *The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflict*, 30 INT’L & COMP. L.Q. 416, 423 (1981) (analyzing this question as regards application to rebels of Additional Protocol II to the Geneva Conventions).

159. Vienna Convention on the Law of Treaties arts. 34–36, May 23, 1969, 1155 U.N.T.S. 331, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

160. Cassese, *supra* note 158, at 423.

161. 1954 Hague Convention, *supra* note 42, art. 19(1).

162. *Id.*

163. Second Protocol, *supra* note 92, arts. 2–4.

164. *Id.* art. 1.

165. Henckaerts, *supra* note 90; see also Clapham, *supra* note 157, at 9 (stating that “[t]his state-centric reading is . . . contradicted by Henckaerts, who participated in the drafting, and who writes that such a ‘literal interpretation would lead to a manifestly absurd result of declaring a treaty applicable to non-international armed conflicts and at the same time eliminating most of its practical relevance in such conflicts.’”).

2012] CAN THE 1945 HAGUE CONVENTION APPLY TO NON-STATE ACTORS? 421

because Article 1 of the Protocol defines the word “Party” as a State Party to the Second Protocol. However, the understanding was that throughout the text the word “Party” in the phrase “Party to the conflict” includes rebel groups of States party to the Second Protocol but not third States which have not ratified the Second Protocol. The reasoning was that non-governmental forces involved in a non-international armed conflict within a State party to the Protocol are bound by the Protocol through the ratification of the State concerned.¹⁶⁶

Additionally, the summary report from the Second Protocol convention indicates that the contracting parties intended the Protocol to apply to all parties in a non-international conflict, whether state parties or non-state parties.¹⁶⁷

The second condition required for a treaty to apply to third parties—that the third party must accept the obligations created by the treaty—necessitates a case-by-case inquiry to determine if a particular non-state group has accepted the provisions of the Hague Convention.¹⁶⁸ This condition is extremely problematic when applied to non-state actors because the decentralized and often disorganized nature of armed non-state groups makes it difficult to ascertain if an armed non-state group has adopted treaty obligations.¹⁶⁹

Without confirmation from a non-state group that it has accepted the obligations created by the Hague Convention, it would be difficult to say that the Convention can be applied to non-state actors through the Vienna Convention. There is, however, another method by which the Hague Convention can be applied to non-state actors: through customary international law. As discussed above, customary international law is comprised of general rules accepted into international law, based on the opinion and practice of states. In contrast to treaty law, customary international law will bind non-state actor groups even if the non-state group has not formally accepted the obligations created by the international law.¹⁷⁰ The provisions of an international treaty, if commonly accepted among both signatory and non-signatory states, can become part of customary international law, and will therefore bind not just states but non-state actors such as rebel factions or secessionist groups.¹⁷¹

Key provisions of the 1954 Hague Convention are regarded as having achieved customary international law status.¹⁷² Most importantly, Article 4 (which obliges

166. Henckaerts, *supra* note 90 (citations omitted).

167. UNESCO Conference on the Second Protocol, *supra* note 89, para. 36.

168. See Cassesse, *supra* note 158, at 428 (“As for the second test, *i.e.* the assent by a third party to the rights or duties deriving from the treaty, it will of course be necessary to determine in each civil war whether rebels are ready and willing to accept the Protocol.”).

169. See Mali Bamako, *Armed Groups, Weapons Availability and Misuse: An Overview of the Issues and Options for Action*, in BRIEFING KIT FOR ARMED GROUPS PROJECT 38, 46 (David Capie ed., 2004) (addressing the decentralization and disorganization of non-state actors).

170. See Clapham, *supra* note 157, at 11 (noting that customary international law will “usually be binding on the non-state actor”).

171. Christopher Greenwood, *Relevance of Other Fields of International Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 142, at 72, 76.

172. See *supra* note 142 and accompanying text; see also O’KEEFE, *supra* note 19, at 316 (“At its twenty-seventh session, the General Conference of UNESCO declared that ‘the fundamental principles of protecting and preserving cultural property in the event of armed conflict’—by which it appeared to mean

parties to refrain from attacking cultural property unless required by military necessity and to prevent all theft, pillage, or vandalism of cultural property) and Article 19 (which applies the Convention to non-international armed conflicts) are now considered to be part of customary international law.¹⁷³ As a result, these provisions will be binding on both state and non-state actors in international and non-international armed conflicts, even though the non-state actors have not formally accepted the obligations imposed by the Hague Convention.

While certain provisions of the Convention have become part of customary international law, the Hague Convention would be more effective if it provided stronger protections for cultural property in non-international armed conflicts. While the Second Protocol clarified that the Convention applies in non-international armed conflicts, it did not provide a definition of that term.¹⁷⁴ In order for the Convention to be an effective tool in the protection of cultural property, it must be clear when and where the Convention is applicable.

C. *The Conflict in Libya*

The need to protect cultural property in non-international armed conflicts has been brought into focus by the recent events in Libya. On February 16, 2011, demonstrations erupted in Libya protesting the forty-two year reign of Colonel Muammar el-Qaddafi.¹⁷⁵ Between several hundred and several thousand protestors gathered in Benghazi, Libya's second-largest city, to demand Qaddafi's removal from power.¹⁷⁶ Asserting that he would never step down, Qaddafi attempted to suppress the uprisings by force, employing military forces, mercenaries, helicopters, and warplanes in attacks upon demonstrators.¹⁷⁷

Despite Qaddafi's violence, the rebels quickly took control of eastern Libya.¹⁷⁸ By February 27, the rebels were increasing their military coordination and firepower, as Libyan military officers defected and joined the rebels in eastern Libya.¹⁷⁹ The rebels controlled vast Libyan oil reserves and displayed impressive firepower, including machine guns, tanks, and anti-aircraft weapons.¹⁸⁰ Fighting between the rebels and Qaddafi's forces continued to escalate over the next three weeks, resulting

the obligations of respect embodied in article 4 of the 1954 Hague Convention, the only ones applicable under the Convention to both international and non-international armed conflict—'could be considered part of international customary law'.")

173. 1954 Hague Convention, *supra* note 42, arts. 4, 19; *see also supra* note 142 and accompanying text; O'KEEFE, *supra* note 19, at 324–25 (“In *Tadic*, the Appeals Chamber . . . cit[ed] as one of the ‘treaty rules [which] have gradually become part of customary law’ article 19 of the 1954 Hague Convention . . .”).

174. *See* Second Protocol, *supra* note 92, art. 22 (stating that the “Protocol shall apply in the event of an armed conflict not of an international character”).

175. Alan Cowell, *Protests Take Aim at Leader of Libya*, N.Y. TIMES, Feb. 16, 2011, http://www.nytimes.com/2011/02/17/world/middleeast/17libya.html?_r=1&pagewanted=all.

176. *Id.*

177. David D. Kirkpatrick & Mona El-Naggar, *Qaddafi's Grip Falters as His Forces Take On Protestors*, N.Y. TIMES Feb. 21, 2011, <http://www.nytimes.com/2011/02/22/world/africa/22libya.html?pagewanted=all>.

178. *Id.*

179. David D. Kirkpatrick and Kareem Fahim, *Rebels in Libya Gain Power and Defectors*, N.Y. TIMES, Feb. 27, 2011, <http://www.nytimes.com/2011/02/28/world/africa/28sunrest.html?pagewanted=all>.

180. *Id.*

in the imposition by the United Nations of a no-fly zone over Libya.¹⁸¹ The next day, coalition forces, including forces from Britain, France, and the United States, began airstrikes against Qaddafi's troops.¹⁸² Qaddafi's supporters and the coalition-backed rebel forces continued to fight back and forth through the summer, but in August 2011 the rebels gained control of Tripoli and forced Qaddafi into hiding.¹⁸³ On September 16, the rebel group organized as the National Transitional Council (NTC) achieved formal recognition as the representative for Libya in the United Nations.¹⁸⁴ Finally, on October 20, 2011, Qaddafi was killed by NTC fighters as he attempted to flee Sirte.¹⁸⁵

The conflict in Libya raises the question of whether the Libyan rebel forces were under any duty to protect cultural property during the fighting.¹⁸⁶ Libya is home to five UNESCO World Heritage sites: the Old Town of Ghadamès, an oasis that is one of the oldest pre-Saharan cities; the ancient Greek archaeological sites of Cyrene; the Roman ruins of Leptis Magna; the Phoenician trading-post of Sabratha; and the rock-art sites of Tadrart Acacus in the Sahara Desert.¹⁸⁷ Libya has been a melting pot of cultures throughout history and is home to Roman, Greek, Punic, Egyptian, and Berber archaeological sites.¹⁸⁸ Libya also contains some of the world's earliest rock and cave art, among other important prehistoric sites.¹⁸⁹ On March 23, 2011, Irina Bokova, head of UNESCO, urged that the cultural heritage of Libya be protected during the fighting.¹⁹⁰ Bokova stated that "[f]rom a cultural heritage point of view, [Libya] is of great importance to humanity as a whole Several major sites bear witness to the great technical and artistic achievements of the ancestors of the people [of Libya], and constitute a precious legacy."¹⁹¹ She called on both Libyan

181. Press Release, Security Council, Security Council Approves 'No-Fly Zone' Over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, By Vote of 10 in Favor with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011), available at <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm>.

182. Liz Sly, Greg Jaffe, and Craig Whitlock, *U.S. and European Officials Say Initial Assault on Gaddafi's Forces 'Very Effective'; Libyan Leader Pledges 'Long, Drawn-out War'*, WASH. POST, Mar. 19, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/19/AR2011031903274.html>.

183. *Libya Unrest: Rebels Overrun Gaddafi Tripoli Compound*, BBC NEWS (Aug. 23, 2011), <http://www.bbc.co.uk/news/world-africa-14630702>.

184. Neil MacFarquhar, *U.N. Takes Steps to Assist Libya's Transitional Leaders*, N.Y. TIMES, Sept. 16, 2011, <http://www.nytimes.com/2011/09/17/world/africa/un-takes-steps-to-assist-libyas-transitional-leaders.html>.

185. Kareem Fahim, Anthony Shadid, & Rick Gladstone, *Violent End to an Era as Qaddafi Dies in Libya*, N.Y. TIMES, Oct. 20, 2011, <http://www.nytimes.com/2011/10/21/world/africa/qaddafi-is-killed-as-libyan-forces-take-sirt.html?pagewanted=all>.

186. The governments of the United States, the United Kingdom, and France recognized the Libyan rebel council as the "sole governmental authority" in Libya. See *UK Expels Gaddafi Diplomats and Recognises Libyan Rebels*, BBC NEWS (July 27, 2011), <http://www.bbc.co.uk/news/uk-politics-14306544>; see also Sebnem Arsu & Steven Erlanger, *Libya Rebels Get Formal Backing, and \$30 Billion*, N.Y. TIMES, July 15, 2011, http://www.nytimes.com/2011/07/16/world/africa/16libya.html?_r=1&ref=libya. Nevertheless, my analysis addresses the rebels as a non-state actor group and focuses on the events occurring when the dispute in Libya was primarily one between a state actor and a non-state actor group.

187. Properties inscribed on the World Heritage List: Libya, UNESCO World Heritage Centre, available at <http://whc.unesco.org/en/statesparties/ly> (last visited Sept. 16, 2011).

188. Declan Butler, *Libya's 'Extraordinary' Archaeology Under Threat*, NATURE (Mar. 2, 2011), <http://www.nature.com/news/2011/110302/full/news.2011.132.html>.

189. *Id.*

190. Director-General Statement to Forces Engaged in Libya, *supra* note 4.

191. *Id.*

forces and coalition forces to respect the Hague Convention, saying UNESCO is “alarmed by reports of destruction, damage and theft at museums, archaeological sites and libraries and deeply concerned that this period of social upheaval will leave cultural heritage vulnerable to those unscrupulous few who would profit from the situation.”¹⁹² Sabratha and Leptis Magna were especially vulnerable because of their proximity to Tripoli: both sites are within eighty miles of the Libyan capital.¹⁹³

On March 14, 2011, the United States Committee of the Blue Shield, a nonprofit organization committed to the protection of cultural property worldwide during armed conflict, issued a statement on Libya expressing concern for Libya’s cultural heritage.¹⁹⁴ The statement asserted:

The ongoing armed conflict in Libya gives reason for concern, not only amongst academics but for everybody concerned with the preservation of cultural heritage, about the vulnerability of cultural institutions, sites and monuments. Especially aerial bombardments and artillery pose a grave danger to fragile cultural sites. Any loss of Libyan cultural property would seriously impoverish the collective memory of mankind.¹⁹⁵

Libya is a party to the 1954 Hague Convention, as well as to the Second Protocol.¹⁹⁶ The Blue Shield statement appealed “to *all parties involved* to respect the stipulations of the Convention and to protect our world cultural heritage.”¹⁹⁷

To date, there are no official reports indicating significant damage to Libya’s cultural heritage, although there are rumors that Qaddafi stored rocket launchers at the World Heritage site of Leptis Magna.¹⁹⁸ Nevertheless, the ongoing concern about the possibility of damage to Libya’s cultural property highlights the need for strong protective measures. Article 19 of the Hague Convention and Article 22 of the Second Protocol provide for the protection of cultural property in the event of a non-international armed conflict.¹⁹⁹ Using Pictet’s criteria, the conflict in Libya would easily be characterized as a non-international armed conflict,²⁰⁰ rather than a mere uprising or riot because: (1) the rebels possessed an organized military force; (2) it was necessary for the Libyan government to resort to use of “regular military forces against the insurgents organized as [a] military and in possession of a part of the national territory;”²⁰¹ and (3) “the dispute [was] admitted to the agenda of the United Nations Security Council . . . as being a threat to international peace, a breach of the

192. *UN Official Calls for Concerted Effort to Safeguard Cultural Heritage in North Africa*, UN NEWS CENTRE (Mar. 16, 2011), <http://www.un.org/apps/news/story.asp?Cr1=&NewsID=37781&Cr=UNESCO>.

193. *UNESCO Urges All Sides to Preserve Libyan Treasures*, REUTERS (Mar. 23, 2011), <http://af.reuters.com/article/libyaNews/idAFLDE72M17V20110323>.

194. Blue Shield Statement on Libya, *supra* note 4.

195. *Id.*

196. *States Parties to the 1954 Hague Convention*, *supra* note 5; *States Parties to the First Protocol to the 1954 Hague Convention*, *supra* note 44.

197. Blue Shield Statement on Libya, *supra* note 4 (emphasis added).

198. Ishaan Tharoor, *South African President Blasts NATO Actions in Libya*, CNN (June 14, 2011), www.cnn.com/2011/WORLD/africa/06/14/libya.war/index.html; Ishaan Tharoor, *With Roman Ruins Under Threat, Libya’s Ancient Past Presses Against Its Present*, TIME (June 14, 2011), <http://globalspin.blogs.time.com/2011/06/14/with-roman-ruins-under-threat-libyas-ancient-past-presses-against-its-present>.

199. 1954 Hague Convention, *supra* note 42, art. 19; Second Protocol, *supra* note 92, art. 22.

200. PICTET COMMENTARY, *supra* note 152, at 49–51.

201. *Id.*

2012] CAN THE 1945 HAGUE CONVENTION APPLY TO NON-STATE ACTORS? 425

peace, or an act of aggression.”²⁰² The Libyan government, therefore, had a duty to abide by the obligations set out under the Hague Convention in its dealings with the insurgent forces.

The more interesting question is whether the insurgent forces had a similar duty to protect cultural property under the Hague Convention. If the Hague Convention binds only state parties, it would have provided no protection for Libya’s cultural property against destruction by the rebel forces. Because the rebel group was not a party to the Hague Convention, it would have had no obligations to protect cultural property during the conflict.

As previously discussed, however, many provisions of the Hague Convention have become established as customary international law, and have been made applicable to both state and non-state actors. These provisions include the obligation to avoid attacking cultural property unless required by military necessity and to avoid the theft, pillage, or vandalism of cultural property. As a result, the rebel forces in Libya were obliged to avoid destroying Libya’s cultural property, even though the rebel group is not a formal party to the Hague Convention. The extension of obligations under the Hague Convention to non-state actors is necessary to achieve effective protection of cultural property. With the increasing frequency of conflicts involving non-state actors, limiting the scope of the Hague Convention so that it binds only state parties would hamstring the Convention’s effectiveness. In Libya, it would have allowed the rebel group to destroy cultural property at will. To provide the most effective cultural property protection, the Hague Convention should be refined so that it clearly obliges both state and non-state actors to respect cultural property during times of conflict.

CONCLUSION

As the events in Iraq and Libya demonstrate, armed conflicts involving non-state actors will almost surely increase in frequency in the coming years. Protecting cultural property during these conflicts, therefore, is becoming increasingly important. Using the 1954 Hague Convention to help address this problem seems the most logical and effective solution. In order for the Hague Convention to remain relevant in these non-international armed conflicts, however, the Convention must forcefully and clearly apply to non-state actors. Otherwise, the future efficacy of international cultural property protection will be in doubt.

202. *Id.* at 50.