

AMERICAN BAR ASSOCIATION  
SECTION OF  
INTERNATIONAL LAW AND PRACTICE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1           RESOLVED, That the American Bar Association recommends United States ratification of  
2 the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

## REPORT

Cultural property “constitutes one of the basic elements of civilization and national culture;” “its interchange increases the knowledge of the civilization of man, enriches the cultural life of all people, and inspires mutual respect and appreciation among nations.”<sup>1</sup> The value attached to cultural property mandates acknowledgment of its significance and the need for protection of such property both by law and by public awareness. Destruction of cultural property during armed conflicts destroys some of the common property of humanity. A reporter for the Chicago Tribune, Alan Artner,<sup>2</sup> commented that combatants in the Serbo-Croatian war suffered both of the two greatest casualties in armed conflict – the loss of life and the loss of memory. As Artner stated,

Loss of memory is perhaps less grievous than loss of life, but the memory of a people is embodied in buildings and monuments that give a sense of culture. When they are destroyed, the culture goes with them.

International conventions assume that the collective efforts of all nations and peoples are required to protect and preserve the cultural heritage of humanity. The concept that cultural property is the property of all humanity, and not a prize of plunder, emerged in international law during the Napoleonic period. Concern for the protection of cultural property arose in the United States during the Civil War. The principles for protection of cultural property during war were codified in the Lieber Code of 1863 (named for Dr. Francis Lieber, an international lawyer and Columbia College professor). The Lieber Code prescribed a code of conduct for Union military forces during the Civil War. An international movement to reduce the destructiveness of war resulted in two Hague Conventions, in 1899 and 1907, to protect cultural property. Violations of the Conventions were subject to international sanctions. Nonetheless, in contravention of the Hague Conventions, immediately before and during World War II, Germany amassed the largest collection of European treasures since Napoleon. The wholesale destruction of historical sites and the widespread looting of Europe’s treasures by German occupying forces during World War II accelerated the movement for an effective international legal protection of cultural property.<sup>3</sup>

Although the destruction, pillage, and theft of cultural property has occurred for centuries, the level of destruction and theft that occurred during World War II reached new heights. A new awareness of the need to respect cultural property surfaced during and after World War II. Specialists and specialist units on cultural property were established during World War II to advise battlefield commanders on the respect and protection of cultural property and to assist in the recovery

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<sup>1</sup>1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Preamble, 823 U.N.T.S. 231 (1972).

<sup>2</sup>Alan G. Artner, “Yugoslav Civil War Takes High Cultural Toll, Chicago Tribune, March 6, 1992, News, pg. 1; zone: C.

<sup>3</sup>Joshua Kastenberg, USAF, “The Legal Regime for Protecting Cultural Property during Armed Conflict,” 42 A.F.L. Rev. 277 (1997)

or safeguarding of cultural property.<sup>4</sup> As Hays Parks, Special Assistant to the Judge Advocate General of the Army for Law of War Matters, pointed out, “the scale of theft, damage and destruction of cultural property during World War II prompted efforts for more detailed international regulation.”<sup>5</sup> A committee of government experts was convened following a 1948 proposal to the United Nations Educational, Scientific and Cultural Organization (UNESCO) to draft a convention to protect cultural property during armed conflicts.<sup>6</sup> That committee met in 1952 and forwarded its drafts to the General Conference. An Intergovernmental Conference met in 1954 in The Hague to produce and adopt the Convention for the Protection of Cultural Property in the Event of Armed Conflict.<sup>7</sup>

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>8</sup> was the first convention to consider solely the protection of cultural property during armed conflict. As Joshua Kastenberg noted, the 1954 Hague Convention “introduced the term ‘cultural property’ and gave it definition.”<sup>9</sup> It eliminated loopholes of the 1899 and 1907 Conventions to expand protection for cultural property to all armed conflicts rather than full-scale wars.<sup>10</sup>

After World War II, international law recognized that historic monuments, archaeological sites, and artwork are the property of humanity and not just that of a single state. The concept of a cultural heritage for all humanity evolved from ideals set out in the preamble to the 1954 Hague Convention. The Preamble to the Convention states that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind.” The Preamble acknowledges that “each people makes its contribution to the culture of the world.”

Pursuant to the 1954 Hague Convention, cultural property bears a distinctive international

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<sup>4</sup>Hays Parks, “Protection of Cultural Property from the Effects of War,” Chapter 3, in Phelan, (Ed.), *The Law of Cultural Property and Natural Heritage*, Kalos Kapp Press, 1998, p. 3-25.

<sup>5</sup>Id. at 3-14.

<sup>6</sup>Id. at 3-14, 15.

<sup>7</sup>Id. at 3-15.

<sup>8</sup>Forty-five countries signed the 1954 Hague Convention at its inception. Seventy-five countries have ratified or acceded to the Hague Convention. As Joshua Kastenberg noted, the variety of signatory countries, with their diverse cultures and divergent political views, indicates the breadth of support for the underlying principles of the Convention. (Joshua Kastenberg, “The Legal Regime for Protecting Cultural Property during Armed Conflict,” 42 A.F.L. Rev. at 290).

<sup>9</sup>Joshua Kastenberg, 42 A.F. L. Rev. at 291.

<sup>10</sup>Id.

emblem, a blue shield, during military conflict to facilitate its recognition. The emblem is used as a means of identification of immovable cultural property under special protection and the transport of movable cultural property. The 1954 Hague Convention created an International Register of Cultural Property under Special Protection. Cultural property being transported under special protection is immune from seizure or capture. The International Committee of the Blue Shield (ICBS) has called upon all parties involved in military conflict to do everything within their power to protect museums, archives, libraries, monuments, and sites that are expressions of the history and the right of existence of peoples in the affected regions.

The 1954 Hague Convention contains a preamble, forty articles in seven chapters, and a three-part Protocol. Article 3 requires parties to the convention 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.” Article 4 requires signatory parties to “respect cultural property situated within their own territory and within the territory of other states.” Article 4 prohibits theft, pillage, or misappropriation of cultural property and prohibits the destruction of cultural property for reprisal purposes. Article 5 requires contracting parties to “support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.” Should the “competent national authorities” be unable to protect the cultural property of the occupied nation, Article 5 requires the occupying power, “as far as possible,” to take the “most necessary measures of preservation.” Article 7 provides that contracting parties must “undertake to plan or establish in peace-time, within their armed forces, services or specialist personnel” to secure respect for cultural property and to co-operate with civilian authorities responsible for safeguarding cultural property.

Article 8 permits signatory nations to construct refuges to shelter movable cultural property in the event of armed conflict. Articles 9, 10, and 11 provide immunity for cultural property sites. Article 12 and 13 provide for special protection for the transport of cultural property. Article 10 establishes the international distinctive emblem, described in Article 16 as the blue and white shield, to mark cultural property under special protection. Articles 16 and 17 govern use of the international emblem. Article 14 provides that cultural property has immunity from seizure, prize, or capture.

Article 28 requires signatory parties to “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” who breach provisions of the Convention.

Although the United States has been a leader in promoting national laws to protect cultural property, the U. S. Congress has not ratified the 1954 Hague Convention. The United States initially strongly supported the concept of a separate treaty for the protection of cultural property and, along with forty-four other countries, did sign the Hague Convention when it was completed in 1954. However, upon return with the documents to Washington after World War II, the delegation’s ratification efforts ran into the iron curtain of the Cold War.<sup>11</sup> While the Department of State supported ratification of the convention, objections from the Joint Chiefs of Staff and the General Counsel, Department of Defense prevented it.<sup>12</sup> Some of the concern apparently was that the Convention might limit the options of the United States in the event of nuclear war.

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<sup>11</sup>Hays Parks, at 3-18.

<sup>12</sup>Id. at 3-18, 19.

In the late 1960s and early 1970s, the 1954 Hague Convention was invoked to protect cultural properties in both Cambodia and in the Middle East. In the 1980s, it was invoked to protect cultural properties in the Near East and Persia. After the end of the Cold war and the considerable efforts taken by the United States to protect cultural property in the 1991 war to liberate Kuwait, new interest in U. S. ratification of the 1954 Hague Convention surfaced.<sup>13</sup> In 1994, Department of State officials prepared a draft transmittal package for forwarding the convention and its protocol to the White House and Senate.<sup>14</sup> However, further work had to be postponed due to the urgency attached to negotiations relating to the irresponsible use of antipersonnel landmines.<sup>15</sup>

Currently reports of the intentional destruction of cultural property during the war in the former Yugoslavia emphasize the continued need for laws to protect cultural property during military conflicts and a means for their enforcement.<sup>16</sup> As Radovan Ivancevic, president of the Association of Art Historians of Croatia and a professor at Zagreb University, stated, regarding the Serbo-Croatia conflict, “[N]ot since World War II has there been such destruction in Europe.” Hays Parks has acknowledged that “[A]n “increased level of protection” is needed.<sup>17</sup> The great tragedy that occurred in the Balkans in 1999 caused not only great human suffering but also massive damage to the cultural heritage in Belgrade, Novi Sad, Leskovac, and Kosovo.

The needless destruction of historical monuments during military conflicts could be halted if the United States would set an example for the rest of the world in recognizing an obligation to protect cultural property from thefts and military conflicts by enacting legislation to implement the 1954 Hague Convention. It should be the duty of the United States to encourage and to help other countries to protect their cultural property by creating appropriate domestic preparations in case of emergency/armed conflict. By ratifying the 1954 Hague Convention, the United States would demonstrate to cultural communities the importance the United States places on the protection of the cultural heritage of humanity.

Ratification by the United States of the 1954 Hague Cultural Property Convention would accomplish a great deal. According to Hays Parks, implementation would be beneficial in two respects. It would create an awareness among military commanders of the importance of cultural property and its need for protection from theft and “the avoidance of unintended damage incidental to attack of legitimate targets.”<sup>18</sup> It also would “make the general public and the political leadership

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<sup>13</sup>Id. at 3-23.

<sup>14</sup>Id.

<sup>15</sup>Id. at 3-24.

<sup>16</sup>Id. at 3-24, 25.

<sup>17</sup>Id. at 3-25.

<sup>18</sup>Id. at 3-26.

of each community, and those dedicated to the safeguarding of cultural property, aware of their responsibilities."<sup>19</sup> Ratification would ensure that cultural property is not used for military purposes and would require military forces to separate cultural property from possible wartime targets.<sup>20</sup> It would require that cultural property be marked (physically and on maps).<sup>21</sup>

While military leaders are aware of the need to protect cultural property during wartime and are receptive to efforts on an international scale to provide such protection, the United States has continued to move away from definite action and towards providing protection through international agreement. This has caused other nations to have less concern about the protection and preservation of cultural property during armed conflicts. The United States must exert the leadership needed to assure that in future military conflicts the needless destruction of cultural property ceases. Implementation of the 1954 Hague treaty, which "has existed, and generally has been ignored, for more than four decades,"<sup>22</sup> should be a major goal of the Department of State and the U.S. Congress. It is ironical that the United States, as a world leader, continues to refuse to ratify an international agreement that provides for the protection of cultural property during armed conflicts. A recommendation by the American Bar Association that the United States should ratify the 1954 Hague Convention would have tremendous influence on members of Congress and the President as they again consider U.S. ratification of the convention.

Respectfully submitted,  
Daniel B. Magraw, Jr.  
Chair

Dated February, 2001

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<sup>19</sup>Id.

<sup>20</sup>Id.

<sup>21</sup>Id.

<sup>22</sup>Id. at 3-26.

## GENERAL INFORMATION FORM

Submitting Entity:  
Section of International Law and Practice

Submitted By:  
Daniel B. Magraw, Jr., Chair of the Section of International Law and Practice

1. Summary of Recommendation.

The recommendation would urge U.S. ratification of the 1954 Hague Convention. The State Department wants a sense of the non-governmental organizations that are interested in U.S. ratification. It would be most beneficial if the American Bar Association would express to the State Department, to Congress, and to the President a positive response to U.S. ratification of the treaty.

2. Approval by Submitting Entity.

The recommendation was approved on July 9, 2000, at the Annual 2000 Meeting of the Section of International Law and Practice.

3. Has this or a similar recommendation been submitted to the House or Board previously?

There has not been a similar recommendation submitted previously to the House of Delegates or the Board of Governors.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

There are no existing ABA policies relevant to this recommendation.

5. What urgency exists which requires action at this meeting of the House?

Although the United States has failed to ratify this treaty for 46 years, there is a sense of urgency that it take this step at this time in view of the tremendous loss of historical monuments during the conflicts in former Yugoslavia. The loss will continue to occur in future armed conflicts if there is no international convention to require the collective efforts of all nations to preserve the cultural heritage of humanity.

6. Status of Legislation.

The 1954 Hague Convention is on a "long queue" of other treaties under consideration by the Foreign Relations Committee for presentation to Congress.

7. Cost to the Association.

Adoption of the recommendation would not result in expenditures.

8. Disclosure of Interest.

None

9. Referrals.

Sections, committee, bar associations, or affiliated entities to which the recommendation has been referred:

Section of Business Law  
Section of Criminal Justice  
Section of Intellectual Property law  
Section of Real Property, Probate, and Trust Law  
Section of Taxation  
Standing Committee on Law and National Security

10. Contact Person. (Prior to the meeting.)

The name, address and telephone number of the person who should be contacted prior to the meeting concerning drafting problems, additional referrals, background information, and any other questions about the report is as follows:

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11. Contact Person. (Who will present the report to the House.)

The person who will present the report to the House and who should be contacted at the meeting when questions arise concerning its presentation and debate is  
(Section Delegates in the House.)

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12. Contact Person Regarding Amendments to this Recommendations:

There are no known proposed amendments at this time.

## EXECUTIVE SUMMARY

### 1. Summary of the recommendation:

The recommendation is that the American Bar Association urge the United States to ratify the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

### 2. Summary of the issue which the recommendation addresses:

Cultural property is being destroyed needlessly by unnecessary bombings of historical monuments during military conflicts. Cultural property—artworks, archaeological, historical, and ethnological property--constitutes a fundamental part of the identity and dignity of a people of a region. Such property also benefits society in that it increases the knowledge of civilization and enriches the cultural life of all people. Destruction of cultural property during armed conflicts destroys some of the common property of humanity. The 1954 Hague Convention was drafted to protect cultural property during armed conflict. The needless destruction of historical monuments during military conflicts as well as the thefts of artworks and other cultural property during such conflicts could be halted if the United States would set an example for the rest of the world in recognizing an obligation to protect cultural property from destruction and thefts by enacting legislation to implement the 1954 Hague Convention. The real strength of the 1954 Hague Convention lies in its recognition of the importance of cultural property and its admonition to international powers to stop the needless destruction of cultural property during military conflicts.

### 3. An explanation of how the proposed policy position will address the issue:

The 1954 Hague Convention is being considered by the Foreign Relations committee for presentation to Congress. The proposed policy position of the American Bar Association would emphasize to the President and members of Congress that an influential non-governmental organization is concerned about the needless destruction of cultural property during armed conflicts and that it recognizes the importance of ratification of the convention to halt much of the unwarranted destruction of such property.

### 4. Summary of any minority views or opposition which have been identified.

There are no minority or opposing views that have been identified.