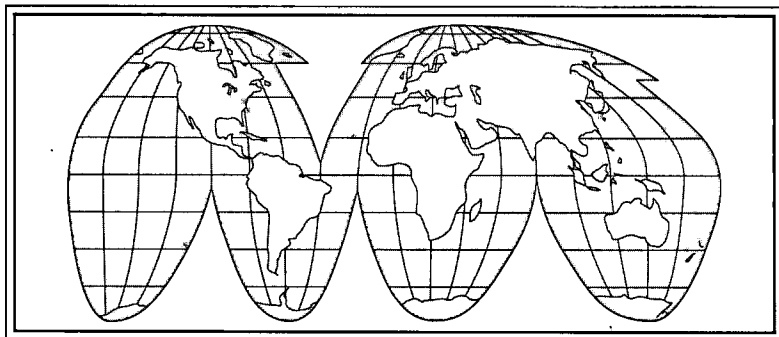


Wisconsin International Law Journal



ARTICLES

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21

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Table of Contents

ARTICLES

- Cultural Heritage Endangered by Large Dams and
its Protection Under International Law.....233
Mehmet Komurcu

- The Decolonization-Modernization Interface
and the Plight of Indigenous Peoples in
Post-Colonial Development Discourse in Africa.....297
Joel Ngugi

ESSAY

- Law as Hope: Constitution and Social
Change in Latin America.....353
Mauricio García-Villegas

NOTES AND COMMENTS

- The Comfort Women Case in the United States: A
Note on Questions Resolved and Unresolved in
Hwang v. Japan, The First Lawsuit Brought by
Asian Women Against Japan for War Crimes.....371
Makoto Nishigai

- European Union Regulation of Electronic
Communication Networks: Stifling Global
Integration of Securities Markets.....397
Randolph James Amaro, Jr.

- Trademark Law & Enforcement in China:
A Transnational Perspective.....415
Jessica Jiong Zhou

BOOK REVIEW

- Global Organized Crime and International
Security.....445
Thomas J. Holter

In this issue...

Mr. MEHMET KOMURCU evaluates the controversies surrounding large dam construction. Specifically, he considers the threats to cultural heritage posed by the construction of the Birecik and Ilisu Dams in Turkey. He subsequently reviews the legal instruments used by Turkey to protect cultural heritage. Considering the limitations of these domestic measures, he supports the adoption of a human rights perspective, which would consequently require a more comprehensive legal framework for international protection.

Mr. JOEL NGUGI analyzes the concurrent development of the decolonization movement and the emergence of indigenous peoples' rights in the Third World. He further argues that the creation and recognition of this dual-modernization discourse within international law has principally served to repress the Third World and the indigenous peoples within them. Through his examination of the Maasai people of Southern Kenya, he advances his proposition that dual-modernization discourse interventions ultimately contribute to the disempowerment of indigenous peoples.

Prof. MAURICIO GARCÍA-VILLEGAS examines the relationship between constitutions and social progress, which has characterized Latin American constitutionalism since the middle of the 19th century, and which he terms here "aspirational constitutionalism." Upon outlining key aspects of "aspirational constitutionalism," he theoretically discusses its attendant benefits and risks and, by way of explanation, points to Colombia. For these reasons, he advocates for a form of "aspirational constitutionalism," which narrows the gap between desires and realities, and pragmatically guarantees rights in the present.

Mr. MAKOTO NISHIGAI assesses the legal recourse available to fifteen surviving women post-*Hwang v. Japan*. Upon analyzing the plaintiffs' complaint, oral arguments, and court's reasoning in *Hwang*, he maintains that the court left unanswered (1) whether Japan enjoys sovereign immunity under the Foreign Sovereign Immunities Act and (2) whether postwar treaties preclude individual victims' claims for reparation. Aside from this potential legal recourse, he cautions that Japan faces the possibility of embarrassment with continued indolence.

Mr. RANDOLPH JAMES AMARO describes the recent proliferation of Electronic Communication Networks (ECNs) and the profound role this service has had in revolutionizing the modern securities market. Despite the global significance of this service, he contends that the European Union (EU) has generally been unable to effectuate market integration of ECNs with its existing set of regulatory initiatives. Accordingly, he advises that the EU should mind the protection of investors while establishing a new set of regulatory initiatives.

Ms. JESSICA JIONG ZHOU surveys China's historical attempts as well as current efforts to protect trademark rights. Despite significant legislative steps in the area of trademark protection over the past two decades, she suggests that several problems related to enforcement continue to linger. However, she asserts that the enforcement problems will eventually subside, as China, a new World Trade Organization member, strives to keep up with international IPR protection standards in its steady transition to a market economy.

TINA CHANG

CULTURAL HERITAGE ENDANGERED BY LARGE DAMS AND ITS PROTECTION UNDER INTERNATIONAL LAW

MEHMET KOMURCU*

I. INTRODUCTION

In recent years, construction of large dams around the world has caused intense and escalating controversies with respect to their benefits, as well as their adverse impact on cultural heritage.¹ While the consciousness to safeguard precious cultural heritage from destructive effects of large dams has been growing, persons negatively affected by dams and anti-dam advocates are increasingly challenging the building and financing of new dams.² This has recently emerged with respect to the construction of the Birecik and Ilisu Dams in Turkey. With the beginning of the operation of the Birecik Dam and contracting of the proposed Ilisu Dam a new chapter in Turkey's battle over its watercourse projects in the international arena has begun.³ These issues came to the forefront when the ancient city of Zeugma, a 2000-year-old city with one of the world's richest Roman mosaics,⁴ was threatened by the floodwaters of Birecik Dam. The discovery of the spectacular ruins in the path of rising waters has turned this site into the center of domestic and international attention.⁵

* LL.M., American University Washington College of Law (1997), LL.M.-SJD, University of Wisconsin Law School (2002), currently with Birsal Law Offices, Istanbul, Turkey. The author gratefully acknowledges the generous guidance of Professor William L. Church of the University of Wisconsin Law School and his contributions and criticism to many of the ideas in this article. The author also would like to thank Professor Zeynep Ahunbay of the Istanbul Technical University for her helpful comments.

¹ Raul S. Sanchez, *To The World Commission on Dams: Don't Forget the Law, and Don't Forget Human Rights—Lessons from the U.S.-Mexico Border*, 30 U. MIAMI INTER-AM.L.REV. 629, 629 (1999).

² *Id.*

³ Syria and Iraq have criticized Turkey's water projects on the Euphrates and Tigris Rivers. They claim water projects upstream decreased the amount of water reaching their countries.

⁴ The Zeugma site includes the ruins of a Roman city of 60-80,000 population and excellent examples of civic and religious architecture. Experts refer to the ancient city of Zeugma as one of the world's richest collections of Roman mosaics. See generally David L. Kennedy & P.W.M. Freeman, *Zeugma Archaeological Project: Preliminary Season*, 44 ANATOLIAN STUDIES 18-20 (1994); David L. Kennedy & P.W.M. Freeman, FORTY-FIFTH ANNUAL REPORT 36-38 (British Institute of Archaeology at Ankara 1993); DAVID KENNEDY & P.W.M. FREEMAN, THE TWIN TOWNS OF ZEUGMA ON THE EUPHRATES. RESCUE WORK AND HISTORICAL STUDIES, JRA, SUPPLEMENTARY SERIES 27 (1998) (ISBN 1-887829-27-0); David Kennedy et al., *Mining the Mosaics of Roman Zeugma*, ARCHAEOLOGY 54-55 (Mar./ Apr. 1995).

⁵ The Southeastern Anatolia Project Regional Development Administration, a Turkish governmental agency on sustainable development, signed a memo of understanding with Packard Humanities Institute (PHI), a California based foundation in the United States, to reinforce the emergency rescue work at Zeugma. The PHI has agreed to earmark a budget of \$ 5 million for the excavation, conservation and study of Zeugma. For detailed information see generally Jonathan Gorratt, *Turkey Dam Project Unearths Roman City Likened to Pompeii*, BOSTON GLOBE, June 21, 2000.

Occasionally there are harrowing acts of physical destruction of cultural heritage around the world. While such incidents occur most frequently in armed conflicts, inappropriate and disrespectful treatment by states also cause physical destruction of the cultural heritage. In whatever form it occurs, intentional destruction of cultural heritage has been recently observed as an assault on the cultural heritage of not only the country the cultural heritage is located in but also of the entire world's civilization. Most recently a disturbing incident occurred when the Taliban, the former Islamic government of Afghanistan, destroyed the Buddhas of Bamiyan in Afghanistan.⁶ While countries with large number of Buddhists, such as Thailand, Sri Lanka and Nepal, were outraged by Taliban's acts, many other nations, including Muslim countries, were upset by the wantonness of the destruction. Despite the fact that the Taliban wanted to point out the irony that the starving Afghan people get little attention vis-à-vis the Buddhas of Bamiyan, the government's destruction of statues did not help to justify their cause.⁷ International community and international organizations joined protests and urged an end to the destruction of Buddhist monuments⁸ but, unfortunately, these efforts were not successful. Such kind of state actions are condemned by all international communities and have raised a new discussion on the concept of "crime against culture."

In addition to such direct destruction, large dams in many parts of the world also threaten the world's cultural heritage. Observing this fact Professor Steven Brandt and Professor Fekri Hassan reported "[t]he Magnitude of loss from different parts of the world wherever large dams are constructed is staggering."⁹ Examples of these losses include: the Three Gorges Dam on the Yangtze River in China threatening 1,300 known

⁶ Among the art being destroyed are early Buddhist statues in the national museum in Kabul and the world's tallest standing Buddha, a 174-foot (53 meter) figure carved into a cliff face at Bamiyan near Kabul. A smaller one stands beside it at 120 feet (37 meters). The two statues were carved into the Afghan mountainside in the fifth century. Amir Shah, *Taliban Demolish Head and Legs of Ancient Buddha Statues*, Mar. 3, 2001, A.P. NEWSWIRE, available at Westlaw 3/3/01APWIRE01:46:00.

⁷ The destruction of Buddha statues by Taliban government in Afghanistan was not only for religious reasons, but also ideological ones that may lead us to say it was a kind of ideological destruction. While world community cared about these statues and help was offered from everywhere around the world, no attention was paid to the starving people in Afghanistan.

⁸ Many countries and international organizations condemned the destruction of Buddhist statues. Russia, Germany, India, Pakistan, Nepal and UNESCO appealed to the Taliban to end the destruction and rethink their actions. Unfortunately, the Taliban government ignored all international calls and carried out its outrageous mission. Carlin Romano, *Trying to Outguess Buddha*, DAYTON DAILY NEWS, Apr. 1, 2001, available at Westlaw 2001WL3835103.

⁹ World Commission on Dams (WCD), *Dams and Cultural Heritage Management, Working Paper, Conclusions: Lessons Learned and Recommendations*, available at <http://www.dams.org/docs/html/contrib/soc212cl.htm> (last visited Apr. 20, 2001).

archaeological sites and hundreds other yet to be discovered;¹⁰ two hydroelectric projects in India, the Nagarjunasagar and the Srisailem, submerged relics of archaeological significance from ancient India including temples of typical Chalukyan style;¹¹ operation of large hydroelectric dams on the Colorado and Columbia Rivers threatening Native American tribes' ancient burial grounds and sites.

Reactions of the international community to the threat that the world's common heritage would be lost under the waters of these large dams shows that the protection of cultural heritage is not just a national issue but rather a world issue. That is why Egypt's Aswan High Dam triggered an international archaeological salvage operation of the ancient city of Nubia as early as 1950s. That is why more than 300 archaeologists from many nations work side by side with their Turkish counterparts during the excavations of the ancient city of Zeugma.¹² Moreover, the evidence that many NGOs, both in Turkey and abroad, started campaigns against the Ilisu Dam show that people, or at least focused interest groups, across all continents care about cultural objects.

Even though certain measures have been taken to protect cultural property by the Turkish government agencies, state action alone proved inadequate due to the economic and political situation in Turkey.¹³ It is saddening that the construction of dams, which are, expected to enhance the country's economic power, will result in the destruction of its historic treasures.¹⁴ It is apparent that there are conflicting needs of the state. On the one hand, there is a compelling need to meet increasing energy demand to

¹⁰ The dam is the largest hydroelectric project ever undertaken, and will result in the submersion of 13 cities, 140 towns, more than 1,600 villages and 300 factories. In addition, nearly 1.5 million people relocated. Information about the Three Gorges Dam is available at <http://www.archaeology.org/online/news/china.html> (last visited Apr. 24, 2001). Full articles documenting the Yangtze looting crisis are located on the International Rivers Network website, available at <http://irn.org/programs/threeg/index.shtml> (last visited Apr. 27, 2001).

¹¹ UNESCO and foreign governments collaborated in transferring the archaeological remains to safer sites. See Press Release, WCD, *Flooded Fortunes: Dams and Cultural Heritage Management*, available at http://www.dams.org/press/pressrelease_61.htm.

¹² John Tuohy, *Waters Submerge Roman Ruins*, USA TODAY, Jun. 6, 2000, available at 2000 WL 5782655.

¹³ On the basis of Act No. 2863 on the Conservation of Cultural and Natural Property, a fund set up by the Ministry of Culture provides loans for the preservation, upkeep and restoration of cultural and natural property in private or public ownership. Moreover, Turkish law grants full tax exemption for property registered as "immovable cultural property to be conserved" and with Grade I or Grade II listing, archaeological and natural sites on which new construction is prohibited. Owners of immovables forming part of the architectural heritage enjoy tax relief on income tax, property tax and VAT. Promoters of rehabilitation schemes enjoy appreciable tax relief, while arrangements concerning loans, credit and other incentives tend to favor new constructions. *Kulter re Tabiat Varliklarini Koruma Kanunu*, Act No: 2863, OFFICIAL GAZETTE No 18113 (July 23, 1983).

¹⁴ Erdem Yucel, *Ancient Cultures of Anatolia in Jeopardy*, TURKISH DAILY NEWS, July 29, 2000, available at http://www.turkishdailynews.com/old_editions/07_29_001/feature.htm.

continue development. On the other hand, there is need to preserve and protect history for the future generations. In this regard, the conflict is between Turkey's quest for economic growth and the need to protect and preserve rich and unique historical sites.¹⁵ At the present time, it seems Turkey has chosen the former.

The current problem, threats to the archeological sites of Turkey, is worthy of being analyzed under existing international law. International agreements dealing with protection of cultural and historical sites were concluded under the auspices of several international organizations. Furthermore, the idea of the protection of nature for the benefit of future generations has been widely recognized by many international instruments.¹⁶ Likewise, the idea that the international community should protect the cultural heritage as an integral part of the human environment in a manner analogous to other global problems such as global warming and the depletion of biological diversity is widely accepted.¹⁷ The results of the destruction of cultural heritage may be more harmful than the depletion of biological diversity because while endangered species and animals can reproduce themselves and be raised in captivity, cultural resources, once destroyed, are lost forever.¹⁸

The primary purposes of this article are to first, discuss potential threats to immovable cultural heritage, and second, to increase the desire and manners to save world's cultural heritage. The scope of this article will be limited, in most part, to the protection of immovable cultural heritage, e.g. historical monuments and ancient archaeological sites. Section I examines the form and the nature of the threat by dams to cultural heritage, focusing on two recent projects in Turkey. It then analyzes the following questions in an effort to propose more effective international protection of common heritage of humankind: Should acute energy shortage and necessity to economic development justify the destruction of cultural heritage of humankind? What national and international measures currently protect

¹⁵ The building of dams not only eliminates historically and culturally important sites, but also means the displacement and probable cultural destruction of the people living in the area. Zeynep Zilelioglu, *Last Images of Hasankeyf*, TURKISH PROBE, July 21, 2000, available at 2000 WL 8405826.

¹⁶ The idea of protecting nature for future generations has been recognized by many international instruments, such as the 1946 International Convention for the Regulation of Whaling, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, the 1974 UN Charter on the Economic Rights and Duties of the States, the 1982 Earth Summit, the 1995 World Summit for Social Development.

¹⁷ Lakshnab Guruswamy et al., *Protecting the Cultural and Natural Heritage: Finding Common Ground*, 34 TULSA L.J. 713, 742 (1999).

¹⁸ *Id.* at 713.

cultural property against damages caused by large dams and what are the consequences of such damages?

Part II reviews international legal instruments for the protection of the cultural heritage. In this part, a wide range of international treaties created under aegis of several international institutions will be examined. Moreover, legal protection provided under Turkish legal system will be examined in the relevant part. The Human Rights aspects of and obligations of international community for the protection of cultural heritage will be argued in Part III. Part IV will examine possibilities for more effective protection of cultural heritage.

A. WATER DEVELOPMENT PROJECTS AS THREAT TO CULTURAL HERITAGE

While the general features of the Euphrates-Tigris basin hydrogeology and water issues between Turkey, Syria and Iraq are well known and have been widely publicized, recent arguments have been particularly focused on the protection and preservation of the historical-cultural sites from the adverse effects of large dams. Construction of a series of dams in connection with Turkey's Southeastern Anatolia Project (GAP) on the Euphrates and Tigris Rivers has initiated international debate about their adverse effects on the common cultural heritage of humankind located in Turkey. The GAP has been developed by the Turkish government as a means to meet both the growing demands for electric power and as a way to improve the national economy, particularly seeking to boost economic activity in southeastern Turkey, thereby also alleviating the Kurdish problem.¹⁹

With a population growing at about 1.3 per cent per year, low per capita electricity consumption, rapid urbanization and strong economic growth, Turkey has been one of the fastest growing power markets in the world for nearly two decades.²⁰ Projections by Turkey's Electricity Generating and Transmission Corporation (TEAS) indicate that growth in electricity consumption as high as ten percent annually will continue over the next fifteen years. With electricity shortages and blackouts already common, increasing the country's electricity generating capacity is a top priority for Turkish energy officials. Therefore, Turkey plans to increase

¹⁹ Tony Juniper, *If Britain and Other Countries Support an Environmentally Destructive Dam Project in Turkey: What are We then to Make Our "Ethical Foreign Policy"?* 30 ECOLOGIST 52 (2001) (ISSN: 0261-3131).

²⁰ Turkey Country Analysis Brief by Energy Information Administration, available at <http://www.eia.doe.gov/emeu/cabs/turkey.html> (last visited June 12, 2001).

domestic electricity production especially through construction of new power plants. In this respect, hydroelectric power plants under construction as part of the \$32 billion GAP will help meet the country's growing power demand when completed.

While Turkey has been slowly but steadfastly proceeding on the GAP project, half of which has been already completed,²¹ the recent developments around the GAP project prove that the environmental and human cost of big water projects is not limited to water pollution and quantity. Development projects on international watercourses may cause other important degradation to the environment and human life. Drawing attention to these degradations, a recent report from the World Commission on Dams states "large dams have had significant adverse effects on cultural heritage through the loss of cultural resources of local communities and the submergence and degradation of plant and animal remains, burial sites and archaeological monuments."²² Therefore, while well-designed dams can provide cheap renewable energy and irrigation, and help countries' economic development they change the water flow and adjacent environment dramatically. Consequently, several of the projects under the GAP scheme are very controversial for a variety of social, political, environmental and archaeological reasons by making people homeless, threatening regional political stability, damaging the environment and destroying cultural heritage.²³

Turkey is a land of rich history and surprising contrasts where East and West join in a unique blend. Due to mingling of European and Asian

²¹ Completion of the GAP was originally scheduled for the end of the 2001, but various factors kept this ambition from becoming reality. The most important of these reasons is the need to acquire financing. The World Bank and International Monetary Fund (IMF) have, at various points, refused to fund the GAP project, or certain aspects (most notably the Ataturk Dam), unless and until agreement was reached between the riparian states as to water sharing. Thus, Turkey often has been left to find alternative methods to finance the project. The entire project is scheduled to be completed by 2010; however, the centerpiece of the GAP and its largest, most significant structure, the Ataturk Dam, was completed in 1990. DAVID HILLEL, *RIVERS OF EDEN: THE STRUGGLE FOR WATER AND THE QUEST FOR PEACE IN THE MIDDLE EAST* 125-26 (1994).

²² WCD, *Dams and Development: A New Framework for Decision-Making, The Report of the World Commission on Dams, An Overview*, at 130, Nov. 16 2000, available at <http://www.dams.org> (last visited Nov. 20, 2000). Degradations caused by large dams may be stated as follows: submergence of cultural heritage, relocation of large number of population and inadequate resettlement applications, destruction of habitats of rare flora and fauna, inefficiency and unproductiveness in use of expropriation payments and similar issues. G.A. Choudhury, *Large Dams and Alternatives in Bangladesh: Experiences and Lessons Learnt*, WCD Regional Consultation (Dec. 1998).

²³ Juniper, *supra* note 19.

civilizations, Turkey is very rich in historical monuments and sites.²⁴ Despite this richness, the grave economic and politic situation of Turkey has had a negative impact on cultural heritage and left these monuments and sites to their fate. They have been exposed to various risks, such as construction of development projects, illegal exportation, urbanization, industrialization as well as damages by natural forces.²⁵ However, it should be noted that the loss of cultural heritage through government's neglect far exceeds the damage done to it by the combined efforts of all others. The Turkish government's practice represents unbelievable contradictions with internationally accepted standards that require archaeological surveys be done before a dam construction begins.

In some cases, however, location and existence of cultural property do not emerge until a dam or other development construction begins. For instance, Portugal's Coa Dam construction unearthed Paleolithic engravings. After subsequent controversy and protests, the Portugal government abandoned the Coa Dam, even after investing \$150 million into it.²⁶ In contrast, dams in Turkey are built on the well-known archaeological sites without paying proper attention to their value and public reactions. Another example of bad practices by the Turkish government is that while the Ministry of Culture reclaimed from a New York museum a piece of mosaic smuggled from Zeugma another government agency, the Ministry of Energy, flooded ancient city of Zeugma at the expense of maybe hundreds of other mosaics.

The government's neglect and dams are not the only things that destroy a country's cultural wealth. Elements of civilizations are also being lost in a more sinister and less public way through illegal exports.²⁷ Even though the Turkish government endorses strict national import and export restrictions as a means of protecting national patrimony, the country is so rich in antique remains that it is the victim of some of the greatest art thefts on the face of the earth.²⁸ While Turkey devotes much effort to reclaiming

²⁴ Turkey is in a position on the crossroads between European, Asian, Middle Eastern, and Mediterranean cultures. Turkey's geographic location as a bridge between continents and cultures is part of the reason that Anatolia has been host for many civilizations. It is full of fabulous mosques, temples and ancient cities.

²⁵ Damage to cultural heritage by man's activities is sometimes accidental and sometimes intentional. Fire, pollution, urbanization, tourism, social factors such as ideology, religion and illicit traffic in cultural property are among the major human factors that injure cultural heritage. Wind, earthquakes, erosion, flood, fire, natural decaying, cyclones are some of the natural causes that cause damage to cultural heritage. Council of Europe, Doc. 5579, May 22, 1986.

²⁶ See WCD Press Release, *supra* note 11.

²⁷ Maryann Bird & James Wilde, *The Arts/Archaeology*, TIME INTERNATIONAL, Dec. 6, 1999, at 58.

²⁸ *Id.*

antiques that have been smuggled abroad, many items are left unprotected due to a budget which devotes less than one percent to culture.²⁹

Above all, Turkey's dilemma between meeting increasing energy demand and protecting historical-cultural sites poses serious threat to the latter. Turkey currently faces important energy shortages as a result of the booming population and rapid industrial growth that pressure Turkey to find some dramatic and fast solutions to growing energy problems.³⁰ However, Turkey has limited resources, both financial and natural, to meet its energy needs. Limited quantities of available domestic oil and gas brought the country's water resources to the forefront for the production of energy. Therefore, Turkey began to make major investments in several huge projects to utilize its watercourses for this purpose. Water resource development in Turkey has been multipurpose, but because the country stresses industrialization, hydroelectric power has always received priority over irrigation and other aspects of water resource development.³¹ Consequently, a huge portion of the country's domestic energy comes from hydroelectric power stations.³² Principals among these power stations are on the Euphrates and Tigris rivers as part of the GAP.³³ These projects are designed to provide energy and irrigation for the vast arid lands of the Southeast part of Turkey. Furthermore, they are planned to generate income and employment. Turkey's construction of dams and hydroelectric power plants and utilization of its watercourses to produce electric energy is in line with international concerns on sustainable economic development, especially

²⁹ The Ministry of culture's share of the national budget for the year 2000 was 0.02 percent. A cultural ministry official complains that "our budget is shrinking all the time and nobody ever consults us before they decide to build dams." See *Watery Graves*, *ECONOMIST*, Apr. 29, 2000, available at Westlaw, 2000 WL 8141733.

³⁰ Turkey's population growth rate is 1.3 percent per year, and the industrial growth rate averaged around 8 per cent through out the 1990s. See *Demirel Promotes Energy Investment*, *TURKISH DAILY NEWS*, May 9, 2000, available at 2000 WL 4630677. While Turkey's current annual power production capacity is 1119 billion kwh, the total power consumption in the country is expected to reach around 185 billion kwh by the year 2004, and 289 billion kwh by 2010. *Id.*

³¹ Joseph W. Dellapenna, *The Two Rivers and the Lands Between: Mesopotamia and the International Law of Transboundary Waters*, 10 *BYU J. PUB. L.* 213, 239 (1996).

³² More than 38 per cent of Turkey's energy needs in 1998 were met by the hydroelectric power, followed by coal and gas. See *Demirel Promotes Energy Investment*, *supra* note 30.

³³ There are 110 dam projects currently under development in Turkey. The Turkish Southeast Anatolian Project (Güneydogu Anadolu Projesi/GAP) can be summarized as follows: "The project for Southeast Anatolia is a system for irrigation and the production of hydroelectric energy, which envisages the construction of 22 dams, 19 electric power stations and irrigation channels on the Euphrates and Tigris rivers and their tributaries. The project will cost \$32 billion and will cover 1.7 million hectares." Mehmet Komurcu, *International Legal Implications of Middle East Water Issues* (2000) (unpublished LL.M thesis, University of Wisconsin) (on file with the University of Wisconsin Law Library).

given the concerns over global warming which call for utilization of cleaner energy resources.

While the GAP has brought many benefits to the region, the lakes behind the dams have destroyed many archaeological sites.³⁴ Because only the half of the GAP is completed, the threat to cultural heritage still continues and the region, known as a cradle of many ancient civilizations, will lose many more valuable sites, from early Roman to late Islamic, as project develops.³⁵ Thus, it has become apparent that the price paid for development (GAP project) is substantial. The cost of economic investment required for the infrastructure is enormous, however, the costs have not been purely economic. The social and cultural costs of these huge projects are also enormous.³⁶ Due to the government's irresponsible policies, these hidden costs are especially high in Turkey. The lack of coordination between related government agencies, the Ministry of Energy and Natural Resources, the Ministry of Culture, and the General Directorate of State Hydraulic Works, in determining the dams' location results in destruction of historical and cultural sites. The recently completed Birecik Dam and proposed Ilisu Dam projects constitute clear-cut examples of this uncoordinated and neglectful approach. As Istanbul University Archaeology Professor Mehmet Ozdogan states "298 dam projects are currently under construction in Turkey" and "only 25 of them had had archaeological angles factored into the preliminary research."³⁷ He added that two of the GAP dams would flood over 200 historically significant sites. Some of these sites have already been damaged while some others are under the threat of new projects. Among those already gone are Samosata, the Roman garrison along the Euphrates, which now lies under 120 meters of water trapped behind the Ataturk Dam, Urima, the Apameia ancient cities, and many more.³⁸ Horum, Hasskehoyuk, Lidarhoyuk, Tilbes, Hayazhoyuk, Tille tumulus and Halfeti, Rumkale and Kalemeydani are some of the many

³⁴ See *Demirel Promotes Energy Investment*, *supra* note 30.

³⁵ *GAP Project: Neglect of Culture in Economic Development Scheme: The GAP Project Has a Significant Tradeoff in Terms of the Preservation and Rehabilitation of Turkey's Ancient Sites*, *TURKISH DAILY NEWS*, Aug. 30, 2000, available at 2000 WL 22789045.

³⁶ The dislocation of human populations, inundation of cultural sites, destruction of ecosystems, loss of fish species, and contamination of water sources have been among the hidden costs of these development projects. *Id.*

³⁷ Citing the earlier Keban Dam, Professor Ozdogan said that only 65 per cent of the reservoir had been combed for archaeological sites and that 63 sites had been found, of which, one had been totally excavated, and 19 others had only been 10 per cent completed. See *Last Chance to Save Zeugma Ancient City*, *TURKISH DAILY NEWS*, Jun 12, 2000, available at 2000 WL 22786085.

³⁸ See Merryman, *supra* note 27.

other cultural sites in the region that are in danger of being flooded by rising dam waters.³⁹

Turkey has embarked upon GAP in order to utilize its water resources more effectively as an instrument to support its development.⁴⁰ The Birecik and the Ilisu Dams are two of the controversial development projects in the GAP region. They are not the first and probably will not be the last controversial dams in the Southeast Turkey, where the construction of series of other dams is being planned.⁴¹ The current flooding of Zeugma antique city by the Birecik Dam and the danger of flooding Hasankeyf as a result of the construction of Ilisu dam has raised public attention both domestic and international.

1. Birecik Dam and Ancient City of Zeugma

The Birecik Dam and Hydroelectric Power Plant is designed to provide energy and irrigation for vast arid lands. The Birecik Dam is the fourth biggest dam on the Euphrates following the Keban, the Karakaya and Ataturk Dams.⁴² It is located about 20 miles from the Syrian border. The construction of it began in 1993 and its reservoir has been filled since December 1999. The French, German, Belgian, Austrian and Turkish energy consortium built the Birecik Dam under a Built Operate Transfer (BOT) scheme.⁴³ The Birecik Dam and Hydroelectric power plant started electricity production in November 2000. When fully operational, 92,700 hectares of land will be irrigated from its 21.6 square mile reservoir and the

³⁹ *Id.*

⁴⁰ PHILIP ROBINS, *TURKEY AND THE MIDDLE EAST* 87 (1991).

⁴¹ See *Last Images of Hasankeyf*, *supra* note 15.

⁴² See generally *Sharing Mesopotamia's Water*, *ECONOMIST*, Nov. 13, 1999. The Birecik Dam and Hydroelectric Power Plant will produce 2,518 billion kwh of electricity and irrigate 92,700 hectares of land. Turkey has so far completed five dams on the Euphrates. Those are the Keban Dam, Ataturk Dam, Karakaya Dam, Birecik Dam and Karkamis Dam.

⁴³ Shortage of financial sources to invest in major infrastructure projects such as electric power plants forced the Turkish government to envisage other options for financing projects. One option is the so-called Build, Operate and Transfer (BOT) model, under which, private investors build and operate private sector generation facilities for a set number of years, at which point they transfer ownership to the state. First introduced in 1984 by then Prime Minister Turgut Ozal, BOT projects have been plagued by legal problems, which has slowed their implementation. Several BOT plants are currently under construction, including gas-fired units at Marmara Ereğlisi and Istanbul, and a \$1.6-billion, 672-MW hydro project at Birecik on the Euphrates River (due for completion in 2001). In coming years, many more power plant projects could be offered to the private sector under the BOT (or possibly an alternative Build-Operate, or BO model), particularly given the recent changes in Turkish law which reclassifies power projects as "commercial agreements." U.S. Energy Information Administration, available at <http://www.eia.doc.gov/emeu/cabs/turkey.html> (last visited Apr. 25, 2002).

plant will generate 2.518 billion kwh of electricity per year, constituting two percent of Turkey's annual electricity production.⁴⁴

The controversy surrounding the Birecik Dam's impact on the local people and culture were brought to the world's attention when the rising waters of the dam has started to flood historic Roman settlement of Zeugma. Domestic and international media played an important role in bringing these issues to world's attention.⁴⁵ With widespread news coverage came much needed money: U.S. based Packard Humanities Institute gave \$5 million to support excavation works at Zeugma.⁴⁶ As a result of this new consciousness, a voluntary group, the Zeugma Initiative,⁴⁷ consisting of Turkish businessmen, professionals and intellectuals was established to support rescue efforts at Zeugma. The waters of the Euphrates now cover the ancient city of Zeugma, which was founded in the third century BC as a Roman military base and trade center.⁴⁸ In the first centuries AD, Zeugma was a major city on the eastern edge of the Roman Empire with a population of roughly 70,000.⁴⁹ The first systematic excavation of the area began in 1972 and German archaeologists discovered the ancient Roman ruins in 1976.⁵⁰ Archaeologists who have studied Zeugma believe that the size and

⁴⁴ *Major Hydropower Plant to Start Electricity Production in November*, *TURKISH DAILY NEWS*, June 6, 2000, available at 2000 WL 22785816.

⁴⁵ All newspapers and TV stations have given broad exposure to the magnitude of the loss through on the spot broadcasting, editorials and expert interviews.

⁴⁶ Sibel Utku, *Final Countdown for Ancient City of Splendour*, *AGENCE FRANCE-PRESSE*, Oct. 3, 2000, available at 2000 WL 24726981.

⁴⁷ The Zeugma Initiative, a civic organization, was recently established to save the antique city from flooding. The first step of this group has been to issue a call to the President, the Prime Ministry and the Culture Ministry, asking for urgent meetings in order to inform the public about the issue in search of public support. The Initiative is based on the idea that what will be flooded by the waters of the dams in the GAP region is "not only our past but also our common future." The initial goals of the group are establishing and coordinating communications centers, focusing the attention of the private and public sectors on the issue, shaping public opinion and harnessing the support of public authorities, establishing the legal and financial infrastructure of working groups and preserving and transporting the excavated objects.

⁴⁸ The fourth Roman legion, which defended the eastern frontier of the Roman Empire, was based in this city that became a prosperous trading center on the famous Silk Road. For more information, see Professor David Kennedy's Zeugma web site, available at <http://www.arts.uwa.edu.au/Classics/archeology/Z2.html>.

⁴⁹ David J. Lynch, *An Ancient City Awaits its Watery Grave in Turkey, Archaeologists Race to Save Relics Before Advancing River Floods Roman Site*, *USA TODAY*, June 6, 2000, at 09D.

⁵⁰ *Zeugma's Days Draw to a Close*, *TURKISH DAILY NEWS*, Jun. 19, 2000, available at 2000 WL 22786366. In the 1970s German archaeologist J. R. Wagner pointed out in his doctoral thesis that Zeugma possessed invaluable cultural artifacts, and he applied to the Monuments and Museums General Directorate to ask for permission for an excavation. Wagner's demand was rejected, but he went ahead and submitted a copy of his thesis to the institution; however, the fate of his thesis is unknown. See *GAP Project: Neglect of Culture in Economic Development Scheme: The GAP Project Has a Significant Tradeoff in Terms of the Preservation and Rehabilitation of Turkey's Ancient Sites*, *TURKISH DAILY NEWS*, Aug 30, 2000, available at 2000 WL 22789045.

richness of the site make it unique.⁵¹ Although this site has been known for a long time the extensive excavation works were started just shortly before the flooding. This kind of behavior is in line with the Turkish Government's neglect towards archaeological sites. In a last minute effort to give some time to archaeologists to document and save relics from the Zeugma site, the government has delayed flooding of the Birecik Dam for ten days, from June 18 to June 28, 2000. Unfortunately, most of the excavation sites were already under water.⁵²

The excavation site of Zeugma was divided into three zones.⁵³ The lower parts, Zone A and Zone B, were prioritized and excavated in a race like manner with the rising water. Zone A is where the most urgent excavation and documentation have been done. The emergency excavation in the areas described as Zone A and Zone B was completed in early October when the water level of the Birecik Dam reached its maximum, covering two thirds of Zeugma.⁵⁴ The remaining one third of the site, Zone C, which lies under the hills, remains unaffected even after the dam's reservoir is full.⁵⁵ The Ministry of Culture plans to build an open-air museum along with a mosaic museum in Zone C.⁵⁶

The results of excavation work were impressive. During rescue excavations archaeologist removed three huge mosaics and also frescoes that decorated the walls and floors of the riverside villas of Zeugma's elite. They have also found many statues and thousands of coins and stamps, indicating a highly developed state.⁵⁷ These findings proved that in spite of providing energy and irrigation as well as helping generate income and employment for the poor people of the region, the Birecik Dam's cultural cost is enormous.⁵⁸

⁵¹ F.T. McCarthy, *Moreover*, ECONOMIST, Apr. 29, 2000. Even after almost two millennia, Zeugma's sophistication is apparent. Its inhabitants enjoyed running water and eye-catching frescoes of maroon, gold, green and ivory. Mosaic floors, the product of talented craftsmen using naturally colored riverbed stones and tiny cubes of glass, turned atriums and fountains into dazzling artistic statements. All these show that this was an ancient civilization, not a primitive one. See also Lynch, *supra* note 49.

⁵² *Turkey to Delay Flooding of Archaeological Sites by 10 Days*, AGENCE FRANCE-PRESSE, Jun. 5, 2000, available at 2000 WL 2808025. Turkish officials say that it is technically difficult and costly to stop the inundation. A month of delay cost Turkey about \$ 10 million.

⁵³ *Last Chance to Save Zeugma Ancient City*, TURKISH DAILY NEWS, Jun 12, 2000, available at 2000 WL 22786085.

⁵⁴ See Utku, *supra* note 46.

⁵⁵ See Lynch, *supra* note 49.

⁵⁶ See Utku, *supra* note 46.

⁵⁷ *Id.*

⁵⁸ For example, under the waters of the Birecik Dam and Karkamis Dam, there are 13 Hellenistic and Bronze Age sites dating back over 3,000 years. The ancient city of Samosata, which goes back to 2000 B.C., was also flooded by Atatürk Dam in early 1990s. David Kennedy, *Double*

While the neglect of cultural property partly results from a lack of appreciation of the significance of the objects, lack of financial resources also constitutes an important part of the problem. The Turkish government allocates only a small portion of its budget, less than one per cent, to culture, despite the fact that the country is so rich in historical remains that it is often described as an "open air museum."⁵⁹ As such, although the existence and the wealth of Zeugma had been known long before the beginning of construction of the Birecik Dam, the site, however, had not attracted sufficient funds and attention to stop the construction of the Birecik Dam until it was too late.⁶⁰ It has become apparent that the Turkish government cannot cover the cost of saving its historical riches without financial and technical assistance from developed countries.

Turkey has been criticized for not doing more to protect Zeugma, but the controversy raises equally troublesome questions about international archaeologists who were slow to explore a site they have known about for years.⁶¹ Feasibility studies for the dam began in 1986, but construction did not start until 1993. By then, archaeologists knew that the area housed Roman ruins.⁶² In early 1995, David Kennedy, an Australian archaeologist who performed some of the earliest work at the site, publicly appealed for financial aid.⁶³

Kennedy notes "there are many culprits in this unhappy episode but Turkey should not be at the head of the list."⁶⁴ According to him, Western scholars have known about the wealth of Zeugma for long time and the imminent loss of the city could have been avoided if timely measures had been taken.⁶⁵ Several foreign countries, including the United States and Britain, have long maintained institutes in Turkey to support the activities of their nationals in archaeology there.⁶⁶ Yet they did little or nothing

Tragedy on the Euphrates, available at <http://www.arts.uwa.edu.au/classics/archeology/z3.html> (last visited May 16, 2002).

⁵⁹ The Ministry of culture's share of the national budget for the year 2000 was 0.02 per cent. *Turkish Dam Threatens Ancient Roman city and Mosaic Treasures*, CANADIAN PRESS, May 18, 2000, available at 2000 WL 22516649.

⁶⁰ See Lynch, *supra* note 49.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Amberin Zaman, *Turkey's Dam Threatens 'Bridge to Ancient Past*, L.A. TIMES, May 27, 2000, at A2.

⁶⁵ Professor Kennedy states that a survey of the areas to be flooded by the Birecik and four other dams planned on the Euphrates-Tigris rivers, conducted in the 1980s by American archaeologist Guillermo Algaze, established Zeugma's importance beyond doubt. See *Id.*

⁶⁶ *Id.*

despite repeated appeals for funding from the cash-strapped Turkish Ministry of Culture.⁶⁷

The actions of the Turkish government go against established archaeological principles and international conventions concerning protection of cultural heritage, which require sites of historic and archaeological importance to be marked and measures taken to preserve them at the preliminary survey stage of engineering projects. These principles were not taken into account by the Turkish government regarding the Birecik Dam. At the outset, the project was started without giving due attention to the presence of the unique architectural heritage. The construction of Birecik Dam and destruction of the Zeugma site in relation to the dam project constitutes an obvious inconsistency with the requirements set forth in the Article 23 of the 1968 UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works.

Article 23 requires that measures for the preservation or salvage of cultural property be carried out well in advance of public or private works. In areas of archaeological or cultural importance, such as historic towns, villages, sites and districts, the starting of new work should be made conditional upon the execution of preliminary archaeological excavations.⁶⁸ In the case of Zeugma, Turkey started and completed the project first, and then tried to excavate cultural riches just before the rising waters flooded them. Therefore, it can be argued that Turkey failed in two main principles of protection of cultural property. These principles are physical preservation of the object, and the recognition and protection of its cultural significance. What was destroyed in Zeugma was the loss of the world's common heritage as much as it was a loss for Turkey and the Turkish people.

2. Ilisu Dam and the Preservation of Hasankeyf

The proposed Ilisu Dam is part of the same ambitious scheme as the Birecik Dam. It is located on the Tigris River at a very controversial site

⁶⁷ See Andrew Finkel, *Roman Mosaics Win Reprieve from Turkish Leader*, TIMES OF LONDON, June 6, 2000, at 2D. The director of the Ankara office of the American Research Institute in Turkey, Toni Cross, said "The site was known about since 1917. People knew the dam was coming in the 1980s. The mosaics were discovered around 1992." *Id.* David Shankland, who was acting director of the British Institute of Archaeology in Ankara, confirmed that when the Ministry of Culture sought help from foreign institutions the decision not to make Zeugma a priority was deliberate. *Id.*

⁶⁸ UNESCO's Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works art. 23, UNESCO Doc. CFS.68/vi.14x/AFSR (1968) [hereinafter UNESCO's Recommendations].

forty miles from the Iraqi border.⁶⁹ The Ilisu Dam is projected to be 1820 meters long and 135 meters high with a capacity to hold 10.4 billion cubic meters of water, which constitutes a one half year flow of the Tigris river.⁷⁰ The dam will flood an area of 313 square kilometers. The Ilisu dam will be the largest dam on the Tigris in terms of hydropower production, and will be the second largest in the GAP project in same terms.⁷¹ Construction of Ilisu Dam also constitutes serious threat to cultural heritage of Turkey. Hasankeyf, which is one of the medieval sites in Turkey, is faced with the danger of being flooded by Ilisu Dam.⁷² Hasankeyf was settled more than 10,000 years ago and survived several major civilizations, stretching from the Assyrians through the Ottomans.⁷³ Each has added its own cultural layer.

An international consortium, consisting of British, Italian, Swiss, Swedish and Turkish companies, is undertaking the construction of Ilisu Dam.⁷⁴ The Ilisu Dam project has caused serious international opposition, especially in the United Kingdom. The British government is involved due to the presence of Balfour Beatty, the British company awarded one of the contracts for this dam as part of the Swiss-led international consortium which applied for an official Export Credit Guarantee.⁷⁵ However, British Balfour Beatty and Italian Impregilo pulled out of the Ilisu dam project due to the widely publicized campaign mounted by some political activists and environmental pressure groups such as Friends of the Earth.⁷⁶ Balfour Beatty and Impregilo denied that their decision was influenced by the pressure from opponents and said their withdrawal was a business decision based on a thorough and extensive evaluation of the commercial, environmental and social issues in the project.⁷⁷ While other consortium companies are still

⁶⁹ *Turkey's Latest Controversial Dam*, ECONOMIST, Apr. 29, 2000, available at 2000 WL 8141706.

⁷⁰ Environmental News Service, *Turkish Dam Criticism Fueled by Leaked Report*, Sep. 7, 2000, available at 2000 WL 7839557.

⁷¹ James M. Dorsey, *Controversial Dam May Spur G-8 Action*, WALL STREET JOURNAL (Europe), July 21, 2000, at 30, available at Westlaw 2000WL21066804.

⁷² *Turkish Dam Threatens Ancient Roman City and Mosaic Treasures*, *supra* note 59.

⁷³ Hasankeyf is a rich treasure of Assyrian, Christian, Abbasidian-Islamic, Arabic, Seljuk, Kurdish and Turkish cultural heritage.

⁷⁴ Peter Bosshard, *Ilisu- A Test Case of International Policy Coherence*, Berne Declaration (Nov. 1998), available at <http://www.rivernet.org/turquie/ilisu.htm> (last visited Sept. 29, 2000). A consortium led by Switzerland's Sulzer Hydro and ABB Power Generation has been awarded the contract. A group that includes Britain's Balfour Beatty, France's Alstom, Italy's Impregilo, Sweden's Skanska, and the Turkish Nurol, Kiska and Tekfen. *Id.*

⁷⁵ *Dam Non-sense*, TIME OF LONDON, July. 13, 2000, at 23.

⁷⁶ James O'Brien, *Balfour Beatty Pulls Out of Dam Scheme*, BIRMINGHAM POST, Nov. 14, 2001, at 23.

⁷⁷ Balfour Beatty funded an environmental impact analysis and made recommendations to the Turkish General Directorate of State Hydraulic Works (DSI). The company said it was taking to long for Turkish government departments to meet their recommendations to solve the environmental, social and commercial challenges the dam presents. See Byandrew Johnson,

committed to the project, the future of the project is not as clear as before. Although Turkish Ministry of Foreign Affairs issued a statement saying that Turkey would continue with the project whether or not it got the foreign backing, it would be difficult for Turkey to finance the project on its own given the country's current troubled financial situation. Whatever the real reason for the withdrawals it was a great victory for the opponents of the project. Opponents argued that British money should not finance a project that would flood the ancient city of Hasankeyf, damage environment and violate human rights of the local people.⁷⁸

A number of potential problems are easily attributable as critiques of the project. Most significantly, construction of the dam is culturally irresponsible because it will cause destruction of invaluable cultural artifacts. Another contradiction is that Hasankeyf is currently a "first degree protected site" (in Turkish called a SIT) under Turkish Law.⁷⁹

Another critical point about Ilisu Dam is its life span. Apart from destruction to cultural heritage, long-term social and economic benefits and feasibility of Ilisu Dam are being seriously questioned among water experts through out the world. Experts say that some of world's unique historical and cultural sites will be destroyed forever for the short-term gain of some power generation. Among others, Istanbul Technical University Professor Zeynep Ahunbay foresees far less than a century for the functional life span of most dams and about 50 to 60 years for the Ilisu Dam.⁸⁰ When the very short useful life of the dam is set against the centuries of history of Hasankeyf and the city's potential to live, one is compelled to ask the authorities "Why build Ilisu dam?"⁸¹

A further concern about Ilisu Dam is that the dam is located in a troubled region where the majority of people are of Kurdish origin. That is why the Ilisu Dam has brought out a flood of international criticism. In order to prevent the completion of this project some NGOs and human rights groups in Turkey and abroad have started campaigns.⁸² Taking advantage of this situation, some groups (mostly Kurdish activists in Europe and some Western European politicians) are trying to flare up ethnic differences by

Balfour Pulls out of Disputed Dam, DAILY EXPRESS, Nov. 14, 2001, available at 2001 WL 29602419.

⁷⁸ Chris Morris, *Wonders Snatched from Rising Water: Hydroelectric Dam will Draw Countless More Unknown Treasures as Turkey Puts Economy Before Homes and Antiques*, GUARDIAN, May 19, 2000, available at 2000 WL 21813825.

⁷⁹ SIT is a term used for places or regions placed under protection for having "historical or natural value."

⁸⁰ Ahunbay, *Preservation Of Hasankeyf/A Site Threatened By Ilisu Dam Project*, YAPI 16 (2000).

⁸¹ See *id.*

⁸² Zilelioglu, *supra* note 15.

alleging that the Dams are part of a Turkish plan to wipe out all traces of Kurdish culture.⁸³ These groups and individuals intentionally changed the focus of the issues from the Dam's effects on the local people and cultural heritage to the human rights violations that Turkey has been experiencing for a long time as a result of its fight against separatist Kurdish terrorists. However, these efforts of relating the opposition for the Dam to the charges of ethnic cleansing are misguided and perhaps purposefully made to attack Turkey on this sensitive problem.

These allegations are not true for several reasons. First of all, there is no ethnic discrimination in Turkey.⁸⁴ Constitutionally, all citizens of Turkey, regardless of their religion, race, and language, are entitled to the same treatment and with equal duties.⁸⁵ In fact, many Kurds have achieved high positions within the Turkish establishment as cabinet ministers, members of parliament and businessmen.⁸⁶ Second, these claims are without merit. It is true majority of inhabitants in the Ilisu Dam area are Turkish citizens of Kurdish origin. However, another dam, the Birecik Dam on the Euphrates, will flood nine villages and an entire town where all inhabitants of this area are ethnic Turks.⁸⁷ Therefore, linking these projects to the claims of ethnic cleansing or discrimination, and claiming that Turkish government uses them against both Turkish and Kurdish citizens does not make any sense. Furthermore, the primary reason for this project (GAP), the most expensive in the history of Turkey, is the government's plan to bring prosperity to this area and increase the standard of living of regions where

⁸³ For example, Friends of the Earth, a British NGO, has caused some misguided groups to go as far as to brand the developments as "ethnic cleansing by another name." Press Release, Friends of the Earth, *Ilisu Dam Would Breach Human rights*, at <http://www.foe.co.uk/pubsinfo/infoteam/presse/2001/2001/01/000102.html> (last visited May 16, 2002).

⁸⁴ For further information on ethnic discrimination in Turkey, see İBRAHİM YASA, *TURKIYE'NİN TOPLUMSAL YAPISI VE TEMEL SORUNLARI 180-84 (1970)* (translated as "Social Structure of Turkey and its Main Problems").

⁸⁵ Article 10 of the 1982 Constitution states:

All individuals are equal without any discrimination before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such considerations. No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings.

TURK. CONST. art. 10 (1982).

⁸⁶ YASEMİN CELİK, *CONTEMPORARY TURKISH FOREIGN POLICY 4* (1999).

⁸⁷ The Birecik Resettlement Project area covers a total of 44 villages located in the Halfeti, Birecik and Bozova districts in the Sanliurfa province, Araban, Yavuzeli, the Nizip districts in Gaziantep province, the central and Besni districts in Adiyaman province. See *ETHNIC GROUPS IN THE REPUBLIC OF TURKEY 252-429* (Peter Alford Andrews ed., 1989).

people are mostly of Kurdish origin.⁸⁸ As a result of the opposition, a committee of British MPs suggested the British government not support the project.⁸⁹ However, even if the campaigners are successful in preventing support from export credit agencies, it may not stop the Turkish government from building the \$1.5 billion Ilisu Dam, as the financial blocking of Syria and Iraq could not stop Turkey beginning the \$32 billion GAP project.

The Turkish government considers the possibility of transferring some of the monuments to another site before the completion of the Ilisu Dam. This approach, if realized, constitutes a clear contradiction not only with established archaeological principles but also provisions of international conventions concerning protection of cultural property. Archaeologically, a monument or a religious place of worship acquires importance because of many factors such as its location, historical background, architecture, or it has other special significance.⁹⁰ A mere imitation and transfer to another location can never replace the original. As Professor Ahunbay states, it is unfeasible to transfer Hasankeyf to another location due to the technical impossibilities. Archaeologists hope to save only about twenty percent of the cultural artifacts if Hasankeyf is transferred.

Even though modern technology offers several methods for transferring buildings the possibility of salvaging some of the monuments by transferring them from Hasankeyf to another site needs to be reconsidered.⁹¹ Monuments with rubble masonry such as the Koc and

⁸⁸ The objectives for the development of the GAP region are set by the GAP Regional Development Administration as follows: i. to develop all the land and water resources in the Region, in order to achieve accelerated economic and social development, ii. to alleviate disparity between the Region and other regions by increasing production and welfare levels in the Region, iii. to increase the productivity and employment capacity in the Region, iv. to meet increased need for infrastructure resulting from population explosion and urbanization, v. to organize economic and physical infrastructure in rural areas, in such a way as to utilize the resources, in the most useful ways and to direct urban growth in desired directions, vi. to contribute to the national objectives of sustained economic growth and export promotion by efficient utilization of the Region's resources. The objectives of the GAP project are available at <http://www.mfa.gov.tr/grup/dcd/dcd/gap.htm> (last visited Nov. 15, 2001).

⁸⁹ Two parliamentary selected committees, Trade and Industry (March 2000) and International Development (July 2000), condemned the UK support for the Ilisu Dam. See <http://www.heureka.clara.net/sunrise/ilisu.htm> (last visited Oct. 9, 2000).

⁹⁰ Ahunbay, *supra* note 80.

⁹¹ The most favorable from the point of conservation is the technique in which the monument is cut off from its foundations and mounted on a wheeled trolley. This sophisticated technique has been used in Europe to move cathedrals and palaces. It would be the right one for Zeynel Bey Tomb, which is a significant monument from late 15th century. The structure has a cylindrical shaft, the exterior of which is decorated with glazed bricks, laid in geometric patterns, featuring Timurid tradition and marking the strong artistic link between Anatolia and Central Asia in the fifteenth century. Another technique, which is widely adopted for moving is by the dismantling of the historic building and its reassemble at the new site. After careful photographic documentation and survey, each stone block in the structure is numbered. This technique is generally applied to monuments with ashlar construction. In Hasankeyf, it can be used to transfer architectural elements like minarets and the gates of the citadel. The criticism

Sultan Suleyman mosques in Hasankeyf cannot be transferred. If such structures are transferred, almost ninety-five percent of the masonry will have to be renewed after the operation.⁹² This means that most of the historic substance will be lost during the dismantling and restoration. Moreover, the essential ingredient of any cultural property policy is that the object itself be physically preserved. If it is lost or destroyed, it is obvious that it cannot be enjoyed, studied or used.⁹³

The Ilisu Dam project also contradicts with international standards and conventions which recommend that at the preliminary survey stage of engineering projects sites of historic and archaeological importance be marked and measures taken to preserve them in-situ.⁹⁴ First of all, the project was started without giving due attention to the presence of the unique architectural heritage at Hasankeyf.⁹⁵ This practice is clearly in conflict with the UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works (1968). The Recommendation points out that "It is the duty of governments to ensure the protection and the preservation of cultural heritage of mankind.... Preventive and corrective measures should be aimed at protecting or saving cultural property from public or private works likely to damage and destroy it."⁹⁶

Subsequently, the idea of transferring the monuments from Hasankeyf contradicts with the requirement that cultural property be preserved in-situ.⁹⁷ As Professor Merryman stated "Physical preservation of discrete objects themselves may not be enough. Every cultural object is some extent a part of a larger context from which it draws, and to which it adds, meaning."⁹⁸ The cultural significance of the object will be lessened or destroyed when separated from its cultural context.⁹⁹ At the extreme the

to this technique is that during the dismantling and the re-erection process, monuments lose some of their original details; some blocks break down or crumble. Binding elements like mortar and clamps need to be changed or replaced. The workmanship is not the same. The mounting has to be done very carefully to assure proper alignment of the members. *Id.*

⁹² Ahunbay, *supra* note 80.

⁹³ J.H. Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 340 (1989).

⁹⁴ Ahunbay, *supra* note 80.

⁹⁵ *Id.*

⁹⁶ UNESCO's *Recommendations*, *supra* note 68.

⁹⁷ See Article 4 (ii) of the 1992 European Convention on the Protection of Cultural Heritage. There is a requirement to ensure possibilities for the modification of development plan policies, to allocate time and resources for appropriate scientific study of the impact of development proposals and to conserve in situ elements of archeological heritage. See generally THE ARCHAEOLOGY AND URBAN PROJECT: A EUROPEAN CODE OF GOOD PRACTICE BY THE COUNCIL OF EUROPE (2000).

⁹⁸ See Merryman, *supra* note 93, at 356.

⁹⁹ Roger W. Mastalir, *A Proposal for protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033, 1046 (1992/1993).

object becomes anonymous, an orphan without reliable indication of its origin, its significance, its place and function as part of something else.¹⁰⁰

Likewise, the siting and topography of the Hasankeyf are very important in moving monuments or parts thereof. Even if a monument is successfully transferred, removal of it from its original place for which it was commissioned arguably takes it out of context, depriving it of meaning and expressive power. A similar landscape and context has to be created in order to make them impressive and meaningful again.¹⁰¹ Yet one has to consider the fact that, it is almost impossible to create the same landscape and context for the transferred monuments. Therefore, arguments about relocating Hasankeyf and exhibiting it somewhere else do not make any sense. First, there will be no replacement since what is destroyed has no equivalent. Next, there will be no pay out since what is destroyed is without price. In this regard, Professor Ahunbay asks who can re-create such picturesque background for monuments, like the Koc and Sultan Suleyman mosques of Hasankeyf, once they are relocated.¹⁰²

B. OTHER ISSUES RELATED TO DAM PROJECTS

Besides their effect on cultural heritage, social protest against large dams usually revolves around the issue of displacement.¹⁰³ A recent report from the World Commission on Dams (WCD) revealed that some 40-80 million people have been physically displaced by dams worldwide and millions of people living downstream from dams have also suffered serious harm to their livelihoods and the future productivity of their resources has been put at risk.¹⁰⁴ As is the case for all development projects, the GAP brings along negative changes for some sectors of the population. One such sector involves those whose settlements and farmlands are to be flooded. These people will face the problems of resettlement, as well as finding new means of subsistence and adapting to a new way of life. The Birecik and Ilisu Dams adversely affect about 60,000 people according to Turkish government, and 75,000 people according to international reports.¹⁰⁵

¹⁰⁰ Merryman, *supra* note 93, at 356.

¹⁰¹ Ahunbay, *supra* note 80.

¹⁰² *Id.*

¹⁰³ SATYAJIT SINGH, *TAMING THE WATERS: THE POLITICAL ECONOMY OF LARGE DAMS IN INDIA* 182 (1997).

¹⁰⁴ *Dams and Development: A New Framework for Decision-Making*, The Report of the World Commission on Dams, An Overview (Nov. 16 2000), available at <http://www.dams.org> (last visited Nov. 20, 2000).

¹⁰⁵ The Birecik Dam affected approximately 30,000 people and 45 villages, 5 of which are completely under water. Furthermore, there are twenty-nine villages whose farmlands are partly affected. Altogether, the population affected by the dam is 30,003 (according to 1997 census).

The issues of displacement and resettlement are enormous and complex.¹⁰⁶ Displacement due to development projects includes the process of physically uprooting large sections of people from their land, economy, resources and culture.¹⁰⁷ Resettlement in most cases is usually in newly established communities or in the historical parts of nearby towns.¹⁰⁸ Most of the time the payment of "fair compensation" is the main concern for the displaced people. Moreover, social and cultural destruction has far reaching consequences in terms of the displaced persons' emotional and spiritual attachment to land of their ancestors. These values, in contrast to Western cultures, are fundamental to eastern cultures.

The Turkish government has started special programs to deal with the problems of displaced people.¹⁰⁹ These projects are supported by the United Nations Development Program and carried out by a group of consultants.¹¹⁰ It is unfortunate that irrigation and power generation, which

Among them, 6,500 people from 850 households are subject to resettlement. See *The Second Death of "Mosaic City" Archeologists Race to Save What They Can as Turkey Floods a Marvel of Antiquity*, BOSTON GLOBE, May 9, 2000, available at 2000 WL 3325613.

¹⁰⁶ Building of dams has lately forced 4 million people per year, 11,000 each day, from their homes. See Kader Asmal, *Parting the Waters*, CIVILIZATION, 86 (October/November 2000).

¹⁰⁷ See SINGH, *supra* note 103. It is further discussed that the oustees, "victims" of development through the loss of their livelihood and sustenance economy, are forced to depend on the market economy for the survival. *Id.* Their entry into direct market relations, without the necessary capital or skills, places them at a disadvantage from the very beginning. Displacement, thus, usually leads to their pauperization and increased marginalization.

¹⁰⁸ See *Birecik Dam Close to Completion*, TURKISH DAILY NEWS, Apr. 6, 2000, available at 2000 WL 4629534.

¹⁰⁹ The first of the special projects was developed for the area affected by Birecik Dam in 1997. The project aims at helping the resettlement of the people of 43 villages in the Halfeti area, and facilitating their social, economic and cultural adaptation to their new environments. Another governmental project is underway for the much disputed Ilisu dam. The British Department of Trade and Industry has set four conditions that include i. a proper resettlement plan should be put in place; ii. archaeological riches of medieval Hasankeyf should be secured as much as possible; iii. water flows are to be preserved; iv. water quality is to be maintained. See *Planning and Implementation for the Resettlement, Employment and Investments of People Affected by Birecik Dam*, available at <http://www.Gap.Gov.Tr/English/Frames/Fr1.html> (last visited Sept. 29, 2000).

¹¹⁰ *Id.* See also, *Turkish by Leaked Report*, *supra* note 70; *Dam Non-sense*, *supra* note 75. Project activities cover three components. The social component is related to community life, organization and management. The economic component consists of investment for employment generation. Finally, the spatial component of the project is related to physical settlement itself. Policies for supporting people in matters related to social life, economic investment and resettlement are based upon the principles of participation and sustainability. This means that the people concerned are informed at each stage of the project and their participation to decision-making is ensured. While accepting the measures, the Turkish government finds such outside pressure unacceptable for political reasons. However, a report by a former World Bank resettlement expert, Ayse Kudat, identifies a list of problems with the project's proposed resettlement plan that would violate World Bank and OECD guidelines. The problems are as mentioned in the report, including the lack of will or capacity in Turkey to handle resettlement issues, failure to meet international standards of World Bank, inadequate budget, lack of necessary information on affected people, and the failure to address the needs of women. *Id.*

could play an important role in the alleviation of poverty and promote greater social justice, is, in fact, doing just the opposite for the poorest segment of the people of Southeast Turkey.¹¹¹ Under the present practice existing in Turkey, such people are given two options: 1) To appeal for rural or urban resettlement through the means of the State, or 2) To receive compensation for expropriation.¹¹² The practice so far presents some problems both for the State and the people affected. Those who have been resettled by the State are dissatisfied with their new settlements, face some adaptation problems and have low-income levels.¹¹³ Looking at the issue from the viewpoint of the State, there is the problem of inefficiency in using public funds since compensations do not find a channel to productive investment.

Another problematic impact of the Birecik Dam is on Turkey's relations with its neighbors. As with every new Turkish dam, the completion of the Birecik Dam also brought complaints from the south of the border. Syria and Iraq have criticized the Birecik dam because they worry about a crucial cut off of the Euphrates waters. The Turkish government, on the other hand, claims that Syria and Iraq will benefit from the Birecik Dam

¹¹¹ Most of those who have received their compensations have become poorer for not channeling their funds into appropriate investments. Moreover, since most land in Southeast Turkey is concentrated in the hands of large landowners and the compensation has usually been tied to the property of land or houses, many landless families were not compensated at all. See Bosshard, *supra* note 74.

¹¹² More information is available at <http://www.GAP.gov.tr>.

¹¹³ Southeastern Anatolia Project Regional Development Administration, GAP Administration survey, *Problems of Employment and Resettlement in Areas to Remain Under Dam Lakes* (1992-1994). The survey covered 1,376 household heads. Among these persons, there were 193 who were resettled by the State, 131 who had received compensation, and 1,052 who would be affected by dams under construction. In addition, there were interviews with 85 village headmen and 38 local governors to identify overall problems related to the process of resettlement. The findings of the survey indicate that: "Adaptation to the environment" and/or "clash with the environment" constitutes an important social problem for resettled people and is a source of worry for those waiting to be resettled; 67% of those resettled by the State and 89% of those who received their compensation want to return to their previous environments; those who had to move elsewhere mostly preferred the locations within the region; and those who had received their compensation considered these funds insufficient. These funds were mostly invested in immovable property or used for daily consumption; While the main problem of those who received their compensation was economical, others who have been resettled by the State faced adaptation problems; 70% of those who were subject to resettlement preferred resettlement as a community rather than settling individually. While 58% of households wanted to be resettled by the State, 42% want to find a place to settle by themselves after receiving their compensation. People with no land and small landholders generally wanted to be resettled by the State; Delays in the payment of compensation reduced the investment capacity of households and led to shrinking funds because of high inflation. Compensation funds were used mostly for such businesses as car-dealing, wholesale trade and investments in immovable property and taxi or truck driving which do not require any specific skill. Thirty six per cent of households looked for state support to continue crop farming, while 6% expected the same support in stock-breeding. Credit facilities, land and education were other expectations from the State. *Id.*

since it will help regulate the Euphrates waters, released by the Ataturk and Karakaya dams, particularly during the peak times of downstream flows.¹¹⁴

Turkey's neighbors, Syria and Iraq, whose borders are 40 miles from the Ilisu project, also oppose this project and they claim that it will disrupt the flow of water into their countries. Syria and Jordan, on behalf of Iraq, have made formal protests to the foreign office of Britain over British support for the Ilisu Dam.¹¹⁵ The Arab League is also against the project, and suggests that the construction of the dam may directly lead to war in the Middle East.¹¹⁶

II. LEGAL PROTECTION OF THE CULTURAL HERITAGE

The protection of cultural property is developing as a fundamental concern of international law.¹¹⁷ International law is inevitably triggered by the utilization of international river basins, where upper riparian states' land use and water use pose certain environmental or health risks to lower riparian states due to impairment of water quality or quantity. While the most obvious points of the relationship between the utilization of international watercourses and international environmental law are on water pollution and water quantity issues, social and cultural results of large water projects may also create problems under international law. Customary international law imposes duties upon states to respect and protect both its own and alien cultural heritage.¹¹⁸ Moreover, there is a growing network of bilateral and multilateral treaties that address the treatment of cultural property in different circumstances.

While the idea of creating an international movement for protecting sites in other countries emerged after World War I, protection of cultural property as a common heritage of mankind has become an important task of public international law beginning from World War II.¹¹⁹ The landmark event in arousing international concern was the decision to build the Aswan High Dam in Egypt, which would have flooded the valley containing the

¹¹⁴ See Turkish Ministry of Foreign Affairs, *Water Disputes in the Euphrates-Tigris Basin*, available at <http://www.turkey.org/groupc/Water/CHAPTER1/CHAP1C.HTML> (last visited Nov. 22, 2000).

¹¹⁵ See generally Paul Brown, *Britain is Warned not to Fund Turkish Dam*, GUARDIAN UNLIMITED, May 8, 1999.

¹¹⁶ See McCarthy, *supra* note 51.

¹¹⁷ See Mastalir, *supra* note 99, at 1034.

¹¹⁸ SHARON WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY* 64-66 (1977).

¹¹⁹ KIFLE JOTE, *INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE* 19 (Stockholm, 1994).

Abu Simbel temples, a treasure of ancient Egyptian civilization.¹²⁰ An analysis of the international legal protection provided to the cultural heritage helps us to understand how well international community has responded to this task.

Various international organizations, both governmental and non-governmental, have been established for the protection, preservation and advancement of cultural property.¹²¹ Since the late 1960s, governments and international organizations have made an increasing number and variety of decisions about cultural property.¹²² Implementing the fact that cultural resources are common patrimony of human kind,¹²³ a number of conventions and recommendations exist under which states are required to ensure the protection of cultural property.¹²⁴ Because international organizations have played an important role in regulating international rules for the protection and preservation of the cultural heritage, the analysis of international legal instruments will be undertaken together with these organizations. A number of international legal instruments dedicated to the preservation of the world's cultural heritage were prepared under the aegis of UNESCO. Agreements have also been concluded at a regional level in Europe and the Americas.¹²⁵

A. UNESCO

UNESCO is a specialized agency and the main organ of the United Nations in charge of cultural matters. The scope of UNESCO activities covers a wide area including safeguarding cultural heritage under different

¹²⁰ UNESCO, *What is the World Heritage?*, 6 COURIER 6 (1997) (Heritage Sites Worldwide). After an appeal from the government of Egypt and Sudan, UNESCO decided to launch an international campaign, and Abu Simbel and Philae temples were dismantled, moved to dry ground and reassembled. The campaign cost about \$80 million, half of which was donated by some fifty countries, showing the importance of nations' shared responsibility in conserving outstanding cultural sites. Its success led to other safeguarding campaigns, including for Venice in Italy, Moenjodaro in Pakistan and Borobudur in Indonesia. *Id.*

¹²¹ See JOTE, *supra* note 119, at 241.

¹²² See Merryman, *supra* note 93, at 340.

¹²³ EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 257(1988).

¹²⁴ The World Heritage Convention calls for international efforts to conserve unique natural and cultural resources for present and future generations. See generally The Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972 U.S.T., T.I.A.S. 8226. See also The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 (1956).

¹²⁵ Some of the regional agreements are the 1971 Nordic Cultural Agreement; the 1935 Washington Treaty (also known as the Roerich Pact); the 1976 Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations. For more information see Cultural Protection Treaties and other International Agreements, available at <http://fletcher.tufts.edu/multi/cultural.html>.

circumstances.¹²⁶ UNESCO seeks to encourage the identification, protection and preservation of cultural and natural heritage around the world considered to be of outstanding value to humanity.¹²⁷ UNESCO is so far responsible for the adoption of three conventions concerning the protection of cultural heritage under different circumstances.¹²⁸ These international agreements are: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,¹²⁹ the 1970 Convention on Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property,¹³⁰ and the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage.¹³¹

These conventions, along with other international documents, recognize the status of cultural property as part of the "common heritage of humankind" and place an international duty on states to protect not only their own cultural heritage but also all other nations' cultural property for the ultimate benefit of mankind.¹³²

1. The 1954 Hague Convention

The Hague Convention aims to prevent wartime destruction of cultural property. The extensive destruction of cultural property during World War I and II constituted the origins of the Hague Convention for the

¹²⁶ The main purpose of UNESCO is to contribute to peace and security by promoting collaboration among the nations through education, science and culture, in order to further universal respect for justice, the rule of law, human rights and fundamental freedoms for the peoples of the world, without distinction of race, sex, language or religion. U.N. CHARTER art. 1.

¹²⁷ *World Heritage Convention Commemorated*, 35 UN CHRONICLE 79 (Jan. 1, 1998) (ISSN: 0251-7329).

¹²⁸ See JOTE, *supra* note 119, at 195.

¹²⁹ UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague].

¹³⁰ The UNESCO Convention on Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971) [hereinafter the 1970 UNESCO Convention]. The Convention outlines specific obligations required of each contracting party such as "respecting cultural property situated within their own territory as well as within the territory of other High Contracting parties by refraining from any use of the property and its immediate surroundings which is likely to expose it to destruction or damage." *Id.* The import, export and transfer of designated cultural properties without the consent of the country of origin are prohibited.

¹³¹ The Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 U.N.T.S. 151, 11 I.L.M. 1358 [hereinafter the World Heritage Convention].

¹³² See Preamble, *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, reprinted in UNESCO, THE PROTECTION OF MOVABLE CULTURAL PROPERTY 336 (1984) (stating that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind."). See also Preamble, *Recommendation for the Protection of Movable Cultural Property*, reprinted in UNESCO, THE PROTECTION OF MOVABLE CULTURAL PROPERTY 386 (stating that "movable cultural property representing the different cultures forms part of the common heritage of mankind.").

protection of cultural sites in times of armed conflict. The 1954 Hague Convention prohibits wartime pillaging or the destruction of archaeological objects unless military necessities dictate otherwise.¹³³ The concept of mankind's common cultural heritage as cultural property that transcends the interests of nations or individuals was embodied for the first time in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.¹³⁴ The duty of the international community to protect cultural resources is clearly addressed in the preamble of the Convention. Its preamble asserts "the preservation of cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection." As it is stated above, the 1954 Hague Convention views cultural property as the cultural heritage of all humankind and establishes a system for the universal protection of cultural property rather than leaving it to the individual nation states.¹³⁵ As of March 8, 2001, one hundred states had become parties to the Convention.¹³⁶

2. The 1970 UNESCO Convention

The 1970 Convention on Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention) attempts to prevent illicit trade in cultural property. While definition of "cultural property" can be expanded to include almost anything made or changed by man, the 1970 UNESCO Convention defines cultural property to include the intellectual, artistic, social and historical record of human beings.¹³⁷ It is the first global agreement that addresses the international problem of illegal trafficking in cultural property and offers

¹³³ See 1954 Hague, *supra* note 129, at art. 4.

¹³⁴ Theresa Papademetriou, *International Aspects of Cultural Property: An Overview of Basic Instruments and Issues*, 24 INT'L J. LEGAL INFO. 270, 271 (1996).

¹³⁵ M. Catherine Vernon, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE J. INT'L L. 435, 457-59 (1994).

¹³⁶ The list of state parties to the 1954 Hague Convention is available at www.unesco.org/culture/laws/hague/html_eng/page9.shtml

¹³⁷ See 1970 UNESCO Convention, *supra* note 130. The Convention defines cultural property to include: (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; (b) property relating to history, including the history of science and technology and military and social history . . . ; (c) products of archaeological excavations . . . ; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest . . . ; (h) rare manuscripts and incunabula, old books, documents and publications of special interest . . . ; (i) postage, revenue and similar stamps . . . ; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments. *Id.* at 9.

some protective measures for cultural resources during the times of peace.¹³⁸ Ninety-one nations have become party to the Convention as of December 1, 1999.¹³⁹ Despite the large number of parties, the Convention has not been able to stop the trade of stolen and looted art since most of the ratifying countries are "source" nations.¹⁴⁰ It is evident that the Convention is applicable to movable cultural property since trafficking can only be possible for portable cultural property.¹⁴¹ The Convention requires the parties to cooperate globally in fighting the problem of illegal trafficking in cultural heritage.¹⁴² The Convention requires states to designate specific items as protected cultural property based on the objects' importance to "archaeology, prehistory, history, literature, art or science."¹⁴³ Because the 1970 UNESCO Convention seeks to protect cultural property through a policy of national retention, it has adopted a less internationalist approach than the earlier Hague Convention.

3. World Heritage Convention

The General Assembly of UNESCO adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) on November 16, 1972, and it entered into force in 1975.¹⁴⁴ Akin to the 1954 Hague Convention, this convention also

¹³⁸ Final Act of the Diplomatic Conference for the Adoption of the Draft, UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1332. The UNIDROIT (International Institute for the Unification of Law) Convention seeks to further the 1970 UNESCO Convention's purpose of regulating the illegal trafficking of cultural heritage, and is very similar to the 1972 UNESCO Convention. The differences include the UNIDROIT Convention's distinction between stolen cultural objects and illegally exported cultural objects, the compensation of bona fide purchasers, the ability of both states and individuals to make claims in foreign courts, and the placement of time limits on claims of stolen or illegally exported cultural property. *Id.*

¹³⁹ The list of the 91 State Parties to the 1970 UNESCO is available at http://www.unesco.org/culture/laws/1970/html_eng/page3.shtml (last visited Sept. 5, 2001).

¹⁴⁰ Stephanie Doyal, *Implementing the UNIDROIT Convention on Cultural Property into Domestic Laws: The Case of Italy*, 39 COLUM. J. TRANSNAT'L L. 657, 665 (2001).

¹⁴¹ See JOTE, *supra* note 119, at 205.

¹⁴² See 1970 UNESCO Convention, *supra* note 130, arts. 7 (b)(ii), 9, 13, 15, 17, for provisions dealing with global cooperation.

¹⁴³ See *id.* art. 1.

¹⁴⁴ UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151 [hereinafter World Heritage Convention]. 149 States Parties, including Turkey, have ratified the Convention. This vast participation makes it the most universal international legal instrument in the field of heritage conservation. The Convention is uniquely founded on the premise that certain natural and cultural sites are of "outstanding universal value" and form part of the common heritage of human kind. The conservation of this common heritage is of concern not just for individual nations, but for all humanity. Another unique feature of this convention is the fact that it seeks to protect both cultural and natural

adopted an internationalist concept of cultural property that forms part of the common heritage of mankind. To date, 164 countries have become parties to the Convention, making it one of the most universal international legal instruments for the protection of the cultural and natural heritage.¹⁴⁵ The primary mission of the Convention is to identify cultural and natural heritage of "outstanding universal value" throughout the world, and to ensure its protection through international cooperation.¹⁴⁶ The concepts of nature conservation and the preservation of cultural sites are linked to each other in the World Heritage Convention.¹⁴⁷ The thinking behind this approach is that nature and culture are complementary and cultural identity is strongly related to the natural environment in which it develops.

Part one of the Convention defines the kind of natural or cultural sites which can be considered for inscription on the World Heritage List, and sets out the duties of States to identify potential property and their role in protecting and preserving them.¹⁴⁸ Cultural heritage is divided into three major groups: monuments, groups of buildings, and cultural sites.¹⁴⁹ In order to enjoy the protection of the Convention, it is required that cultural and natural heritage be of outstanding universal value from the point of view of

heritage. See Bernd von Droste, *The World Heritage Convention, 25 Years on*, 6 UNESCO COURIER 97 (Sept. 1, 1997).

¹⁴⁵ As of July 31, 2001 164 states signed the convention, available at <http://www.unesco.org/whc/nwhc/pages/doc/main.htm> (last visited Sept. 06, 2001).

¹⁴⁶ See UNESCO, *What is the World Heritage?*, 6 UNESCO COURIER 6 (Sept. 1, 1997).

UNESCO's World Heritage mission is to: encourage countries to sign the 1972 Convention and to ensure the protection of their natural and cultural heritage; encourage States Parties to the Convention to nominate sites within their national territory for inclusion on the World Heritage List; encourage States Parties to set up reporting systems on the state of conservation of World Heritage sites; help States Parties safeguard World Heritage sites by providing technical assistance and professional training; provide emergency assistance for World Heritage sites in immediate danger; support States Parties' public awareness-building activities for World Heritage conservation; encourage participation of the local population in the preservation of their cultural and natural heritage; encourage international cooperation in conservation of cultural and natural heritage. *Id.*

¹⁴⁷ See UNESCO Doc. SHC/MD/18 for the views of Austria, Luxembourg and the United Kingdom. Due to its extensive scope some countries were critical about the Convention and they declared that they would have preferred it to be limited to cultural heritage.

¹⁴⁸ See JOTE, *supra* note 119, at 245.

¹⁴⁹ World Heritage Convention, *supra* note 144, at art. 1. The monuments include: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science. The group of buildings consist of groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science. Cultural sites are defined to include works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view. *Id.*

history, art, science, aesthetics, anthropology, conservation, and natural beauty.¹⁵⁰

Another requirement to enjoy the Convention's protection is that every state should identify their cultural property of outstanding universal value and nominate it to be listed in the World Heritage List. The expression "outstanding universal value" has been defined neither in the draft nor in the final text of the World Heritage Convention.¹⁵¹ Because Article 34 of the Convention confers the power to make a national decision on the identification and nomination of areas to the World Heritage List only upon the national governments of signatory countries, the determination of whether a cultural property has outstanding universal value in most cases can be subjective.¹⁵² Especially at a time when the state's conflicting interests on economic development and protection of cultural property clashes each other, different countries give different significance and values to properties located in their territories. Turkish government's decision to go with the Ilisu Dam project despite its threat to the medieval city of Hasankeyf constitutes a clear sample of this subjectivity. Because the UNESCO makes no recommendations for listing, the application for a site to be inscribed in the World Heritage List must come from the country itself.¹⁵³ Therefore, states can act freely if there is no international pressure especially on disputed sites such as Hasankeyf.

Through international solidarity, the Convention translates the principle of collective responsibility for the protection of World Heritage into action. The Convention states:

Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage (...) is situated, and without prejudice to property rights provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to cooperate.¹⁵⁴

By signing the World Heritage Convention, a country also pledges to protect the whole of its national heritage, whether or not it is recognized as World

¹⁵⁰ See JOTE, *supra* note 119, at 246. The requirement to be outstanding universal value is mentioned several times in the Preamble of the World Heritage Convention, *supra* note 144, and in arts. 1, 2, 8, 11, 12, 15, 20.

¹⁵¹ *Id.* at 246.

¹⁵² See *Id.*

¹⁵³ See UNESCO, *supra* note 146.

¹⁵⁴ World Heritage Convention, *supra* note 144, at art. 6.1.

Heritage.¹⁵⁵ Article 5 (a) of the World Heritage Convention places a specific obligation on State Parties to "adopt a general policy which aims to integrate the protection of the cultural and natural heritage into regional planning programs and adopt measures, which give this heritage a function in the day-to-day life of the community."¹⁵⁶

Turkey ratified the World Heritage Convention on March 16, 1983. Zeugma and Hasankeyf were not listed in the World Heritage List. However, they certainly had qualifications to be included in tentative list of places that may be considered for nomination at some future time as required by the Operational Guidelines for the Implementation of the World Heritage Convention.¹⁵⁷

The World Heritage Convention refers to cultural heritage in an international context. For the purpose of effective international cooperation and assistance for identification, preservation and conservation of cultural and natural property, the Convention established the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage (World Heritage Committee).¹⁵⁸ According to Article 8, the World Heritage Committee shall ensure the implementation of the provisions of the World Heritage Convention.¹⁵⁹ The committee's main functions are mentioned in Articles 11 and 13.¹⁶⁰ The World Heritage Committee has inscribed 630 properties on the World Heritage List as of December 1999.¹⁶¹ Turkey listed

¹⁵⁵ See UNESCO, *supra* note 146, at 6.

¹⁵⁶ World Heritage Convention, *supra* note 144, at art. 5 (a).

¹⁵⁷ See Operational Guidelines for the Implementation of the World Heritage Convention ¶7, available at <http://whc.unesco.org/nwhc/pages/doc/main.htm> (last revision adopted by the World Heritage Committee in the 22th session, Dec. 1998).

¹⁵⁸ World Heritage Convention, *supra* note 144, at art. 8.

¹⁵⁹ See JOTE, *supra* note 119, at 248.

¹⁶⁰ World Heritage Convention, *supra* note 144, at arts. 11, 13. Those functions can be summarized as follows: establish a world heritage list of properties of outstanding universal value, establish a list of world heritage in danger, make public the entries in the world heritage list of properties of outstanding universal value and the list of world heritage in danger, establish criteria for inclusion of property in the world heritage list, consider requests made for inclusion in the world heritage list, assist State parties in the preparation of lists of cultural and natural heritage that could fall under the scope of the Convention, receive requests and for assistance and determine the extent and nature of the assistance, list and publicize the items on whose behalf assistance is granted, and administer the resources of the World Heritage Fund. *Id.*

¹⁶¹ The World Heritage List was established under terms of The Convention Concerning the Protection of the World Cultural and Natural Heritage adopted in November 1972 at the 17th General Conference of UNESCO. See World Heritage Convention, *supra* note 144. The Convention states that a World Heritage Committee "will establish, keep up-to-date and publish" a World Heritage List of cultural and natural properties, submitted by the States Parties and considered to be of outstanding universal value. *Id.* The list includes 480 cultural, 128 natural and 22 mixed properties in 118 States Parties, and is current as of December 1999. The World Heritage Committee meets once a year and examines the nominations on the basis of technical evaluations. These independent evaluations of proposed cultural and natural sites are provided by two advisory bodies, the International Council on Monuments and Sites (ICOMOS) and the

nine sites¹⁶² in the World Heritage List. Unfortunately, neither Zeugma nor Hasankeyf were nominated to be included in this list though they would easily satisfy the selection criteria.¹⁶³ UNESCO can only operate in areas that have been declared as a World Heritage Site, and it has no power to intervene without national government approval.

Cultural heritage basically refers to the physical remnants of past eras that are deemed worthy of preservation, even if it is not inscribed in the World Heritage List, for historical, aesthetic or archaeological reasons.¹⁶⁴ Although Zeugma and Hasankeyf were not inscribed in the World Heritage List, they deserve to be and their destruction constitutes a crime against culture. Were they included in the World Heritage List, the invocation of the Convention provisions would stop the building of the Birecik and Ilisu Dams as it happened for the building of a hydroelectric dam in the Franklin River wilderness of South Western Tasmania¹⁶⁵ and constructions around the pyramids in Egypt.¹⁶⁶ There would be additional benefits of being listed. First, with the inclusion on the World Heritage List they would receive

World Conservation Union (IUCN), respectively. A third advisory body, the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), provides expert advice on restoring monuments and organizes training courses. The list of the properties, which the World Heritage Committee has inscribed on the World Heritage List is available at <http://www.unesco.org/whc/nwhc/pages/doc/main.htm> (last visited Nov. 29, 2000).

¹⁶² Turkish sites, inscribed in the World Heritage List are as follows; Historic Areas of Istanbul, Goreme National Park and the Rock Sites of Cappadocia, Great Mosque and Hospital of Divrigi, Hattushas, Nemrut Dag, Xanthos-Letoon, Hierapolis-Pamukkale, City of Safranbolu, Archaeological Site of Troy.

¹⁶³ See Operational Guidelines for the Implementation of the World Heritage Convention, *supra* note 157, ¶¶ 23-42. To be included in the World Heritage List, sites must satisfy the selection criteria. These criteria are explained in the Operational Guidelines for the Implementation of the World Heritage Convention, which, besides the text of the Convention, is the main working document on World Heritage. The criteria have been revised regularly by the Committee to match the evolution of the World Heritage concept itself. Cultural properties should: i. represent a masterpiece of human creative genius; or ii. exhibit an important interchange of human values over a span of time or within a cultural area of the world on developments in architecture or technology, monumental arts, town-planning or landscape design; or iii. bear a unique or at least exceptional testimony to a cultural which is living or has disappeared; or iv. be an outstanding example of a type of building or architectural or technological ensemble, or landscape which illustrates (a) significant stage(s) in human history; or v. be an outstanding example of a traditional human settlement or land-use which is representative of a culture (or cultures), especially when it has become vulnerable under the impact of irreversible change; or vi. be directly or tangibly associated with events or living traditions, with ideas or with beliefs, with artistic and literary works of outstanding universal significance. *Id.*

¹⁶⁴ Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L. J. 291, 301 (1999).

¹⁶⁵ Commonwealth of Australia v. State of Tasmania, 39 I.L.M. 20, 20 (2000) (involving a political and constitutional dispute arising out of a determination by the Hydro-Electric Commission of Tasmania to press ahead a large hydro dam on the Franklin River in the South West Tasmania). By the time the case reached the High Court, the proposed dam site had been inscribed on the World Heritage List as part of the nomination of the Western Tasmania Wilderness National Parks.

¹⁶⁶ H. Williams, *The Convention Against the Cannons*, 39 UNESCO SOURCES 6 (July/August 1992).

international recognition. A further benefit of listing for both national and local economies would be the increase potential for tourism. Many countries now include their World Heritage listings in their advertising to attract foreign tourists.¹⁶⁷ Moreover, registration in the list would make these sites eligible for the assistance and cooperation needed to ensure their protection, conservation, preservation, or rehabilitation.¹⁶⁸

In addition to the three conventions, UNESCO has adopted ten recommendations concerning the protection of cultural heritage.¹⁶⁹ UNESCO recommendations, such as the 1968 Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works are not legally binding upon Member States. However, they have some impact on the protection of cultural heritage. The preamble of the 1968 Recommendations the General Conference of UNESCO recommends that preventive and corrective measures should be aimed at protecting or saving cultural property from public or private works, such as the construction of dams, likely to damage and destroy it. Member States are further required to bring this recommendation to the attention of the authorities or services responsible for public or private works as well as to the bodies responsible for the conservation and the protection of monuments and historic, artistic, archaeological and scientific sites.¹⁷⁰

In summary, while the UNESCO conventions provide important safeguards to the cultural heritage the protection provided by these three conventions has two important shortcomings. First, both the 1970 and 1972 conventions assign the sole responsibility of identifying and designating cultural property to states and ignores the possibility that states may fail to properly identify cultural property as a result of simple neglect or for ethnic or religious reasons. Second, the World Heritage Convention is very restrictive in scope, because it applies only to major archaeological or historic sites of "outstanding universal value." Although many other sites

¹⁶⁷ Ben Boer, *World Heritage Disputes in Australia*, 7 J. ENV'T L. & LITIG. 247, 256 (1992).

¹⁶⁸ See JOTE, *supra* note 119, at 256.

¹⁶⁹ See Official Records, at <http://www.unesco.org/nwhc/pages/doc/main/htm>, for the following recommendations: Recommendation on International Principles Applicable to Archaeological Excavation (1956); Recommendation concerning the Safeguarding of the Beauty and Character of Landscapes and Sites (1962); Recommendation on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1964); 1968 UNESCO Recommendation; Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage (1972); Recommendations of the Intergovernmental Conference on Cultural Policies in Europe, Helsinki, (19 - 28 June 1972); Recommendation concerning the International Exchange of Cultural Property, Nairobi, (1976); Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it, Nairobi (1976); Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas (1976); Recommendation for the Protection of Movable Cultural Property (1978).

¹⁷⁰ See UNESCO's Recommendations, *supra* note 68.

deserves to benefit from the protection provided by these conventions, they are left unprotected due to the failure of states to include them in the inventory of their cultural property.

B. COUNCIL OF EUROPE

In Europe, protection of cultural heritage has been initiated and carried out by the Council of Europe (CoE) and the European Union.¹⁷¹ Through its own experience and through being able to draw upon an enormous resource of accumulated expertise within the member states, the CoE is uniquely equipped to help national, regional, and local authorities to tackle complex issues of enhancing, managing and preserving the cultural heritage in an integrated way.¹⁷² In order to undertake these tasks, CoE established a Cultural Heritage Committee, which is mainly responsible for promoting and preserving the historic and architectural heritage.¹⁷³ Four conventions concerning the protection of cultural heritage in Europe have been adopted as a result of CoE initiatives.¹⁷⁴ These conventions aim to consolidate, improve, and harmonize policies designed to conserve and enhance Europe's archaeological and architectural heritage, providing a legal framework for international cooperation.¹⁷⁵

1. 1954 European Cultural Convention

The first of these conventions, the 1954 European Cultural Convention,¹⁷⁶ attempts to safeguard "Europe's common heritage" as a whole. The 1954 Convention requires State Parties to preserve their cultural heritage, and declares the cultural heritage of the Member States as "the common heritage of European culture."¹⁷⁷ Article 5 of the Convention states that State Parties consider cultural property located in their territory as an integral part of the cultural heritage of Europe, and take all necessary

¹⁷¹ See Council of Europe homepage, at <http://culture.coe.fr/pat/eng/epat1.html>. The Council of Europe was established on May 5, 1949 to facilitate cooperation among Member States and to work for the adoption of agreements on economic social, environmental, legal, cultural and scientific questions. Turkey became member to Council of Europe on Apr. 13, 1950. The Council of Europe should not be confused with the European Union, as the two organizations are quite distinct. The 15 European Union states, however, are all members of the Council of Europe. *Id.*

¹⁷² ROBERT PICKARD, POLICY AND LAW IN HERITAGE CONSERVATION at Foreword (2001).

¹⁷³ See Council of Europe homepage, *supra* note 171.

¹⁷⁴ See JOTE, *supra* note 119, at 183.

¹⁷⁵ See Council of Europe homepage, *supra* note 171.

¹⁷⁶ 1954 European Cultural Convention, Dec. 19, 1954, 218 U.N.T.S. 140 (entered into force May 5, 1955).

¹⁷⁷ *Id.* at art. 5.

measures to safeguard and develop it and make it accessible to the public. The convention does not include a definition of the objects to be protected.

2. *The 1969 European Convention on the Protection of Archaeological Heritage*

The 1969 European Convention on the Protection of Archaeological Heritage is the second CoE Convention in this area.¹⁷⁸ The Convention was revised in 1992 and the revised Convention entered into force on May 25, 1995.¹⁷⁹ While the 1969 Convention was mainly concerned with archaeological excavations and the extraction of information from those excavations,¹⁸⁰ the purpose of the revised Convention is to "protect archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study."¹⁸¹ The list of the objects to be protected covers a wide range of elements, including, for instance, burial sites as well as urban walls. The revised Article 1(2) lists elements of archaeological heritage to include:

all remains and objects and any other traces of mankind from past epochs, mainly those: 1- the preservation and study of which help to trace the history of mankind and its relation with the natural environment; 2- for which excavations or discoveries and other methods of research into mankind and the related environment are the main source of information; and 3- which are located in any area within the jurisdiction of the parties.¹⁸²

The new text makes the conservation and enhancement of the archaeological heritage one of the goals of urban and regional planning policies. It is concerned in particular with arrangements to be made for co-operation among archaeologists and town and regional planners in order to

¹⁷⁸ European convention on the Protection of Archaeological Heritage, May 5, 1969, 738 U.N.T.S. 227, 8 I.L.M. 736, 66 E.T.S. 1969 (entered into force Nov. 20, 1970).

¹⁷⁹ Revised European Convention on the Protection of Archaeological Heritage, May 25, 1995, E.T.S. No. 143 1992 [hereinafter Revised Convention].

¹⁸⁰ See JOTE, *supra* note 119, at 184.

¹⁸¹ Revised Convention, *supra* note 179, at art. 1(1).

¹⁸² European Convention on the Protection of Archaeological Heritage, *supra* note 178, at art. 1. The Convention was revised in 1992. Article 1 of the 1969 Convention defines objects to be protected as follows: "all remains and objects, or any other traces of human existence, which bear witness to epochs and civilizations for which excavations or discoveries are the main source or one of the main sources of scientific information, shall be considered as archaeological object." *Id.*

ensure optimum conservation of archaeological heritage.¹⁸³ According to the Recommendation No. R (89) 5 adopted by the Committee of Ministers of the Council of Europe, large-scale construction projects have become the major threat to the archaeological heritage during the 1980s.¹⁸⁴ With increasing populations and ever-higher standards of living, development projects grew in number and complexity.¹⁸⁵ The scale of such operations, for instance, dam projects, pose serious threats to the discovery and protection of the archaeological heritage.¹⁸⁶ Articles 2-10 and 12 of the Convention describe the duties of the parties, which include creating a legal system for the protection of archaeological heritage through inventory and designation,¹⁸⁷ creating archaeological reserves, discovering and carrying out excavations,¹⁸⁸ reconciling and combining archaeological requirements with development plans,¹⁸⁹ adopting well-balanced strategies for the protection, the conservation and enhancement of sites with archaeological interest, ensuring that the opening of archaeological sites does not damage findings and their surroundings, organizing financial resources for research,¹⁹⁰

¹⁸³ See Summary of the 1992 Treaty revising the European Convention on the Protection of Archaeological Heritage, available at <http://conventions.coe.int/treaty/en/Summaries/Html/143.htm> (last visited Nov. 25, 2000).

¹⁸⁴ See <http://conventions.coe.int/Treaty/EN/CadreListeTreaties.htm>. The Recommendation suggested: the formation of archaeological inventories and data banks which would be communicated by archaeological heritage managers to developers; the creation of administrative structures capable of handling development projects involving archaeological data; the adoption of legal and administrative measures necessary for archaeological data to be taken into account as a matter of course in the town and country planning process; the promotion of specified new working conditions in the context of major development operations; the education of the public in the value of the archaeological heritage as a major element of the European cultural identity. *Id.*

¹⁸⁵ The Recommendation no. R (89) 5, the Committee of Ministers of the Council of Europe. *See id.*

¹⁸⁶ *Id.*

¹⁸⁷ *See id.* at art. 2. The primary requirement of this article is that States should institute a legal system for the protection of the archaeological heritage. The article also sets out certain provisions requiring the use of an inventory recording the archaeological heritage and, the designation of protected monuments and areas.

¹⁸⁸ *See id.* at art. 4. Article 4 deals with the setting up of legal and administrative systems to enable the establishment of archaeological reserves, as well as the conservation and management of excavated sites and objects. Article 4 imposes on States the obligation to actually take physical measures to bring these about. Although the qualifying phrase "as circumstances demand" is used, this article obliges States to allocate resources, both physical and human, to the tasks specified. States are required to ensure that public authorities are aware of the desirability of establishing archaeological reserves and have the means to do this. *Id.*

¹⁸⁹ *See id.* at art. 5. According to this article, States are required to involve archaeologists in the entire planning process and to ensure that archaeologists and town and regional planners consult one another.

¹⁹⁰ *See id.* at art. 6. This article deals with the provision of financial support for archaeological research. Paragraph ii of this article is highly significant for this study, as it places on those responsible for development projects the burden of funding archaeological activities necessitated by those projects. This approach also appears in the 1968 UNESCO Recommendations, the Council of Europe Recommendation No. R (89) 5 and in the ICOMOS Charter.

scientific study and rescue work, disseminating knowledge and information about the significance of archaeological items, their discovery and existing rules,¹⁹¹ facilitating their international exchange for scientific purposes, refusing items which are products of illicit excavations¹⁹² and cooperating in giving technical assistance.¹⁹³

3. *Convention for the Protection of the Architectural Heritage of Europe*

The Convention for the Protection of the Architectural Heritage of Europe was adopted on October 3, 1985.¹⁹⁴ This convention is concerned with immovable cultural property and comprises three categories of Architectural Heritage: Monuments, Groups of buildings, and Sites.¹⁹⁵ State parties undertake a variety of obligations such as maintaining inventories of protected properties; taking statutory measures to ensure protection; providing financial assistance to ensure protection; and taking measures to improve the architectural environment.¹⁹⁶ This Convention is unique in that it does not call for international cooperation to protect the archaeological heritage of urban European cities, but only requires signatory states to implement legislation aimed at protecting archaeological heritage while also attempting to improve the quality of life for the inhabitants of those urban cities.¹⁹⁷

¹⁹¹ See *supra* note 184, at art. 8. This article deals with the dissemination of information resulting from work on the archaeological heritage.

¹⁹² See *id.* at arts. 10 and 11 for provisions dealing with the basic legal and practical problems involved in preventing unlawful trade in elements of the cultural heritage, and a number of obligations that States would undertake in order to prevent the illicit circulation of elements of the archaeological heritage.

¹⁹³ See *id.* at art. 12 for the provision of technical assistance. See also JOTE, *supra* note 119, at 186.

¹⁹⁴ The Convention for the Protection of the Architectural Heritage of Europe, Oct. 3, 1985, 25 I.L.M. 380 (entered into force Dec. 1, 1987). Turkey has ratified this Convention.

¹⁹⁵ *Id.* The Convention defines the "architectural heritage" to comprise "1. Monuments: all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings; 2. Groups of buildings: homogeneous groups of urban or rural buildings conspicuous for their historical, archaeological, artistic, scientific, social or technical interest which are sufficiently coherent to form topographically definable units; 3. Sites: the combined works of man and nature, being areas which are partially built upon and sufficiently distinctive and homogeneous to be topographically definable and are of conspicuous historical, archaeological, artistic, scientific, social or technical interest.

¹⁹⁶ *Id.* at arts. 2-14.

¹⁹⁷ Maurizio Greco, *Le Principali Convenzioni Internazionali in Materia di Protezione dei beni Culturali*, in I BENI CULTURALI PROFILI DI DIRITTO COMPARATO ED INTERNAZIONALE 295 (Giovanni Cofrancesco ed., 1999).

4. *1985 Convention on Offenses Relating to Cultural Property*

Another CoE Convention is the 1985 Convention on Offenses Relating to Cultural Property.¹⁹⁸ It was adopted on June 23, 1985, and signed by six countries, but it has yet to enter into force.¹⁹⁹ The members of the CoE signatory to this Convention, in "recognizing their common responsibility and solidarity in the protection of European cultural heritage," agreed to take all necessary measures to prevent and punish offenses against cultural property.

In addition to CoE conventions, an action plan was adopted at the Second Summit of the CoE, held in Strasburg in October 1997. Accordingly, a campaign "Europe: A Common Heritage" was launched in September 1999 and continued for one year. The main theme of the campaign was "respecting cultural diversity, based on existing or prospective partnership between government, education and cultural institutions, and industry."²⁰⁰ Moreover, EU adopted legislative measures to introduce a Community wide system to protect cultural treasures of the Member States.²⁰¹ Prior to the Treaty on European Union, the European Economic Community Treaty did not expressly cover cultural property; however, the Treaty on European Union includes a separate title on Culture.²⁰² The Community adopted a Regulation No. 3911/92 on the export of cultural goods²⁰³ and a Council Directive on the return of cultural objects unlawfully removed from the territory of a Member State.²⁰⁴

¹⁹⁸ The European Convention on Offenses Relating to Cultural Property, June 23, 1985, 25 I.L.M. 44, 35 ILM 44; 119 TES 1985. Based on the concept of common responsibility and solidarity in the protection of European cultural heritage, the Convention aims to protect cultural property against criminal activities. To achieve this objective the Parties undertake to enhance public awareness of the need for protection, to co-operate in the prevention of offences against cultural property, to acknowledge the seriousness of such offences and to provide for adequate sanctions or measures with a view to co-operating in the prevention of offences relating to cultural property and in the discovery of cultural property removed. *Id.*

¹⁹⁹ See JOTE, *supra* note 119, at 188.

²⁰⁰ See PICKARD, *supra* note 172, at 1.

²⁰¹ See Papademetriou, *supra* note 134, at 283.

²⁰² Title IX reads as follows: The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting or supplementing their action in the following fields, including the preservation and safeguarding of cultural heritage of European significance. GEORGE A. BERMAN ET. AL, EUROPEAN UNION LAW 645 (2002).

²⁰³ Official Journal of the European Communities, L395 (1992).

²⁰⁴ See *id.* at L74/74 (1993).

C. TURKISH LAW AND THE PROTECTION OF CULTURAL HERITAGE

Because it has been host to many civilizations dating back to ancient times, Turkey is one of the richest countries in the world in terms of cultural property found in its territory. While cultural objects in Turkey are subject to extensive state control and regulation, Turkish government's recent practice is far from providing adequate protection to cultural property located in Turkey. The main legislation on cultural property is Act No. 2863, the law on Conservation of Cultural and Natural Property. This regulation along with the Act No. 3386 and Turkish Constitution provide the legal framework for the protection of cultural property in Turkey.

1. The Turkish Constitution

The foundation for the protection of cultural heritage is established by the Constitution of Republic of Turkey, which entered into force on September 11, 1982. The issue of the Conservation of Historical, Cultural, and Natural Wealth is regulated in the Second Chapter, which comprises fundamental rights and duties. The Constitution provides for the protection of cultural heritage very clearly in Article 63 as follows: "The State shall ensure the conservation of the historical, cultural and natural assets and wealth, and shall take supporting and promoting measures towards this end."²⁰⁵ The interpretation of the above provision shows that Article 63 not only establishes basic principles concerning cultural heritage but it also puts an affirmative duty on the State to promote cultural heritage as well as protect them. Historical, cultural and natural sites are accepted as objects of public domain under the Turkish Law. There is no law regulating the public domain in Turkey, however, some separate laws and Constitutional provisions exist.²⁰⁶ Moreover, preservation of historical, natural and cultural sites and resources is a duty of the state and has been covered by separate laws.²⁰⁷

²⁰⁵ TURKIYE CUMHURİYETİ 1982 ANAYASASI art. 63 [Constitution of the Republic of Turkey], translated at http://www.turkey.org/politics/p_consti.htm [hereinafter Turkey Constitution].

²⁰⁶ Sait Guran, *Administrative Law*, in INTRODUCTION TO TURKISH LAW 71 (Tugrul Ansay & Don Wallace, Jr. eds., 1996). The Constitution also provides guarantees against nationalization of privately owned cultural property. Article 63 provides that "Any limitations to be imposed on such assets and wealth which are privately owned and the compensation and exemptions to be accorded to the owners of such, as a results of these limitations, shall be regulated by law." Turkey Constitution, *supra* note 205, at art. 63.

²⁰⁷ See *Id.*

2. Other Domestic Legislation

The law on Conservation of Cultural and Natural Property (Act No. 2863) was adopted by the Turkish Parliament on July 21, 1983. This law provides a system of legal protection for movable and immovable cultural objects. This Act defines the cultural and natural properties to be conserved, establishes the relevant procedures and measures on use, repair, alteration and expropriation of cultural property, and sets up responsible standard-setting, decision-making bodies.

The categories of property covered by Turkish legislation relating to the conservation areas are mainly divided into three groups as cultural, natural and historic sites.²⁰⁸ The present Turkish legislation has inclusively defined cultural property as "objects above or below ground, or under water, of prehistoric or of historical times, of scientific, cultural, religious or artistic value..."²⁰⁹ Such an approach that adopts an extensive or inclusive definition of cultural property normally lacks specific requirements.²¹⁰ Moreover, adopting such broad definitions gives government great control and makes it difficult to identify exactly what items are protected. Therefore, it is the fact that current national legislation does not seem to have guaranteed effective protection against damage to cultural property.²¹¹

Legislation for the protection and preservation of cultural heritage in Turkey is far from satisfactory. Current legislation is poorly defined and very difficult to enforce against the government's will, especially for dam projects. Because the Turkish government gave priority to building dams it ignores regulatory requirements to protect cultural heritage in order to expedite the construction of dams. Such a situation has happened with regards to the Hasankeyf. Under current Turkish law, it is illegal to build any structure in a protected (SIT) area without permission from the Monuments Council. The authority to declare a place or region as a SIT is given to the Monuments Council.²¹² Because of its history and beauty, Hasankeyf was declared as a first degree SIT in 1978. But, unfortunately, the

²⁰⁸ Cultural properties "to be conserved" are divided into the following categories: civil architecture buildings, religious buildings, cultural buildings, military buildings, administrative buildings, and monumental buildings, industrial buildings and cemeteries; natural property, e.g. historic tombs, caves, characteristic trees or groups of trees, etc.; sites, which may be: areas of civilization, dating from any period from prehistoric times to the present day and consisting of towns or the remains of towns, which illustrate the social, economic, architectural or other characteristics of the period concerned; or of places where important historical events took place territory designated for conservation on account of its natural characteristics. See Kultur re Tabiat Varliklarini Koruma Kanunu, *supra* note 13.

²⁰⁹ *Id.*

²¹⁰ See JOTE, *supra* note 119, at 128.

²¹¹ *Id.* at 127.

²¹² Serdar Alyamac, *SIT*, TURKISH DAILY NEWS, Oct. 11, 1999, available at 1999 WL 22749846.

declaration apparently has carried little weight since plans for the Ilisu Dam are moving forward unabated.²¹³ Although a first-degree SIT is a completely protected area, in which it is impossible even to hammer a nail anywhere, the Turkish government has already completed planning of the project and contracted with an international consortium without obtaining permission for the construction of the Ilisu Dam from the Monuments Council of the region.

It is apt to say that the Turkish government acts as if it were above the law by insisting on the Ilisu Dam project. In other words, while citizens are banned to cause even the slightest harm, the State insists on building a dam destroying the whole area, which is supposed to be under its protection. In planning to flood Hasankeyf the Turkish government is directly contradicting its own Ministry of Culture's 1978 declaration of "complete archaeological protection" on the city.²¹⁴ Numerous cultural experts and activists in Turkey have appealed to the national authorities and foreign companies to save Hasankeyf by changing the design of Ilisu Dam.²¹⁵ But, those appeals had no avail.

Act No. 2863 was amended by the Act No. 3386 of June 24, 1987. Act No. 3386 reforms the protection system and partially decentralizes responsibilities for conservation. In general, two ministries, the Ministry of Culture and the Ministry of Environment, and several autonomous directorates are responsible for the protection of cultural heritage.²¹⁶ Under the Act No. 3386, the Supreme Council for the Preservation of Immovable Cultural and Natural Property and seventeen Local Councils for the Conservation of Immovable Cultural and Natural Property share the

²¹³ Laurie Udesky, *Turkish Dam Threatens Ancient Treasures: Hydroelectric Project on Tigris, Euphrates Submerging Ruins*, S.F. EXAMINER, Oct 2, 2000, at A1.

²¹⁴ See Juniper, *supra* note 19. Because of its beauty and richness, Hasankeyf was awarded complete archaeological protection by the Ministry of Culture on April 14, 1978 (decision A-1105).

²¹⁵ See Bosshard *supra* note 74.

²¹⁶ Analysis of National Policies on Cultural Heritage, Report on Cultural Heritage Policies in Europe: Turkey, available at <http://culture.coe.fr/pat/eng/9697erev.htm> (last visited Dec. 16, 2000). The institutions and departments responsible for the architectural heritage are: the Ministry of Culture and, within it, the General Directorate for the Preservation of the Cultural and Natural Heritage; the General Directorate for Monuments and Museums; the Ministry of Environment and within it, the Authority for the Protection of Special Areas; the following General Directorates: the General Directorate of Foundations (directly responsible to the government); the General Directorate of National Palaces (directly responsible to the Turkish Grand National Assembly). For conservation areas, urban planning guidelines are laid down and 17 Local Councils monitor their application for the Conservation of Immovable Cultural and Natural Property set up by Act No. 3386. At local level, municipalities work with the decentralized branches of the national civil service (local councils) to implement policies and programs drawn up at national level. *Id.*

responsibilities for protection of cultural property.²¹⁷ All work on cultural property is subject to approval by the relevant departments of the Ministry of Culture. However, in most cases local councils examine applications. The General Directorate for the Preservation of the Cultural and Natural Heritage is responsible for the General Inventory, surveys of which are continuing through out the country. The ongoing inventory of monumental buildings also serves as an instrument of protection. Under the heading of protected property, Turkish officials reported the figure of 46,849 buildings and monuments as of 1995.²¹⁸

3. International Conventions to Which Turkey is a Party

In addition to domestic legislation, Turkey signed several international conventions concerning the protection of cultural heritage and is theoretically expected to abide by them.²¹⁹ Turkey is a party to the 1954 Hague Convention for the Protection of Cultural Property In the Event of Armed Conflict,²²⁰ the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage²²¹ and the 1970 Convention on Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property.²²² Turkey has also become a party to several European conventions, including the 1985 European Convention for the Protection of the Archaeological Heritage of Europe.²²³ Additionally, as a full membership candidate to the European Union, Turkey must adopt and implement Community legislation affecting cultural property into its

²¹⁷ *Id.*

²¹⁸ The break down of the protected buildings and monuments as of 1995 is as follows: 31,047 civil architecture buildings, 5,265 religious buildings, 5,126 cultural buildings, 587 military buildings, 755 administrative buildings, 397 industrial and commercial buildings, 1,596 cemeteries, 182 martyrs (monuments at the site of a martyr's tomb), 1,003 natural properties, 189 monuments and statues, 702 remnants. *Id.*

²¹⁹ Although Turkey has become a party to many international conventions, it has been, in many cases, very slow to adopt domestic legislation for the implementation of the principles of those conventions.

²²⁰ After being ratified by Turkey on December 12, 1965 the Convention entered into force on March 15, 1966. For the List of 88 States who were parties to the Convention see <http://www.icomos.org/hague/hague.rat.html>.

²²¹ Turkey is obliged to abide these conventions not only because it has a treaty obligation to do so, but also because the Turkish Constitution puts International Treaties in the same line with national laws. TURK. CONST. art. 90 (1982).

²²² Turkey ratified the Convention on April 21, 1981 and the Convention entered into force on July 21, 1981. See UNESCO Convention on Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, *supra* note 130.

²²³ See The Convention for the Protection of the Architectural Heritage of Europe, *supra* note 194. The Convention was signed by Turkey on Oct. 3, 1985. After being ratified by the Turkish Parliament on Oct. 11, 1989 the Convention entered into force on Feb. 1, 1990.

domestic law. Moreover, international agreements gain the power of national statutes after being ratified by the Turkish National Assembly under Article 90 of the Turkish Constitution. As a result, violation of these Conventions means the violation of domestic laws.

The current practices of the Turkish government, especially through construction of water projects, constitute a clear violation of legal protection provided to cultural resources by international conventions, the Turkish Constitution and Turkish law.²²⁴ Therefore, the Turkish government, despite being obligated by international agreements and domestic laws has failed to take measures to prevent the devastating impacts of cultural degradation caused by its waterworks. What is more, the government not only fails to provide adequate protection to the country's cultural heritage but also creates serious threats to its destruction. The current practices of the Turkish government constitute certain discrepancies with its international legal obligations that can be analyzed in light of the selected provisions of the treaties to which Turkey is a signatory.

At the outset, considering Article 5 of the World Heritage Convention and that Zeugma and Hasankeyf had potential to become future heritage sites, the Turkish government's deliberate destruction of these sites constitute, if not a legal, at least a moral violation of its obligations under the Convention and the Operational Guidelines.

Next, the preamble of the 1968 UNESCO Recommendations requires that preventive measures should be aimed at protecting or saving cultural property from public or private works likely to damage and destroy it, and that the member States bring this recommendation to the attention of the authorities responsible for public or private works. Similarly, under the Article 5 of the 1985 European Convention on the Protection of Architectural Heritage, States are required to involve archaeologists in the entire planning process and to ensure that archaeologists and town and regional planners consult one another.²²⁵ In this way, known and suspected sites can be taken into account in developing plans for the project. Regrettably, of the 298 dam projects currently under construction in Turkey, only twenty-five had archaeological angles factored into the preliminary research.²²⁶ Modifications can often be made easily at the planning stage,

²²⁴ See *GAP Project: Neglect of Culture in Economic Development Scheme: The GAP Project Has a Significant Tradeoff in Terms of the Preservation and Rehabilitation of Turkey's Ancient Sites*, TURKISH DAILY NEWS, Aug 30, 2000, available at 2000 WL 22789045.

²²⁵ Explanatory Report on the European Convention on the Protection of the Archaeological Heritage (revised) (ETS no. 143), available at <http://conventions.coe.int/treaty/en/Reports/Html/143.htm> (last visited Dec. 19, 2000).

²²⁶ See *Last Chance to Save Zeugma Ancient City*, TURKISH DAILY NEWS, Jun 12, 2000, available at 2000 WL 22786085. Citing the earlier Keban Dam, Professor Ozdogan said that only 65 %

which later would cost a great deal of time and money. The construction for the Ilisu dam has not yet started but the planning stage has already been completed in violation of these international requirements. However, it is still possible to make amendments on the project to save the archaeological riches of the Hasankeyf. Archaeologists suggest that Hasankeyf be saved if the dam's height is lowered by five meters from its original level.

Article 5, paragraph iv, of the European Convention on the Protection of Architectural Heritage recommends preservation in situ as far as feasible. How this is done will depend largely on the nature of the site and what is being constructed.²²⁷ Turkish government's plan to transfer Hasankeyf to another location clearly contradicts this provision. Article 6 deals with the provision of financial support for archaeological research. Paragraph ii of the article is highly significant, as it places on those responsible for development projects the burden of funding archaeological activities necessitated by those projects. This approach also appears in the 1968 UNESCO Recommendation, in the Council of Europe Recommendation No. R (89) 5 and in the ICOMOS Charter.

III. HUMAN RIGHTS ISSUES AND OBLIGATIONS OF THE WORLD COMMUNITY

Despite their economic and social benefits,²²⁸ large dams leave behind a legacy of unsurpassed cultural destruction, and environmental damage. This reality calls attention to the need to adopt a human rights perspective in considering the impacts of dams on affected populations and their cultural heritage.²²⁹ It is an undeniable fact that there is an urgent need to protect world's cultural heritage both by individual countries and by the world community as a whole. This situation brings up two questions in the field of human rights, one at the national level and one at the international level. First, it raises the question of whether there is a human right to seek the protection of cultural property, and if so, to what extent a state has an obligation to protect its cultural heritage when there are conflicting needs between its development priorities and the protection of cultural property. Second is the question whether human rights law has any role to play in the intervention of international society.

of the reservoir had been combed for archaeological sites and that 63 sites had been found, of which, one totally excavated and 19 others had only been 10 % completed.

²²⁷ See Explanatory Report, *supra* note 225.

²²⁸ Large dams help in water management and agriculture, and are of great economic and social benefit because they stop destructive floods and provide regulated water for irrigation.

²²⁹ See Sanchez, *supra* note 1, at 630.

A. HUMAN RIGHT TO PROTECTION OF CULTURAL HERITAGE

Under human rights law, the individual is the subject as well as the object of international law. Therefore, individuals whose human rights have been violated can seek redress on their behalf without having to rely on the intercession of their own government through several international legal mechanisms, and, where possible, in domestic tribunals.²³⁰ The situation at hand must begin with an evaluation of the crucial question of whether the cultural rights, as defined in several international instruments, include a right to seek protection and preservation of cultural heritage. Should such rights exist, it should be further decided who can assert those rights and what is the scope of those rights.

A concern for protection of cultural property is consistent with the emergence of international laws and institutions protecting human rights.²³¹ It is implied in Article 27 of the Universal Declaration of Human Rights that the loss or irreparable destruction of the cultural heritage of a living community constitutes a violation of their human rights.²³² Under the International Bill of Human Rights, which consists of the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966), human rights are divided into civil, political, economic, social and cultural rights.²³³ While cultural rights, as human rights, are present in several of the international human rights instruments, as well as UNESCO Conventions, this area is perhaps the least developed in the human rights field and is in need of more explicit legislation and codification. It is widely acknowledged among human rights specialists that economic, social and cultural rights have not been a primary focus in the human rights community. Instead political and civil rights have been the primary concern in the post-war period.²³⁴

Article 27 of the Universal Declaration of Human Rights provides, "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its

²³⁰ *Id.*

²³¹ See UNESCO, *Cultural Rights As Human Rights*, Studies and Documents on Cultural Policies (1970).

²³² Steven A. Brandt & Fekri Hassan, *Dams and Cultural Heritage Management Final Report 70* (Aug. 2000) (working paper submitted to the WCD).

²³³ Rodolfo Stavengahen, *Cultural Rights and Universal Human Rights*, in ASBJØRN EIDE ET AL., *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 63 (1995).

²³⁴ Peter Schmidt, *Human Rights, Culture, and Dams: A New Global Perspective*, in BRANDT & HASSAN, *supra* note 232, at 14.

benefits...."²³⁵ However, it is not clear from this article whether there is a right to seek the protection of cultural property, and if so, what the contours of such a right might be. It seems obvious that such a right may be granted if we see the link between everyone's right to the full development of his or her personality²³⁶ and his or her right to participation in culture.²³⁷ Persons are products of culture and as cultural products; they seek preservation of the culture, which has shaped them.²³⁸ The preservation of one's identity is often found in the culture into which he or she was born and can be of crucial importance to his or her well-being and self-respect.²³⁹ From this perspective, cultural rights should give priority to access to, and education about one's own culture, as well as right to participate in the protection and further development of that culture.

Moreover, it is also stated in the 1968 UNESCO Recommendation that "the well being of all people depends upon the existence of a favorable and stimulating environment and that the preservation of cultural property of all periods of history contributes directly to such an environment."²⁴⁰ Likewise, Article 15 of the Covenant on Economic, Social and Cultural Rights (E.S.C. Covenant) includes provisions concerning the right to take part in cultural life and the right to enjoy the benefits of scientific progress and its application. Furthermore, it requires state parties to take steps to achieve full realization of this right, including that necessary for the conservation, the development and the diffusion of science and culture.²⁴¹

²³⁵ Article 27, Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810 at 71 (1948).

²³⁶ The right to development as a human right has been the subject of extensive reflection and proposed formulations for nearly a decade and is well advanced in acquiring the status of an internationally recognized human right. Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 439-452 (1981). Declaration on the Right of Development, G.A. Res. 41/128 (1986). Article 2 places the individual as the active subject of all economic and social development. Article 2 provides in the pertinent part that "1. The human being is the central subject of development and should be the active participant and beneficiary of the right to development. 2. All human beings have a responsibility for development, individually and collectively...." *Id.*

²³⁷ JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT* 218 (1999).

²³⁸ Asbjørn Eide, *Cultural Rights as Individual Human Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 231 (Asbjørn Eide et al. eds., 1995).

²³⁹ *Id.*

²⁴⁰ See UNESCO's Recommendations, *supra* note 68.

²⁴¹ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3. Article 15 provides as follows: "1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications;..... 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture..... 4. The States Parties to the present

Article 15 also requires the encouragement and development of international cooperation as regards to scientific and cultural fields.

Cultural rights as human rights are perfectly defined and established as one's right to participate in the cultural life of the community. As an extension of this view, the right to culture includes the rights of individuals to have access to cultural property of that community. Furthermore, it might be interpreted that the right to access cultural property cannot be accomplished without having an opportunity to protect and preserve. However, if the cultural property is not protected, is lost, or is destroyed, talking about access is no longer an issue. Thus, the right to protect and preserve the cultural property is implicit in one's right to participate in cultural life of the community.²⁴² Additionally, the education and enjoyment of cultural objects requires that they be accessible to the relevant public.²⁴³ Therefore, such a right could be envisaged as part of one's right to development and right to participation in culture. While significant obstacles to the establishment of the human right to cultural property as an immediately binding obligation persist, it is clear that, at least in some form, the right may be inferred under the basic instruments of international human rights law.

Even though cultural rights are included in the international human rights instruments they always come at the end and constitute an almost remnant category. While the expression "economic, social and cultural rights" is often used, in most cases it singles out cultural rights and refers to the economic and social rights. This lack of importance placed on cultural rights is reflected in human rights theory as well as in practice.²⁴⁴ In

Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields." *Id.*

²⁴² Cultural rights have both an individual and collective dimension. The individual right is the right of a person to participate in cultural life of the society. This includes the right to freely access historical, natural and cultural sites. The collective dimension implies to the duty of state and other people to respect and protect the cultural resources of that particular society. In the last analysis, the state and all other social actors have the duty to place the human interest before the natural or individual interest.

²⁴³ See Merryman, *supra* note 93, at 360.

²⁴⁴ Eide, *supra* note 238, at 229. The lack of importance paid to cultural rights in academia is almost apparent when one starts searching in this area. It is no surprise that there is only a few pieces of written work for the protection and preservation of cultural resources, where even the major pieces of the human rights field either do not mention or very briefly touches on the cultural rights. See generally GLENN MOVER, INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE (1985) (for an example of one of the relatively few comprehensive studies in the field). Mover has an analysis of CESC, but does not mention Article 15 and its implementation. Among the more general standard works on international human rights, there is a similar situation. KAREL VASAK (ED.), THE INTERNATIONAL DIMENSION OF HUMAN RIGHTS (1982) (vol. 1-2) (for a chapter on economic social and cultural rights has a chapter on economic, social and cultural rights written by V. Kartashkin, which contains only three brief pages on cultural

summation, the review of international legal and institutional agreements relevant to the question of cultural heritage supports the conclusion that there is a general right to participate in cultural life with specific acknowledgements of duties and responsibilities on the states. However, a human right to seek protection of cultural property as an internationally accepted human right does not exist. In other words, even though one's right to participate in cultural life is very well defined in international legal instruments, there is no definitive norm establishing an international human right to seek protection and preservation of cultural property. However, it is without doubt that several explicit provisions guaranteeing access to cultural heritage in international legal instruments cannot be achieved or guaranteed without also guaranteeing protection of cultural property.

After concluding that there is at least an implicit human right to seek protection of cultural heritage, the question is then to what extent does a state have an obligation to protect its cultural heritage. As with the UDHR, protection of cultural heritage is not explicitly mentioned in the ICESCR and the ICCPR, but the right to protection of cultural heritage can be inferred as derivative rights necessary to meet the explicit rights to participate in cultural life and access to cultural property.²⁴⁵ Under these Covenants, each State would undertake to ensure all individuals within its jurisdiction certain human rights and adopt the "necessary legislative or other measures to give them practical effect."²⁴⁶ While the ICESCR requires state parties to implement the obligations under that agreement progressively, the ICCPR imposes an immediate obligation on State Parties to implement its provisions immediately by taking positive action to provide the appropriate means of subsistence necessary to support life.²⁴⁷ By interpreting provisions of these

rights). See also David M. Trubek, *Economic, Social and Cultural Rights in the Third World: Human Rights Law and Policy Issues*, in THEODOR MERON (ED.), HUMAN RIGHTS IN INTERNATIONAL LAW (1984) (cultural rights under Article 15 of the CESC is not mentioned); FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS (1996) (contains a large section on CESC but no explanation is made on cultural rights).

²⁴⁵ See generally Y. DANIELI ET AL., THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: FIFTY YEARS AND BEYOND (1999).

²⁴⁶ As of February 21, 2001, there were 143 parties to the ICESCR, and 147 parties to the ICCPR. Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principle International Human Rights Treaties, available at http://www.unhchr.ch/html/menu3/b/a_cesr.htm (last visited Feb. 26, 2001).

²⁴⁷ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3. Article 2(1) of the ICESCR states:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the

conventions, it is possible to reach a result concerning the right to seek protection of cultural heritage as a human right. However, the imposition of obligations on States by the ICCPR may result in a clash of conflicting interests of the state, especially on the part of the developing states. Therefore, States may possibly fail to implement those obligations.

Consequently, such failures of the international community and States cause the loss of invaluable cultural heritage. Being aware of these possibilities, the World Heritage Convention established an international regime that invites the whole world community to participate in the protection of cultural and natural heritage on a collective basis.²⁴⁸ In this regard, Articles 4 and 5 of the Convention place obligations on international community and on each State. Article 4 states:

Each State Party to this convention recognizes that the duty of... protection, conservation... of the cultural heritage...on its territory... It will do all it can to do this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

Similarly, Article 5 obliges each state party "to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavor, in so far as possible, and as appropriate for each country..." The language of these provisions shows that the World Heritage Convention adopts a similar approach to the

full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 2(2) of the ICCPR states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

In its General Comment No.3 (1990) on the nature of state obligations under Article 2(1), the Committee on Economic, Social and Cultural Rights points out that while the concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time, the phrase must be seen in light of the overall objective, which is to establish clear obligations for States Parties to move as expeditiously as possible towards the realization of these rights. General Comment No.3, (U.N. doc. E/1991/23).

²⁴⁸ See Boer, *supra* note 167, at 250.

ICESCR. It does not impose an immediate obligation, instead it requires state parties to make their best effort to implement its provisions. One commentator, March Denhez, who refers to these provisions as a "best effort clause," states that "although a 'best efforts' clause does dilute a treaty's obligations, it does not obviate them all together," and the provisions do, in fact, contain legal obligations.²⁴⁹

It bears keeping in mind that under international law obligations for human rights are primarily held by States. As such States must respect collective cultural rights of the society in the first place. Consequently, as part of the obligation to respect cultural property the State should take steps to recognize and keep an inventory of cultural property of that particular society.²⁵⁰ In Turkey, there is no complete inventory of cultural property available even though there is a study undertaken by the General Directorate for the Preservation of the Cultural and Natural Heritage that has been continuing for a long time. The protection of cultural property, which is the most important aspect of state obligation, comes at a secondary level.

The obligation to protect cultural property is spelled out in existing Turkish law. For example, Article 63 of the Turkish Constitution puts a duty on the state to protect cultural wealth of the nation. Additionally, Turkish government has accepted the Universal Declaration of Human Rights and the Covenants as the international framework of human rights. (The Council of Europe's Convention on Human Rights, the European Social Charter) Within this framework, the ESCR Covenant provides a convenient basis of protection of cultural heritage. Turkey has recently signed the ICESCR and the ICCPR. Before they enter into force they need to be ratified. However, Turkey showed its intent to abide by these covenants by signing them. As mentioned above, these Covenants lay duties on States to recognize and take appropriate measures for the realization of rights included.²⁵¹

Signing international instruments and including economic, social and cultural rights in the constitution are not enough to ensure that the rights protected by international law are protected within the national context. Effective enforcement of those rights is the way to best assure their protection. This may be achieved by providing an appropriate legal remedy for violation of rights and removing any obstacles to enjoyment of them.

²⁴⁹ Marc McC. Denhez, *Pacta Sunt Servanda: Reinterpreting the World Heritage Convention, in Old Cultures in New Worlds* 869, Symposium Papers vol. II, 9th General Assembly and International Symposium, Council on Monuments and Sites, Symposium Papers Vol. II (Washington, D.C., October 10-15, 1987).

²⁵⁰ World Heritage Convention, *supra* note 144, at art. 11 (1).

²⁵¹ RALPH BEDDARD & DILYS M. HILL, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 10 (1992).

Moreover, the realization of these rights may require comprehensive administrative measures and social action. The success of the transformation depends on the evolution of human rights culture where individuals accept both their own rights and their duties to the community, making the enjoyment of rights possible.²⁵²

The right to seek protection of cultural heritage may be inferred under the basic instruments of international law. In addition to other international instruments, UNESCO drafted several conventions to provide additional protection. Member states have adopted several international instruments, which protect human rights within UNESCO's field of competence.²⁵³ In this regard, another point to be considered is that right of future generations. For centuries communities have recognized that it is important to conserve cultural heritage for future generations.²⁵⁴ A lucid realization of that fact is the prime requirement of our responsibility to future generations.²⁵⁵

Realizing a responsibility to future generations, the idea of the protection of nature, including cultural heritage, for the benefit of future generations has been recognized by a growing number of international agreements, declarations and the United Nations General Assembly resolutions.²⁵⁶ For instance, World Heritage Convention imposes a clear obligation on signatory parties to ensure transmission of cultural heritage to future generations as follows: "Each State Party to this Convention recognizes that the duty of ensuring the identification, protection,... and transmission to future generations of the cultural and natural heritage... situated on its territory, belongs primarily to that State...."²⁵⁷ Cultural resources are essential to the well-being of future generations because they provide them with a sense of ongoing community with the past, with a rich resource base upon which to build and to continue their societies, with knowledge essential for living in and using the natural system, and with

²⁵² Eide, *supra* note 238, at 30.

²⁵³ Julia Hausermann, *The Realisation and Implementation of Economic, Social and Cultural Rights*, in: ECONOMIC, SOCIAL AND CULTURAL RIGHTS 59 (Ralph Beddard & Dilys M. Hill eds., 1992).

²⁵⁴ See WEISS, *supra* note 123, at 257.

²⁵⁵ *Id.*

²⁵⁶ For the idea of protecting nature for future generations see generally the 1946 International Convention for the Regulation of Whaling, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, the 1974 UN Charter on the Economic Rights and Duties of the States, the 1982 Earth Summit, the 1995 World Summit for Social Development.

²⁵⁷ World Heritage Convention, *supra* note 144, at art. 4.

artistic pleasures.²⁵⁸ As an art historian explains, works of art and cultural objects tell us who we are and where we came from.²⁵⁹

B. RIGHT OF INTERNATIONAL SOCIETY TO INTERVENE

It is widely accepted that the ownership issues involving cultural heritage fall within the domain of the national legislation of the states.²⁶⁰ This part will analyze the issues of participation and protection of cultural heritage that is distinct from the ownership. The primary question is whether the international community has a right to access cultural heritage of humankind located in other countries, and a right to demand protection of them. If so, a second question arises as to whether there is an obligation for the international community to take part in the protection of cultural heritage located in other states.

The question relating to the international community's right to intervene in the protection of cultural heritage necessitates a brief examination of the disputes over the dichotomous aspects of the cultural heritage. The first aspect is the property aspect, which derives from the fact that cultural property consists of tangible, movable objects.²⁶¹ The second aspect is the cultural aspect, which derives from the cultural significance of the object.²⁶² While sovereignty of the state over cultural heritage located in its territory is widely accepted, the question of ownership and right to access to cultural property is highly controversial.

Reflecting the dichotomous nature of cultural property, the question of ownership embraces the possessory interests of source nations and the global interests in maintaining use and enjoyment of cultural heritage. These diverse interests are best represented by two opposing schools of thought concerning cultural heritage: "cultural internationalism" and "cultural nationalism." While the "cultural internationalists" believe that cultural heritage is the property of all humankind, the "cultural nationalists" believe that it is first and foremost the property of source nations.²⁶³ The scholarly

²⁵⁸ See WEISS, *supra* note 123, at 257.

²⁵⁹ A. Elsen, *Introduction: Why Do We Care About Art?*, 27 HASTINGS L. J. 951, 952 (1976); See also A. ELSEN, *PURPOSE OF ART VI-VII* (4th ed. 1981).

²⁶⁰ A. STRATI, *THE PROTECTION OF UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA* 100 (1995).

²⁶¹ JOHN H. MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS, AND THE VISUAL ARTS* 46 (2d ed. 1987).

²⁶² C. Franklin Sayre, *Comment, Cultural Property Laws in India and Japan*, 33 UCLA L. REV. 851, 857 (1986).

²⁶³ Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L. J. 291, 300 (1999). The "cultural internationalist" approach is best illustrated in the 1954 Hague Convention and the work of John Henry Merryman. See Merryman, *supra* note 93, at 339; Henry Merryman, *Two*

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²⁶³ Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L. J. 291, 300 (1999). The "cultural internationalist" approach is best illustrated in the 1954 Hague Convention and the work of John Henry Merryman. See Merryman, *supra* note 93, at 339; Henry Merryman, *Two*

debate about the disposition of cultural heritage forces us to choose between two alternatives: either cultural heritage is the common heritage of all humankind, or it is the exclusive possession and domain of a particular group, definable and understood by only that group. Were the former chosen it may be concluded that international community has a right and duty to intervene into the protection of cultural heritage. On the other side, acceptance of the latter leads us to think that cultural heritage is exclusively the property of source nations, that source nations should have the power to deal with it in accordance with their own rules and customs, and that the value of cultural heritage is poorly understood outside of its culturally affiliated group.²⁶⁴ Although these schools are concerned with different aspects of cultural heritage, they agree on the fundamental importance of preservation and protection of cultural property.²⁶⁵ It may also be called the "best interest of the cultural property."

Recent developments in the international law of cultural heritage favors the "cultural nationalist" approach, especially in the area of rights of indigenous people. The "cultural nationalism", which is possessive in a nationalistic sense, may provide required safeguards for the protection of certain cultures and properties that belong to that culture. However, insistence on the nationalist approach may leave common cultural heritage of humankind unprotected in cases where a nation state is guilty of neglecting or destroying such property. As Professor Merryman argues, "cultural nationalism" expresses dubious values, such as mere possession by a state that has not housed, protected, or studied the objects adequately.²⁶⁶ Therefore, acceptance of an internationalist approach, which is more cosmopolitan and is based on a broader global concern for humanity's cultural heritage, may provide greater protection to cultural heritage. Additionally, cultural heritage of all humankind, such as Zeugma and Hasankeyf, should be brought out of the realm of any particular nation's patrimony and their cultural, historical, educational and scientific importance should be introduced to all humanity.²⁶⁷ As discussed before, several international conventions accepted this approach and recognized

Ways of Thinking About Cultural Property, 80 AM. J. INT'L L. 831, 831-840 (1986). The "cultural nationalist" approach is best illustrated in the 1970 UNESCO Convention and the work of Richard Handler. But see Richard Handler, *Who Owns the Past?: History, Cultural Property, and the Logic of Possessive Individualism*, in *THE POLITICS OF CULTURE* 63 (Brett Williams ed., 1991).

²⁶⁴ Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L. J. 291, 301 (1999).

²⁶⁵ See Mastalir, *supra* note 99, at 1045.

²⁶⁶ Henry Merryman, *Thinking About the Elgin Marbels*, 83 MICH. L. REV. 1881, 1891 (1985).

²⁶⁷ See Merryman, *supra* note 263, at 846.

international community's right to access the cultural heritage of humankind located in other countries.²⁶⁸

Because the internationalist approach extends the right to access to cultural heritage to all humankind, more people will benefit from its educational, scientific and aesthetic qualities. Corollary to the international community's right to access cultural heritage in other states, it may be concluded that international community also has a right to demand the protection of such heritage. In fact, in the case of destruction of cultural heritage by nation states, the public pressure against them will be more powerful and more effective if supported by the international community. It is therefore in the best interest of world's cultural heritage that the international community's right to intervene for the protection of cultural heritage should be recognized. Although it is theoretically easy to conclude in favor of such a right, it is very difficult to implement such rights due to the sovereignty and development concerns of the source nations. However, it is possible that international community may take an active role in the protection of the world's common cultural heritage and still pay attention to concerns of source nations. These issues are discussed in the Part IV ("Possible Solutions").

After affirmatively concluding that the international community has a right to access and a right to demand protection of cultural heritage from the government of its location, it is apt to turn to the question of whether the international community has any obligation towards cultural heritage. Professor Ralph Slatyer, a former Chairperson of the World Heritage Committee, explains this obligation very well. He states that:

There are some parts of the world's natural and cultural heritage which are so unique and scientifically important to the world as a whole that their conservation and protection for present and future generations is not only a matter of concern for individual nations but for the international community as well.²⁶⁹

The obligation of the international community is also clearly defined by the 1972 World Heritage Convention. To begin with, the preamble of the Convention describes the deterioration or disappearance of cultural and natural heritage as "a harmful impoverishment of the heritage

²⁶⁸ For example, 1954 Hague Convention, World Heritage Convention and Convention for the Protection of the Architectural Heritage of Europe are some of the international instruments in which this approach is adopted.

²⁶⁹ Ralph Slatyer, *The Origin and Evolution of the World Heritage Convention*, 12 AMBIO 138, 138 (1983).

of all nations of the world," and urges that "it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage."²⁷⁰ Moreover, the obligation of international community is mentioned throughout the Convention, especially in Articles 4, 6(1), 7 and Part V (Conditions and Arrangements for International Assistance). While the Convention left the identification of cultural heritage to nation states, it recognizes that "such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate."²⁷¹ In order to realize the international community's duty to co-operate and financially contribute to the protection of common cultural heritage, the Convention created the World Heritage Fund and made arrangements for the provision of international assistance.²⁷² Similar provisions are included in other UNESCO Cultural Heritage Conventions and Council of Europe Conventions.

IV. POSSIBLE SOLUTIONS

A number of solutions have been suggested to implement a more effective protection of cultural heritage. These proposals can be put into three categories: legal, cooperative and economic. First, there is a need for the creation of a more comprehensive legal framework of international protection. Second, it is necessary to develop an improved system of international cooperation. Finally, the incentives to explore economic aspects of cultural property should be supported.

A. INTERNATIONAL LEGAL SOLUTIONS

Scholars and institutions specializing in this field have made suggestions for improved legal protection of cultural property. The first suggestion is a call for improved dispute resolution mechanisms. In this respect, one proposal is to establish a specialized tribunal for cultural property disputes.²⁷³ The adoption of a specialized international tribunal for cultural property disputes would be consistent with the recent trend in international law is to establish specialized tribunals to deal with particular

²⁷⁰ See Preamble, World Heritage Convention, *supra* note 144.

²⁷¹ *Id.* at art. 6(1).

²⁷² *Id.* at art. 15(1).

²⁷³ See Ann P. Prunty, *Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing its Marbles*, 72 GEO. L. J. 1155, 1155 (1984).

types of issues.²⁷⁴ Although it would be ideal to establish a specialized tribunal, it is not likely to succeed due to the complexity of problems in establishing such a tribunal. However, this objective can be reached through other forums. While the International Court of Justice comes to mind as the logical forum, it handles cases involving only States, not individuals, and its jurisdiction depends on the consent of the parties.

A more appropriate forum to handle violations against cultural heritage would be the International Criminal Court. Because it is still in the stage of establishment and its original jurisdiction includes intentional destruction of cultural property at the time of an armed conflict. Therefore, it would be easier to make additions to its jurisdiction to include cases concerning cultural property disputes during the times of peace. As such, the concepts of "crime against culture" and "illicit trafficking of cultural property" could be included in the jurisdiction of the Court. The jurisdiction of this court regarding cultural property issues should be secondary and subject to exhaustion of domestic remedies. Nations agree that criminals should normally be brought to justice by national institutions, in certain cases however national judicial institutions are unwilling or unable to act.²⁷⁵ Without an international criminal court to deal with individual responsibility as an enforcement mechanism, violations of human rights often go unpunished.²⁷⁶ Therefore, the International Criminal Court would ensure effective prosecution for intentional destruction of cultural heritage.

International law can help create institutions of cooperation but in the absence of effective enforcement mechanisms the success can only be achieved if the good will of the state is involved. The effective enforcement of international measures on states can be achieved either through imposition of sanctions or incentives. Sanctions imposed can be in the form of economic embargo, mere political pressure on state, or legal sanctions, such as fines or imprisonment of the responsible individuals. While economic and political sanctions on states are most commonly applied, the implementation of sanctions on responsible individuals is not very common. However, personal responsibility of individuals for their actions against cultural heritage has been included in a recent international judicial decision. The International Criminal Tribunal for the Former Yugoslavia included the

²⁷⁴ Richard R. Baxter, *Two Cheers for International Adjudication*, 65 A.B.A. J. 1185, 1185 (1979).

²⁷⁵ In times of conflict, whether internal or international, such national institutions are often either unwilling or unable to act, usually for one of two reasons. Governments often lack the political will to prosecute their own citizens, or even high-level officials, as was the case in the former Yugoslavia. Crimes under international law, by their very nature, often require the direct or indirect participation of a number of individuals at least some of whom are in positions of governmental authority or military command.

²⁷⁶ See generally <http://www.un.org/law/icc/general/overview.htm>

destruction of historic monuments in Kosovo in its judgement of February 26, 2001.²⁷⁷ This indictment concerned a breach of the 1954 Hague Convention.

Recent experiences require that international community take collective action to protect cultural heritage and apply sanctions for its protection. As it is stated in the Preamble of the Statute of the International Criminal Court, there is an international consensus that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.²⁷⁸ In this regard, the attack against cultural heritage is included among the crimes within the jurisdiction of the International Criminal Court in the context of the war crimes. The Article 8.2 (b) (ix) and Article 8.2.(e)(iv) of the Statute of the International Criminal Court provides as follows: "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;..." The protection provided by the Statute is limited only to the cases of armed conflicts. However, there are incidents in which the state agents intentionally destroy cultural property in times of peace. Unfortunately, there is no adequate legal protection provided against peacetime attacks to the cultural property.

In order to fill this gap and provide required protection, there is a need for tighter international regulation of the cultural property. In this regard, the first step should be codification of international standards for the protection of cultural property. Then, the effective enforcement of these standards is imperative to protect cultural property. While international law provides certain protection to the cultural heritage, the lack of effective enforcement mechanisms poses serious threats to the world's cultural heritage at the hands of some inappropriate custodians. Unlike most domestic laws, international law lacks compulsory jurisdiction and

²⁷⁷ Case against Dario Kordic & Mario Cerkez, Case No: IT-95-14/2-T, available at <http://www.un.org/icty/kordic/trials/judgement/index.htm> (last visited Apr. 26, 2001). Violations of the laws or customs of war, Statute of the International Criminal Court for Former Yugoslavia, art.3:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: ... (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science,....

²⁷⁸ Preamble of the International Criminal Court, available at <http://www.un.org/ice/romestat.htm>.

centralized enforcement, making it by necessity self-enforcing.²⁷⁹ Therefore, the rules of international law cannot by themselves alleviate the destruction of cultural heritage. But they can both prevent one state from causing harm to cultural heritage located in its territory and promote cooperative efforts by states to manage the world's common heritage to avoid the loss or destruction of such property. As mentioned earlier, the states' obligation is to make a good faith effort to protect cultural heritage.

In addition to international legal measures, domestic legal systems should be improved. In this respect, enactment of new domestic legislation to ensure effective implementation of international guidelines and agreements will help the efforts to preserve and protect cultural heritage.²⁸⁰ The effective utilization of domestic judicial tools may also help protect cultural heritage. Litigating such violations, especially public interest litigation, may become an effective tool for the protection of cultural heritage. Public interest litigation reflects broad public interest and has some possibility of attaining sound decisions. Even if the case is lost, public pressure may force government to more carefully consider its policy. However, the participation by ordinary citizens is difficult because of the time and expense involved. Moreover, the use and establishment of civil interest groups and NGOs are not widespread in developing countries like Turkey and members of existing groups are normally not able to fund lengthy litigation. On the other hand, development interests and government have the capacity to invest large sums of money into this type of litigation.²⁸¹

Litigation for the protection of cultural heritage can also be directed at the individuals who are responsible for the destruction of that heritage, alleging that the government agencies and officials acted negligently, and committed a crime in failing to apply to the UNESCO World Heritage Committee for inclusion of these sites on the World Heritage List. There are examples of these kinds of cases throughout the world. For example, certain Ministers and members of parliament and the Australian Government have been sued by members of Aboriginal community in *Buzzacott v. Hill & Ors* in the Federal Court of Australia.²⁸²

As mentioned earlier, violation of international instruments and domestic law with regard to failure to provide adequate protection to cultural property and failure to guarantee recognized human right to participate

²⁷⁹ See Komurcu, *supra* note 33.

²⁸⁰ Boer, *supra* note 167, at 248. In this respect, the federal government of Australia enacted the World Heritage Properties Conservation Act of 1983. The main aim of this act was to ensure the domestic implementation of the World Heritage Convention.

²⁸¹ See *id.* at 275.

²⁸² *Buzzacott v. Hill & Ors*, Sept. 1, 1999, 39 I.L.M. 20.

cultural life provide ground for a lawsuit before competent Turkish Courts. Therefore, Turkish people in a public interest case can challenge the Ilisu Dam. The project is in direct contradiction with domestic law and constitutes a clear violation of the international treaty obligations of Turkey. Penalties are required by the 1968 UNESCO Recommendation. Article 27 of the Recommendation requires Member States to take steps to ensure that offences, through intent or negligence, against the preservation or salvage of cultural property endangered by public or private works are severely punished by their Penal Code, which should provide for fines or imprisonment or both. In this regard, government officials, such as related ministers and ministry officials could be held responsible for the destruction of cultural heritage due to the public works they initiated. Members of the Monument's Committee have a special responsibility to determine protected sites, if they remove a protected site, such as Hasankeyf, from its status just because of political pressure, they should be held responsible and be punished for this.

B. COOPERATIVE SOLUTIONS: PROTECTION BY THE INTERNATIONAL COMMUNITY

There are instances of international cooperation in which the international community could successfully agree on common global concerns, such as international protection of global environment. The force behind the cooperative solutions of global environmental problems, i.e., the depletion of ozone layer, was mainly the immediacy and the scope of the problem. There are similarities between the need for cooperation for the protection of cultural heritage and for other global problems, such as depletion of ozone layer and biological diversity. Because problems with the ozone layer are far-reaching, serious, and immediate, and because no single nation could solve the problem, a global solution was required.²⁸³ The hazards of the depletion of ozone layer and the loss of cultural heritage may be different, but the degree of the immediacy and inability of any state to solve the problem alone is similar.²⁸⁴ Furthermore, akin to the situation that many species and plants are threatened to become extinct, cultural heritage is also endangered. Because it is non-renewable, once it is destroyed its archaeological, scientific and historical values are lost forever. Its

²⁸³ John W. Kindt & Samuel P. Menefee, *The Vexing Problem of Ozone Depletion in International Environmental Law and Policy*, 24 TEX. INT'L L. J. 261, 268 (1989). See generally Douglas Hunter Ogden, *Comment: The Montreal Protocol: Confronting the Threat to Earth's Ozone Layer*, 63 WASH. L. REV. 997 (1988).

²⁸⁴ See Mastalir, *supra* note 99, at 1079.

destruction is not much different from the extinction of whales, pandas or elephants. Both provide a compelling reason to take collective action to protect these resources.

The world community responded to other global concerns under the principle of common but differentiated responsibility (CBDR).²⁸⁵ Based on their different social and economic conditions, CBDR incorporates the equitable notion that developed countries should assume primary responsibility for addressing these common concerns of humanity.²⁸⁶ In this regard, developed nations are expected to assist developing countries by transferring adequate funding, expertise and technology. By helping developing nations, the developed nations will guarantee their people's access to world's cultural heritage as well as protecting that heritage.

Moreover, there is a need for the establishment of a fund, similar to the World Heritage Fund (WHF) established under the World Heritage Convention. WHF is limited only for the protection of the World Cultural and Natural Heritage of Outstanding Universal Value. Therefore, many other qualified cultural heritage sites such as Zeugma, Hasankeyf and the Buddhas of Bamiyan that are not yet listed on the World Heritage List are left to their fate.

Recent incidents demonstrate that there is a need to establish a more effective system of protecting cultural heritage of humankind. Such an attempt should include not only governments, but also multinational companies (MNCs), major international financial organizations, and should include set standards for granting funds to huge development projects. The involvement of foreign governments and MNCs in the protection of cultural heritage raises moral questions as well as legal obligations. While only the state is subject to international law, there is a moral obligation on individuals and other states. By extension this obligation devolves onto the MNCs, too.²⁸⁷ It is also argued that this moral obligation can be extended to international organizations such as the IMF, World Bank in relation to the cultural dimension of major development projects. In this respect, most international organizations lack any explicit standardized policies toward cultural heritage, including the Asian Development Bank, Inter American Development Bank and USAID.²⁸⁸ However, the World Bank has long

²⁸⁵ See Guruswamy, *supra* note 17, at 742. See The United Nations Framework Convention on Climate Change, Preamble ¶ 6 and art. 3(1), 31 I.L.M. 849 (1992); The Convention on Biological Diversity, 31 I.L.M. 818 (1992) (for the articulation of this principle).

²⁸⁶ See Guruswamy, *supra* note 17, at 742.

²⁸⁷ See Hausermann, *supra* note 253, at 11.

²⁸⁸ See WCD Press Release, *supra* note 11.

issued guidelines for preserving cultural properties in Bank-funded projects, including dams.²⁸⁹

It is an undeniable fact that MNCs play an important part in international economic life. In the cases of Birecik and Ilisu Dam projects, highly internationalized consortiums of MNCs undertake the projects, threatening some of the unique sites of common heritage of humankind. MNCs have also been known to adopt policies that threaten environmental sustainability, perpetuate child labor practices, hazardous working conditions and exploitation of workers. While Environmental Impact Assessments (EIA) are already codified in many countries, there is an urgent need to develop and implement an internationally acceptable EIA regulation that includes assessment of cultural heritage.²⁹⁰

However, the question of how to bring international players (MNCs, international funding agencies and developing countries) into compliance with such international standards remains unanswered and requires further study. In this regard, without getting into detail, some mechanisms can be suggested to obtain compliance. For example, international funding and construction agencies can be convinced to develop and enforce internationally accepted protocols for conducting archaeological surveys at dam projects.²⁹¹ With respect to dam projects it is widely suggested that a percentage of total construction costs should be allocated for the preservation and protection of cultural heritage, either incorporated into the EIA or considered as a separate line item in project budget.²⁹² Similarly, standards may be established in a manner analogous to that of the International Organization on Standards and funding can be provided only to private corporations and government agencies that meet those standards.²⁹³

As mentioned earlier, demand for electricity is increasing at a high speed in Turkey. In order to keep with current economic growth, Turkish government will spend as much as \$6 billion per year for building hydroelectric power plants in next 10 years. However, Turkey does not have enough money to finance these projects. Since the World Bank and other

²⁸⁹ R. Goodland & M. Webb, *Management of Cultural Property in World Bank-Assisted Projects: Archeological, Historical, Religious and Natural Unique Sites*, World Bank Technical Paper No. 62 (1987).

²⁹⁰ For example, in the U.S., this concept has been imbedded in the 1969 National Environmental Policy Act (NEPA), which was created to maintain an environment that supports diversity and a variety of individual choices, and to save important historical and cultural resources from destruction. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d.

²⁹¹ See Brandt & Hassan, *supra* note 232.

²⁹² See WCD Press Release, *supra* note 11.

²⁹³ *Id.*

major international financial organizations declined to fund GAP projects, the Turkish government expects to finance these projects through foreign investment.²⁹⁴ In order to attract foreign investors, the government has made changes in the foreign investment laws, created a BOT scheme, lifted many of the bureaucratic barriers, and adopted international arbitration. With this potential for future profits, many MNCs are ready to take part in Turkish hydropower projects. However, external financing through foreign investors depends on the support of the Export-Import Bank of their home countries.²⁹⁵ Export credit agencies are governmental bodies that provide financing and insurance to companies bidding on foreign projects.²⁹⁶

The Birecik and Ilisu dams clearly demonstrate the huge chasm that still divides the rich countries' industrial policy from sustainable development.²⁹⁷ Export credit agencies are exposed as preoccupied with supporting their national enterprises at the expense of human rights, environment, international law and political stability.²⁹⁸ As for the controversial Ilisu Dam, the members of the consortium have submitted applications for coverage to the export credit agencies of Britain, Austria, Japan, Germany, the U.S., Italy, Sweden, Switzerland, and Portugal.²⁹⁹ Because export credit agencies are governmental bodies, not aid or development agencies, most of them have no environmental or human rights regulations on their books.³⁰⁰ But should any one of them decline support, it is clear that agencies with lower standards would provide assistance anyway. This classic race to the bottom in pursuit of narrow business aims emphasizes the urgent need for international action to agree on common binding standards applying to all export credit agencies.³⁰¹

²⁹⁴ See Komurcu, *supra* note 33. The World Bank has refused to fund GAP for environmental, political and legal reasons. One of the main concerns was that the Bank guidelines and the Draft articles of the Non-Navigational Uses of International Watercourses required Turkey to inform and gain approval of downstream states, Syria and Iraq, in regard to building dams on shared waters. Another concern was that the World Bank did not want to increase the danger of the conflict between Turkey and its southern neighbors. *Id.*

²⁹⁵ For example, U.S. firms were absent from bidding for another highly controversial dam project, China's Three Gorges Dam, due to the refusal of the US Ex-Im Bank to support US exporters in the project. See *The River Dragon Has Come*, available at <http://www.nextcity.com/ProbeInternational/ThreeGorges/index.html> (last visited on Nov. 8, 2000).

²⁹⁶ *Id.*

²⁹⁷ See Juniper, *supra* note 19.

²⁹⁸ *Id.*

²⁹⁹ See *id.*

³⁰⁰ See generally William Shapiro, *China's Three Gorges Dam*, COLO. J. INT'L ENVTL. L & POL'Y 153 (1997 Year Book).

³⁰¹ See Juniper, *supra* note 19.

C. ECONOMIC SOLUTIONS: CULTURAL HERITAGE AS A SOURCE OF ECONOMIC DEVELOPMENT

The tension regarding the protection of cultural property is between the developing countries desire to further their economic development and the need for the protection of the world's cultural heritage. The solution requires developed countries to recognize the aspirations of developing countries for economic development, and for developing countries to appreciate the threat continued development poses on the environment.³⁰² In order to achieve international cooperation, interests of both sides should be taken into account. While implementation and enforcement of international legal sanctions are important, they will not do much to aid international cooperation.

Instead of such direct measures, an incentive-based approach may be more effective and consistent with the development objectives of the developing countries. In this respect, developed states can offer certain economic incentives in exchange for the protection of cultural heritage. The governments of the Netherlands, the United States, Canada, Switzerland, Germany and Sweden have taken an active role in the success of international initiatives to protect the global environment. One effective way incentives are utilized to encourage developing countries to protect their environment is through the public/private debt-for-nature swaps.³⁰³ Under this scheme, the commercial debts of the debtor nations are reduced in exchange for domestic protection of environmental resources, such as tropical forest protection.³⁰⁴ Similar incentives can be utilized for the protection of cultural heritage.

Moreover, if the economic benefits of cultural heritage to the local and national economy are recognized, there will be an automatic incentive to protect them. Cultural heritage in many source countries is a resource that could, like other resources, be developed, managed and exploited. In that sense, cultural property is a form of wealth of a nation.³⁰⁵ Cultural heritage has another kind of economic value: it attracts viewers and is good for the tourist industry.³⁰⁶ Millions of tourists visit Italy, Egypt, and Greece for their

³⁰² See Mastalir, *supra* note 99, at 1075.

³⁰³ Jennifer A. Loughrey, *The Tropical Conservation Act Of 1998: Can The United States Really Protect The World's Resources?—The Need For A Binding International Treaty Convention On Forests*, 14 EMORY INT'L L. REV. 315, 325 (2000).

³⁰⁴ In this regard, The U.S. Congress has passed several regulations including Global Environmental Protection Assistance Act of 1989, the Enterprise for the Americas Initiative Act of 1992, and Tropical Forest Conservation Act of 1988. *Id.*

³⁰⁵ See Merryman, *supra* note 93, at 355.

³⁰⁶ See *id.*

cultural riches. It is possible to admit that monuments possess a potential economic value in that they contribute to a great extent towards stimulating the tourist trade. From the economic point of view, the monuments can be compared to famous beaches or ski resorts. If the beaches are polluted, or the monuments are damaged a source of income would disappear and capital invested in the ancillary equipment and services would be lost.³⁰⁷

Turkey may promote its development through the tourism industry if it preserves its cultural and historic riches. The preservation of a country's monuments inherited from the past contributes to the development of tourism and thus constitutes one of the factors of the country's economic development.³⁰⁸ It is likely that developing countries like Turkey will be prompted to give tourism a high priority in their plans for economic expansion, since the tourist trade can encourage and accelerate economic progress and investments in the tourism industry can bring in exceptionally rapid returns.³⁰⁹ More than 10 million tourists visited Turkey in 2000. This number is expected to increase to 12 million in 2001.³¹⁰ The importance of tourism for the national economy and international trade is apparent. Turkey's foreign currency earnings from tourism are about \$8 billion a year representing fifteen percent of total foreign currency earnings.³¹¹ Therefore, development of the tourism industry is a more constructive way of financing the protection of cultural heritage than just demanding help from the developed countries.

In addition to the economic gains, tourism to monuments plays an indirect but very important role through its social, educational and cultural influence on people. They contribute to international understanding and peace through improving friendship and understanding among the world's people representing different countries, religions and cultures.

V. CONCLUSION

Recently, governments, international organizations, international aid agencies, non-governmental organizations, and local communities have

³⁰⁷ ALI VRIONI, PRESERVATION OF MONUMENTS AND OTHER CULTURAL PROPERTY IN CONNECTION WITH THE DEVELOPMENT OF TOURISM 2 (1969).

³⁰⁸ Report of the Second General Assembly of the International Council of Monuments and Sites, July 6-12, 1969.

³⁰⁹ VRIONI, *supra* note 307, at 3.

³¹⁰ *Turks See More than 10 million Tourists by End 2000*, REUTERS ENGLISH NEWS SERVICE, available at Westlaw, 9/26/00 RTRENGNS 09:40:00.

³¹¹ According to a World travel and Tourism Council report, the number of tourists visit Turkey will reach to 25 million and earning from them will be about \$ 33 billion. *Türkiye Yeni Binyılın Turizm Merkezi Olacak*, HURRIYET (Turkey), Jan 1, 2000, available at <http://www.hurriyet.com.tr/hur/turk/00/01/09/ekonomi/01eko.htm> (last visited Dec. 19, 2000).

stepped up their efforts to protest the destruction of cultural heritage around the world. The international community responded promptly and determinedly to the recent destruction of cultural heritage such as the destruction of the Buddha's of Bamiyan in Afghanistan by the Taliban, and the destruction of ancient cities and archaeological sites by the development projects of China and Turkey. Although dams on major rivers like the Nile, the Tigris and Euphrates and the Indus have helped civilizations develop, this shows only one side of the coin. On the other side is the possibility of an apocalypse, the irreversible destruction of the cultural and historical heritage of humankind.³¹² Perhaps it is because people begin to realize that the cultural heritage that they leave behind them in this life may well become the cultural heritage of future generations.³¹³ Therefore, despite cultural variations, people in most places care in special ways about objects that evoke or embody or express their own or other peoples' culture.³¹⁴

International discussions and efforts to protect cultural heritage are extremely important but not enough. In order to guarantee individuals access to the cultural heritage, national governments need to be pressured to translate into national and international legal obligations and responsibilities the protection of the cultural heritage of humankind located in their territory. As it is stated in the Preamble of 1968 UNESCO Recommendation, it is the duty of governments to ensure the protection and the preservation of the cultural heritage of mankind, as much as to promote social and economic development.³¹⁵ What is lost with the destruction of cultural property is not only the future and the past of the local people but also part of the history and cultural heritage of the world.

³¹² Federico Mayor, *The Ethics of the Future*, (UNESCO's Advocacy of Preserving Human Cooperation and Culture of Peace), UNESCO COURIER 40 (Apr. 1, 1998).

³¹³ Boer, *supra* note 167, at 279.

³¹⁴ See Merryman, *supra* note 93.

³¹⁵ See UNESCO's Recommendations, *supra* note 68.

THE DECOLONIZATION-MODERNIZATION INTERFACE AND THE PLIGHT OF INDIGENOUS PEOPLES IN POST-COLONIAL DEVELOPMENT DISCOURSE IN AFRICA

JOEL NGUGI*

INTRODUCTION

The two more important developments in Twentieth Century international law were the decolonization¹ movement of the 1950s and 1960s and the recognition of the emerging norm of indigenous peoples rights in international law.² More remarkable, however, there has been the creation of discourses in international law that have constrained these two developments in a way that has prevented the unleashing of their full emancipatory potential. I argue in this article that the discourse that has been deployed to "manage" the creation, development and ultimate resolution of the problems posed by both decolonization and the indigenous peoples problematic is the modernization discourse.³

The modernization discourse has been instrumental in the Third World⁴ in creating subjects – the nation-state as a "national allegory"⁵ and

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¹ See generally JOCHEN ABR FROWEIN, *INTERNATIONAL LAW IN THE PERIOD AFTER DECOLONIZATION* (1988) (giving a good account of decolonization and how it was handled in international law); See also DAVID BIRMINGHAM, *THE DECOLONIZATION OF AFRICA* (1996). See D.K. FIELDHOUSE, *BLACK AFRICA, 1945 – 80: ECONOMIC DECOLONIZATION AND ARRESTED DEVELOPMENT* (1986) (giving a somewhat critical view).

² See generally JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2000) (referring to the emerging norm of indigenous peoples rights, its limits, promises and politics); see also Siegfried Wiessner, *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660 (1990).

³ I define modernization not just as the adoption of the "right" values by previously primitive societies, nor the mere industrialization and transformation of hitherto peasant or subsistence societies. Rather, the term, as a discourse, also includes a mode of production of knowledge and truth. It institutionalizes a way of thinking about the way the society should be structured, and hence structures the power relations in the society. See generally ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* (1994).

⁴ In this article, I use the term "Third World" as an analytical category. See Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, in *THIRD WORLD LEGAL STUDIES* 1-20 (1998-99). Balakrishnan Rajagopal suggests that this conception of the "Third World" de-