

AMERICA’S SCARLET LETTER: HOW INTERNATIONAL LAW SUPPORTS THE REMOVAL AND PRESERVATION OF CONFEDERATE MONUMENTS AS WORLD HERITAGE OF AMERICA’S DISCRIMINATORY HISTORY

*Blake Newman**

I. INTRODUCTION	147
II. THE CURRENT CONTROVERSIES OF CONFEDERATE MONUMENTS	149
III. DEVELOPMENT OF INTERNATIONAL PROTECTIONS OF CULTURAL HERITAGE.....	154
A. <i>Codes, Treaties, and Conventions</i>	154
B. <i>UNESCO Recommendations and Declarations</i>	161
IV. APPLYING INTERNATIONAL LAW TO CONFEDERATE MONUMENTS ...	165
V. CONCLUSION	169

I. INTRODUCTION

The cornerstone of what the Confederacy stood for has been made clear, through speeches and actions of the parties involved, that black men, women, and children were seen as inferior to their white counterparts. In his infamous Corner Stone speech, Confederate Vice President Alexander H. Stephens said just weeks

* J.D., Southwestern Law School, 2020; B.A. Political Science, University of Southern California, 2013. I would like to give special thanks to Professor Henry Lydiate, Professor Robert Lind, and Professor Alexandra D'Italia for giving me the inspiration, know-how, and confidence in writing this paper. Your words of encouragement and resources were invaluable for helping me develop this paper. I would also like to thank the very talented staff and board members of Southwestern’s Journal of International Law for their many contributions.

before the Civil War, “[Our new government’s] foundations are laid, its corner-stone rests, upon the great truth that the negro is not equal to the white man; that slavery – subordination to the superior race – is his natural and normal condition.”¹ This ideology continued to thrive long after the end of the American Civil War. *Plessy v. Ferguson* upheld Jim Crow laws as constitutional and legitimized the principle of “separate but equal.”²

Therefore, the country stayed divided.³ Black men and women were told where they could eat, work, buy a house, go to school, where to drink, and which bathrooms they could use.⁴ Most Confederate monuments were constructed against this backdrop.

Since 1900, over 1,700 Confederate monuments have been built in public parks, schools, and courthouses throughout the United States.⁵ The majority of these monuments were erected between 1900 and 1930.⁶ During that era, the lynching of African Americans was at its peak.⁷ Additionally, the ideology of white supremacy and the Ku Klux Klan were rapidly gaining popularity, particularly in the South.⁸ Between 1950 and 1970, during the civil rights era, Confederate monument raisings surged. Erecting vast numbers of Confederate monuments during this period prompted a rallying cry for racist ideals and delivered an intimidating message to people of color.

Recently, there has been a growing trend of protestors vandalizing or destroying Confederate monuments across the United States.⁹ In response to the vandals, municipalities have

1. HENRY CLEVELAND, ALEXANDER H. STEPHENS, IN PUBLIC AND PRIVATE: WITH LETTERS AND SPEECHES, BEFORE, DURING, AND SINCE THE WAR 721 (1886).

2. See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896).

3. Arthur E. Sutherland, *Segregation and the Supreme Court*, THE ATLANTIC (July 1954), <https://www.theatlantic.com/magazine/archive/1954/07/segregation-and-the-supreme-court/306055/>.

4. *Id.*

5. *Whose heritage? Public Symbols of the Confederacy*, SPLC (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy#top>.

6. *Id.*

7. Kevin Drum, *The Real Story Behind All Those Confederate Statues*, MOTHER JONES (Aug. 15, 2017), <https://www.motherjones.com/kevin-drum/2017/08/the-real-story-of-all-those-confederate-statues/>.

8. *Id.*

9. See generally, *Confederate Monuments Are Coming Down Across the United States. Here’s a List*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/interactive/2017/08/16/us/confederate-monuments-removed.html>.

begun removing Confederate monuments and locking them away in storage.¹⁰ Presumably, these actors have noble intentions and an end to the monuments' intimidating legacy.

However, these Confederate monuments are still a part of America's history. Bigotry and racism will not disappear with the destruction or sequester of every Confederate monument. They represent the scars of one of the darkest times in American history. We must use them as reminders of our past mistakes by maintaining public access to them.

This article uses international law to guide the United States government to a compromised solution for how to remove Confederate monuments and comply with international protections for historically significant monuments. Section II highlights current controversies and problems faced by those advocating the removal of Confederate monuments. Section III visits the history that led to the creation of the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") and the various Conventions, Recommendations, and Declarations that pertain to the United States and cultural heritage. Section IV will apply the adoptions of UNESCO to Confederate monuments to show that they fall under these protections. Finally, Section V concludes that the best course of action to preserve Confederate monuments in compliance with international law is to relocate the monuments to museums or less contentious areas with federal funding.

II. THE CURRENT CONTROVERSIES OF CONFEDERATE MONUMENTS

On August 12, 2017, the "Unite the Right" rally in Charlottesville, Virginia turned deadly when a white supremacist drove his vehicle into a crowd of counter-protesters injuring at least nineteen people and killing one, Heather Heyer.¹¹ Various alt-right groups, including white nationalists, neo-Nazis, and the Ku Klux Klan, organized hundreds of white supremacists to rally against the planned removal and sale of a Confederate statue of

10. *Id.*

11. Rosa Flores et al., *James Alex Fields Jr. has First Hearing; Tensions Still High in Charlottesville*, CNN (Aug. 15, 2017), <https://www.cnn.com/2017/08/14/us/charlottesville-white-nationalist-protests-violence/index.html>.

General Robert E. Lee from a public park.¹² The organizers claimed that the rally was in response to the growing number of calls for the removal of Confederate monuments across the country.¹³ The 2015 murders by a white supremacist of several African American churchgoers in Charleston, South Carolina prompted renewed efforts to remove Confederate monuments.¹⁴ Racial tensions had been growing leading up to Charlottesville, and Confederate monuments have stood as symbols of the grievances felt against both sides.

In the wake of the events in Charlottesville, protesters gathered around Confederate monuments around the country.¹⁵ The Confederate Soldiers Monument in Durham, North Carolina, which has stood in front of the Durham County courthouse since 1924, was one such monument.¹⁶ It bore the quote: “In memory of the boys who wore grey.”¹⁷ Law enforcement, choosing restraint and public safety, observed as protesters placed a rope around the neck of the monument and tore it down.¹⁸ The monument crumpled under its own weight and the surrounding protesters violently kicked and spat on the fallen statue.¹⁹ The police decided to not intervene in this destruction and waited several days to make their arrests.²⁰

The Durham County Sheriff was quoted saying, “Let me be clear, no one is getting away with what happened.”²¹ However, the district judge ultimately dismissed the case against several of the vandals and the Durham County District Attorney dropped all

12. Dara Lind, *Unite the Right, the Violent White Supremacist Rally in Charlottesville, Explained*, VOX (Aug. 14, 2017, 12:06 PM), <https://www.vox.com/2017/8/12/16138246/charlottesville-nazi-rally-right-uva>.

13. *Id.*

14. *Id.*

15. Amanda Jackson & Ralph Ellis, *Seven Arrested in Toppling of Confederate Statue in North Carolina*, CNN, <https://www.cnn.com/2017/08/14/us/confederate-statue-pulled-down-north-carolina-trnd/index.html> (last updated Aug. 16, 2017, 4:04 PM).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. David A. Graham, *How the Activists Who Tore Down Durham’s Confederate Statue Got Away With It*, ATLANTIC (Feb. 21, 2018), <https://www.theatlantic.com/politics/archive/2018/02/durham-confederate-monument-charges-dismissed/553808/>.

charges against the rest.²² After the charges were dropped, one participating protester stated, “I did the right thing . . . [e]veryone who was there—the people did the right thing. The people will continue to keep making the right choices until every Confederate statue is gone, until white supremacy is gone. That statue is where it belongs. It needs to be in the garbage.”²³

The crash of the monument on the pavement outside the Durham courthouse echoed loudly across the country. On August 20, 2018, nearly one year after the events of Charlottesville and Durham, 250 protesters tore down “Silent Sam,” a Confederate monument located at the entrance of the University of North Carolina at Chapel Hill’s campus.²⁴ The United Daughters of the Confederacy, a group that funded and lobbied for the construction of many of the Confederate monuments standing today, helped erect this monument in 1913.²⁵ Since the 1960s, vandals frequently targeted the statue and critics frequently called for its removal.²⁶

The protesters justified taking down the monument by pointing to white-supremacist, Julian Carr, a Civil War veteran and Ku Klux Klan supporter, who said in his speech at the monument’s dedication ceremony,²⁷ “The present generation . . . scarcely takes note of what the Confederate soldier meant to the welfare of the Anglo Saxon race during the four years immediately succeeding the war, when the facts are, that their courage and steadfastness saved the very life of the Anglo Saxon race in the

22. *Id.*

23. *Id.*

24. Amir Vera, *UNC Protesters Knock Down Silent Sam Confederate Statue*, CNN (Aug. 21, 2018), <https://www.cnn.com/2018/08/20/us/unc-silent-sam-confederate-statue/index.html>.

25. See Jesse James Deconto & Alan Blinder, ‘*Silent Sam*’ Confederate Statue Is Toppled at University of North Carolina, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/unc-silent-sam-monument-toppled.html>.

26. Colin Warren-Hicks, *A look at the Long and Controversial Life of ‘Silent Sam’*, THE NEWS & OBSERVER (Aug. 23, 2017, 8:48 AM), <https://www.newsobserver.com/news/local/counties/orange-county/article168816697.html>.

27. Antonia Noori Farzan, ‘*Silent Sam*’: A Racist Jim Crow-era Speech Inspired UNC students to Topple a Confederate Monument on Campus, WASH. POST (Aug. 21, 2018, 2:52 AM), https://www.washingtonpost.com/news/morning-mix/wp/2018/08/21/silent-sam-a-racist-jim-crow-era-speech-inspired-unc-students-to-topple-a-confederate-monument-on-campus/?utm_term=.4bdb1f7f789e.

South.”²⁸ Carr concluded with a disturbingly graphic story from his academic years at the University of North Carolina:

One hundred yards from where we stand, less than ninety days perhaps after my return from Appomattox, I horse-whipped a negro wench until her skirts hung in shreds, because upon the streets of this quiet village she had publicly insulted and maligned a Southern lady, and then rushed for protection to these University buildings where was stationed a garrison of 100 Federal soldiers. I performed the pleasing duty in the immediate presence of the entire garrison, and for thirty nights afterwards slept with a double-barrel shot gun [sic] under my head.²⁹

For many, the toppling of the Confederate monuments in Durham and the University of North Carolina marked victories against racist ideals and white supremacy. Others view toppling these monuments as a destruction of America’s culture and history.

In part, protesters tearing down Confederate monuments resulted from increased frustrations over the laws that restrict their legal removal. North Carolina is one of many states that have enacted laws that severely limit the ability to alter or remove Confederate monuments on grounds of historical significance.³⁰

For example, Tennessee enacted the Heritage Protection Act, a 2013 law prohibiting *government* employees from removing Confederate monuments without a waiver.³¹ However, the City of

28. Julian Shakespeare Carr, Univ. of N.C. alumnus and Trustee, Confederate Monument Dedication Speech at the Univ. of N.C. (June 2, 1913), <http://hgreen.people.ua.edu/transcription-carr-speech.html>.

29. *Id.*

30. See generally Jaweed Kaleem, *In Some States, It’s Illegal to Take Down Monuments or Change Street Names Honoring the Confederacy*, L.A. TIMES (Aug. 16, 2017, 1:05 PM), <http://www.latimes.com/nation/la-na-confederate-monument-laws-20170815-htlstory.html> (Alabama enacted legislation in 2017 prohibiting the “altering, renaming or removing monuments, memorial streets or memorial buildings that have been on public property for more than 40 years.” Virginia prohibits cities from disturbing or interfering with historic monuments and memorials. Mississippi’s 2004 law only allows removal of memorials if they interfere with drivers’ vision or they are moved to an approved location.); see also Ivana Hrynkiw, *AG, Birmingham Attorneys Argue Over Confederate Memorial*, AL.COM (Apr. 13, 2018), https://www.al.com/news/birmingham/index.ssf/2018/04/ag_birmingham_attorneys_argue.html (describing Alabama law barring removal of Confederate monuments without a waiver, but waivers only available for monuments erected less than 40 years ago).

31. 2013 Tenn. Pub. Acts 75 (amended 2016).

Memphis exploited a loophole in the law by selling public land to a private party to legally remove monuments of Confederate President Jefferson Davis and Ku Klux Klan figure and Confederate general, Nathan Bedford Forrest.³² Consequently, Tennessee amended the law in 2016.³³ The amended version of the Heritage Protection Act requires *all* potential removals go through the Tennessee Historical Commission.³⁴ This commission includes several Sons of Confederate Veterans, a similar organization to the Daughters of the Confederacy, sitting on the governor appointed board.³⁵

The next hurdle that removal proponents must overcome is the cost.³⁶ In New Orleans, the original estimate to remove four Confederate monuments skyrocketed from \$170,000 to \$2.1 million.³⁷ The price escalated sharply because of workers' safety concerns.³⁸ Monument supporters terrorized the contractors hired to remove statues in an attempt to scare them off.³⁹ They firebombed a contractor's car and made repeated death threats against any contractor who accepted removal work.⁴⁰ The City of New Orleans was forced to pay for FBI and security officers, including snipers, to safeguard workers and the removal project.⁴¹

The final hurdle for relocating Confederate monuments is what to do with them after removal. As of August 5, 2018, at least twenty-seven cities have taken down more than forty-five monuments since the events of Charlottesville.⁴² Each of the

32. David Lohr, *This is Why Another Confederate Statue Won't Come Down in Tennessee*, HUFFINGTON POST (May 31, 2018, 9:01 AM), https://www.huffingtonpost.com/entry/tennessee-confederate-statues_us_5b0f1b77e4b05ef4c22a7796.

33. *Id.*

34. *See id.*

35. *Id.*

36. Paul LeBlanc, *Cost of Removing Confederate Monuments in New Orleans \$2.1 Million*, CNN (June 12, 2017, 3:44 PM), <https://www.cnn.com/2017/06/12/us/new-orleans-confederate-monument-removal-price-trnd/index.html>.

37. *Id.*

38. *Id.*

39. *Id.*

40. Anderson Cooper, *The History and Future of Confederate Monuments*, CBS NEWS (July 15, 2018), <https://www.cbsnews.com/news/60-minutes-the-history-and-future-of-confederate-monuments>.

41. *Id.*

42. Noah Caldwell & Audie Cornish, *Where do Confederate Monuments go After They Come Down?*, NPR (Aug. 5, 2018, 8:08 AM),

monuments highlighted above have been locked away in undisclosed storage units until authorities can figure out where to relocate them permanently.⁴³ Museums, including the Smithsonian, refuse to accept the monuments because they either cannot afford to conserve them, or they logistically cannot accommodate their housing; one statue of Robert E. Lee is over sixty feet tall.⁴⁴

III. DEVELOPMENT OF INTERNATIONAL PROTECTIONS OF CULTURAL HERITAGE

A. Codes, Treaties, and Conventions

The international community favors the protection and preservation of cultural heritage. Notably, the United States was the first country that implemented cultural heritage protections when it developed the Lieber Code during the Civil War in 1863.⁴⁵ Article 36 of the Lieber Code states:

If such works of art . . . belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized or removed for the benefit of the said nation . . . In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be *privately appropriated* or *wantonly destroyed or injured* (emphasis added).⁴⁶

The Lieber Code marks the beginning of America's stance that some items are significant enough to warrant protection, even if the source of protection is from the "enemy" state.⁴⁷

<https://www.npr.org/2018/08/05/633952187/where-do-confederate-monuments-go-after-they-come-down>.

43. *Id.*

44. *Id.*

45. PATRICK J. O'KEEFE & LYNDEL V. PROTT, CULTURAL HERITAGE CONVENTIONS AND OTHER INSTRUMENTS: A COMPENDIUM WITH COMMENTARIES 16 (2011).

46. Instructions for the Government of Armies of the United States in the Field, Gen. Orders No. 100, War Dep't, Adjutant General's Office, Washington D.C., April 24, 1863, reprinted in Lieber Code, Section II, Art. 36; James G. Garner, *General Order 100 Revisited*, 27 MIL. L. REV. 1, 6 (1965).

47. See generally Burrus M. Carnahan, *Lincoln, Lieber, and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. OF INT'L LAW 213, 215 (1998).

In 1935, the United States codified this resolve when it entered into the Treaty on the Protection of Artistic and Scientific Institutions and Historical Monuments, later known as the Roerich Pact.⁴⁸ This pact sought to “preserve in any time of danger all nationally and privately owned immovable monuments which form the cultural treasure of peoples.”⁴⁹ Like the Lieber Code, the Roerich Pact designated certain objects to be more important than strategies of war.⁵⁰ Hypothetically, the Roerich Pact would prohibit bombing of a historic monument site, even if that bombing could potentially save lives.

In addition to protecting historical monuments during war, the Roerich Pact also obligated the United States to protect these monuments during times of peace: “The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such *respected and protected by belligerents* . . . The same respect and protection shall be accorded to the historic monuments, museums, scientific, artistic, educational and cultural institutions *in time of peace as well as in war* (emphasis added).”⁵¹ Article II obligates the United States government to adopt “measures of internal legislation necessary to insure said protection and respect” for all articles in Article I.⁵² Franklin Roosevelt praised the importance of the Roerich Pact in his speech at the signing ceremony: “In opening this pact . . . we are endeavoring to make of universal application one of the principles vital to the preservation of modern civilization. . . This treaty possesses a spiritual significance *far deeper than the text of the instrument itself*” (emphasis added).⁵³

Similarly, the Hague Conventions of 1899 and 1907 expanded on the efforts of the Lieber Code.⁵⁴ The two Conventions have slight language variations regarding the pertinent sections, but the

48. PETER BARENBOIM & NAEEM SIDIQI, BRUGES BRIDGE BETWEEN CIVILIZATIONS 7 (2010).

49. Treaty on Protection of Artistic and Scientific Institutions, Historic Monuments, (Roerich Pact), pmbL., Apr. 15, 1935, 49 Stat. 3267, T.S. No. 899 [hereinafter Roerich Pact].

50. *Id.*

51. *Id.* at art. I.

52. *Id.* at art. II.

53. General, *Exhibition: “The Roerich Pact. History and Modernity”*, Peace Palace Library, PEACE PALACE LIBRARY (Apr. 22, 2014), <https://www.peacepalacelibrary.nl/2014/04/exhibition-the-roerich-pact-history-and-modernity-peace-palace-library-2/>.

54. O’KEEFE & PROTT, *supra* note 44, at 16.

general implications are identical. Article 56 of the 1907 Hague Regulations states, “All seizure of, *destruction* or *willful* [sic] *damage* done to institutions of this character, *historic monuments*, works of art and science, is forbidden, and should be made subject of legal proceedings.”⁵⁵ However, while the international community embraced the ideals of protecting historic monuments, this principle was all but abandoned during World War I and World War II.⁵⁶ These great wars resulted in massive damage and destruction to cultural heritage around the world.⁵⁷

In Europe, Adolf Hitler and the Third Reich tried to obliterate people they found to be inferior and rewrote history to erase their existence.⁵⁸ For example, the Nazis attempted to exterminate Poland’s literary heritage because according to them, “Poles were subhuman.”⁵⁹ In 1940, the Nazis destroyed the Adam Mickiewicz Monument in Krakow, Poland, which was erected to both honor the famed Polish poet and to bolster a national and patriotic spirit.⁶⁰ The Nazis deliberately destroyed certain cultural and historical heritage, and many items were destroyed as a direct consequence of the war.⁶¹

After World War II, the international community took notice of the fragility of cultural heritage. The United Nations formed the United Nations Educational, Scientific and Cultural Organization (“UNESCO”),⁶² whose goal encourages the world to unite and

55. Hague Convention on Respecting the Laws and Customs of War on Land, art. 56, ¶ 2, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

56. O’KEEFE & PROTT, *supra* note 44, at 16.

57. *Id.*

58. Michael S. Roth, *How Nazis Destroyed Books in a Quest to Destroy European Culture*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/opinions/how-nazis-destroyed-books-in-a-quest-to-destroy-european-culture/2017/02/24/244ace94-cdf3-11e6-a87f-b917067331bb_story.html?utm_term=.ca94e6d054dd.

59. *Id.*

60. *Adam Mickiewicz Monument*, MAGICZNY KRAKOW, <https://web.archive.org/web/20080308031812/http://www.krakow.pl/en/miasto/abc/?id=18.html> [<https://web.archive.org/web/20080308031812/>]. (last visited Oct. 1, 2019).

61. See generally Liew Hanqing, *What Happens to Heritage Sites in Times of Conflict?*, NLB (Mar. 30, 2017), <https://web.archive.org/web/20170320055809/http://www.nlb.gov.sg/sure/what-happens-to-heritage-sites-in-times-of-conflict/>.

62. Annalisa Merelli, *The US Withdrew from UNESCO Because it’s “anti-Israel.” Now Israel is Leaving, too*, QUARTZ (Oct. 12, 2017), <https://qz.com/1101051/unesco-what-is-it-and-why-is-the-us-leaving/>.

“contribute to the building of peace, the eradication of poverty, sustainable development and intercultural dialogue.”⁶³ Under UNESCO, fifty-six countries formed The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954.⁶⁴ The preamble perfectly sums up the purpose of the Convention as well as the rationale behind it:

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world; [c]onsidering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection . . . that such protection cannot be effective unless national . . . measures have been taken to organize it in time of peace; being determined to take all possible steps to protect cultural property. . .[emphasis added].⁶⁵

Article 1 defines cultural property as “. . . movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular . . . works of art . . . and other objects of artistic, historical or archaeological interest.”⁶⁶

The international community established the concept of a world heritage as the amalgamation of different nations’ culture’s worthy of preservation, as codified by the Hague Convention. Culture that is important to the story of an individual country is, in turn, important to the story of the world. Thus, the world recognized that the protection of historical monuments is at the heart of preserving world heritage.

Like the Roerich Pact,⁶⁷ the Hague Convention applies in both times of peace and armed conflict.⁶⁸ Article 2 of the Convention states that the purpose of the agreement is to ensure the “safeguarding of and respect for such property.”⁶⁹ Article 3 tasks

63. *Id.*

64. See O’KEEFE & PROT, *supra* note 44, at 16.

65. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, T.I.A.S. No. 09-313.1, 249 U.N.T.S. 240 (entered into force Aug. 7, 1956), [hereinafter 1954 Hague Convention].

66. *Id.* at art. 1 (a).

67. Roerich Pact, *supra* note 48, at art.1. ¶ 3

68. See 1954 Hague Convention, *supra* note 64, at art. 3.

69. *Id.* at art. 2.

signatory governments with installing safeguarding measures during times of peace ensuring that historical monuments are protected from “foreseeable effects of an armed conflict.”⁷⁰ The determination of what kind of safeguarding measures are appropriate is left to each individual country’s discretion.⁷¹ Furthermore, Article 4 expands on signatory governments’ duties to world heritage by defining respect for cultural property as tasking these governments to “prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”⁷²

In 1965, America held a White House Conference on International Cooperation and proposed the development for a Trust for World Heritage to “identify, establish, develop, and manage . . . historic sites for the present and future benefit of the entire world citizenry.”⁷³ This proposal led to the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972 (“The World Heritage Convention”), UNESCO’s most explicit Convention concerning the protection of cultural heritage during peacetime.⁷⁴ The Convention creates a duty for signatory countries to identify, protect, and conserve cultural heritage monuments of “outstanding universal value from the point of view of history” situated within its borders.⁷⁵ This duty ensures that lessons derived from such works are preserved for future generations.⁷⁶ The international community believed this duty to be so important that it mandates, “[each Signatory] will do all it can to this end, to the utmost of its own resources . . .”⁷⁷

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 endeavour [sic], *in so far as possible, and as appropriate for each country*:

70. *Id.* at art. 3.

71. *Id.*

72. *Id.* at art. 3 ¶ 3.

73. O’KEEFE & PROT, *supra* note 44, at 77.

74. *Id.*

75. Convention Concerning the Protection of the World Cultural and Natural Heritage, art. 1, 4, and 27, Nov. 23, 1972 U.S.T. 37, 1037 U.N.T.S 151 (entered into force Dec. 15, 1975) [hereinafter World Heritage Convention].

76. *Id.* at art. 4.

77. *Id.*

- a. to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes [sic];
- b. to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
- c. to develop scientific and technical studies and research and to work out such operating methods as will make the state capable of counteracting the dangers that threaten its cultural or natural heritage;
- d. to take the appropriate *legal, scientific, technical, administrative and financial measures necessary* for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
- e. to *foster the establishment or development of national or regional centres* [sic] for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field (emphasis added).⁷⁸

The extent of a signatory government's obligation to actively protect cultural heritage is unclear due to the vague phrasing of Article 5. In particular, Article 5 advises countries to protect world heritage "in so far as possible, and as appropriate for each country."⁷⁹ While this question has yet to be addressed by American courts, the Australian High Court noted that a passive reading of this phrase was a ridiculous notion.⁸⁰ The court interpreted this soft wording as creating a flexible manner of how to perform the obligation of preservation rather than creating the discretion to - or not to -perform.⁸¹ Thus, this holding exemplifies that countries that are party to the World Heritage Convention have, at a minimum, a duty to take reasonable measures to protect applicable cultural heritage.

Whether the World Heritage Convention applies to a particular piece of cultural heritage is also a legal issue. Countries submit

78. *Id.* at art. 5.

79. O'KEEFE & PROT, *supra* note 44, at 10.

80. *See generally Commonwealth v Tasmania* (1983) 158 CLR 1 (Austl.).

81. *Id.* at 490.

cultural and natural heritage sites they believe should be added to the World Heritage List to the World Heritage Committee (“The Committee”) for approval.⁸² However, the Committee regularly changes its’ criteria. As of writing this article, The Committee declared in pertinent part that:

Sites must be of outstanding universal value and meet at least one out of ten selection criteria:

(i) to represent a masterpiece of human creative genius;

...

(iii) to bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared

...

(vi) to be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria).⁸³

There have been questions as to whether a particular site’s approval to be on the list was a condition precedent for a country to assume these duties under the World Heritage Convention.⁸⁴

Again, we find guidance from the Australian High Court.⁸⁵ The court pointed to the fact that the Convention instructs each individual country to identify which cultural and natural heritage should be awarded convention protections.⁸⁶ The World Heritage Committee acts as a mere stamp of approval.⁸⁷ While inclusion on the World Heritage List certainly confirms that a country’s property should fall under World Heritage Convention protections, being added to the list is only relevant to its being eligible for international assistance.⁸⁸

Although the United States has announced its plan to withdraw from UNESCO by the end of 2018, the US is still bound

82. World Heritage Convention *supra* note 73, at art. 8, 11.

83. UNESCO World Heritage Center, THE CRITERIA FOR SELECTION, <https://whc.unesco.org/en/criteria/> (last visited Nov. 17, 2018).

84. See O’KEEFE & PROT, *supra* note 44, at 79.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 80.

by the conventions it ratified.⁸⁹ Namely, these include the World Heritage Convention and the Hague Convention, ratified by Congress in 1973 and 2009, respectively.⁹⁰

However, this is not the first time the United States has withdrawn from UNESCO.⁹¹ President Ronald Reagan withdrew from UNESCO in 1984. The US did not become a member state again until 2002 under President George W. Bush.⁹² Additionally, President Barack Obama stopped supplying funds to UNESCO, which will amount to \$600 million by the end of 2018.⁹³

However, in each of these cases, the US' decision to distance itself from UNESCO arose out of political grounds separate from the principles and goals of the organization.⁹⁴ As such, the US has taken the position to remain an active nonmember observer state that continues to contribute to debates and activities, despite losing member voting rights.⁹⁵

B. UNESCO Recommendations and Declarations

UNESCO Recommendations require fewer votes to create legal obligations for member states because they are less imposing than those created by conventions and treaties.⁹⁶ Creating uniform and widely accepted obligations via convention is difficult because every country has a unique legal system.⁹⁷ Recommendations are helpful because they act as a guide and allow greater flexibility for individual countries to achieve compliance.⁹⁸ Furthermore,

89. Merelli *supra* note 61; UNESCO, UNITED STATES OF AMERICA, <https://en.unesco.org/countries/united-states-america>.

90. *Ratified Conventions U.S.A.*, UNESCO, http://www.unesco.org/eri/la/conventions_by_country.asp?language=e&contr=US&typeconv=1 (last visited Oct. 8., 2019).

91. Eli Rosenberg & Carol Morello, *U.S. Withdraws from UNESCO, the U.N.'s Cultural Organization, Citing Anti-Israel Bias*, WASH. POST (Oct. 12, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/10/12/u-s-withdraws-from-unesco-the-u-n-s-cultural-organization-citing-anti-israel-bias/?utm_term=.1dc9517b5456.

92. *Id.*

93. *Id.*

94. *See id.*

95. *Id.*

96. *See* O'KEEFE & PROTT *supra* note 44, at 205 (conventions require a two-thirds majority to adopt whereas recommendations only require a simple majority).

97. *Id.*

98. *Id.*

countries can apply Recommendations in ways that best fit their own system to achieve the goals of a given Recommendation.⁹⁹

UNESCO Declarations (“Declarations”) are the weakest form of a standard-setting.¹⁰⁰ Declarations emphasize the importance of, and call attention to, certain issues concerning cultural heritage.¹⁰¹ Declarations have no bright-line procedure for implementation.¹⁰² In other words, Declarations are persuasive guidance rather than binding policies.

The United States’ planned exit from UNESCO should not affect its observance of Recommendations or Declarations. As stated above, America’s withdrawal is the result of certain actions by UNESCO and not because it disagrees with any of the Organization’s goals. Additionally, each of the relevant Recommendations and Declarations were enacted during the periods the US was an active member of UNESCO.

First, the Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works 1968 is one of the most useful Recommendations to protect cultural heritage endangered by intrastate changes.¹⁰³ This Recommendation recognizes that both intrastate development and cultural property are independently important but may at times be at odds with one another.¹⁰⁴ As such, this Recommendation permits the removal of a historical monument in the event that intrastate change risks damaging or destroying that monument.¹⁰⁵ Still, the preamble reiterates that accessibility to the work at hand is equally important to its preservation.¹⁰⁶ Therefore, monuments removed under this Recommendation must then be placed in a location where the public may visit.¹⁰⁷

Second, the Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage 1972 expands

99. *Id.* at 206.

100. *Id.* at 319.

101. *Id.* at 320.

102. *Id.*

103. *Id.* at 231.

104. United Nations Educational, Scientific, and Cultural Organization [UNESCO], *Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works 1968*, at pmbl. ¶ 6 (Nov. 20, 1968) (*hereinafter Recommendation for Public or Private Works*).

105. *Id.* at art. 5 (b), 22 (b).

106. *Id.* at pmbl. ¶ 10.

107. *Id.*

on a country's duty to protect heritage by broadening the applicable monuments meant for preservation. Consequently, this Recommendation dovetails with the World Heritage Convention.¹⁰⁸ Whereas the World Heritage Convention only applies to sites of "outstanding universal value," this Recommendation applies to all historical monuments within a country's territory:¹⁰⁹

[T]hat each item of the cultural and natural heritage is unique and that the disappearance of any one item constitutes a definite loss and irreversible impoverishment of that heritage, . . . that every country . . . has an obligation to safeguard this part of mankind's heritage and to ensure that it is handed down to future generations, . . . [and] that the cultural and natural heritage forms an harmonious whole, the components of which are indissociable [sic]. .

¹¹⁰

This Recommendation was enacted due to fear that the World Heritage Convention would divert all available funds into preserving only works of "outstanding universal value."¹¹¹ The fear was that this would leave out works that may be important to a more localized community or just not meet the standard of "outstanding universal value."¹¹² This Recommendation, thus, greatly emphasizes that the moving of a monument should not be considered. However, it still creates an exception for "exceptional means of dealing with a problem, justified by pressing considerations."¹¹³

Lastly, the Recommendation for the Protection of Movable Cultural Property 1978 ("1978 Recommendation") enhances and adds greater specificity to obligations already imposed by The Hague, the World Heritage Convention, and the 1972 Recommendation.¹¹⁴ The 1978 Recommendation notes that

108. O'KEEFE & PROTT, *supra* note 44, at 240.

109. *Id.*

110. United Nations Educational, Scientific, and Cultural Organization [UNESCO], *Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage 1972*, at pmbl. ¶ 5-6, 8 (Nov. 21, 1972).

111. O'KEEFE & PROTT, *supra* note 44, at 240-241.

112. *Id.*

113. *Id.* at art. 24.

114. United Nations Educational, Scientific, and Cultural Organization [UNESCO], *Recommendation for the Protection of Movable Cultural Property 1978*, at pmbl. ¶ 8 (Nov. 28, 1978).

growing perils like riots, vandalism, and other public disorders, threaten movable cultural property which should “incite all those responsible for protecting it, in whatever capacity, to play their part.”¹¹⁵ This Recommendation tasks each country to define the criteria for which movable cultural properties within a territory are deserving of these protections, including “items resulting from the dismemberment of historical monuments.”¹¹⁶

While this Recommendation suggests countries partially indemnify damaged items, it states that protection and the prevention of risks are far more important. It stresses that “the essential purpose is to preserve the cultural heritage, not to replace by sums of money objects which are irreplaceable.”¹¹⁷ Finally, this Recommendation states that the education of the public to the importance and value of cultural heritage is essential for ensuring the continual preservation of cultural property.¹¹⁸

Furthermore, the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage 2003 was adopted by the international community in response to the Taliban destroying giant Buddhas in the Bamiyan Valley in Afghanistan in 2001.¹¹⁹ This Declaration reiterates the obligations for countries to respect their own heritage in peacetime under The Hague and readdresses the concerns over acts of vandalism previously mentioned in the 1978 Recommendation.¹²⁰ With it, the UNESCO underscored the abhorrent nature of deliberate acts of destruction and damage to cultural heritage. The Declaration, therefore, tasks countries to take “all appropriate measures to prevent, avoid, stop and suppress acts of intentional destruction, wherever such heritage is located.”¹²¹

115. *Id.* at art. 1(b)(i), 4, 8.

116. *Id.* at art. 1(a)(iv), 2.

117. *Id.* at art 9.

118. *Id.* at art. 5, 17.

119. O'KEEFE & PROTT, *supra* note 44, at 328.

120. *See generally*, United Nations Educational, Scientific, and Cultural Organization [UNESCO], *UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage 2003* (2003).

121. *Id.* at art. III (2)

IV. APPLYING INTERNATIONAL LAW TO CONFEDERATE MONUMENTS

The above-mentioned codes, treaties, conventions, and UNESCO Recommendations and Declarations demonstrate a robust framework for protecting cultural heritage. But, do these protections cover Confederate monuments?

First, Confederate monuments are historically significant because they contextualize the development of the United States as a nation. As stated, the erection of Confederate monuments surged during a time when lynching African Americans was at its peak, the Ku Klux Klan was gaining popularity, and once again during *Brown v. Board* and the Civil Rights era.¹²² Placing these monuments in such public areas ensured that minorities could not escape their intimidating presence.

In this context, the monuments are comparable to the Lady Justice monument erected in 1751 by occupying British authorities in Ireland's Dublin Castle.¹²³ This version of Lady Justice is different from all other iterations because it omits her traditional blindfold, the scale she holds is permanently unbalanced, and her back is towards the city and her people.¹²⁴ The British deliberately designed this statue to make clear that the Irish had no right to a balanced justice, and the courts would not be blind to discrimination.¹²⁵

Similarly, many Confederate monuments were erected to rewrite history and purport the Lost Cause mythology, which is a revisionist ideology and a widely debunked account of the Civil War.¹²⁶ The mythology promulgates that the Civil War was fought over state rights rather than slavery and that slavery was a

122. Drum, *supra* note 7.

123. Star na Heireann, *History of Ireland: Irish History, Culture, Heritage, Language, Mythology*, <https://stairnaheireann.net/> (last visited Oct. 18, 2019).

124. *Id.*

125. *Id.*

126. See James Oliver Horton, *Confronting Slavery and Revealing the "Lost Cause"*, NAT. PARK SERV., <https://www.nps.gov/articles/confronting-slavery-and-revealing-the-lost-cause.htm>. (last visited Nov. 17, 2018); see also Karen L. Cox, *The Whole Point of Confederate Monuments is to Celebrate White Supremacy*, WASH. POST (Aug. 16, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/08/16/the-whole-point-of-confederate-monuments-is-to-celebrate-white-supremacy/?utm_term=.559214c85cd2.

benevolent institution.¹²⁷ The connection between erecting Confederate monuments and the Lost Cause mythology is exemplified in a booklet published by the United Daughters of the Confederacy, stated in their dedication ceremony for the controversial monument at Arlington National Cemetery, which includes a depiction of a Black Confederate soldier:

The astonishing fidelity of the slaves everywhere during the war to the wives and children of those who were absent in the army was convincing proof of the kindly relations between master and slave in the old South. One leading purpose of the U.D.C. is to correct history. [The monument's sculptor] is here writing it for them, in characters that will tell their story to a generation after generation.¹²⁸

This effort to spread Lost Cause mythology should be recognized as an important aspect of the story surrounding Confederate monuments. In such context, international law would prescribe the preservation and protection of Confederate monuments, particularly those erected during the post-Reconstruction and Civil Rights eras. These monuments should be preserved as cultural heritage for the history of African Americans and the United States.

Preserving bleak moments of history as cultural heritage is not a novel concept for the international community. In 1979, Auschwitz Birkenau ("Auschwitz"), a Nazi concentration and extermination camp, was admitted onto the World Heritage List, entitling it to international protections under the World Heritage Convention.¹²⁹ Auschwitz satisfied criterion (iv), as it is "an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates [a] significant stage in human history."¹³⁰ The World Heritage Committee defines Auschwitz's outstanding universal value as being "a key place of memory for the whole of humankind for the

127. Cox, *supra* note 124.

128. HILARY A. GERBERT, HISTORY OF THE ARLINGTON CONFEDERATE MONUMENT 77 (1914).

129. United Nations Educational, Scientific and Cultural Organization [UNESCO], World Heritage Convention, *Auschwitz Birkenau: German Nazi Concentration and Extermination Camp (1940-1945)*, <http://whc.unesco.org/en/list/31> (last visited Nov. 18, 2018) [hereinafter *Auschwitz*].

130. World Heritage Convention, *supra* note 73.

Holocaust, racist policies and barbarism; it is a place of our collective memory of this dark chapter in the history of humanity . . .”¹³¹ Additionally, the Committee emphasizes that it is important to preserve Auschwitz to educate future generations and to serve as “a sign of warning of the many threats and tragic consequences of extreme ideologies and denial of human dignity.”¹³²

The comparisons in character between Auschwitz and Confederate monuments are not difficult to make. Both represent humanity’s capacity for evil and both stand as stark reminders of how easily humanity can slip back into ugliness if lessons from history are forgotten. Yet, Confederate monuments can also be distinguished from Auschwitz. Auschwitz is the only concentration camp to be admitted onto the World Heritage List,¹³³ and there are currently well over 700 Confederate monuments.¹³⁴

This is not to say that there may not be one Confederate monument that may be of such outstanding universal value as to represent the whole of Confederate monuments. Even still, a particular item of cultural heritage need not be admitted to the World Heritage List in order to enjoy World Heritage Convention protections.¹³⁵ If the United States federal government determines that certain monuments meet the standards set by the World Heritage Convention, it has both the authority and obligation to preserve that monument.¹³⁶

However, the powerful historical context these monuments represent draws largely from the fact that vast numbers of them were rapidly constructed as a direct response to struggles for civil rights. Thus, their numerosity suggests that these monuments should be preserved and displayed together as a whole.

It has been argued that international cultural heritage law prohibits the removal of historical monuments.¹³⁷ However, this is

131. Auschwitz, *supra* note 127.

132. *Id.*

133. *World Heritage List*, UNESCO, <https://whc.unesco.org/en/list/> (last visited Oct. 11, 2019).

134. S. POVERTY LAW CTR., WHOSE HERITAGE? PUBLIC SYMBOLS OF THE CONFEDERACY, 10 (2016), https://www.splcenter.org/sites/default/files/com_whose_heritage.pdf.

135. O’KEEFE & PROTT, *supra* note 44, at 79.

136. *Id.*

137. Luszcz Lixinski, *Confederate Monuments and International Law*, 35 *Wis. Int’l L.J.* 549, 607 (2018).

demonstrably false. The argument points to the Venice Charter, which was adopted by the International Council of Monuments and Sites (“ICOMOS”). ICOMOS was one of three groups of experts in charge of overseeing the implementation of the World Heritage Convention.¹³⁸ The author completely omits Article 7 from his argument which states: “A monument is inseparable from the history to which it bears witness and from the setting in which it occurs. The moving of all or part of a monument cannot be allowed *except where the safeguarding of that monument demands it or where it is justified by national or international interest of paramount importance* (emphasis added).”¹³⁹ Article 7 is in line with the stated missions of the above mentioned conventions, treaties, Recommendations, and Declarations.

As such, protecting and safeguarding cultural heritage monuments is of the utmost importance to secure access to them for all future generations. When the need arises, the movement of monuments is completely justified and has never been forbidden. The closest any of UNESCO’s adoptions have come to barring removal was in the Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works 1968.¹⁴⁰ However, as previously mentioned, this Recommendation merely states that industrial work should be mindful and avoid placing any items in danger. In fact, this Recommendation instructs that in the event such danger is unavoidable, time should be given to ensure the excavation of the site to guarantee preservation.

The current controversies surrounding Confederate monuments have sprung from protesters vandalizing and destroying monuments that possess value as cultural heritage.¹⁴¹ Such actions have been followed by riots and even murder.¹⁴² Protesters continue to call for the removal of monuments. However, many states have enacted laws, which greatly limit, if not completely forbid the removal of Confederate monuments,

138. World Heritage Convention, *supra* note 73 at art. 8 (3).

139. Lixinski, *supra* note 135 at 568; Int’l Council on Monuments & Sites [ICOMOS], Int’l Charter for the Conservation and Restoration of Monuments and Sites, *The Venice Charter*, May 31, 1964, https://www.icomos.org/charters/venice_e.pdf.

140. See generally *Recommendation for Public and Private Works*, *supra* note 102.

141. Jackson, *supra* note 15; Vera, *supra* note 24.

142. Flores, *supra* note 11.

even when a majority of local residents favor such removal. As this cycle worsens, the debate erupts, often violently.

V. CONCLUSION

Civil disobedience is defined as “refusal to obey government demands or commands and nonresistance to consequent arrest and punishment . . . [usually] with the acceptance of consequences such as arrest, physical beatings, and even death.”¹⁴³ A report by the Federal Bureau of Investigation shows that overall hate crimes have risen seventeen percent between 2016 and 2017,¹⁴⁴ and hate crimes targeting Jews have risen thirty-seven percent.¹⁴⁵ It is not a stretch to foresee Confederate monuments as the easiest target for retaliation. Thus, safeguarding measures, such as the removal of Confederate monuments, would be completely warranted under international law to ensure preservation.

However, removing Confederate monuments as a safeguarding measure by itself will not satisfy international law provisions. The international community has repeatedly stated that cultural heritage should be protected to ensure that future generations have access to that heritage.¹⁴⁶ Protecting cultural heritage is a useless endeavor if the items are placed under lock and key. Therefore, municipalities and other organizations that have removed monuments and stored them in undisclosed locations are violating international law.

To best comply with international law, Confederate monuments should be removed and placed in museums or other publicly accessible, but less contentious areas. While it may be costly and logistically difficult, the United States government has a duty to protect its cultural heritage since the “damage to the cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people

143. CIVIL DISOBEDIENCE, <http://disobediencivil.weebly.com/dr-martin-luther-king-jr.html> (last viewed Oct. 18, 2019).

144. Erin Donaghue, *New FBI Data Shows Rise in Anti-Semitic Hate Crimes*, CBS NEWS (Nov. 13, 2018, 8:24 PM), <https://www.cbsnews.com/news/fbi-hate-crimes-up-new-data-shows-rise-in-anti-semitic-hate-crimes/>.

145. *Id.*

146. *Recommendation for Public or Private Works*, *supra* note 102; *Recommendation Concerning the Protection of Cultural and Natural Heritage 1972*, *supra* note 108; *Recommendation for the Protection of Movable Cultural Property*, *supra* note 112.

makes its contribution to the culture of the world.”¹⁴⁷ As such, the federal government should consider these five options: (i) create incentives for museums to accept the monuments, (ii) help fund needed expansions of museums to accommodate the monuments, (iii) establish new museums to house the monuments and educate the people as to their history, (iv) offer assistance in the removal and moving process to ensure the monuments do not get damaged, or (v) assist in relocating the monuments to less contentious areas. All of these options are not only acceptable under international law, but also mandated by it.

147. 1954 Hague Convention, *supra* note 64, at pmbl.