

## THE PROTECTION OF CULTURAL PROPERTY AND POST-CONFLICT KOSOVO

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### Résumé de l'article

Considérant le niveau sans précédent de destruction de biens culturels au Kosovo depuis la prise de contrôle par la communauté internationale en 1999, l'auteur de cet article tente de répondre à deux questions. Premièrement, l'héritage religieux bâti serbe du Kosovo mérite-t-il une protection internationale ? Deuxièmement, les deux autorités internationales en place au Kosovo, soit le MINUK et le FORK, une force militaire menée par l'OTAN, ont-elles l'obligation de protéger cet héritage culturel ? Après une analyse du droit international pertinent, l'auteur soutient que les édifices religieux serbes au Kosovo peuvent être qualifiés de biens culturels possédant une valeur internationale et que, de ce fait, elles méritent d'être protégées. Une étude plus approfondie du mandat reçu par l'administration internationale au Kosovo mène l'auteur à conclure que le MINUK et le FORK y exercent ensemble l'autorité publique, ce qui placerait l'héritage religieux serbe sous leur juridiction. Conséquemment, l'auteur affirme que l'obligation de protéger le patrimoine culturel du Kosovo, bien que normalement dévolue au souverain territorial par le droit international, doit ici être assurée par ces deux entités.

## THE PROTECTION OF CULTURAL PROPERTY AND POST-CONFLICT KOSOVO

*Par Eduard Serbenco\**

In the context of the unprecedented level of cultural destruction taking place in Kosovo since the international community took over in 1999, the author of this article seeks to provide an answer to two questions. First, whether the Serbian-built religious heritage in Kosovo deserves any international protection. Second, whether the two international authorities in place in Kosovo, UNMIK and KFOR, a NATO-led military force, are under any legal obligation to protect this religious heritage. Relying on the relevant international law provisions, the author determines that items of Serbian-built religious heritage in Kosovo qualify as cultural property of international value, thereby deserving international protection. Examining further the legal mandate received by the international administration in Kosovo, the author argues that both UNMIK and KFOR exercise public authority in this province, thus placing the Serbian religious heritage in question under their jurisdiction. As a result, the author concludes that the legal obligation to ensure the protection of cultural heritage in Kosovo, although normally assigned by international law to the territorial state, here devolves upon these two international entities.

Considérant le niveau sans précédent de destruction de biens culturels au Kosovo depuis la prise de contrôle par la communauté internationale en 1999, l'auteur de cet article tente de répondre à deux questions. Premièrement, l'héritage religieux bâti serbe du Kosovo mérite-t-il une protection internationale? Deuxièmement, les deux autorités internationales en place au Kosovo, soit le MINUK et le FORK, une force militaire menée par l'OTAN, ont-elles l'obligation de protéger cet héritage culturel? Après une analyse du droit international pertinent, l'auteur soutient que les édifices religieux serbes au Kosovo peuvent être qualifiés de biens culturels possédant une valeur internationale et que, de ce fait, elles méritent d'être protégées. Une étude plus approfondie du mandat reçu par l'administration internationale au Kosovo mène l'auteur à conclure que le MINUK et le FORK y exercent ensemble l'autorité publique, ce qui placerait l'héritage religieux serbe sous leur juridiction. Conséquemment, l'auteur affirme que l'obligation de protéger le patrimoine culturel du Kosovo, bien que normalement dévolue au souverain territorial par le droit international, doit ici être assurée par ces deux entités.

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## Introduction

The destruction of cultural property constitutes an inherent component of any armed conflict. In recent times, the Balkan wars of the 1990s have offered the desperate view of the devastation of an enemy's cultural property without any justification of military necessity. The massive 'cultural genocide' in the former Yugoslavia involving the destruction of Sarajevo's numerous churches, mosques, and libraries – many of which were built in the 14<sup>th</sup> and 15<sup>th</sup> centuries – and the destruction of sixty-three percent of Croatia's Dubrovnik, the most outstanding historic town of Europe with 460 monuments (1992 to 1993), are some of the examples of cultural destruction.<sup>1</sup> Because of the nature of the conflict in the former Yugoslavia, religious symbols constituted the main target of attacks on cultural property.<sup>2</sup> Countless churches, mosques, monasteries, and even cemeteries have been leveled to the ground.<sup>3</sup>

Strikingly, cultural aggression, namely the destruction and pillage of the adversary's non-renewable cultural resources,<sup>4</sup> has not ceased even after the direct involvement of the United Nations (UN) and North Atlantic Treaty Organization (NATO) in former Yugoslavia. Assuming the existence of a humanitarian catastrophe implying gross violations of human rights taking place within Kosovo, NATO countries prompted an intervention in this Yugoslav region in March 1999 without receiving any UN authorization.<sup>5</sup> It was believed that a complete withdrawal of all Serbian forces from Kosovo would restore the peace and consequently put an end to the mass human rights violations directed against the Albanian population.<sup>6</sup> After an

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<sup>1</sup> P. Ishwara Bhat, "Protection of Cultural Property under International Humanitarian Law: Some Emerging Trends" (2001) 4 ISILYBIHRL 2, online: ISIL Year Book of International Humanitarian Law <<http://www.worldlii.org/int/journals/ISILYBIHRL/2001/4.html>>.

<sup>2</sup> Hired Abtahi, "The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia" (2001) 14 Harv. Hum. Rts. J. 31.

<sup>3</sup> The Kosovo Albanians claim that during the 1999 war 215 mosques, some of them up to 400 years old, were damaged or destroyed by Serbian paramilitary and military attacks. See Branko Bjelajac & Felix Corley "Kosovo: Religious Freedom Survey" *Forum 18 News Service* (9 September 2003) at 2, online: *Forum 18 News Service* <[http://www.forum18.org/Archive.php?article\\_id=137&printer=Y](http://www.forum18.org/Archive.php?article_id=137&printer=Y)>.

<sup>4</sup> *Supra* note 2 at 1.

<sup>5</sup> The then NATO Secretary-General Javier Solana stated that the UN Security Council Resolution 1199 of September 23, 1998 gave the Alliance the right to use force: "We have the legitimacy to act to stop a humanitarian catastrophe" *Financial Times* (10 August 1998). In SC Res. 1199, UN SCOR, 53<sup>rd</sup> Sess., 3930<sup>th</sup> Mtg., UN Doc. S/RES/1199 (1998), the Security Council, while deciding that there was "[a] threat to peace and security in region," called only for the withdrawal of Serbian security forces from Kosovo and urged the participants to improve the situation and initiate the negotiations to bring this about.

<sup>6</sup> The development of the ethnic composition of the population in Kosovo shows a remarkable and constant growth in the Albanian part, combined with a decline in the Serbian population. In 1991, when the former Socialist Federal Republic of Yugoslavia (SFRY) broke down, the Albanian part of the population increased to 82% and in 1994 to 90% as opposed to 10% Serbs. See Julianne Kokott, "Human Rights Situation in Kosovo 1989-1999" in Christian Tomuschat, ed., *Kosovo and the International Community: A Legal Assessment* (The Hague: Kluwer Law International, 2002) 1 at 4. Since 1999, when the UN and NATO began jointly managing Kosovo, more than 200,000 Serbs (half the total or more) have been forced to leave the province, making up now less than 10% of the population of 2 million. See Lorne Gunter, "'March Pogrom' belies UN control myth: University of

air campaign lasting 79 days, the withdrawal of Serbian forces was obtained and an international presence was installed in Kosovo in the form of the United Nations Interim Administration Mission in Kosovo (UNMIK) and Kosovo Force (KFOR).<sup>7</sup> However, the violence in Kosovo has not halted and Serbian religious buildings in Kosovo remain one of the main targets of Albanian extremists.

The purpose of this study is twofold. We will focus first on whether the Serbian-built religious heritage in Kosovo does deserve international protection. An account of the unprecedented level of cultural destruction taking place in Kosovo since an international administration took over in 1999 is more than appropriate herein.

During the latest set of riots in Kosovo, between March 17 and 19, 2004, ethnic Albanian mobs attacked Serbian homes, churches, and schools throughout Kosovo. The attacks took place under the watch of 20,000 KFOR NATO-led troops, UNMIK, the local Kosovo Police Service (KPS) and the Kosovo Protection Force (KZK). The violence left 19 people dead, 250 homes looted and burned, as well as 30 churches, monasteries and several graveyards heavily damaged, looted, burned, or destroyed.<sup>8</sup> In the town of Prizren, in the southwest of the province, many medieval buildings were badly harmed and injured. The Church of Bogorodica Ljeviska, Holy Mother of God, one of the finest examples of late Byzantine architecture anywhere, completed under King Milutin in 1307 and painted with exquisite frescoes, was burned from the inside, the frescoes being heavily damaged. The Church of Christ the Saviour with its 14<sup>th</sup> century frescoes was burned. The Churches of St. Nicolas and St. George, from the 14<sup>th</sup> and 16<sup>th</sup> centuries respectively, have been burned from the inside as well. Although the Churches of Holy Sunday and of St. Panteleymon, both from the 14<sup>th</sup> century, were recently reconstructed following previous Albanian attacks, they were burned down during the recent spree. The monastery of Holy Archangels which contained the tomb of King Dusan, from the 14<sup>th</sup> century, was burned and looted in the presence of German KFOR soldiers. Near Prizren, in Zivinane, the Church of Holy Sunday was dynamited.<sup>9</sup>

Eruptions of Albanian violence during which Serbian villages, monasteries, and churches were systematically attacked have occurred on several occasions since the end of the war. According to the Serbian Orthodox Church representatives in Kosovo,<sup>10</sup> even though major damage had occurred during the war, the most

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Alberta forum to examine destruction of Christian culture in Kosovo" *Edmonton Journal* (16 May 2004), online: *Edmonton Journal* <<http://www.canada.com/edmonton/edmontonjournal/columnists/story.html?id=8004a5f9-b709-4bf7-b7aa-0c487e52830d>>.

<sup>7</sup> UN SCOR, 54<sup>th</sup> Sess., 4011<sup>th</sup> Mtg., UN Doc. S/RES.1244 (1999).

<sup>8</sup> Branko Bjelajac & Felix Corley, "Kosovo: Nobody charged for destruction of Orthodox churches and monasteries" *Forum 18 News Service* (6 May 2004) at 1, online: *Forum 18 News Service* <[http://www.forum18.org/Archive.php?article\\_id=314&printer=Y](http://www.forum18.org/Archive.php?article_id=314&printer=Y)>.

<sup>9</sup> *Ibid.* at 3. For a list, plus photos, see online: Serbian Orthodox Diocese of Raska-Prizren and Kosovo-Metohija Info-Service <<http://www.kosovo.com/default4.html>>.

<sup>10</sup> This is Father Sava's (Janjic) testimony, deputy abbot and spokesman for the Dečany Monastery, that has been quoted in a report drawn by a Council of Europe's study-visit on the protection of cultural property in Kosovo, undertaken in October 2003. See Council of Europe, P.A., Committee on Culture, Science and Education, 2004 Ordinary Sess., *Protection of cultural heritage in Kosovo*, Doc. 10127

systematic destruction of Serb property came in the immediate aftermath of the war. The subsequent destruction was not vandalism by ordinary people or looting by thieves, even though these did occur. Rather, it was professional destruction by trained people who knew exactly where to plant explosives for maximum and permanent effect.<sup>11</sup> This was corroborated by the findings of a United Nations Educational, Scientific and Cultural Organization (UNESCO) assessment mission that visited more than 40 selected sites in Kosovo in March 2003. Among the factors that account for the present sad state of the cultural heritage sites, the UNESCO mission identified the intentional destruction by dynamite, shelling, and fire:

During the period that preceded the armed conflict and during the conflict itself, but especially in the weeks and months that followed it, violent acts of intentional destruction of cultural property took place throughout Kosovo: mosques and churches were burnt and blown up with dynamite, religious and cultural symbols were destroyed or disfigured, and cemeteries desecrated.<sup>12</sup>

Following the NATO intervention in 1999, 56 historic churches, monasteries, and sacral monuments – some of them, as pointed out, dating back to the 14<sup>th</sup> and 15<sup>th</sup> centuries – have been burnt, looted, desecrated, and destroyed, as well as 52 more recently built sites.<sup>13</sup> This brings the total number destroyed, since international forces took over responsibility for Kosovo in 1999, to 140.<sup>14</sup> Aside from Serbian religious buildings being destroyed, sacred artefacts such as ancient scriptures, icons, and ornate relics have also been permanently lost, defaced, or sold on the black market.<sup>15</sup> This is how Lawrence Uzzell, the president of International Religious Freedom Watch, describes the situation: “[I]t’s as if a Palestinian state were to win control of Jerusalem and then start demolishing every architectural relic of Judaism.”<sup>16</sup>

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(2004) at 4, online: Council of Europe <<http://assembly.coe.int/Documents/WorkingDocs/doc04/EDOC10127.htm>>.

<sup>11</sup> *Ibid.*

<sup>12</sup> Mission Report UN ESCOR, “Cultural Heritage in Kosovo: Protection and Conservation of a Multi-Ethnic Heritage in Danger” (2003), online: UNESCO <[http://portal.unesco.org/en/ev.php-URL\\_ID=20022&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=20022&URL_DO=DO_TOPIC&URL_SECTION=201.html)>.

<sup>13</sup> Branko Bjelajac & Felix Corley, *supra* note 3 at 2.

<sup>14</sup> *Supra* note 9 at 1. According to Nicholas Wood & David Binder “Treasured Churches in a Cycle of Revenge” *New York Times* (3 April 2004), online: *New York Times* <<http://www.nytimes.com/2004/04/03/arts/03CHUR.html?ex=1081659600&en=f2123a6fed9a99e4&ei5062>>, “[t]he total score shows that Albanians have destroyed more medieval Christian churches in modern Europe than any other nation in the world which clearly proves that behind the ethnic hatred lies also the innate religious intolerance and attempt to uproot Christian culture in Kosovo forever”.

<sup>15</sup> Gunter, *supra* note 6. Father Sava from Dečani Monastery brings more details in that regard: “Since 1999, more than 10,000 icons and other church vessels were destroyed or stolen for the purpose of selling them on black market,” see *supra* note 10 at 3.

<sup>16</sup> Lawrence Uzzell “Kosovo’s religious tables turned” *The Christian Monitor* (20 May 2004), online: *The Christian Monitor* <<http://www.csmonitor.com/2004/0520/p09s02-coop.html>>.

In order for us to establish that the Serbian religious buildings destroyed and desecrated in Kosovo were not simple huts,<sup>17</sup> we will seek to determine in Section I whether they qualify as items of cultural property according to the sense defined by international law. After a brief review of the principal instruments applicable to the protection of cultural property during both wartime and peacetime, we will argue that the Serbian religious heritage in Kosovo falls under the category of cultural property of international value.

The second question we wish to pose in this study is whether the two international authorities in Kosovo, UNMIK and KFOR, are under any obligation to protect the Serbian religious heritage located therein. In comparison to other cases of ethnic cleansing, expulsions, and destruction of cultural property which occurred during the Balkan wars and armed conflicts in the 1990s, the events in Kosovo occurred under the UN and KFOR's eye. Since 1999, no one responsible for the destruction of 140 churches has been arrested and convicted by UNMIK, KFOR, or the mainly ethnic-Albanian KPS. Most surprising is that no one has yet been charged for organizing the violence in mid-March 2004, which included the destruction of 30 Orthodox churches.<sup>18</sup> One may get the impression that the international authorities in Kosovo assumed no responsibility to protect them.

To answer the latter question, we shall address in Section II the responsibilities incumbent upon the international administration by virtue of its mandate. The examination undertaken will lead us to the conclusion that the public authority in Kosovo is exercised by UNMIK and KFOR, preventing the territorial sovereign - the Federal Republic of Yugoslavia (FRY)/ Union of Serbia and Montenegro (USM)<sup>19</sup> - from performing any act of power and control in that province. Then, in Section III, we address two main arguments supporting the proposition whereby an international obligation to protect the Serbian-built religious heritage in Kosovo is binding upon UNMIK and KFOR : first, the territorial applicability of the FRY/USM relevant international treaties to Kosovo and, second, the application to the province of the legal regime of the law of occupation.

Taking into account the fact that Serbian religious buildings have predominantly succumbed to Albanian extremists' violence since the installation of the international presence in Kosovo, the aim of this paper is to focus on the destruction of that property only. In addition, the legal basis for NATO's military intervention in Kosovo will not be addressed beyond the issues related in this paper.

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<sup>17</sup> The expression is taken from an Interview of Massimo Cacciari, philosopher and former mayor of Venice, by Corriere della Serra in "Italy, Save the Serbian Churches in Kosovo" (25 March 2004), online: Serbian Orthodox Diocese of Raska-Prizren and Kosovo-Metohija Info-Service <<http://www.kosovo.net/node/view/50>>.

<sup>18</sup> *Supra* note 8.

<sup>19</sup> The two acronyms used in this paper, FRY and USM, are interchangeable.

## I. Does the Serbian-built religious heritage in Kosovo deserve international protection?

The common trait of the Serbian-built religious heritage destroyed in Kosovo is that it falls within the definition of religious cultural property, a category of a much broader notion of cultural property. To answer the question whether that heritage in Kosovo deserves international protection we need to determine first whether it qualifies as cultural property under international law.

### A. The definition of cultural property

The term ‘cultural property’ usually refers to objects that have artistic, ethnographic, archaeological, or historical value.<sup>20</sup> As for the legal definition of cultural property, one of the most comprehensive definitions is found in the 1954 *Hague Convention for the Protection of Cultural Property in Event of Armed Conflict*,<sup>21</sup> which also introduced the term in the legal context.<sup>22</sup> Article 1 states:

For the purposes of the present Convention, the term ‘cultural property’ shall cover, irrespective of origin or ownership:

- (a) movable or immovable property of *great importance to the cultural heritage of every people*, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

<sup>20</sup> John H. Merryman, *Thinking About Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (London: Cluwer Law International, 2000) at 27.

<sup>21</sup> 14 May 1954, 249 U.N.T.S. 240 [1954 Hague Convention]. The Convention and its First Protocol were adopted on May 14, 1954, at The Hague (Netherlands) in the wake of massive destruction of cultural heritage in the Second World War. The Second Protocol to the Convention, was adopted in March 1999, and entered into force on March 9, 2004. It reinforces the 1954 Convention and its First Protocol. Since its adoption, 109 States have become party to the 1954 Convention, 88 of them have joined the First Protocol, and 22 have joined the Second Protocol. See UNESCO Media Advisory No. 2004-38, “The Hague Convention: 50 Years of Protecting Cultural Property During Armed Conflict” (13 May 2004), online: UNESCO <[http://portal.unesco.org/en/ev.php-URL\\_ID=20434&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=20434&URL_DO=DO_TOPIC&URL_SECTION=201.html)>.

<sup>22</sup> Kifle Jote, *International Legal Protection of Cultural Heritage* (Stockholm: Jurisförlaget, 1994) at 65.

- (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centres containing monuments’.<sup>23</sup>

The definition is broad enough to cover all the property which every people considers to be of great importance to their cultural heritage, whether religious or secular.<sup>24</sup>

The preamble of the 1954 Hague Convention also stresses the rationale for the international protection of cultural property. It is based on the idea that the preservation of the cultural heritage is not only a matter for the State on whose territory the property is located but “is of great importance for all peoples of the world and that it is important that this heritage should receive international protection.”<sup>25</sup> The concern for such protection thus transcends the borders of a single State to become a matter of international importance.<sup>26</sup>

Although the 1954 Hague Convention was the first international agreement to deal solely with cultural property, it is not the only one relating to the protection of cultural property as such. There are other instruments relating to armed conflict that do not explicitly refer to cultural property but provide only the protection of its components, thereby giving some insight into its definition. They can be traced back to the *Lieber Code* of 1863 (Instructions for the Governance of the Army of the United States in the Field). This US national law instructed that the property belonging to churches, establishments of education, and museums of the fine arts shall be considered as public property and hence immune from appropriation by the victorious army (Article 34).<sup>27</sup> Afterwards, the 1874 *Brussels Declaration*, the 1880 *Oxford Manual*, and the 1907 Hague Conventions N° IV and IX carried forward the principles prohibiting, *inter alia*, bombardment or wilful damage to historic monuments, works of art, and buildings dedicated to religion.<sup>28</sup> Article 27 of the *Regulations Respecting the Laws and Customs of War on Land*, annexed to the Hague Convention of October 18, 1907 (Convention N° IV), for example, stipulates that

<sup>23</sup> *Supra* note 21 at 242 [emphasis added].

<sup>24</sup> As Roger O’Keefe, “The meaning of ‘Cultural Property’ under the 1954 Hague Convention” (1999) XLVI *Nethl. Int’l L. Rev.* 26 at 55, was saying: “[t]he term ‘cultural property’ refers to the full gamut of each high contracting party’s national cultural heritage, as defined by that party itself, and not ‘to a restricted *élite*’ of what one author has aptly dubbed ‘super’ cultural property”.

<sup>25</sup> *Supra* note 21 at 240, third preambular paragraph.

<sup>26</sup> Jiří Toman, *The Protection of Cultural Property in Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, Signed on 14 May 1954 in The Hague, and on Other Instruments of International Law Concerning Such Protection* (Paris: UNESCO Publishing, 1996) at 24.

<sup>27</sup> Pietro Verri, “The Condition of Cultural Property in Armed Conflicts: From Antiquity to World War II” (1985) 246 *Int’l Rev. Red Cross* 127-128; Michael H. Hoffman, “The Customary Law of Non-International Armed Conflict - Evidence from the United States Civil War” (1990) 277 *Int’l Rev. Red Cross* 322-324; Toman, *Ibid.* at 7.

<sup>28</sup> For an account of historical development of the rules of international law concerning the protection of cultural property, see Toman, *Ibid.* at 3.



in sieges and bombardments all necessary steps must be taken to spare, as far as possible, *buildings dedicated to religion*,<sup>29</sup> art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.<sup>30</sup>

As pointed out, none of these instruments specifically dealt with cultural property. Instead, they were more specific to the protection of human life and property in general as the protection of cultural property was merely an accessory topic. Following the suggestion of Professor Nicholas Roerich, the international interest in the 1930s turned to the preparation of a convention directed explicitly at the protection of cultural property. Adopted by the Governing Board of the Pan-American Union, the predecessor of the present Organization of the American States, the *Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments*,<sup>31</sup> generally referred to as the Roerich Pact, was signed on April 15, 1935, and entered into force on August 26, 1935. However, it has a limited scope, binding only eleven states of the Western hemisphere. Under the Pact, which applies both in times of war and in peacetime, "historic monuments, museums, scientific, artistic, educational and cultural institutions [...] must be respected and protected."<sup>32</sup> Besides that, it covers only immovable property, so movable property is protected only if it is located in the immovable property.<sup>33</sup>

It was obvious that in the wake of the massive destruction of cultural heritage in the Second World War, the awareness of the need to better protect cultural property would grow even more. As not all states were bound by the 1954 Hague Convention, the *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, which met in Geneva from 1974 to 1977, inserted an article protecting cultural property in the two Protocols added to the Geneva Conventions of August 12, 1949, relating to the protection of victims of armed conflicts. These are Article 53 of the Protocol I, applicable in situations of international armed conflicts,<sup>34</sup> and Article 16 of the

<sup>29</sup> The expression "buildings dedicated to religion" covers the buildings of all religious persuasions, both Christian and non-Christian, churches, places of worship, mosques, synagogues and so forth. It was introduced at the request of the Turkish delegate (to replace the word "churches") at the 1874 Brussels Conference (Toman, *Ibid.* at 11).

<sup>30</sup> *Regulations Respecting the Laws and Customs of War on Land*, annexed to the Convention Respecting the Laws and Customs of War on Land (Convention No. IV), The Hague, October 18 1907, reprinted in *International Law Concerning the Conduct of Hostilities: Collection of Hague Conventions and Some Other Treaties* (Geneva: International Committee of the Red Cross ("ICRC") Publications, 1989) at 25 [emphasis added]. The provisions of the Convention No. IV are still in force; the 1954 Hague Convention is referring explicitly to it in its preamble. Moreover, according to Toman, *Ibid.* at 13, the Convention No. IV is considered part of international customary law.

<sup>31</sup> CLXVII L.N.T.S. 290.

<sup>32</sup> *Ibid.* at Article I.

<sup>33</sup> Toman, *supra* note 26 at 47.

<sup>34</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 4 [the 1977 Protocol I].

Protocol II, applicable in situations of non-international armed conflicts.<sup>35</sup> Article 53 of the 1977 Protocol I, entitled “Protection of Cultural Objects and Places of Worship,” provides the following:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- (a) to commit any acts of hostility directed against the historic monuments, works of art or *places of worship which constitute the cultural or spiritual heritage of peoples*<sup>36</sup>

Article 16 of the Protocol II, with almost an identical content as Article 53 of the Protocol I, also prohibits any acts of hostility directed against cultural property and its use in support of the military effort.<sup>37</sup>

The reference in Articles 53 and 16 of the Additional Protocols to the 1954 Hague Convention makes us inquire as to whether the protection granted to property is the same in all three instruments. The property protected by the Article 1 of the 1954 Hague Convention is broadly defined to include both the historic monuments and the works of art mentioned in Articles 53 and 16.<sup>38</sup> The Protocols, however, introduce an innovation in contrast with the 1954 Hague Convention, since they also protect places of worship, not only as part of the cultural heritage, but also as a part of the spiritual heritage irrespective of their cultural importance. In fact, the Protocols’ specified articles describe heritage as “the cultural or spiritual heritage of peoples,” while Article 1 of the 1954 Hague Convention refers to property that is “of great importance to the cultural heritage.”<sup>39</sup> Referring specifically to that divergence, the Commentary on the Additional Protocols states that “[i]t does not seem that these expressions have a different meaning.”<sup>40</sup> Indeed, the meaning might be the same but the extent of the protection provided by the Protocols to the places of worship appears to go beyond that granted by the 1954 Hague Convention since the definition of the property protected by Article 1 is restricted to property of great importance only.

Other international humanitarian law instruments, such as the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia<sup>41</sup> (ICTY) and the 1998 Rome Statute of the International Criminal Court<sup>42</sup> (ICC), under which the wilful destruction of cultural property is treated as a war crime and commands universal

<sup>35</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 U.N.T.S. 610 [the 1977 Protocol II].

<sup>36</sup> *Supra* note 34 at 27 [emphasis added]. As a corollary, Article 85 of the Protocol I qualifies the breaches of these prohibitions as a war crime, *Ibid.* at 41-42.

<sup>37</sup> *Supra* note 35 at 616.

<sup>38</sup> Toman, *supra* note 26 at 387.

<sup>39</sup> The 1954 Hague Convention, *supra* note 21 at 242.

<sup>40</sup> Y. Sandoz, C. Swinarski & B. Zimmerman, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987) at para. 2064.

<sup>41</sup> UN SCOR, 48<sup>th</sup> Sess., 3217<sup>th</sup> Mtg., UN Doc. S/RES/827 (1993).

<sup>42</sup> 17 July 1998, 2187 U.N.T.S. 90.

jurisdiction,<sup>43</sup> are also relevant to the present analysis. According to Article 3(d) of the 1993 ICTY Statute, acts of “seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”<sup>44</sup> are included among violations of the laws or customs of war. The Tribunal has already had the occasion to apply this rule in a recent judgment in which both defendants, Dario Kordić and Mario Čerkez, were found guilty of a crime against cultural property due to their deliberate armed attacks on ancient mosques in Bosnia and Herzegovina.<sup>45</sup> Article 8 of the 1998 ICC Statute, paragraph 2(b)(ix), states that “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives” constitutes a war crime.<sup>46</sup>

This brief review of the principal instruments applicable to the protection of cultural property in the event of armed conflict reveals that, along with other cultural property, namely “institutions dedicated to charity and education, the arts and sciences, historic monuments and works of art and science,” the basis of protection granted to “institutions dedicated to religion” is twofold: they are protected because they are civilian in nature and because they form part of the cultural or spiritual heritage of a people.<sup>47</sup> Moreover, as the ICTY case law has established, the prohibition of destruction or wilful damage to “institutions dedicated to religion” has achieved a customary character.<sup>48</sup>

Since the provisions of the aforementioned instruments apply as a general rule during wartime,<sup>49</sup> would “institutions dedicated to religion” enjoy the same

<sup>43</sup> In view of Neeru Chadha, “Protection of Cultural Property During Armed Conflict: Recent Developments” at 8, online: ISIL Year Book of International Humanitarian and Refugee Law <<http://www.worldlii.org/int/journals/ISILYBIHRL/2001/12.html>>, under the concept of universal jurisdiction a State Party can establish its jurisdiction over a war crime on the basis of nationality, territoriality or presence of the accused in its territory.

<sup>44</sup> The full text of the ICTY Statute is available online: United Nations <<http://www.un.org/icty/legaldoc/index.htm>>.

<sup>45</sup> *Prosecutor v. Dario Kordić and Mario Čerkez* (2001), Case No. IT-95-14/2-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para. 207, online: United Nations <<http://www.un.org/icty/kordic/trialc/judgement/index/htm>>. According to the Tribunal, the destruction or wilful damage to institutions dedicated to religion “[w]hen perpetrated with requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of ‘crimes against humanity’, for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects.” Furthermore at paragraph 206, the Tribunal states that the act of destruction or wilful damage to institutions dedicated to religion “[h]as [...] already been criminalized under customary international law”.

<sup>46</sup> The 1998 ICC Statute, *supra* note 42 at 95.

<sup>47</sup> For the definition of the expression « institutions dedicated to religion », see Toman, *supra* note 26 at 47.

<sup>48</sup> *Supra* note 45. Nonetheless, the imperativeness of such a rule in the event of armed conflict is limited by the omnipotent doctrine of “military necessity”. Article 4(2) of the 1954 Hague Convention provides that the obligation to respect cultural property “may be waived [...] in cases where military necessity imperatively requires such a waiver”; *supra* note 21 at 244.

<sup>49</sup> For example, Article 18(1) of the 1954 Hague Convention stipulates that it “shall apply in the event of declared war or of any other conflict [...]”; *Ibid.* at 254.

protection during peacetime? The answer to this question is obviously contingent upon the rules and principles established by the international human rights conventions but more specifically by the international conventions for the protection of cultural property applicable during peacetime. In this regard, the *Convention for the Protection of the World Cultural and Natural Heritage*,<sup>50</sup> adopted by the UNESCO General Conference on November 16, 1972, is of particular significance.<sup>51</sup>

However, the definition of property protected by the 1972 Convention is narrower than that found in the 1954 Hague Convention since in the former only immovable property is protected. Cultural heritage is defined as monuments, groups of buildings, and sites of ‘outstanding universal value’ from the point of view of history, art, and science.<sup>52</sup> As the definition requires, to enjoy the protection of the Convention a component of the cultural heritage is to be of outstanding universal value. Nonetheless, the term ‘outstanding universal value’ is defined nowhere in the text of the 1972 Convention.<sup>53</sup> As with the concept of ‘great importance’ used in the 1954 Hague Convention, the determination of whether cultural property has outstanding universal value can be subjective, with different countries giving different significance and value to properties located in their territories.<sup>54</sup> Hence the importance of corroborating international appraisal in the determination of the outstanding universal value of cultural property.

Thus, to enjoy international protection in principle, an item of cultural property has to be either of “great importance to the cultural heritage of every people” or of “outstanding universal value from the point of view of history, art or science.” The criteria advanced are not contradictory. The idea of a general interest in the

<sup>50</sup> 16 November 1972, 1037 U.N.T.S. 152. [the 1972 Convention] It came into force on December 17, 1975. 178 states have signed the Convention as of May 1, 2004. Unlike the 1954 Hague Convention, the 1972 Convention retains in its title the term “cultural heritage”. This is mainly due to the lack of a uniform definition of the concept of cultural property in various international instruments. According to some doctrinal opinions, the difference between the two terms is that while cultural property comprises tangible movable and immovable property of cultural significance, cultural heritage “includes intangible heritage, such as crafts, folklore, and skills.” See Theresa Papademetriou, “International Aspects of Cultural Property: An Overview of Basic Instruments and Issues” (1996) 24 Int’l J. Legal Info. 270, 271-73, cited in Abtahi, *supra* note 2 at 6. In the same vein, see Toman, *supra* note 26 at 40.

<sup>51</sup> Fulfilling its constitutional mandate, which, according to Article I(2)(c) of its Constitution, 16 November 1972, 4 U.N.T.S. 276 at 278, consists in the preservation of the cultural heritage of humanity, on November 14, 1970, UNESCO adopted another instrument, the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. The Convention, which aims at protecting movable cultural property chiefly in times of peace, came into force on April 24, 1972. Its text may be found at 823 U.N.T.S. 231.

<sup>52</sup> The 1972 Convention, *supra* note 50 at 153, Article 1.

<sup>53</sup> However, para. 49 of the *Operational Guidelines for the Implementation of the World Heritage Convention* (WHC.05/2 2 February 2005), prepared and regularly revised by the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, see *infra* note 62, defines the term as follows: “Outstanding universal value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity [...]” See online: World Heritage Committee <<http://www.whc.unesco.org/en/guidelines>>.

<sup>54</sup> Jote, *supra* note 22 at 245.

safeguarding of cultural property (“the cultural heritage of all mankind”)<sup>55</sup> first established in the 1954 Hague Convention and then carried forward by other international acts and agreements, including the 1972 Convention,<sup>56</sup> allows the two criteria to correlate. Moreover, “echoing the Preamble to the 1954 Hague Convention, the Preamble to the World Heritage Convention declares that the deterioration or disappearance of any item of the cultural [...] heritage constitutes a *harmful impoverishment of the heritage of all nations of the world*.”<sup>57</sup> In other words, the underlying idea is that what is of value to one nation is of value to all nations.<sup>58</sup> It follows to determine now whether the Serbian-built religious heritage destroyed by the Albanian extremists in Kosovo qualifies as cultural property of international value.

## **B. Is the Serbian-built religious heritage in Kosovo cultural property of international value?**

The existing international legal framework on the protection of cultural property is premised on the idea that the determination of whether a cultural property has either “great importance” or “outstanding universal value” is to be first made by the country on whose territory the object is located and then by the international community which brings its support to it. According to Article 4 of the 1972 Convention, State Parties ensure “the identification, protection, conservation, presentation and transmission to future generations of the cultural heritage situated on its territory.”<sup>59</sup> International protection, according to Article 7, shall include “the establishment of a system of international cooperation and assistance designed to support State Parties in their efforts to conserve and identify their cultural heritage.”<sup>60</sup> In that sense, the value which both the Serbia and Montenegro authorities and the international community place on the Serbian religious property, destroyed or damaged by the Albanian extremists in Kosovo, would be determinative in answering the question encapsulated in the title of this section.

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<sup>55</sup> Merryman, *supra* note 20 at 78.

<sup>56</sup> The relevant provisions of the 1972 Convention’s preamble read as follows: “[...] the existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong; [...] parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole.” The 1972 Convention, *supra* note 50 at 152.

<sup>57</sup> O’Keefe, *supra* note 24 at 44 [emphasis added].

<sup>58</sup> Moreover, singling out “the institutions dedicated to religion, charity, education [...] historic monuments and works of art and science,” the ICTY case law stresses that the destruction and wilful damage done to them “represents a violation of values especially protected by the international community.” See *Prosecutor v. Miodrag Jokić* (2004), Case No. IT-01-42/I-S (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para. 46, online: United Nations <<http://www.un.org/icty/jokic/trialc/judgement/index/htm>>.

<sup>59</sup> The 1972 Convention, *supra* note 50 at 154.

<sup>60</sup> *Ibid.* at 155.

As noted in the Introduction, during the Kosovo armed conflict and in the waves of violence that followed it, the latest spree being in March 2004, many Serbian Orthodox churches and monasteries were the focus of hatred and revenge. Many of them, however, are not only places of worship but also objects of the world's cultural heritage. The opinions held by relevant interveners in the field of protection of cultural property favour such an approach.

As soon as the conflict in Kosovo broke out, the Yugoslav authorities began claiming that the attacks by Albanian terrorists were directed against the cultural treasures owned by the Serbian Orthodox Church.<sup>61</sup> Being convinced that "the valuable cultural monuments in Kosovo represent a unique cultural legacy recognized long ago as the European heritage,"<sup>62</sup> they called for assistance on the part of UNESCO and other international bodies to canalize the efforts in the protection of that heritage.

Following a request made on March 20, 2002, by the Coordination Centre of the Federal Republic of Yugoslavia and of the Republic of Serbia for Kosovo and Metohija, the Director-General of UNESCO sent an expert mission to Kosovo and Belgrade in March 2003 to evaluate the state of the monuments and propose a plan to safeguard them.<sup>63</sup> The UNESCO mission visited more than 40 selected sites in Kosovo. Upon the completion of its mandate, the mission prepared a report entitled *Cultural Heritage in Kosovo—Protection and Conservation of a Multi-Ethnic Heritage in Danger*, where they stated:

Outstanding architectural monuments built during the Middle Ages and the Ottoman period, have remained intact until today: 14<sup>th</sup> century churches and monasteries of a unique aesthetic accomplishment and mosques of great stylistic perfection, but also non-religious buildings like fortresses, urban centres and bridges, highlight the dense artistic creativity that is characteristic of the region and that now forms the impressive built cultural heritage in Kosovo. The Monastery of Dečani has been proposed for inscription on UNESCO's World Heritage List,<sup>64</sup> and the Monastery Church of Gračanica figures on the tentative list. Completely different in

<sup>61</sup> See the Document of Serbia and Montenegro Ministry of Foreign Affairs "A Plan for the Political Solution to the Situation in Kosovo and Metohija", online: Serbia and Montenegro Ministry of Foreign Affairs <[http://www.mfa.gov.yu/Facts/plan/\\_kim\\_e.html](http://www.mfa.gov.yu/Facts/plan/_kim_e.html)>.

<sup>62</sup> *Ibid.* at para. 4.1.

<sup>63</sup> See UNESCO Press Release No. 2004-27, "Kosovo: 'Beyond monuments and heritage, it is memory and cultural identity that are being destroyed' declares Director-General of UNESCO" (22 March 2004), online: UNESCO <[http://portal.unesco.org/en/ev.php-URL\\_ID=19486&URL\\_DO=DO\\_PRINTPAGE&URL=](http://portal.unesco.org/en/ev.php-URL_ID=19486&URL_DO=DO_PRINTPAGE&URL=)>. It should be mentioned that the question of preserving monasteries in Kosovo and protecting religious sites from inter-community violence and neglect was raised by the UN Secretary-General during his meeting with the Director-General of UNESCO on November 26, 2002. See the 2003 UNESCO Mission Report, *supra* note 12 at 7.

<sup>64</sup> For the purpose of effective international cooperation, the 1972 Convention in Article 8 establishes the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage (the World Heritage Committee). By virtue of Article 11, paragraph 2, the World Heritage Committee "[o]n the basis of the inventories submitted by States[,] [...] shall establish, keep up to date and publish, under the title of 'World Heritage List,' a list of properties forming part of the cultural heritage [...] having outstanding universal value [...]" *Supra* note 50 at 155.

style, these monuments with their refined frescoes date back to the early 14<sup>th</sup> century and are universally recognized as outstanding examples of medieval religious architecture in Europe, just as the Monastery of Peć, which is also the seat of the Serbian Orthodox Patriarchs. Historians and scholars consider these sites, along with hundreds of others, as belonging to the cradle of Serbian Culture, and for many Serbs they represent the very heart of Serbian spiritual and national identity.<sup>65</sup>

The Dečany Monastery was finally inscribed on UNESCO's World Heritage List of Properties having outstanding universal value during the 28<sup>th</sup> session of the World Heritage Committee held in Suzhou, China, between June 28 and July 7, 2004.<sup>66</sup>

However, the fact that Serbian cultural properties in Kosovo, other than the Dečany Monastery, are not inscribed on the World Heritage List does not affect their inestimable artistic value. It is relevant to note that Article 12 of the 1972 Convention, states that:

The fact that a property belonging to the cultural or natural heritage has not been included in either of the [World Heritage List or the list of the World Heritage in Danger] shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists.<sup>67</sup>

Jean-Marie Guéhenno, the UN Under-Secretary-General for Peacekeeping Operations, condemning the onslaught led by Kosovo Albanian extremists against the minority Serbs, Roma and Ashkali, as well as the destruction or damaging of Serbian Orthodox churches, monasteries, and religious and cultural sites that took place in mid-March 2004, told the Security Council on April 13, 2004, that the attacks had not been simply against places of worship, but against *Kosovo's cultural heritage*.<sup>68</sup>

The main executive body of the Council of Europe, the Committee of Ministers, addressing the same issue on March 25, 2004, strongly condemned the recent acts of ethnically-motivated violence which seriously affected a large number of people in Kosovo, including "attacks on property and the destruction of cultural

<sup>65</sup> The 2003 UNESCO Mission Report, *supra* note 12 at 5.

<sup>66</sup> UNESCO Press Release No. 2004-61, "Iran's Ancient City of Bam among the 34 New Sites Inscribed on World Heritage List" (2 July 2004), online: UNESCO <[http://portal.unesco.org/en/ev.php-URL\\_ID=21566&URL\\_DO=DO\\_PRINTPAGE&URL](http://portal.unesco.org/en/ev.php-URL_ID=21566&URL_DO=DO_PRINTPAGE&URL)>. Though the listing of a property on the World Heritage List indicates its genuine outstanding value, this mere fact cannot be a guarantee against any destruction or damage. In reality it proves to be very symbolic. For instance, the Old City of Dubrovnik in Croatia, destroyed in 1990, was included in the World Heritage List in 1979. See on that account Jote, *supra* note 22 at 252.

<sup>67</sup> The 1972 Convention, *supra* note 50 at 156 [emphasis added].

<sup>68</sup> UN Security Council Press Release, SC/8056, "March Violence in Kosovo 'Huge Setback' to Stabilization, Reconciliation, Under-Secretary-General for Peacekeeping Tells Security Council" (13 April 2004), online: UN <<http://www.un.org/News/Press/docs/2004/sc8056.doc.htm>> [emphasis added].

and religious monuments *which are part of the common heritage of all Europeans*.<sup>69</sup> Another main body of the Council of Europe, the Parliamentary Assembly, also investigated the matter of the protection of the cultural heritage in Kosovo. At the request of Serbia and Montenegro's representative who expressed concern about the destruction of the cultural and historic Christian Orthodox heritage in the region of Kosovo and Metohija under the presence of the UN and KFOR, the Parliamentary Assembly's Committee on Culture, Science, and Education conducted a study-visit to Kosovo in October 2003. Among the religious buildings singled out as monuments of immense heritage value in Kosovo, in the information report completed by that mission, were the monasteries of Dečani, Gračanica, and Prizren.<sup>70</sup>

Despite their value, these cultural treasures were not spared during the March 2004 unrest in the territory of Kosovo. Although attacked by mortar fire, the splendid Dečani Monastery was saved by the Italian KFOR troops. A different fate awaited Prizren, where many medieval buildings forming the jewel of the short-lived Serbian empire of the 14<sup>th</sup> century suffered the worst damage (see *supra* in Introduction).<sup>71</sup> In all, as previously mentioned, on March 17 and 18 alone, around 30 churches and monasteries were demolished and damaged – 16 of them being items of cultural heritage.<sup>72</sup> The latest wave of destruction exceeded the post-war wave in 1999, as two of the six monuments of universal value, as defined by the 2003 UNESCO Report on Kosovo, were devastated: the Monastery of the Holy Archangels, with its tomb of King Dusan, and the Church of Bogorodica Ljeviska.<sup>73</sup>

The invaluable artistic quality of the religious property destroyed in Kosovo has been stressed at the non-governmental level as well. Several authoritative individuals and organizations underscored the real artistic value of Kosovo's churches and monasteries. According to a recent New York Times report, "Kosovo is the cradle of Serbia's national identity, the Serbian Orthodox equivalent of the Vatican. Its churches, many founded by medieval kings, are symbols of a long-standing claim to the province that is still formally a part of Serbia and Montenegro."<sup>74</sup> Massimo Cacciari, philosopher and former mayor of Venice, while reminding us of the magnificent churches and monasteries such as Dečani, Peć, Prizren, Vitina, and Uroševac, stressed:

There is a lot of talk in Europe about its roots but without knowledge of culture. *In Kosovo there are exceptional artistic values of importance for European reality.* The destruction of one building containing a cycle of frescoes is equivalent to the massacre of St. Mark, St. Vitale or St.

<sup>69</sup> Council of Europe, C.M., Press Release 151a, "Declaration of the Committee of Ministers of the Council of Europe on recent events in Kosovo" (2004), online: Council of Europe <[http://press.coe.int/cp/2004/151a\(2004\).htm](http://press.coe.int/cp/2004/151a(2004).htm)>.

<sup>70</sup> *Supra* note 10 at 8 [emphasis added].

<sup>71</sup> Wood & Binder, *supra* note 14 at 2. According to these authors, in 2002, the old town of Prizren was listed on the World Monuments Fund's list of the world's most endangered sites.

<sup>72</sup> Without providing the rationale qualifying them as items of cultural property, this particular figure is specified at para. 4.4 of the Serbia and Montenegro Ministry of Foreign Affairs Document titled "A Plan for the Political Solution to the Situation in Kosovo and Metohija," *supra* note 61.

<sup>73</sup> *Ibid.*

<sup>74</sup> Wood & Binder, *supra* note 14 at 1.



Apollinaire in Ravenna. It is the same early Christian region under the influence of Byzantium.<sup>75</sup>

In the same vein, Lawrence Uzzell, the president of International Religious Freedom Watch, acknowledged that “some of these churches had been places of Christian worship since the 14<sup>th</sup> century, *jewels of medieval architecture treasured by art historians worldwide*. Today they are ashen ruins.”<sup>76</sup> The outstanding value of cultural heritage in Kosovo is also recognized by a Sweden non-governmental organization, Cultural Heritage Without Borders (CHWB), which expressed its “condemnation of [...] *destruction of cultural heritage of great importance*”<sup>77</sup> in a resolution adopted on March 19, 2004, over the violent developments then taking place in Kosovo.

The foregoing testimony makes it clear that the Serbian religious buildings of historical and medieval character, either destroyed or damaged in Kosovo, were undoubtedly of great importance to the cultural heritage of peoples. As such, irrespective of whether they meet the “outstanding universal value” standard set forth in Article 1 of the 1972 Convention, this cultural heritage representing “architectural works, buildings and paintings of generally recognized historical and spiritual value” should fall within the concept of cultural property relevant to both the 1954 Hague Convention and the 1972 Convention, thus triggering international protection.<sup>78</sup>

## II. International administration in Kosovo

Kosovo is an integral part of the State Union of Serbia and Montenegro, the state that replaced the former FRY.<sup>79</sup> The new Constitution adopted on February 4, 2003, provides in its preamble that “the state of Serbia which includes the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija, the latter currently under international administration in accordance with UN SC resolution 1244.”<sup>80</sup> Resolution 1244, adopted by the Security Council on June 10, 1999, only one day after the end of NATO military action against the FRY, envisaging the withdrawal from Kosovo of all its military and police forces,

<sup>75</sup> *Supra* note 17 at 1 [emphasis added].

<sup>76</sup> Lawrence Uzzell, *supra* note 16 at 1 [emphasis added].

<sup>77</sup> The text of the resolution is available online: CHWB <<http://www.chwb.org>> [emphasis added].

<sup>78</sup> Since our discussion is focused chiefly on “institutions dedicated to religion,” one should not escape from his or her view that the protection afforded to them in international law goes beyond the conventional framework outlined herein to reach the protection of customary law. It was held expressly that “[i]nstitutions dedicated to religion are protected [...] under customary international law” in *Prosecutor v. Radoslav Bardjanin* (2004), Case No. IT-99-36-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para. 595, online: United Nations <<http://www.un.org/icty/bardjanin/trialc/judgement/index/htm>>.

<sup>79</sup> Articles 14, 59 and 60 of the new Constitution imply the continuation in the Union of Serbia and Montenegro of the international legal personality of the FRY. The Constitutional Charter of Serbia and Montenegro is available online: Serbia and Montenegro Ministry of Foreign Affairs <<http://www.mfa.gov.yu/YugFrameset.htm>>.

<sup>80</sup> *Ibid.*

reaffirmed the commitment of all UN Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia.<sup>81</sup> Based on the authority of Chapter VII of the UN Charter,<sup>82</sup> the Security Council decided on the deployment into Kosovo of international civil and security presence under UN auspices.<sup>83</sup> UNMIK, the ‘international civil presence’, was to be established by the “Secretary-General, with the assistance of relevant international organizations,”<sup>84</sup> while KFOR, the ‘international security presence’, was to be established by “Member States and relevant international organizations.”<sup>85</sup> The finality of the international administration put in place for Kosovo was to replace the FRY authorities in the territory and assume full interim administrative responsibility.<sup>86</sup> The legal category which best encapsulates this regime would be to call Kosovo an international territory.<sup>87</sup>

Since the present Serbia and Montenegro authorities are excluded from any administrative role in Kosovo as per Resolution 1244, the question is what are the rights and obligations of the international administration in relation to the territory.

## A. UNMIK

The ‘civil presence’ of UNMIK was mandated by the UN Security Council to:

[P]rovide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.<sup>88</sup>

<sup>81</sup> *Supra* note 7 at the 11<sup>th</sup> preambular paragraph.

<sup>82</sup> *Ibid.* at the final preambular paragraph.

<sup>83</sup> *Ibid.* at para. 5.

<sup>84</sup> *Ibid.* at para. 10.

<sup>85</sup> *Ibid.* at para. 7.

<sup>86</sup> Alexandros Yannis, “The Concept of Suspended Sovereignty in International Law and its Implications in International Politics” (2002) 13 E.J.I.L. 1036 at 1047. Assuming “full interim administrative responsibility” would mean a territorial arrangement where international organizations would exercise full or partial jurisdiction of legislative, executive or judicial functions. See Meir Ydit, *Internationalized Territories from the “Free City of Cracow” to the “Free City of Berlin”*; *A Study in the Historical Development of a Modern Notion in International Law and International Relations (1815-1860)* (Leyden: A.W. Sythoff, 1961); Ralph Wilde, “From Danzing to East Timor: The Role of International Territorial Administration” (2001) 95 A.J.I.L. 583, cited in Enrico Milano, “Security Council Action in the Balkans: Reviewing the Legality of Kosovo’s Territorial Status” (2003) 14 E.J.I.L. 999 at 1003.

<sup>87</sup> The term is retained by Malcolm N. Shaw, *International Law*, 5<sup>th</sup> ed. (Cambridge: Cambridge University Press, 2003) at 207. Though he calls it “internationalized territory”, the notion is also preferred by Matthies Ruffert for its political and historical neutrality in “The Administration of Kosovo and East-Timor by the International Community” (2001) 50 I.C.L.Q. 629. On that account, see also Milano, *Ibid.* at 1003. Among several historical precedents of internationalized territories that come to mind are the Free City of Danzing, the Free Territory of Trieste or other more contemporary arrangements such as Bosnia and Herzegovina and East Timor.

<sup>88</sup> Resolution 1244, *supra* note 7 at para. 10.

Among its responsibilities can be listed:

promoting the establishment [...] of substantial autonomy and self-government in Kosovo [...]; performing basic civilian administrative functions [...]; organizing and overseeing the development of provisional institutions for democratic and autonomous self-government [...]; in a final stage, overseeing the transfer from Kosovo's provisional institutions to institutions established under a political settlement; maintaining civil law and order [...]; protecting and promoting human rights [...].<sup>89</sup>

Resolution 1244 also envisaged the appointment of a Special Representative of the UN Secretary-General (SRSG) to administer Kosovo. The first regulation adopted by the SRSG on July 25, 1999, vested all legislative and executive authority in the territory in UNMIK as exercised by the Special Representative.<sup>90</sup> The powers of the international administration and the SRSG were additionally specified in the *Constitutional Framework for Provisional Self-Government* promulgated by the Special Representative in May 2001.<sup>91</sup> These two instruments provide that the SRSG is the supreme authority in Kosovo and that all of Kosovo's institutions are subject to these powers.<sup>92</sup> Both the Special Representative and UNMIK are subsidiary organs of the Security Council or of the UN as a whole.<sup>93</sup>

The tasks entrusted to the international administration in Kosovo are not carried out by the UN alone. According to their special capacities and general objectives, several administrative tasks are attributed to other international organizations such as the European Union (EU), the Organization for Security and Co-operation in Europe (OSCE), and many members of the 'UN family'.<sup>94</sup>

The first regulation also established that the law applicable to the territory was the law in place prior to March 24, 1999,<sup>95</sup> insofar as it did not conflict with

<sup>89</sup> *Ibid.* at para. 11.

<sup>90</sup> UNMIK, Regulation 1999/1 of 25 July 1999, "On the Authority of the Interim Administration in Kosovo", Section 1, Article 1. This was backdated to the date of the adoption of resolution 1244. Note: Regulation 1999/1 was amended by UNMIK, Regulation 1999/25 of 12 December 1999 and by UNMIK, Regulation 2000/54 of 27 September 2000. They are available online: UNMIK <<http://www.unmikonline.org/>>.

<sup>91</sup> UNMIK, Regulation 2001/9 of 15 May 2001 online: <<http://www.unmikonline.org/>>.

<sup>92</sup> Milano, *supra* note 86 at 1005.

<sup>93</sup> Michael Bothe & Thilo Marauhn, "UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration" in Tomuschat, *supra* note 6 at 217 to 228.

<sup>94</sup> Ruffert, *supra* note 87 at 619.

<sup>95</sup> This is the date when NATO started its aerial bombing campaign against FRY. The campaign continued until June 9, 1999, when the FRY were imposed at Kumanovo the withdrawal of any security presence from Kosovo and the deployment of a NATO-led force. The acronym of NATO, however, does not appear anywhere in the Kumanovo Military Technical Agreement's text. The parties to it are the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia. This Agreement was endorsed by the Resolution 1244, *supra* note 7 at Annex 2, para. 10. For the text of the Agreement, see 9 June 1999, 38 I.L.M. 1217.

international standards referred to in Section 2 of the regulation, the fulfilment of the mandate given to UNMIK under Resolution 1244, or any other regulation issued by UNMIK.<sup>96</sup> Aside from the municipal law, which continued to be valid, UNMIK, via various ‘Regulations’, has developed a comprehensive body of law in areas such as economic and taxation law, criminal law, and court procedure.<sup>97</sup> These two sources of Kosovo’s legal order, the UN legislation and the pre-1999 municipal law provisions, complement each other.<sup>98</sup> The applicable law is thus a mixture of the old (municipal) and the new (UN) law.<sup>99</sup>

Concerning the relationship between the territorial sovereign, USM, and the international administration, a UNMIK-FRY Common Document was passed in November 2001 between Hans Haekkerup, the then SPSG for Kosovo, and Nebojsa Cović, Special Representative of the President of the FRY.<sup>100</sup> This document reiterates the acceptance of Resolution 1244’s basic principles, addressing areas of cooperation between the FRY and UNMIK in the field of Kosovo’s civil administration. Under the parties’ specific areas of engagement and common interests also figures the protection of cultural sites and property in Kosovo. In particular, the 2001 Document “confirms the will to apply the relevant provisions of the Hague Convention (1954) regarding the protection of cultural sites and property in Kosovo.”<sup>101</sup> The implementation of that provision was due to take the form prescribed by Resolution 1244, stating in its Annex 2, paragraph 6,<sup>102</sup> that after the withdrawal of Yugoslav security forces from Kosovo an agreed number of Yugoslav and Serbian personnel will be permitted to return to maintain a presence at Serb patrimonial sites. Security considerations ruled out the possibility of any return of FRY/USM personnel to perform such a task as well as other functions within its mandate.<sup>103</sup> However, this did not relieve UNMIK, which has effective control over the territory of Kosovo, from assuming its share of responsibility with respect to Serbian cultural heritage in the province and the implementation of the afore-mentioned provision.

## B. KFOR

In Kosovo, as pointed out, the ‘security presence’, unlike the ‘civil presence’, is not established by the UN Secretary-General, but by UN Member States and relevant international organizations. Annex 2 of Resolution 1244 refers to an “international security presence with substantial North Atlantic Treaty Organization

<sup>96</sup> UNMIK, Regulation 1999/1, Section 3, online: <<http://www.unmikonline.org/>>.

<sup>97</sup> They are numbered UNMIK/year/number.

<sup>98</sup> Ruffert, *supra* note 87 at 623.

<sup>99</sup> Bothe & Marauhn, *supra* note 93 at 229.

<sup>100</sup> UNMIK-FRY Common Document, 5 November 2001. The text of the document is available online: Serbia and Montenegro Ministry of Foreign Affairs online: <<http://www.mfa.gov.yu/Foreinframe.htm>> [the 2001 Document].

<sup>101</sup> *Ibid.*

<sup>102</sup> *Supra* note 7.

<sup>103</sup> Yannis, *supra* note 86 at 1047.

participation.”<sup>104</sup> In reality, however, the international security force, KFOR,<sup>105</sup> has been placed under ultimate and exclusive NATO authority.<sup>106</sup>

KFOR only has limited, well-defined military tasks such as

detering renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal [...] of Federal and Republic forces [...]; demilitarizing the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups [...]; establishing a secure environment [...]; ensuring public safety and order until the international civil presence can take responsibility for this task; supporting, as appropriate, and coordinating closely with the work of the international civil presence [...].<sup>107</sup>

This latter task especially points out the fact that the relationship between UNMIK and KFOR is characterized by co-operation and not subordination. Moreover, according to Resolution 1244, the SRSG is “[t]o coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in mutually supportive manner.”<sup>108</sup>

Turning now to the relationship between USM and KFOR, following the acceptance by the FRY authorities of the *Military Technical Agreement* (MTA) on June 9, 1999, they have not formalised any further accord. However, Article 3 of the MTA Annex B provided for the conclusion of a *Status of Forces Agreement* (SOFA) within a short period of time.<sup>109</sup> This provision has yet to be fulfilled. Rather, it has been superseded by the UNMIK-KFOR common document of August 17, 2000, and by UNMIK Regulation 2000/47 of 18 August 2000, which have spelled out the immunities enjoyed by KFOR personnel in Kosovo.<sup>110</sup>

In light of the foregoing and by the virtue of Resolution 1244, the links that bind Kosovo to the USM are modified to the extent of excluding USM’s authorities from exercising power and control over Kosovo. Although the mandate of international administration in respect of Kosovo is carried out by many actors, the responsibilities assumed by both UN and NATO allow us to state that Kosovo is under the joint administration of these two international organizations. Together these two entities are effectively authorized and mandated to exercise all public authority in Kosovo.<sup>111</sup>

<sup>104</sup> *Supra* note 7 at Annex 2, para. 4.

<sup>105</sup> See M. Guillaume, G. Marhic & G. Etienne, “Le cadre juridique de l’action de la KFOR au Kosovo” (1999) 45 A.F.D.I. 308.

<sup>106</sup> According to the KFOR official site (<<http://www.nato.int/kfor/kfor/nations/default.htm>>), the “security force” is made up of more than 30 nations, but it is composed primarily of NATO forces.

<sup>107</sup> *Supra* note 7 at para. 9.

<sup>108</sup> *Ibid.* at para. 6.

<sup>109</sup> *Supra* note 95.

<sup>110</sup> It is interesting to note that the MTA is not recalled anywhere in UNMIK Regulation 2000/47 of August 18, 2000.

<sup>111</sup> John Cerone, “Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo” (2001) 12 E.J.I.L. 469 at 472.

### III. Are UNMIK and KFOR under any obligation to protect Serbian built religious heritage in Kosovo?

Since the territory of Kosovo is placed under an international administration in accordance with Resolution 1244, the question is whether UNMIK and KFOR, which have assumed public authority in the province and thus have substituted the territorial State, are under any obligation to ensure the protection of Serbian-built religious heritage located therein. This obligation is stipulated in the same Article 4 of both the 1954 Hague Convention and the 1972 Convention.

There are two main arguments supporting the proposition that the provisions of the specified international instruments are still in force in Kosovo and thus continue to govern the conduct of both UNMIK and KFOR: by virtue of the continuing application of USM international treaties, the territory of Kosovo is within the range of the territorial applicability of these treaties and that the obligations deriving from the 1954 Hague Convention would be incumbent upon UNMIK and KFOR, thus applying to the territory of Kosovo the legal regime of the law of occupation.<sup>112</sup>

#### A. The USM international obligations

As noted above, the newly-emerged USM is the continuation of the legal personality of the former FRY. This would mean that all the international obligations of the 'old' state, FRY, continue to bind the 'new' state, USM.<sup>113</sup> The 1954 Hague Convention and the 1972 Convention, to which the FRY was a state party,<sup>114</sup> therefore continue to apply to the USM. Since Kosovo *de jure* constitutes a part of that state, it is quite clear that international obligations binding the USM, including these two instruments, continue to apply in the territory of Kosovo as well.

<sup>112</sup> Normative support for an obligation to ensure the protection of religious cultural heritage may be gathered from the human rights law incorporated in the mandate of the international administration in Kosovo; see Resolution 1244, *supra* note 7 at para. 11(j). Since such an argument would enlarge a lot of the limited scope of the present paper, we are compelled to leave it aside.

<sup>113</sup> To the operation in question, the rule of automatic succession provided for by Article 34(a) of the 1978 Vienna Convention on Succession of States in Respect of Treaties was applicable: "[a]ny treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed." For the text of the Convention, see 23 August 1978, 1946 U.N.T.S. 3, 17 I.L.M. 1488. In spite of the fact that few States are parties to the 1978 Vienna Convention, its provisions are deemed to be declaratory of customary international law; see *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. (Vol. 7) at para. 123, cited in Cerone, *supra* note 111 at 474.

<sup>114</sup> By virtue of the same rules on State succession it inherited them from the previously defunct SFRY. The latter ratified the 1954 Hague Convention and its First Protocol on February 13, 1956, and the 1972 Convention on May 26, 1975. With regard to the 1954 Hague Convention, the FRY became a State party to it by means of a notification of succession made on September 11, 2001. In addition, the FRY notified the UNESCO Director-General on April 27, 1992 that it would strictly abide by all the international obligations, which the SFRY had assumed in the past. See Toman, *supra* note 26 at 450, 452, 490.

With the installation of an international administration in Kosovo in June 1999, the situation did not change very much. While technically continuing to be binding upon the USM authorities, the obligation to ensure the protection of cultural heritage in Kosovo, which by nature is attached to the territory, is opposable to UNMIK and KFOR. In accordance with Resolution 1244, these two entities assume full interim administrative responsibility in the region to the virtual exclusion of the USM authorities.

It follows that for the entire period of time following June 1999, Serbian cultural heritage in Kosovo was under the joint authority of the UN and NATO. Accordingly, the obligation to ensure the protection of Serbian built religious heritage in Kosovo was incumbent primarily upon them. Article 4 of the 1972 Convention leaves no doubt in that regard: “the duty of ensuring the [...] protection, conservation, preservation and transmission to future generations of the cultural [...] heritage [...] situated on [the] territory [of each State Party to this Convention], *belongs primarily to that State*.”<sup>115</sup>

Turning to the 1954 Hague Convention, things seem more delicate. Undoubtedly, the treaty was binding for the FRY and is therefore binding upon the new USM. In response to the request of Nebojsa Cović, President of the Coordination Centre of the FRY and the Republic of Serbia for Kosovo and Metohija,<sup>116</sup> to dispatch a mission having the mandate to evaluate the state of monuments in Kosovo, the Director-General of UNESCO, by letter of May 13, 2002, replied: “UNESCO welcomes your country’s commitment to the Hague Convention of 1954, all of whose provisions apply to the whole territory of the Federal Republic of Yugoslavia, including Kosovo.”<sup>117</sup> Prior to that, the 2001 Document signed by Mr. Cović jointly with the SRSG, stressed “the will to apply the relevant provisions of the Hague Convention (1954) regarding the protection of cultural sites and property in Kosovo.”<sup>118</sup> Furthermore, the Director-General of UNESCO on March 22, 2004, while strongly condemning the attacks against rich cultural and religious heritage that took place during those days in Kosovo, reiterated the necessity of enforcing international normative instruments, especially the Hague Convention of 1954 and its two Protocols.<sup>119</sup>

Unlike the 1972 Convention, which is specifically aimed at the protection of cultural heritage in peacetime, the 1954 Hague Convention relates to times of war. Whatever the level of hostilities in Kosovo prior to March 1999, it is clear that from the inception of the NATO air campaign an international armed conflict existed, therefore triggering the application of humanitarian law,<sup>120</sup> the body of which the 1954 Hague Convention pertains to. The issue that arises is whether the 1954 Hague

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<sup>115</sup> *Supra* note 50 at 154 [emphasis added].

<sup>116</sup> It was renamed afterwards the Coordination Centre of Serbia and Montenegro and of the Republic of Serbia for Kosovo and Metohija.

<sup>117</sup> The 2003 UNESCO Report, *supra* note 12 at 7.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Supra* note 63.

<sup>120</sup> Cerone, *supra* note 111 at 482.

Convention continued to apply following the withdrawal of Yugoslav military forces from Kosovo in June 1999. The most plausible way to consider this point, as the instrument itself hints, is to inquire whether Kosovo can be deemed an occupied territory.

## **B. Kosovo as occupied territory**

Undoubtedly during the armed conflict in Kosovo, the 1954 Hague Convention was applicable among its contracting parties since Article 18(1) states that it is applied “[i]n the event of declared war or of any other armed conflict between two or more of the High Contracting Parties, even if one of the parties in conflict does not recognize the state of war.”<sup>121</sup> The armed hostilities ended and the situation thus changed from conflict to peacekeeping.<sup>122</sup> Would then UNMIK and KFOR qualify as occupying forces and thus be compelled to apply the 1954 Hague Convention Article 18(2) of the Hague Convention clearly states that it “shall apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the occupation meets with no armed resistance.”<sup>123</sup>

### **1. THE APPLICATION OF THE LAW OF OCCUPATION TO UNMIK OPERATIONS IN KOSOVO**

The easiest answer to the question above would be that neither UNMIK nor KFOR are parties to the 1954 Hague Convention and thereby are not bound to comply with its provisions. Such an argument, however, cannot be supported since legal entities deriving their authority from a particular body of law cannot themselves be construed as being above the law that created them. This is particularly true in public international law as international institutions deriving their authority from public international law remain accountable under international law.<sup>124</sup> Both UNMIK and KFOR have been established under existing international law. Thus, the legal framework for UNMIK’s conduct would reflect its status as a UN organ so that it would be subject to the law governing the UN as a whole. It must therefore respect the rules of international law, in particular customary rules and those of the UN Charter.<sup>125</sup> What about humanitarian law and, more precisely, the laws of occupation? Do their rules apply to the operations carried out by UNMIK in Kosovo?

Ever since the UN Security Council decided to send armed forces into a troubled area, the question has remained open as to whether such peace-keeping or peace enforcement contingents are required to comply with international

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<sup>121</sup> *Supra* note 21 at 254.

<sup>122</sup> According to Shaw, *supra* note 87 at 1108, “peacekeeping [essentially] involves the deployment of armed forces under UN control to contain and resolve military conflicts”.

<sup>123</sup> *Supra* note 21 at 254.

<sup>124</sup> Bothe & Marauhn, *supra* note 93 at 237.

<sup>125</sup> *Ibid.*



humanitarian law.<sup>126</sup> In Resolution 1244, the Security Council did not decide whether the international presence in Kosovo was to ensure the application of either the law of occupation or of the 1954 Hague Convention by the civilian and military personnel involved therein.

Before determining whether the regime of the laws of occupation applies, it is necessary to consider what the term 'occupation' implies. The core of these laws can be found in the *Hague Regulations*, annexed to Convention N° IV of 1907, the IV Geneva Convention of 1949 relative to the protection of civilian persons in time of war, and the 1977 Protocol I additional to the 1949 Geneva Conventions, applicable in international armed conflicts. Article 42 of the *Hague Regulations* initially provided the definition of 'occupation' as follows: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."<sup>127</sup> Afterwards the concept was widened by the adoption of the IV Geneva Convention of 1949, which stipulates in Article 2(2) that its provisions "also apply to all cases of partial or total occupation of the territory of a High Contracting Party even if the said occupation meets with no armed resistance."<sup>128</sup> The same formula, as shown above, was adopted in the 1954 Hague Convention.<sup>129</sup>

Evoking the definition of occupation, Eyal Benvenisti believes that it consists in "[t]he effective control of power (be it one or more states or an international organisation, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory."<sup>130</sup> In the same vein, Adam Roberts envisages the application of the law of occupation even in situation of peaceful occupation by the UN.<sup>131</sup> There are, however, other authors who maintain the opposite. Daphna Shrager asserts that "whereas the essence of an occupant-occupied relationship is that of conflict of interest, that which characterizes a United Nations 'administration' of a territory is cooperation between the force and the local population."<sup>132</sup>

In other words, what would distinguish a UN administration of a territory is the fact that it implies the consent of the territorial sovereign to be displaced from the exercise of public authority over its territory in favour of the UN. Thereby, without any conflict of interest, there will be no occupation. This assertion would be valid in the case of Kosovo as well since the FRY authorities did consent to the international

<sup>126</sup> Michael H. Hoffman, "Peace-enforcement actions and humanitarian law: Emerging rules for 'interventional armed conflict'" (2000) 837 *Int'l Rev. Red Cross* 193-204, online: ICRC <<http://www.icrc.org/>>.

<sup>127</sup> *Supra* note 30 at 28.

<sup>128</sup> *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 at 288.

<sup>129</sup> *Supra* note 21.

<sup>130</sup> Eyal Benvenisti, *The International Law of Occupation* (Princeton: Princeton University Press, 1993) at 355.

<sup>131</sup> Adam Roberts, "What is a Military Occupation?" (1984) 55 *Brit. Y.B. Int'l L.* 289-291.

<sup>132</sup> Daphna Shrager, "The UN as an actor bound by international humanitarian law" in Luigi Condorelli et al., eds., *Les Nations Unies et le droit international humanitaire*, Actes du Colloque international à l'occasion du 50e anniversaire de l'ONU (Paris: Pedone, 1996) at 328.

presence on its territory. Nonetheless, the military pressure by the NATO countries reduced the element of consent to a great extent.<sup>133</sup> In fact, Yugoslav acquiescence was obtained as a result of the NATO aerial bombardment on June 3, 1999, when an *Agreement on Political Principles* (ratified at the same date by the Serbian Assembly) among the FRY, the EU, and Russian envoys passed.<sup>134</sup> The aerial campaign continued until June 9 of 1999, the day the Agreement of June 3, 1999, was endorsed by the MTA,<sup>135</sup> which had been concluded among KFOR and the Governments of Yugoslavia and the Republic of Serbia. These being the circumstances of the FRY acquiescence in the establishment of an international administration in Kosovo, at least regarding its military branch, and in light of the principles established by the 1969 Vienna Convention on the Law of Treaties,<sup>136</sup> some authors have questioned whether the Yugoslav consent was truly obtained.<sup>137</sup>

In light of the foregoing, namely, of the way the Yugoslav consent was extorted, the taking of Kosovo would not depart very much from an occupation. Indeed, there will be an occupation “[d]ès lors qu’une armée étrangère contrôle un territoire de manière effective et que cette présence n’est pas approuvée par les autorités disposant de la souveraineté sur ce territoire.”<sup>138</sup> The story though does not stop here; another element adding to the puzzle was the passage by the UN Security Council of Resolution 1244, which not only endorsed the MTA<sup>139</sup> but also entrusted UNMIK with a large mandate over the territory of Kosovo. Although Resolution 1244 does not specify whether the laws of occupation are applicable to UNMIK and KFOR, some of the responsibilities entrusted clearly point to this conclusion. While an occupying power is entitled to ensure the maintenance of public order and safety in an occupied territory,<sup>140</sup> UNMIK exists to maintain civil law and order in Kosovo, while KFOR’s mandate is to ensure public safety and order.<sup>141</sup> According to the laws of occupation, there is a prohibition on the introduction of institutional or legislative changes in an occupied territory.<sup>142</sup> At an expert’s meeting on the application of international humanitarian law to UN-mandated forces, organised by the ICRC on December 11 and 12, 2003, the participants underlined the difficulty of reconciling certain provisions of the laws of occupation, namely the prohibition just stressed, with

<sup>133</sup> Bothe & Marauhn, *supra* note 93 at 233; Ruffert, *supra* note 87 at 616; Milano, *supra* note 86 at 1008.

<sup>134</sup> Milano, *Ibid.* at 1003.

<sup>135</sup> In accordance with para. 4(a), the MTA dealt with the procedures and modalities of the FRY forces withdrawal from Kosovo for the purpose of “establish[ing] a durable cessation of hostilities.” See *supra* note 95.

<sup>136</sup> Article 52 of that instrument provides: “[A] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.” For the text of the Convention, see 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

<sup>137</sup> See Cerone, *supra* note 111 at 484, and Milano, *supra* note 86 at 1007.

<sup>138</sup> Sylvain Vité, “L’applicabilité du droit international de l’occupation militaire aux activités des organisations internationales” (2004) 853 Int’l Rev. Red Cross 14.

<sup>139</sup> The Agreement is recalled in Annex 2, para. 10. Endorsing an invalid agreement under Article 52 of the 1969 Vienna Convention on the Law of Treaties, in view of Milano, *supra* note 86 at 1018, would claim the illegality of parts of Resolution 1244, recalling and endorsing the MTA.

<sup>140</sup> The 1907 Hague Regulations, Article 43, *supra* note 30 at 28.

<sup>141</sup> Resolution 1244, *supra* note 7 at paras. 11(i) and 9(d).

<sup>142</sup> The 1907 Hague Regulations, *supra* note 30 at Article 43, and the IV Geneva Convention of 1949, *supra* note 128 at Article 64.

the particular nature of UN-mandated operations that are in control of a given territory.<sup>143</sup> The example of UNMIK clearly provides an illustration to that effect. Acting on the authority of Resolution 1244 the SRSG vested all legislative and executive authority in the territory of Kosovo to itself,<sup>144</sup> bringing about a serious transformation of the law in the province.<sup>145</sup> With regard to that power, the rights given to the UNMIK undoubtedly go beyond any occupier's mandate within the meaning of the laws of occupation.<sup>146</sup> However, that fact does not prove that the laws of occupation are not applicable to UN-mandated forces. Rather, "[l]e régime des administrations civiles internationales transitoires, tout en étant sui generis, s'inscrit [...] dans le prolongement du droit de l'occupation et en constitue, en quelque sorte, une adaptation."<sup>147</sup> In order to avoid misinterpretations, it would be preferable for the Security Council to impose "[l]ui-même l'application du droit de l'occupation [en adoptant sa résolution créant un régime transitoire]."<sup>148</sup> In addition, since the provisions of the UN Charter from which the Security Council derives its authority to administer a territory of a sovereign state are not well established, to base them in that part of international humanitarian law regulating the powers and duties of occupation forces would be very reliable.<sup>149</sup>

On the other hand, the UN Secretary-General did not shy away from the difficulty of addressing that thorny issue. The matter seems settled with the promulgation by the Secretary-General on August 6, 1999, of a code of "principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control."<sup>150</sup> The text states: "They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defense."<sup>151</sup> UNMIK is a peacekeeping mission currently in operation.<sup>152</sup> Accordingly, the practice of applying international humanitarian law extends also to UNMIK operations in Kosovo. Therefore, UNMIK is subject to the law of occupation, namely the principles included in the Hague Regulations of 1907 and to the basic provisions of the IV Geneva Convention of 1949.<sup>153</sup>

<sup>143</sup> *Application of international humanitarian law and international human rights law to UN-mandated forces*, Report on the Expert meeting on multinational peace operations, organized by the ICRC in cooperation with the University Centre for International Humanitarian Law, Geneva, 11-12 December 2003, (2004) 853 Int'l Rev. Red Cross 209.

<sup>144</sup> UNMIK, Regulation 1999/1 of 25 July 1999.

<sup>145</sup> See sub-section on UNMIK, above, for more on this aspect.

<sup>146</sup> See especially Section III "Occupied Territories" of the IV Geneva Convention of 1949, *supra* note 128 at 318.

<sup>147</sup> Vité, *supra* note 138 at 27.

<sup>148</sup> *Ibid.* at 30.

<sup>149</sup> Accord Hoffman, *supra* note 126.

<sup>150</sup> UN Secretary-General Bulletin, ST/SGB/1999/13, "Observance by United Nations Forces of International Humanitarian Law" (6 August 1999), online: ICRC <<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList175/711A2C1A3BD7FA2Ec1256B66>>.

<sup>151</sup> *Ibid.*

<sup>152</sup> See United Nations Department of Public Information, DPI/1634/Rev.46, "United Nations Peacekeeping Operations" (April 2005), online: UN <<http://www.un.org/peace/bnote010101.pdf>>.

<sup>153</sup> Roberts, *supra* note 131 at 289-291.

The provisions of the UN Secretary-General's Bulletin concerning the protection of cultural property are to be found in Section 6:

The United Nations force is prohibited from attacking monuments of art, architecture or history, archaeological sites, works of art, places of worship and museums and libraries which constitute the cultural or spiritual heritage of peoples. [...] Theft, pillage, misappropriation and any act of vandalism directed against cultural property is strictly prohibited.<sup>154</sup>

Judging by the wording used, Section 6 draws from Article 27 of the *Hague Regulations* of 1907 as well as articles 53 and 16 respectively of the 1977 Protocols I and II additional to the 1949 Geneva Conventions. It is generally agreed that the provisions embedded in these Articles are an expression of customary rules which apply to all belligerents, whether or not they are bound by the instrument in question.<sup>155</sup> Consequently, the provision stated in Section 6 of the Secretary-General's Bulletin would be of the same character.

Another legal basis for the application of humanitarian law to peacekeeping operations, consecrated by the practice thereof, has been the inclusion of a provision to such an effect in the status-of-forces agreements (SOFA) signed by the UN along with the host countries of their deployment.<sup>156</sup> In connection to this, Section 3 of the UN Secretary-General's Bulletin establishes that

in the status-of-forces agreement concluded between the United Nations and a State in whose territory a United Nations force is deployed, the United Nations undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel.<sup>157</sup>

Though the 2001 Document is not properly called a SOFA, it confirmed "[t]he will to apply the relevant provisions of the Hague Convention (1954) regarding the protection of cultural sites and property in Kosovo."<sup>158</sup> Therefore, UNMIK has assumed the responsibilities of an occupying force in the territory of Kosovo within the meaning of the 1954 Hague Convention. As such, under Article 5(1) of the 1954 Hague Convention, UNMIK is to "support [as far as possible] the competent national authorities in safeguarding and preserving its cultural property."<sup>159</sup> Besides that, an

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<sup>154</sup> *Supra* note 150.

<sup>155</sup> François Bugnion, "The origins of the legal protection of cultural property in the event of armed conflict under treaty-based and customary international humanitarian law: Meeting to mark the 50<sup>th</sup> Anniversary of the 1954 Hague Convention, Cairo, February 2004" (14 February 2004), online: ICRC <<http://www.icrc.org/Web/eng/siteeng0.nsf/iwplst260/D395AADD22644C1256E70002>> at 3.

<sup>156</sup> Shaw, *supra* note 87 at 1116.

<sup>157</sup> *Supra* note 150.

<sup>158</sup> *Supra* note 100.

<sup>159</sup> According to Article 2 of the Convention, "[t]he protection of cultural property shall comprise the safeguarding and the respect for such property." While "safeguarding" consists of all positive measures (defining the action to be taken) which are designed to ensure the best possible material conditions for

occupier shall comply with provisions of the 1954 Hague Convention concerning respect for cultural property. Article 4 of the 1954 Hague Convention requires state parties to refrain from actions that expose cultural property to destruction or damage, from any use of cultural property and its immediate surroundings during hostilities,<sup>160</sup> and to prohibit, prevent, and stop any form of theft, pillage, misappropriation, and any acts of vandalism directed against cultural property.<sup>161</sup> Furthermore, according to Article 7(2) of the 1954 Hague Convention, UNMIK was to “establish [...] services or specialist personnel whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it.”<sup>162</sup> Without addressing the issue of cultural heritage in a systematic manner,<sup>163</sup> UNMIK has transferred the responsibility for the protection and preservation of cultural heritage in Kosovo to the Provisional Institutions of Self-Government (PISG), namely to a Ministry for Culture, Youth and Sport. It remained, however, responsible for ensuring adequate protection of minority rights in the province, which means that ultimately the overall responsibility for cultural heritage in Kosovo lies with UNMIK.

We are aware that with respect to the 2001 Document one may raise the question of whether it is legally binding. Although the law of treaties does not require a treaty to be in any particular form or to use special wording,<sup>164</sup> when the states do not intend to conclude a legally binding document, “instead of ‘shall’ they use a less imperative term, such as ‘will’.”<sup>165</sup> The clause on protection of cultural sites in Kosovo in the 2001 Document uses exactly the term ‘will’. Does that mean that UNMIK and FRY did not intend to create any legal obligation in relation to cultural heritage in Kosovo? There is no plausible reason to think so. The terminology of an instrument, taken on its own, can be misleading. It is wrong to assume that an instrument is not binding simply because it does not contain treaty terminology. What is decisive, while determining the status of an agreement, is whether the parties intended the instrument to be (or not be) legally binding.<sup>166</sup> While not singling it out, the FRY intended the 2001 Document to create legal effects. The relevant evidence can be gathered from the provision below:

The prevailing approach to the protection [...] of cultural heritage in Kosovo is illustrated by [the fact that] UNMIK has failed to establish a body in charge of preserving the cultural heritage in Kosovo, even though it had to do so under the 1954 Hague Convention [...] (Article 7, Paragraph 2). UNMIK has also failed to accept the responsibility for the protection of cultural property ‘within the territory of other High

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the protection of cultural property, “respect for such property” has an essentially negative character: it represents an obligation not to commit a number of prohibited acts, such as placing cultural property in peril or causing damage to it. See Toman, *supra* note 26 at 57.

<sup>160</sup> The 1954 Hague Convention, *supra* note 21, Article 4(1) at 242.

<sup>161</sup> *Ibid.* Article 4(3) at 244.

<sup>162</sup> *Ibid.* at 246.

<sup>163</sup> The 2003 UNESCO Report, *supra* note 12 at 6.

<sup>164</sup> *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, [1961] I.C.J. Rep. 17 at 31-32.

<sup>165</sup> Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000) at 27.

<sup>166</sup> *Ibid.* at 20.

Contracting Parties', Serbia in this case, as provided for by Article 4 of the Hague Convention.<sup>167</sup>

In addition, two of the law of treaties' principles of interpretation favour the proposition advanced. According to the principle of integration, treaties are to be interpreted as a whole, that is, the individual parts, chapters, or sections of a treaty are not to be interpreted out of their overall context.<sup>168</sup> Indeed, the provision discussed should be looked at through the more assertive terms of the chapter's title where it is inserted. The title refers to "specific areas of engagement and of common interest." Therefore, the protection of cultural sites in Kosovo is not a matter merely contemplated by parties to be dealt with, but one of their areas of real engagement in Kosovo. By virtue of the principle of effectiveness, "the instrument as a whole and each of its provisions must be taken to have been intended to achieve some end, and that the interpretation that would make the text ineffective to achieve that [end] is [...] incorrect."<sup>169</sup> It is unreasonable to presume that UNMIK and FRY, by signing the mentioned 2001 Document, were seeking an end other than to apply the 1954 Hague Convention. Accordingly, the use of a less imperative terminology in the 2001 Document cannot distort the legally binding character of the obligation incumbent upon UNMIK and USM to observe the relevant provisions of the 1954 Hague Convention.

## 2. KFOR AS OCCUPYING FORCE IN KOSOVO

Under Resolution 1244, much of the responsibility within the peacekeeping mission in Kosovo is given to the civilian authority, UNMIK, whereas the military authority, KFOR, takes on a supporting role.<sup>170</sup> Would that mean that KFOR is compelled to comply with rules other than those UNMIK is held accountable for? The opinions advanced on this subject differ. Michael H. Hoffman is of the view that since Kosovo has plainly come under foreign military control through the use of force, the international military contingent in Kosovo reasonably qualifies as an occupation force.<sup>171</sup> On the other hand, James A. Burger has argued that "[w]ith the cessation of open hostilities, KFOR was not an occupying force. Its authority was not based on the imposition of military control by a State upon another State, but on the authorization by the United Nations to keep the peace."<sup>172</sup>

Burger's assertion seems rather unconvincing. In addition to the already advanced developments regarding the procurement of the Yugoslav consent to the

<sup>167</sup> The Document of Serbia and Montenegro Ministry of Foreign Affairs, *supra* note 61 at para. 4.4.

<sup>168</sup> Malcolm D. Evans, ed., *International Law* (Oxford: Oxford University Press, 2003) at 185. As to the normative formulation of the principle of integration, it is to be found in the provisions set forth in art. 31 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 332.

<sup>169</sup> Evans, *Ibid.* at 190.

<sup>170</sup> *Supra* note 7 at para. 9(f).

<sup>171</sup> *Supra* note 126.

<sup>172</sup> James A. Burger, "International humanitarian law and the Kosovo crisis: Lessons learned or to be learned" (2000) 837 Int'l Rev. Red Cross 129.

MTA, two more propositions might be of interest. First, assuming that the FRY's agreement to the principles embedded in Resolution 1244 and the signature of the MTA brought an end to armed conflict between the parties, the authorisation by the Security Council of the KFOR deployment in Kosovo cannot cure the manner in which the Yugoslav consent to such a deployment was secured, namely by the use of force, in breach of the UN Charter.<sup>173</sup> Second, KFOR itself is largely composed of NATO forces that were to ensure the withdrawal of Yugoslav forces from Kosovo and subsequently gained military control over that region. Accordingly, KFOR follow-up operations in Kosovo would not depart from an occupier's qualification within the meaning of the IV Geneva Convention of 1949.<sup>174</sup>

The question that further arises in relation to KFOR is to what extent the UN Secretary-General's Bulletin of August 6, 1999, applies to its peace-enforcement operations in Kosovo. The expert meeting on the application of international humanitarian law held in Geneva on December 11 and 12, 2003, while discussing the legal status of Secretary-General's Bulletin, agreed that it is an internal document of the UN.<sup>175</sup> As such, it is binding upon all troops under UN command and control, but does not constitute a legal obligation *stricto sensu* upon states.<sup>176</sup> KFOR, which is not strictly speaking a UN force<sup>177</sup> under the global organisation's command but consists of NATO-led sections of the armed forces of participating states, would appear not to be bound by the UN Bulletin. However, according to Resolution 1244, KFOR is a 'security force' deployed "under United Nations auspices," meaning that, in principle, it should be held to the same standards as UN forces.<sup>178</sup>

As we have noted above, the provision of Annex B, Article 3 of the MTA providing for the conclusion of a SOFA between Belgrade and KFOR has not been followed. Despite that and applying the UN Bulletin to KFOR, since the 'security presence' in Kosovo is acting "under UN auspices," the "obligation to respect the [principles and rules of the general conventions applicable to the conduct of military personnel] to UN forces" will not be superseded "even in the absence of a status-of-forces agreement."<sup>179</sup> Therefore even in the absence of a SOFA agreement with Belgrade, KFOR must fulfill its duties as an occupying force arising out of the 1954 Hague Convention.

Aside from that, Resolution 1244 requires KFOR to support, as appropriate, the work of the international civil presence.<sup>180</sup> Given that UNMIK has assumed the

<sup>173</sup> Accord Daniel H. Joyner, "The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm" (2002) 3 E.J.I.L. 597 at 618.

<sup>174</sup> According to Jean Pictet, ed., *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958) at 63, within the meaning of an occupation "carried out under the terms of an instrument which brings hostilities to a close: an armistice, capitulation, etc".

<sup>175</sup> *Supra* note 143.

<sup>176</sup> *Ibid.*

<sup>177</sup> Cerone, *supra* note 111 at 481.

<sup>178</sup> *Ibid.*

<sup>179</sup> The UNSG Bulletin, *supra* note 150 at Section 3.

<sup>180</sup> According to Resolution 1244, para. 6, "both presences operate towards the same goals and in a mutually supportive manner," see *supra* note 7.

responsibility “to apply the relevant provisions of the Hague Convention (1954) regarding the protection of cultural sites and property in Kosovo,”<sup>181</sup> KFOR’s obligation to support UNMIK requires that, at the very least, it refrain from undermining UNMIK’s objectives. This can only be achieved through compliance with the standards set forth by the 1954 Hague Convention.

Since KFOR is composed of troops coming from different countries, its contingents may also be bound by the obligations of their respective States in conformity with the 1954 Hague Convention. NATO countries such as Belgium, Czech Republic, France, Germany, Greece, Italy, Netherlands, Spain, and Sweden all are state parties to the 1954 Hague Convention,<sup>182</sup> and are thereby held, through their armed forces in Kosovo, to abide by the provisions of the instrument. On that account, Article 4(1) of the 1954 Hague Convention requires “[t]he High Contracting Parties [to] undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties.”<sup>183</sup>

In the three days of rioting in March 2004, the protection provided by KFOR to various Serbian religious sites in Kosovo was variable, with the French and German contingents being particularly criticized by the Serbian Orthodox Church.<sup>184</sup> Colonel Dieter Hintelmann, the commander of the German KFOR contingent in Prizren, defended himself in saying: “[W]e acted exactly according to our regulations. Protection of buildings is not the task of the Bundeswehr in Kosovo.”<sup>185</sup> After the Albanian rioters calmed down, the KFOR commander said: “Anyone who attacks Serbian enclaves or cultural properties in Kosovo in the future will confront KFOR.”<sup>186</sup> And thus acknowledged the breach of mandate that some of his troops had committed. In contrast, other KFOR contingents, such as Czechs, Italians, and Swedes, risked their troops’ lives to provide protection to property during the same March 2004 unrest. Captain Jonas Bengtsson of the Swedish contingent was quoted as saying: “Churches have always been one of the most important things to

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<sup>181</sup> *Supra* note 100.

<sup>182</sup> Belgium ratified the Convention on September 16, 1960, France ratified it on June 7, 1957, Germany on August 11, 1967, Greece on February 9, 1981, Italy on May 9, 1958, Netherlands on October 14, 1958, Spain on July 7, 1960 and Sweden on January 22, 1985; the Czech Republic lodged a notification of succession to it on March 26, 1993. See Toman, *supra* note 26 at 450-451.

<sup>183</sup> *Supra* note 21 at 242.

<sup>184</sup> *Supra* note 8 at 1. Critique came even from German policemen in Kosovo who said Bundeswehr in Prizren failed to observe the right the troops are entitled to in accordance with their “Rules on engagement”: “You have the right to repel attacks against KFOR personnel, KFOR material and persons under the protection of KFOR.” Indeed, the way German KFOR acted in Prizren shows that: “About 200 demonstrators sent a delegation under a white flag to the Germans and ensured them that nothing bad would happen to them, that ‘[they] only want[ed] to burn down the monastery [of Holy Archangels]’. The KFOR protectors evacuated six monks and their two visitors to their armoured vehicles and drove them to the other side of the Bistrica. The monastery was then burned down.” See Renate Flottau *et al.*, “German soldiers: The rabbits of Kosovo” *Der Spiegel* (3 May 2004), online: Serbian Orthodox Diocese of Raska-Prizren and Kosovo-Metohija Info-Service <<http://www.kosovo.net/node/view/197>>, at 4.

<sup>185</sup> *Ibid.* at 5.

<sup>186</sup> *Ibid.*



protect.”<sup>187</sup> This is an illustration of how differently the states sending troops discharged their duties in Kosovo in conformity with the 1954 Hague Convention.

Other participating states in KFOR, the United States or the United Kingdom, for example, are not contracting parties to the 1954 Hague Convention. However, this circumstance does not rule out the existence of an obligation for a government that has effective control over the territory of a foreign state to prevent and avoid acts of systematic destruction of cultural heritage.<sup>188</sup> As discussed earlier,

[t]he evolution of cultural property law [...] through the *Lieber Code*, [...] *Brussels Declaration*, Roerich Pact and other international commitments which culminated in the 1954 Hague Convention suggests that the law is deeply rooted in the customary practice of nations and the common conscience of the international community.<sup>189</sup>

Hence, irrespective of whether those countries participating in KFOR are parties to the 1954 Hague Convention, the fundamental principle that well-established customary practices of international law are binding upon the nations can be invoked against them. A confirmation of the customary character of the obligation to protect cultural heritage may also be viewed in the fact of its incorporation into national law. The *Military Code of the United States*, for example, spells out the fact that “[b]ecause they are not used for military purposes, buildings devoted to religion, art or charitable purposes, as well as historical monuments, may not be object of air bombardment.”<sup>190</sup> In this sense, Section 2 of the Secretary-General’s Bulletin underlines the binding character of national law during a peace-enforcement operation: “The present provisions do not [...] prejudice the application thereof, nor do they replace the national laws by which military personnel remain bound throughout the operation.” In turn, Article 4(1) of the 1954 Hague Convention requires state parties “[t]o refrain from any act of hostility directed against [cultural] property.”<sup>191</sup>

Both UNMIK and KFOR qualify as occupying forces that have assumed the authority of a foreign state in the territory of Kosovo, thus triggering their accountability to ensure the protection of cultural heritage in Kosovo in conformity with the 1954 Hague Convention.

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<sup>187</sup> *Supra* note 8 at 1.

<sup>188</sup> Francesco Francioni & Federico Lenzerini, “The Destruction of the Buddhas of Bamiyan and International Law” (2003) 14 E.J.I.L. 633.

<sup>189</sup> Bhat, *supra* note 1 at 6.

<sup>190</sup> *Air Force Intelligence and Security Doctrine*, Article 4.5.2, online: Federation of American Scientists, Intelligence Resource Program <<http://www.fas.org/irp/doddir/usaf/>>, cited in Péter Kovács, “Intervention armée des forces de l’OTAN au Kosovo: Fondement de l’obligation de respecter le droit international humanitaire” (2000) 837 Int’l Rev. Red Cross 128, online: ICRC <<http://www.icrc.org/web/fr/sitefre0.nsf/html/5FZEXP>> at 7. It should be noted that the United States is party neither to the 1977 Protocol I nor to the 1954 Hague Convention.

<sup>191</sup> *Supra* note 21 at 242.

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At a recent meeting to mark the 50<sup>th</sup> anniversary of the 1954 Hague Convention, held in Cairo in February 2004, it was stated that the deliberate destruction of monuments, places of worship, and works of art is a sign of degeneration into a total war. It is sometimes the other face of genocide.<sup>192</sup> Indeed, how can the systematic and deliberate destruction of 140 Serbian churches, monasteries, and sacral monuments in Kosovo – many of which have been built in the 14<sup>th</sup> and 15<sup>th</sup> centuries – be termed otherwise than the mutilation of another people's cultural identity and heritage? With regards to the fact that the dismantling of the former Yugoslavia during the 1990s witnessed the devastation of a great number of religious objects, one would be tempted to say that the destruction of 140 Serbian religious buildings is not different from anything else that took place at that time. The uncommonness, however, of the devastation of the Serbian-built religious heritage in Kosovo lies in the following two circumstances. First, the destruction of that cultural heritage occurred after June 1999, when there was no longer an armed conflict and where the military necessity excuse could not be brought as a justification for the destruction and damage to cultural heritage. Second, the massive destruction of the Serbian cultural heritage in Kosovo happened after the territory, in conformity with Resolution 1244, was placed under international administration. In light of these circumstances, this paper was aimed at providing an answer to two questions. The first is whether the Serbian-built religious heritage in Kosovo deserved international protection. The second is whether the two international authorities in Kosovo, UNMIK and KFOR, a NATO-led military force, were under any legal obligation to protect this religious heritage.

As to the first question, we have sought to determine whether the Serbian-built religious heritage in Kosovo qualifies as cultural property in the sense defined by international law. The brief review of the principal instruments applicable to the protection of cultural property during both wartime and peacetime revealed that the definition of the notion was broad enough to cover 'institutions dedicated to religion', a term of art under which the Serbian-built religious heritage in Kosovo would enter the category of cultural property. However, to enjoy international protection, an item of cultural property has to be either of "great importance to the cultural heritage of every people," as the 1954 Hague Convention requires, or of "outstanding universal value from the point of view of history, art or science," as the 1972 Convention demands. It was submitted that those outstanding Serbian religious buildings of medieval religious architecture in Europe with their refined frescoes dating back to the 14<sup>th</sup> and 15<sup>th</sup> centuries, either destroyed or desecrated in Kosovo, are undoubtedly of great importance to the cultural heritage of peoples. Moreover, the splendid Dečany Monastery was inscribed on UNESCO's World Heritage List of Properties as having outstanding universal value. It was argued that irrespective of whether other Serbian cultural properties in Kosovo meet the "outstanding universal value" standard

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<sup>192</sup> François Bugnion, *supra* note 155.

set forth in Article 1 of the 1972 Convention, this cultural heritage falls within the concept of cultural property relevant to both the 1954 Hague Convention and the 1972 Convention, thus triggering international protection.

With respect to the mandate of the international administration in Kosovo, decided in conformity with Resolution 1244, we have come to the conclusion that the public authority in the province is exercised by UNMIK and KFOR, excluding therefore any act of power and control by Serbia and Montenegro over the territory. As a result, since June 1999, the Serbian cultural heritage in Kosovo is under the jurisdiction of these two entities.

As to the second question, we have tried to identify two main arguments supporting the proposition that the obligation to ensure the protection of cultural property, as contemplated in both the 1954 Hague Convention and the 1972 Convention, is binding upon UNMIK and KFOR in Kosovo. The first argument derives from the continuing application of the USM international treaties to the territory of Kosovo. The second one relates to the application to Kosovo of the laws of occupation. With regards to the first argument, we have shown that while technically continuing to be binding upon the USM authorities, the obligation to ensure the protection of cultural heritage in Kosovo, which by nature is attached to territory, passes on to UNMIK and KFOR, who both, in accordance with Resolution 1244, assume full interim administrative responsibility over Kosovo. As to the second argument, we found that despite the fact Resolution 1244 does not specify whether the law of occupation is applicable to UNMIK and KFOR, the responsibilities entrusted to them clearly prove they qualify as occupying forces in Kosovo. Having the legal status of a peacekeeping mission, UNMIK, according to the UN Secretary-General's Bulletin of August 6, 1999, is subject to the principles and rules of international humanitarian law, of which the law of occupation forms an integral part. In this way, the obligation to ensure the protection of cultural property in Kosovo attaches to UNMIK not only by virtue of Article 18(2) of the 1954 Hague Convention but also by virtue of the 2001 Document.<sup>193</sup> KFOR, consisting of sections of armed forces of more than 30 participating states, but as an entity deployed under UN auspices, is to be held to the same standards as UNMIK. KFOR's mandate to support UNMIK in conformity with Resolution 1244 translates into the same obligation to apply the 1954 Hague Convention. For those KFOR military contingents, the respective states of which are not parties to the 1954 Hague Convention, the obligation to ensure the protection of cultural heritage in Kosovo derives from its customary character. The incorporation of such an obligation into the national law of these states is additional evidence to that effect.

Finally, recalling the fundamental principle enshrined in the Preamble to the 1954 Hague Convention that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world,"<sup>194</sup> states are to take "[a]ll the

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<sup>193</sup> *Supra* note 100.

<sup>194</sup> *Supra* note 21 at 240.

necessary measures to prevent, avoid and suppress acts of intentional destruction of cultural heritage, wherever such heritage is located.”<sup>195</sup> To the question of whether appropriate measures have been taken by UNMIK and KFOR with regard to the protection of cultural heritage in Kosovo, there is no better reply than the reaction of Javier Solana, the 1999 NATO Secretary-General now in charge of the EU foreign policy, to the destruction of cultural properties and expulsions of Serbs from Kosovo during the latest March 2004 spree of violence in the province: “Not only the show of force succeeded perfectly, but UNMIK is null. They do not have any idea about what is happening in Kosovo. The whole policy of the UNMIK is dead.”<sup>196</sup> This statement, put in legal terms and taking into account the unparalleled destruction of cultural heritage perpetrated in Kosovo since the international administration took it over in June 1999, simply means that UNMIK and KFOR have failed to take the required measures to prevent, stop, and suppress acts of intentional destruction of the Serbian-built religious heritage in Kosovo.<sup>197</sup> The issue that arises next concerns the responsibility to be assumed for commission of criminal acts of the destruction of cultural heritage in Kosovo. Since the examination of such an issue would go beyond the scope of our study, it will not be addressed in this instance, although we hope that it remains to be dealt with on a further occasion.

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<sup>195</sup> *Declaration concerning the Intentional Destruction of Cultural Heritage*, UNESCO, 32d Sess., 2003, online: UNESCO <<http://www.unesco.org/culture/laws/intentional/declare.pdf>>.

<sup>196</sup> Serbian Orthodox Diocese of Raska-Prizren and Kosovo-Metohija Info-Service, Newsletter, “Kosovo: The bankruptcy of the imperialism of good” (10 March 2004), online: Serbian Orthodox Diocese of Raska-Prizren and Kosovo-Metohija Info-Service <<http://www.kosovo.net/node/view/115>> at 3.

<sup>197</sup> This is particularly the legal obligation deriving from Article 4(3) of the 1954 Hague Convention, *supra* note 21 at 244.