

CULTURE WARS:
PROTECTION OF CULTURAL MONUMENTS IN A HUMAN RIGHTS
CONTEXT

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I. INTRODUCTION

A nation's internal conflicts are often about cultural supremacy. Conflicts between cultures are far more dangerous than conflicts between states because, while states understand the language of diplomacy, parties involved in a cultural conflict often do not. Many times the differences between cultural blocks in a nation are so strong that they prevent any negotiations towards a truce. Fueled by a fundamentalist mindset, conflicts between different cultural groups frequently become deadly and destructive, often because the goal of the conflict is to attain victory by eradicating of the conflicting culture. Ultimately, many culture wars are about creating a homogeneous national identity.

Attacking the physical manifestations of the conflicting culture is one of the most tempting tools of cultural warfare.¹ While civil wars, like the Kosovo war, provide a clear example of cultural conflicts under international law, the more interesting and difficult situations do not rise to the level of civil wars, such as the Babri Mosque Riots in India, or the destruction of the Bamiyan Buddhas in Afghanistan. With respect to the protection of culture objects, international law is at its weakest where hostilities do not rise to the level of civil war.

International law recognizes the importance of protecting cultural property as both the heritage of a specific group and of all humankind.² However, the driving force behind the major international cultural property preservation and protection agreements is the idea that cultural

¹ KEVIN CHAMBERLAIN, WAR AND CULTURAL HERITAGE 2 (2004).

² John Henry Merryman, The Free International Movement of Cultural Property, 31 N.Y.U. J. INT'L L. & POL. 1, 10-12 (1998).

property is the “inheritance of all human kind.”³ Brennan, in her note on the Bamiyan Buddha situation, explains this motivation as follows:

Cultural property is our inheritance from the past, our cultural heritage. It explains who we are and where we come from. The world values cultural property because it forms social identity and, in some instances, embodies the highest accomplishments of the human spirit. International laws that seek to protect cultural property reflect these values.⁴

For the above stated reasons, many existing treaties recognize the need to protect cultural property in situations of “armed conflict” and in times of peace. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict⁵ (“Hague Convention of 1954”), and its two subsequent protocols signed in 1954 (“First Protocol”) and 1999 (“Second Protocol”)⁶ is a major treaty dealing with the protection of cultural property.⁷ Other major treaties include the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property⁸ (“UNESCO Convention”), and the 1972 Convention for the Protection of the World Cultural and Natural Heritage⁹ (“World Heritage Convention”). If every member nation was in perfect conformity with the specific treaty provisions of the UNESCO, Hague, and World Heritage Conventions,

³ Corrine Brenner, *Cultural Property Law: Reflecting on the Bamiyan Buddhas' Destruction*, 29 *Suffolk Transnat'l L. Rev.* 237, 254 (2006).

⁴ *Id.* at 237-238.

⁵ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, available at <http://unesdoc.unesco.org/images/0008/000824/082464mb.pdf> [hereinafter Hague Convention of 1954].

⁶ Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1954, May 14, 1954, <http://unesdoc.unesco.org/images/0008/000824/082464mb.pdf#page=66> [hereinafter First Protocol]; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999, March 26, 1999, <http://unesdoc.unesco.org/images/0013/001306/130696eo.pdf> [hereinafter Second Protocol].

⁷ CHAMBERLAIN, *supra* note 1, at 13.

⁸ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 232, available at <http://unesdoc.unesco.org/images/0011/001140/114046e.pdf#page=130> [hereinafter UNESCO Convention of 1970]

⁹ Convention Concerning the Protection of the World Cultural and Natural Heritage, November 23, 1972, 27 U.S.T. 37, available at <http://unesdoc.unesco.org/images/0013/001333/133369e.pdf> [hereinafter World Heritage Convention].

cultural property in all member nations would be adequately protected during international armed conflict, conflicts not of an international character, and in times of peace. However, for many reasons, that is not the case.

International law requires states to voluntarily bind themselves to negotiated pacts; yet, even within these negotiated documents, there are loopholes that allow for the commission of prohibited conduct while circumventing the consequences of said behavior. The law is especially weak when it comes to obligating member states to protect their own cultural property through domestic legislation.¹⁰ Two relatively recent events in world history show the glaring need for additional protection of cultural property, and display the ways in which the Hague Convention, the UNESCO Convention, and the World Heritage Convention fail in these types of instances. The destruction of the Babri Mosque in India and the demolition of the Bamiyan Buddhas both provide good examples of situations where international law failed not only to prevent, but also to sanction nations for their failure to abide by their international obligations, duties, and responsibilities toward all of humankind.

While adjusting the existing law to close the loopholes in international pacts may resolve the problems to a degree, the philosophy that drives these laws needs to be adjusted to better protect cultural property. Moving from a cultural internationalist approach towards a more individualized human rights based approach in the protection of cultural property will provide a better basis for creating sanctions against those responsible for the destruction of cultural property. Part II of this note reviews the possible protection encoded within the current international law regime comprised of The Hague and its Protocols and the World Heritage Convention. Part III discusses the historical context in which the treaties were created to provide an illustrative aid for the discussion in Part IV, which appraises the shortcomings of the

¹⁰ CHAMBERLAIN, *supra* note 1, at 3.

current international law regime protecting cultural property. Part V concludes that developing a human rights based regime as the basis for the protection of cultural property is necessary to close the loopholes of current law and correct its failures.

II. TREATIES IN FORCE

A. Hague Convention of 1954

The Hague Convention of 1954 is the first international treaty dealing exclusively with the protection of cultural property in the event of armed conflict. The specific articles of interest for the purposes of this discussion are Articles Three, Eighteen, and Nineteen.

Article Eighteen provides one of the basic assumptions of the convention: except for specific peace-time provisions, the treaty provisions go into effect during times of declared war or armed conflict between two or more contracting parties, or when there is a belligerent occupation of one member state by other member states.¹¹ This basic assumption makes perfect sense in light of the era of history that produced the Convention. Post World War II, the largest concern was the threat of another large-scale war between many states, and the treaty reflects this fear by focusing on armed or war-like conflicts between two or more nations.

Fundamentally, the Hague Convention of 1954 was created to function in another “world-war” type of situation; however, it still covered other types of scenarios. Article Three, one of the few peacetime provisions of the Hague, provides: “[t]he High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.”¹²

¹¹ *Id.* at art. 18.

¹² Hague Convention of 1954, *supra* note 5, at art. 3.

Article Nineteen supplies the most interesting and controversial provisions of the Hague. The article provides in pertinent part: “[i]n the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.”¹³ This language was adopted from the Geneva Conventions of 1949.¹⁴ This article offers guidance on determining what constitutes an armed conflict not of an international character. The Commentaries on the 1949 Geneva Conventions provide several factors that, while not exhaustive, are determinative.¹⁵ These factors include: (1) whether the party in revolt [against the *de jure* or actual government] possesses an organized military force, an authority responsible for its acts, and possess any means to ensure compliance to the Convention; (2) whether the legal government is obliged to use its regular military forces against insurgents organized as military in possession of the national territory; (3) whether the *de jure* government has recognized the insurgents as belligerents or has claimed belligerent rights; (4) whether the insurgents are organized as a state would be, and has *de facto* control over the national territory; and, finally, (5) whether the internal dispute as been submitted to the United Nations Security Counsel or the General Assembly of the United Nations as a threat to peace, a breach of the peace, or an act of aggression.¹⁶

For the purposes of Article Nineteen, the obligations to respect cultural property apply to “each party” of the conflict, whereas, traditionally, international obligations only applied to contracting states. Therefore, Article Nineteen obligates not only member states, but also

¹³ *Id.* at art. 19.

¹⁴ CHAMBERLAIN, *supra* note 1, at 70.

¹⁵ *Id.* at 70, n. 10.

¹⁶ *Id.* at 70.

individual citizens of those member states.¹⁷ Chamberlain, in his explanation of Article Nineteen states:

The obligation extends not only to the contracting party in whose territory the conflict is taking place, who may be the *de jure* government, but also to insurgents engaged in conflict either with the *de jure* government or among themselves. This raises the question as to how an entity that is not a State can be bound by the Convention. . . . In case of an internal conflict a Contracting State may be powerless to prevent violations of the Convention by insurgent forces. But this does not mean that the State is absolved of any responsibility for the duty to prevent further violations and to bring to justice those responsible for the violations of the Convention.¹⁸

Article Three obligates the member nations to protect their own cultural property during times of peace, if they desire protection for it during times of war. Article Nineteen, on the other hand, requires member nations to protect their cultural property during any armed conflict that is not of an international character, such as civil war. As mentioned above, the weakest point of the Convention is that it does not create explicit and compulsory obligations on the member states to protect cultural property during times of peace, nor does it obligate member states to protect cultural property from willful destruction during conflicts that do not rise to the level of “armed conflict not of international character,” as described in the Hague Convention and the Second Protocol. In short, situations like riots, and actions sanctioned by a *bona fide* government during peacetimes, are simply not within the scope of the Convention. The particular scope of the Hague was further elaborated on in the Second Protocol of 1999, which is discussed below.

B. First and Second Protocols to the Hague Convention of 1954

At the 1954 Intergovernmental Conference, which drafted the Hague Convention, the earlier versions were heavily criticized for being extremely focused on private law aspects of

¹⁷ *Id.* at 70.

¹⁸ *Id.* at 70-71.

protection of cultural property during times of war.¹⁹ Many delegations suggested that aspects of public law should be considered; however, the Hague was passed without the incorporation of such suggestions. Ultimately, another protocol would be created under which public law concerns would be addressed.²⁰

The First Protocol, which supplements the Hague Convention of 1954, is comprised of three parts. The first part is concerned with the return of property exported from occupied territories. The second part deals with the return of property from one party to another when a party has removed cultural objects for safekeeping.²¹ The third part of the First Protocol mainly deals with housekeeping matters and is unique to this Protocol because it allows the parties to accept the Protocol in its entirety, or to accept only Parts I or II.²²

By the early 1990's, the effectiveness of the Hague Convention was greatly questioned, mainly due to the vast damage to cultural property during the Second Gulf War, and the war in the former Yugoslavia.²³ As a result of multiple international reviews on the validity and effectiveness of the 1954 Hague Convention and the First Protocol, a diplomatic conference to create a second protocol took place in 1999. Soon thereafter, the Second Protocol was adopted at Hague. The purpose of the Second Protocol, apart from introducing some new elements concerning the protection of cultural property, was to provide greater precision to the more vague provisions of the 1954 Hague Convention. The scope of the Hague and the situations to which it applied were not defined in the original convention. The Second Protocol attempted to clarify this vagueness and stated that it applied to armed conflicts of an international character and to conflicts not of an international character occurring within the territory of one of the

¹⁹ *Id.* at 139.

²⁰ CHAMBERLAIN, *supra* note 1, at 139.

²¹ *Id.*

²² *Id.* at 150.

²³ *Id.* at 168.

Parties.²⁴ However, it is clear from various commentaries on Article Twenty-Two of the Second Protocol that the Hague and the Protocols did 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.”²⁵ Commentators agree that this article, and Article Nineteen of the Hague Convention, do not extend to situations such as riots; however, it can be assumed that mostly civil war type situations are covered in the provisions dealing with armed conflicts not of an international nature.²⁶ Furthermore, by the virtue of the Hague Convention and the two Protocols being mostly war time treaties, with limited peace time application, peace time destruction by the government of its own a state are not covered under the subsequent Protocols or the original Convention.

C. 1970 UNESCO Convention

Like the Hague Convention, the UNESCO Convention also contains several treaties that protect cultural property both during times of peace and war.²⁷ There are three primary articles that deal with cultural property during wartime. The first provision is Article Eleven, which expands Part I of the First Protocol to the Hague Convention of 1954. Article Eleven makes the export and transfer of ownership of cultural property under coercion arising due to occupation by foreign states “illicit” or unlawful.²⁸ The next provision, Article Seven, is in effect during wartime, as well as during peacetime, and requires members to make certain that museums in their jurisdiction are not acquiring illegally exported cultural objects from war torn areas. It further obligates states to provide assistance to other contracting members by facilitating the

²⁴ *Id.* at 168-69.

²⁵ Second Protocol, *supra* note 6, at art. 22(2).

²⁶ CHAMBERLAIN, *supra* note 1, at 171.

²⁷ *Id.* at 16.

²⁸ *Id.*

return of illicitly exported objects.²⁹ Article Nine of the UNESCO Convention is another provision that has utility during times of conflict because it gives contracting members the right to call for assistance from other contracting states if they feel that their “cultural patrimony” is in jeopardy from pillage.³⁰ While this provision does not specifically mention conflict situations, circumstances arising from internal or international conflict would be one obvious circumstance where the pillaging of archeological sites and ethological sites would be likely to occur.³¹ The article obligates contracting members to assist only if another contracting member has requested such assistance. Therefore, Article Nine is of no particular use where the contracting state has not requested such assistance, and is responsible for the pillaging.

The one major limitation of the UNESCO Convention as a whole is, as the name suggests, it is limited to dealing with movement of cultural property. In other words, the UNESCO Convention primarily deals with movable cultural property, and not monuments and structures that are often the target of hostility during cultural conflicts. Unlike Article One of the Hague, Article One of the UNESCO Convention does not mention immovable cultural property, and mostly deals with things such as archaeological objects, antiquities, art, historical manuscripts, etc.³² This narrow focus on movable cultural property is appropriate in the context of the UNESCO Convention because this convention is mainly concerned with the import and export of cultural property obtained through illegal means. The UNESCO Convention, as the name suggests, is an import-export based treaty, focusing on primarily the illicit movement of cultural objects. It is not effective, or even applicable, in protecting actual monuments like ancient temples, a cliff face statute, or an ancient city. For this reason, the UNESCO convention

²⁹ *Id.* at 17

³⁰ *Id.*

³¹ *Id.*

³² CHAMBERLAIN, *supra* note 1, at 16.

cannot be considered a major vehicle for the protection of cultural monuments and is removed from the following discussion.

D. World Heritage Convention

Immovable cultural property, such as religious buildings, palaces, castles, and other landmarks, would be prime targets during cultural, or religious, conflicts. The Hague Convention of 1954 and the World Heritage Conventions are really the only major treaties that provide protections for immovable cultural property. The World Heritage Convention provides for the designation of sites of preeminent world importance as World Heritage Sites.³³ Article Eleven of the Convention requires parties to submit to the World Heritage Committee, established by the Convention, an inventory of cultural property situated in their territory which would be suitable for inclusion in the World Heritage List.³⁴

Other noteworthy parts of the World Heritage Convention deal with more generalized duties and obligations, rather than specifically addressing the issue of protection of cultural property during times of conflict.³⁵ Article Four creates a “general duty on States Parties to identify, protect, conserve and transmit to future generations the cultural and natural heritage situated in its territory.”³⁶ Article Six creates an obligation to refrain from deliberately taking measures that may damage directly, or indirectly, cultural property situated on the territory of another party member.³⁷ Originally, Article Six was explicitly meant to apply during wartimes, however, it no longer does so, and most states are still governed by their obligations under the Hague Convention of 1954 during times of armed conflict.³⁸ Although the World Heritage

³³ *Id.* at 17.

³⁴ *Id.* at 17-18.

³⁵ *Id.* at 18

³⁶ *Id.*

³⁷ *Id.*

³⁸ CHAMBERLAIN, *supra* note 1, at 18.

Convention is ambiguous as to its application in times of armed conflict, the use of the World Heritage List by UNESCO to protect sites in Dubrovnik, during the civil war there, established its limited usefulness in times of armed conflict.

The treaties mentioned above, however, seems to have little or no effect in cases like the Babri Mosque Riots in India, or the destruction of the Bamiyan Buddhas in Afghanistan, as usually they are treaties that deal with armed conflict of international nature -- wars. These two incidents provide perfect examples of why a human rights based approach to protection of cultural heritage is more appropriate than one couched in the post-world war II internationalism.

III. FACTUAL BACKGROUND

A. Destruction of the Babri Mosque

For many Indians, history and mythology blend to create a heightened sense of possessiveness towards old structures, statutes, and sites, depicting the mythological past of India. In a nation where there is a Hindu past, an Islamic past, and an historical past, conflicts between the two religious groups sharing a tenuous peace are inevitable. The issue of the Babri Mosque in the holy city of Ayodhya was fodder for dissension between the Hindu and Muslim fundamentalists looking to shape the image of India in their particular culture rather than the diverse secular nation it is.

B.B. Lal, an archaeologist who was very much a product of the historically mythical Hindu culture, worked to determine the historicity of the two Hindu epics of Mahabharata and Ramayana.³⁹ In 1975, he began excavating Ayodhya City, which is famed as the birthplace of a major Hindu god.⁴⁰ The excavations continued till 1986, and a full report was submitted in

³⁹ B.B. Lal, A Note on the Excavations at Ayodhya with reference to the Mandir-Masjid Issue, in DESTRUCTION AND CONSERVATION OF CULTURAL PROPERTY 117, 117-18 (Robert Layton, et. al. ed., 2001).

⁴⁰ Id. at 118

1993.⁴¹ The real controversy regarding this site began with a discovery made early on in the excavations.⁴² While the excavation as a whole failed to provide any substantial evidence to the claim of a flourishing civilization in which Hindu gods and goddesses were born on earth, it did provide one archeological find on which Hindu fundamentalists renewed the ongoing feud with the Muslim population of India.⁴³ Next to the mosque, fourteen pillars depicting Hindu carvings were discovered. Stone slabs with carvings discussing a Hindu temple were also discovered on the site embedded into the Mosque walls.⁴⁴ This discovery led to claims that the Muslim invaders had destroyed a previously existing Hindu temple to build the Babri Mosque, and thus the land rightfully belonged to the Hindus.

The Babri Mosque was an important structure not only for Islamic, religious, purposes, but also for historical and architectural reasons.⁴⁵ It provided insight in to early Mughal architecture in northeastern India. An annotation by a translator of the Baburnama, the autobiography of the first Mughal Emperor, Babur,⁴⁶ provides some limited information as to the creation of the Mosque.⁴⁷ In 935 A.D., a man called Mir-Baqi commissioned the the Mosque in honor of Babur.⁴⁸ His memoirs made no mention of a previous Hindu temple erected on that site, nor are there any discussions about the demolition of old structures before the construction of the Mosque.⁴⁹ The only mention of a Hindu temple being on site is found in a column in the

⁴¹ *Id.*

⁴² *Id.* at 119

⁴³ *Id.* at 118

⁴⁴ *Id.* at 119

⁴⁵ Lal, *supra* note 40, at 135

⁴⁶ Mughal invader of India; Grandfather of Akbar the Great, the greatest Mughal Emperor of India, and great great grandfather of Emperor Shah Jahan who had the Taj Mahal built in remembrance of his deceased wife.

⁴⁷ Ram Sharan Sharma, *The Ayodhya Issue*, in *DESTRUCTION AND CONSERVATION OF CULTURAL PROPERTY* 127, 135 (Robert Layton, et. al. ed. 2001).

⁴⁸ *Id.*

⁴⁹ *Id.*

Faziabad Gazetteer at the turn of the twentieth century.⁵⁰ Mrs. Beveridge, a columnist for the Gazetteer, amended her annotations to the autobiography to include the notation that the mosque was built on a Hindu site, and further added her own assumption that the temple was dedicated to the major Hindu god Rama.⁵¹ Furthermore, there was no textual evidence to support this assertion in any of the ancient Hindu texts discussing pilgrimage sites and temples in Ganges planes.⁵² Indeed, many scholars speculate that Ayodhya rose to the level of a major pilgrimage site rather late in Indian history.⁵³

For purposes of fundamentalist politics, the assertion that Ayodhya was not a major pilgrimage site historically provided a perfect opportunity to incite the Indian public in the name of religion.⁵⁴ On December 6, 1992, the *Kar Sevaks*, a group consisting of thousands of Hindu fundamentalists, destroyed the Babri Masjid.⁵⁵ This was the culmination of several years of political campaigns by Hindu Nationalist leaders calling for the rebuilding of a Hindu temple on the site of the mosque.⁵⁶ In the time leading up to this event, some 151 people had died nationwide.⁵⁷ The army had been called in to control the riots, and a curfew in towns and cities was commonplace.⁵⁸ These events were merely a small preview of the violence and mayhem yet to come.⁵⁹ Two days after the razing of the mosque violence had spread across the nation and

⁵⁰ *Id.*

⁵¹ *Id.* at 136.

⁵² *Id.* at 127-129.

⁵³ Sharma, *supra* note 48, at 128.

⁵⁴ B.B. Lal, A Note on the Excavations at Ayodhya with reference to the Mandir-Masjid Issue, in DESTRUCTION AND CONSERVATION OF CULTURAL PROPERTY 117, 123 (Robert Layton, et. al. ed., 2001).

⁵⁵ Sharma, *supra* note 48, at 142.

⁵⁶ Nandini Rao & C. Rammanohar, Ayodhya, the Print Media and Communalism, in DESTRUCTION AND CONSERVATION OF CULTURAL PROPERTY, 139, 143 (Robert Layton, et. al. ed., 2001) (lists chronology of events leading up to the destruction, and immediately preceding the destruction of the mosque.)

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

230 more people had died in the resulting riots.⁶⁰ By December 12, 1992, six days later, the death toll had risen to 950.⁶¹ By the time the dispute was under control and the riots had dissipated, some 2000 people had died due to the violence.⁶²

B. The demolition of the Bamiyan Buddhas

Bamiyan Valley in Afghanistan was part of the “pan-continental Buddhist culture that stretched from west Central Asia to China, lasting in Afghanistan until the early eleventh century when Central Asia was overrun by Islamic tribes and the long-standing commercial routes to western China were severed.”⁶³ Bamiyan Valley was home to some of the most impressive statues of the Shakyamuni Buddha, known now as the *Bamiyan Buddhas*, which dated back to the early part of the seventh century.⁶⁴ Starting in 1222, with the invasion of Ghengis Khan, the statues suffered mass damage at the hands of invaders and settlers.⁶⁵

The *Bamiyan Buddhas* were highly important to the documentation of Central Asian material culture, the migration of culture along the silk route, and the subsequent non-Islamic cultures of Afghanistan and surrounding areas.⁶⁶ The Buddhas were a central place of worship during pre-Islamic Afghanistan.⁶⁷ After the Taliban’s victory over the ruling class in the mid-1900s, Afghanistan’s systematic transition into a fundamentalist, orthodox, Islamic State began. On February 26, 2001, Mullah Mohammed Omar (“*Mullah Omar*”), the leader of the Taliban,

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Q & A: Ayodhya Dispute, BBC News, Sept. 30, 2010, at <http://www.bbc.co.uk/news/world-south-asia-11435240>.

⁶³ DEREK GILLMAN, *THE IDEA OF CULTURAL HERITAGE*, 10 (2010).

⁶⁴ ROBERT BEVAN, *THE DESTRUCTION OF MEMORY*, 124 (2006). (although the focus of the journalists and thus the rest of the world was on the two largest Buddha statues, there were actually several statues of much smaller girth carved into the mountain side along with the two large statues).

⁶⁵ GILLMAN, *supra* note 64, at 10.

⁶⁶ *Id.* at 12.

⁶⁷ *Id.*

issued an edict to destroy all statues, proclaiming them to be idolatrous.⁶⁸ Although *Mullah Omar* claimed statues to be against “Islamic order,” Egyptian Fahmi Howeidy, a major expert of Islamic religion, stated that it was the Taliban’s edict that was contrary to Islam, because “Islam [is a religion that] respects other cultures even if they include rituals that are against Islamic law.”⁶⁹

This decision came as a shock to the international community because *Mullah Omar* had declared early in the Taliban’s reign that the Bamiyan Buddhas were rare ancient monuments.⁷⁰ He had previously reasoned that since there were no practicing Buddhists in Afghanistan, the statues were excluded from the Taliban’s campaign against idolatry.⁷¹ The Taliban by this time had already caved under the pressure of the even more radical al-Qaeda and the clerics and militants that gathered around them.⁷² “It was claimed,” says Bevan in his account of the destruction of the Buddhas of Bamiyan Valley, “that the pressure to destroy the statues came after lobbying from the foreign militants gathered around al-Qaeda, supported by Islamic clerics in Saudi Arabia who, it has been argued, are resistant to the incorporation of items of material culture under Islamic control into universal notions of art-historical value.”⁷³ Soon, thereafter, a rapid destruction of statues began. On March 3, 2001, the international press reported that the destruction of the two main Buddha statues had begun, and it continued for two days..⁷⁴ Nations across the world made pleas with the Afghan government to spare the statues, or to sell them so they could exist in their entirety in other parts of the world where the unique beauty and

⁶⁸ Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT’L L. 619, 626 (2003).

⁶⁹ *Id.* at 627.

⁷⁰ GILLMAN, *supra* note 64, at 10.

⁷¹ *Id.*

⁷² BEVAN, *supra* note 65, at 126.

⁷³ *Id.*

⁷⁴ *Id.*

religious value of the Shakyamuni was better understood.⁷⁵ The pleas fell on deaf ears.

“[D]espite the difficulties met by Afghan troops in destroying the solid rock carved statues, the Taliban Ambassador to Pakistan, confirmed on 6 March, 2001 that destruction of all statues, including the two Buddhas, was being completed.”⁷⁶

IV. LOOPHOLES: INEFFECTIVENESS OF THE TREATIES

Out of the two examples discussed above, the *Babri Mosque* scenario better exemplifies why international treaties did not work.⁷⁷ The *Babri Mosque* example clearly falls within the more obvious loopholes of the Hague Convention and the World Heritage Convention, both of which India is a party to. In the Hague Convention the situation that climaxed with the destruction of the *Babri Mosque* can in no way be defined as a civil war. The destruction of the Mosque was a result of internal political strife surrounded by riots. Article Twenty-Two of the Second Protocol would not cover this situation, as there was no “armed conflict,” or even a non-armed conflict, of any sort until after the Mosque was razed.⁷⁸ No other nations were involved, and even the Indian government was somewhat detached from the entire incident. Furthermore, the obligations imposed by the Hague Convention to protect cultural monuments during peace time only extend to the preparation for safeguarding against harm to cultural property against foreseeable effects of an armed conflict.⁷⁹ While it can be argued that the Indian government could have foreseen the civil strife and therefore taken steps to protect the *Babri Mosque*, that supposition can be countered by the argument that the Indian government did not anticipate an

⁷⁵ Corrine Brenner, *Cultural Property Law: Reflecting on the Bamiyan Buddhas' Destruction*, 29 *Suffolk Transnat'l L. Rev.* 237, 251 (2006).

⁷⁶ Francioni & Lenzerini, *supra* note 68, at 627 (emphasis added).

⁷⁷ While most of the legal scholars have focused on the impact of the Ayodhya controversy on the secularist nature of India, and the role of the Indian judiciary in settling the controversy, there has been practically no analysis of India's obligations under the three treaties, and the reaction of the international community to the destruction of the mosque itself.

⁷⁸ Second Protocol, art. 22, March 26, 1999, <http://unesdoc.unesco.org/images/0013/001306/130696eo.pdf>.

⁷⁹ *Id.* at art. 3.

armed conflict within the scope of the Hague Convention, and thus was not under any obligation to take measures to protect the Mosque. The ambiguity about the scope of the Hague Convention leads to multiple interpretations, which create a loophole through which a nation can escape its obligation to protect cultural property from harm.

The ambiguity concerning the scope of the Hague Convention similarly arises within the World Heritage Convention. India is also a party to the World Heritage Convention and is generally obligated to identify, protect, conserve and transmit to future generations the cultural and natural heritage situated in its territory.⁸⁰ As mentioned in the Hague Convention context, this obligation is extremely vague and does not create a duty that can be enforced through sanctions or other means. As long as some attempt has been made to oblige this general mandate of the treaty, a State's obligations can be considered fulfilled. Concerning the other obligations imposed by the World Heritage Convention, the language of the Convention requires that a state upkeep and protect structures and natural areas if the committee agrees that they are world heritage caliber.⁸¹ The weaknesses of the World Heritage Convention can be succinctly described as follows: rights granted by the Convention are held by individual states, which means that only member states have "discretion when deciding which of their territorial sites will be placed on the World Heritage List and which objects are worthy of assistance."⁸² Thus, the World Heritage Convention provides great power to the states, and as discussed later in the Bamiyan context, enforcement by governing bodies and the international community is lax.

The destruction of the Bamiyan Buddhas provides a slightly harder problem. Even if

⁸⁰ See Convention Concerning the Protection of the World Cultural and Natural Heritage, November 23, 1972, 27 U.S.T. 37, available at <http://unesdoc.unesco.org/images/0013/001333/133369e.pdf> [hereinafter World Heritage Convention] (India is listed as one of the party nations, and states that have successfully ratified and implemented the treaty).

⁸¹ See generally Convention Concerning the Protection of the World Cultural and Natural Heritage, November 23, 1972, 27 U.S.T. 37, available at <http://unesdoc.unesco.org/images/0013/001333/133369e.pdf> [hereinafter World Heritage Convention].

⁸² Brenner, *supra* note 75, at 259.

Afghanistan was a party to the Hague Convention of 1954 and its Protocols, which it is not, its applicability to the Buddha situation is questionable. One major reason for the ambiguity surrounding the Hague Convention's effectiveness is that: "[a]lthough the Convention provides a useful framework for protecting cultural property, it is futile when one party intentionally destroys cultural property or identity. The 1954 Hague Convention's premise is that threats to cultural property come from external parties, not the controlling state."⁸³ The 1954 Hague Convention is further inapplicable in the Buddha's situation "because the Bamiyan Valley was free of hostilities and securely under the Taliban's control" when the Buddhas were destroyed.⁸⁴ The Buddhas were not harmed in the fighting, and thus their destruction falls within the realm of willful peacetime, rather than wartime, destruction.

The World Heritage Convention provides more of a substantive analysis because Afghanistan is a party to it, and if Taliban can be seen as a legitimate government, they acceded to the Convention.⁸⁵ As mentioned above, the World Heritage Convention places a lot of power in the hands of the member states because it is the member states that determine which of their sites are eligible for the list.⁸⁶ The situation in Afghanistan is unique because the Buddhas were not placed on the World Heritage List until two years after their destruction at the hands of Taliban.⁸⁷ However, the general duty to identify, protect, conserve and transmit to future generations the cultural and natural heritage situated in its territory could have created an obligation on the Afghan government.⁸⁸ This general obligation seems to create a duty to protect

⁸³ *Id.* at 257-59.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 259.

⁸⁷ *Id.*

⁸⁸ Brenner, *supra* note 75, at 258.

cultural property even when it is not on the World Heritage List.⁸⁹ Taliban's deliberate destruction of the Buddhas could be considered a breach of Afghanistan's general duty to protect its cultural property.⁹⁰ Ultimately, several commentators agree that there was sufficient legal basis to sanction the Afghan government under the World Heritage Convention.⁹¹ Sanctions, such as suspension of technical assistance or withdrawal of financial aid, could have been adopted against Afghanistan.⁹² As we know, in the aftermath of the destruction no states, nor UNESCO, took any measures against Afghanistan.⁹³ The international community's apathy shows that both of these Conventions are mostly "toothless" treaties which really only provide protections in extremely limited circumstances.⁹⁴

V. NEW PHILOSOPHY, NEW LAW

The conditions and ideologies that gave birth to the Hague Convention of 1954 are just as important as the document itself. The Hague Convention was a direct result of the loss of life and property experienced by the international community during World War II.⁹⁵ The preamble to the Hague Convention sets out the philosophy that the drafters sought to encapsulate through the treaty provisions.⁹⁶ The preamble states in relevant part: "Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all humankind, since each people makes its contribution to the culture of the world."⁹⁷ Cultural

⁸⁹ Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 *EUR. J. INT'L L.* 619, 631 (2003).

⁹⁰ *Id.*

⁹¹ Brenner, *supra* note 75, at 260; Franconi & Lenzerini, *supra* note 60, 631.

⁹² Brenner, *supra* note 75, at 260.

⁹³ *Id.* at 259.

⁹⁴ Andrea Cuning, *The Safeguarding of Cultural Property in Times of War and Peace*, 11 *TULSA J. COMP. & INT'L L.* 211, 227 (2003).

⁹⁵ KEVIN CHAMBERLAIN, *WAR AND CULTURAL HERITAGE* 22 (2004).

⁹⁶ John Henry Merryman, *The Free International Movement of Cultural Property*, 31 *N.Y.U. J. INT'L L. & POL.* 1, 11 (1998).

⁹⁷ Hague Convention of 1954, preamble, May 14, 1954, 249 *U.N.T.S.* 240, available at <http://unesdoc.unesco.org/images/0008/000824/082464mb.pdf>

internationalism, or the idea that “there is a legally cognizable international interest in cultural property,”⁹⁸ is an idea that works best in an international context, where two or more states are engaged in armed conflict.

On the other side of this discourse is what Merryman defines as the “source nation discourse.”⁹⁹ The 1970 UNESCO Convention best embodies and supports this school of thought.¹⁰⁰ The source nation discourse focuses on the relationship between cultural objects and the national history, culture, and identity of a state.¹⁰¹ To exhibit this perspective, the UNESCO Convention employs terminology like “cultural patrimony,” “cultural heritage,” and “protection.”¹⁰² Source nation discourse has one inherent flaw; what makes up the cultural heritage and identity of a particular nation is defined by the state, most often by the controlling government.

While source nation discourse goes a long way in connecting a nation’s interest with the cultural object, it also has the negative effect of connecting national identity with a cultural object.¹⁰³ This could result in the situations discussed above -- destruction of the remains of a Buddhist past of an Islamic nation and apathy toward the destruction of an Islamic structure in a nation striving to establish a Hindu identity. The weak points mentioned above stem from the approaches that the Conventions seek to embody, and to a certain degree, the focus of international law on state to state relationships. To have an effective system of cultural property protection it is necessary that individuals be held liable for actions that violate international law, rather than simply relying on states to create domestic law criminalizing the destruction of

⁹⁸ Merryman, *supra* note 94, at 11.

⁹⁹ *Id.* at 12

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See generally* Merryman, *supra* note 94.

cultural property.¹⁰⁴ Simply put, there needs to be direct responsibility to the international community.

The human rights regime is one of the mechanisms that has proven to be extremely effective in creating individual responsibility directly to the international. One example of a successful human rights regime is the Statute of the International Tribunal of the Former Yugoslavia (“ICTY”), which was created by the United Nations Security Council after the end of the Balkan hostilities in the 1990s.¹⁰⁵ The ICTY tribunal was created for “the prosecution of persons responsible for serious violations of humanitarian law.”¹⁰⁶ The ICTY has jurisdiction to prosecute persons for “violations of the laws and customs of war and crimes against Humanity.”¹⁰⁷ For example, the ICTY found three men guilty of crimes against humanity after they had deliberately attacked ancient mosques in Bosnia-Herzegovina. In that case the ICTY found that because the destruction was committed with discriminatory intent it amounted to an attack on a people’s religious identity, and thus constituted a crime against humanity.¹⁰⁸ “The ICTY blurs the distinction between crimes against people and crimes against property, ultimately stating that such crimes may violate human rights. This precedent will be enormously helpful in advancing the law in this area.”¹⁰⁹

¹⁰⁴ Brenner, *supra* note 75, at 257, n. 109 (“The 1999 Second Protocol provides examples of the following measures to be taken during peacetime: including preparing inventories, planning of emergency measures against fire or structural collapse, preparing for removal of movable property and adequate in-situ protection of property and designating competent authorities to safeguard the property.”); see also Cuning, *supra* note 92, at 236.

¹⁰⁵ Brenner, *supra* note 75, at 268.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 *EUR. J. INT’L L.* 619, 637 (2003).; Brenner, *supra* note 75, at 268.

¹⁰⁹ Brenner, *supra* note 75, at 268 (citing Hiram Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 *Harv. Hum. Rts. J.* 1, 31 (2001) (finding ICTY decisions making crimes against property crimes against humanity in certain contexts); Victoria A. Birov, *Prize or Plunder? The Pillage of Works of Art and the International Law*

The ICTY approach would work best in the Babri Mosque context. The creation of an ICTY -type statute that creates a human rights interest in the protection of cultural and religious objects would be the best path to fixing the loopholes in the Hague Convention and the World Heritage Convention left by with the absence of a scheme to deal with conflicts that do not rise to the level of a civil war. By creating individual responsibility, political leaders working behind the scenes to create political and civil disorder and incite riots would be held personally liable under criminal charges for the destruction of cultural property. Such a statute would create an incentive for local leaders to ensure that their actions do not lead to the destruction of cultural sites as it did in the Babri Mosque incident.

This approach, however, would not easily transfer to the Bamiyan Buddha example. It was easier to see the human rights violation in the Babri Mosque riots, as the Hindu majority destroyed a religious symbol of a large minority in India and mostly Muslims were killed in the riots preceding and following the razing of the Mosque.¹¹⁰ It is more difficult to see the human rights violation in the destruction of Bamiyan Buddhas. Reportedly, at the time of the destruction of the Buddhas there were no practicing Buddhists in Afghanistan.¹¹¹ The only way that this would constitute as a human rights violation is if the actions of the Taliban could be considered a human rights affront to Buddhists in other nations, or even more broadly to any other religion that conflicts with Islam on a regular basis. The Human Rights approach discussed above is the most appropriate approach in the present state of the world where it can never be forgotten that, “[s]tates are certainly capable of violating the human rights of their own

of War, 30 N.Y.U.J. Int'l L. & Pol. 201, 211 (1998) (stating ICTY decisions enormously helpful in expanding protection of cultural property)).

¹¹⁰ Nandini Rao & C. Rammanohar, *Ayodhya, The Print Media and Communalism*, in *DESTRUCTION AND CONSERVATION OF CULTURAL PROPERTY*, 139, 142 (Robert Layton, et. al. ed., 2001)

¹¹¹ See Richard F. Nyrop & Donald M. Seekins, *Religion*, in *AFGHANISTAN COUNTRY STUDY*, at <http://library.iit.edu/govdocs/afghanistan/Religion.html>; see also GILLMAN, *supra* note 64, at 10.

people,” and certainly they could be capable of violating the human rights of nationals of other states.¹¹²

Wangkeo defines the cultural protection regime in the human rights context as follows:

In order for a cultural object to be protected . . . , it would have to fulfill two conditions: (1) it must be constitutive of a group's identity; and (2) it must not be symbolic of repugnant values in international law. In order for a state's destructive conduct to be objectionable, it would also have to satisfy two criteria: (1) it would indeed have to constitute iconoclasm (the destruction of the relic in order to eradicate its symbolic power) . . . ; and (2) the act would have to be antagonistic to international law, violating human rights standards or flouting international norms of conduct, for example.¹¹³

In the Bamiyan Buddhas context, the criteria laid out by Wangkeo are met. The giant Buddhas symbolized the Buddhist identity in Asia, both religiously and historically, and they did not represent views that were repugnant to international law ideals. Thus, the first prong is satisfied, and the cultural object is falls within a class of objects that need protection. The second prong is also satisfied because the actions of the Taliban constituted iconoclasm, i.e. the statues were destroyed to obliterate the symbolic value they held in Afghanistan as a symbol of a non-Islamic past -- and the destruction of the statutes was antagonistic to international law. In such circumstances, even though there was not a group of people directly affected by the destruction in Afghanistan, the human rights regime could reach the people responsible for the destruction of the statues. While the system proposed by Wangkeo might not provide a perfect regime, it certainly closes up the loopholes that allowed situations like the Bamiyan Buddha to occur.

VI. CONCLUSION

¹¹² Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT'L L. 183, 271 (2003)

¹¹³ *Id.* at 273 (emphasis added).

Ultimately, under the system discussed above, combined with the creation of a special tribunal such as the ICTY discussed above, a regime could be created where individuals are obligated not to violate the human rights of any other individual. It is time that the current cultural property regime is reevaluated, as the old definition of armed conflict, i.e. state-to-state conflict, is not applicable. Cultural wars are the norm of today, and when cultural property is directly targeted, and targeted for the reason of cultural cleansing, the treaties need to focus on a human rights based approach to the protection of such cultural property.