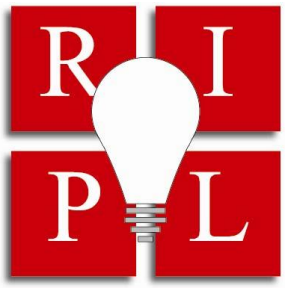
THE JOHN MARSHALL
REVIEW OF INTELLECTUAL PROPERTY LAW



THE DESTRUCTION OF CULTURAL HERITAGE: A CRIME AGAINST PROPERTY OR A CRIME AGAINST PEOPLE?

PATTY GERSTENBLITH

ABSTRACT

The destruction of cultural heritage has played a prominent role in the ongoing conflicts in Syria and Iraq and in the recent conflict in Mali. This destruction has displayed the failure of international law to effectively deter these actions. This article reviews existing international law in light of this destruction and the challenges posed by the issues of non-international armed conflict, non-state actors and the military necessity exception. By examining recent developments in applicable international law, the article proposes that customary international law has evolved to interpret existing legal instruments and doctrines concerning cultural heritage in light of the principles of proportionality and distinction and a definition of intentionality that includes extreme negligence and willful disregard. As a result, international law may more effectively foster the preservation of cultural heritage for future generations.

Cite as Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?,* 15 J. MARSHALL REV. INTELL. PROP. L. 336 (2016).

THE DESTRUCTION OF CULTURAL HERITAGE: A CRIME AGAINST PROPERTY OR A CRIME AGAINST PEOPLE?

PATTY GERSTENBLITH

THE DESTRUCTION OF CULTURAL HERITAGE: A CRIME AGAINST PROPERTY OR A CRIME AGAINST PEOPLE?

PATTY GERSTENBLITH*

I. INTRODUCTION

The recent and ongoing conflicts in the Middle East and North Africa have been devastating for both humans and the cultural heritage of humanity. The failure of international law to protect the remains of the past has been glaringly and painfully obvious, as foreign governments, international organizations including UNESCO and the United Nations, and a multitude of private nongovernmental cultural organizations have issued countless statements condemning the destruction. While international treaty law has continued to evolve in the effort to protect cultural heritage, several obstacles to effective protection and deterrence persist. In some respects, international treaty law concerning the protection of cultural heritage has not evolved over the past century as much as one might have expected.

This article will examine the existing international legal regime that aims to protect cultural heritage and then turn to some of the challenges posed by the current conflict in Syria and the recent conflict in Mali, particularly in terms of the status of non-international armed conflict, non-state actors and the military necessity exception. In reviewing several recent developments concerning the application of international law to cultural heritage preservation, this article suggests a re-examination of the tie between people and places—between humanitarian law and the protection of cultural heritage. As a result of this re-examination, this article concludes that customary international law has evolved to a new understanding of the existing legal instruments and doctrines, thereby opening a path to achieving more effective preservation of cultural heritage.

---

* © Patty Gerstenblith 2016. Patty Gerstenblith is Distinguished Research Professor of Law at DePaul University College of Law and director of its Center for Art, Museum & Cultural Heritage Law. She is founding president of the Lawyers' Committee for Cultural Heritage Preservation (2005-2011), Secretary of the U.S. Committee of the Blue Shield and senior advisor to the ABA's Art and Cultural Heritage Law Committee. In 2011, she was appointed by President Obama to serve as the chair of the President's Cultural Property Advisory Committee in the U.S. Department of State, on which she had previously served as a public representative in the Clinton administration. From 1995 to 2002, she was editor-in-chief of the International Journal of Cultural Property. Her publications include the casebook, ART, CULTURAL HERITAGE AND THE LAW (now in its third edition). Gerstenblith received her AB from Bryn Mawr College, PhD in art history and anthropology from Harvard University, and JD from Northwestern University. Before joining the DePaul faculty, she clerked for the Honorable Richard D. Cudahy of the U.S. Court of Appeals for the Seventh Circuit. She would like to thank Krystin Husz (DePaul College of Law '16), Madelaine Thomas (DePaul College of Law '17) and Ingrida Latoza (John Marshall Law School '16) for their research assistance. Conversations with many individuals have informed this article, including with Tim Slade, author, director and producer of the documentary, THE DESTRUCTION OF MEMORY.

II. BACKGROUND: HOW WE GOT TO WHERE WE ARE

The historical background for the protection of cultural heritage and the evolution of international legal principles to accomplish this protection have been presented elsewhere.[1] The modern origin of legal instruments to protect cultural heritage[2] during armed conflict may be traced to the aftermath of the Napoleonic wars at the beginning of the nineteenth century.[3] This article begins with descriptions of the most relevant international legal instruments to explain what legal tools currently exist in the arsenal to protect cultural heritage.

A. Early Legal Instruments

The first codification of protection of cultural property during armed conflict is found in the Lieber Code,[4] drafted for the U.S. Army by Francis Lieber, a Prussian soldier present at the Battle of Waterloo, who later fought in the Greek War of

---

[1] The development of international law to protect cultural property is treated in greater detail in my articles, *From Bamiyan to Baghdad: The Conduct of Warfare and the Preservation of Cultural Heritage at the Beginning of the Twenty-First Century*, 37 GEO. J. INT'L L. 245, 249-72 (2006) [hereafter *Bamiyan to Baghdad*]; *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 CARDOZO PUBLIC LAW, POLICY & ETHICS JOURNAL 677, 677-91 (2009); *Beyond the 1954 Hague Convention*, *in* CULTURAL AWARENESS IN THE MILITARY: DEVELOPMENTS AND IMPLICATIONS FOR FUTURE HUMANITARIAN COOPERATION 83, 84-87 (Robert Albro and Bill Ivey eds. 2014). This subject has been treated by numerous other authors, including Cherif Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYR. J. INT'L L. & COM. 281 (1983); ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT (2006); KEVIN CHAMBERLAIN, WAR AND CULTURAL HERITAGE: A COMMENTARY ON THE HAGUE CONVENTION 1954 AND ITS TWO PROTOCOLS (2d ed. 2013); JIRÍ TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 3-36 (1996). Margaret Miles presents an excellent overview of the history of the plunder of art works during wartime in antiquity, MARGARET M. MILES, ART AS PLUNDER: THE ANCIENT ORIGINS OF DEBATE ABOUT CULTURAL PROPERTY (2008).

[2] This article uses the term "cultural heritage" as generally synonymous with the term "cultural property," as defined in the 1954 Hague Convention, for which *see infra* note 41 & accompanying text. However, it also recognizes that the term cultural property is restricted to tangible property, while cultural heritage is often understood to include the intangible, such as languages and traditional and religious practices, which are often tightly linked to the tangible, such as historic structures and cultural landscapes. The subject of intangible cultural heritage is not specifically treated in this article, but the current conflicts in the Middle East are also seeing the loss of intangible heritage on a par with the destruction of tangible heritage.

[3] Napoleon took art works from throughout Europe and brought them to Paris as part of his establishment of the French Empire, modeled on the Roman Empire. MILES, *supra* note 1, at 319-29; 327-29. At the conclusion of the Napoleonic wars, the Duke of Wellington refused to take these cultural works as spoils of war and required the French to restore to the European nations the art works that Napoleon had removed, although not all were returned.. *Id.* at 99, 329-30. These actions lay the groundwork for recognizing that cultural works hold a special protected status and should not be considered normal war booty. O'KEEFE, *supra* note 1, at 5-13.

[4] For an extensive history of the law of warfare predating the U.S. Civil War and the drafting of the Lieber Code, *see* JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012). Lieber's background leading up to the Civil War, including his military history and philosophy with respect to war, is discussed in WITT. *Id.* at 173-84. The Lieber Code, issued by President Lincoln as General Orders No. 100, was drafted at the request of General Henry Halleck and Secretary of War Edwin Stanton.

Independence, studied the classics, and ultimately became a professor of history at Columbia University.[5] The result was the first manual, Instructions for the Government of Armies of the United States in the Field (General Order No. 100), for the conduct of armies during war; it explicitly acknowledged a special role for charitable institutions, collections, and works of art.[6] The Lieber Code distinguished such "public property" from other types of moveable public property that could be used as normal war booty.[7]

Following the U.S. Civil War, the international community began the process of drafting a code for the conduct of warfare, culminating in the two earlier Hague Conventions of 1899 and 1907 on the Laws and Customs of War on Land and, in particular, the Regulations annexed to the Conventions. These conventions are significant as the regulating international authority during both World Wars, and they retain, more than a century later, their significance for both the States that have ratified them and as evidence of customary international law.[8]

Articles 23, 28 and 47 of the 1899 Convention Annex prohibit pillage and seizure by invading forces and Article 56 requires armies to take all necessary steps to avoid seizure, destruction and intentional damage to "religious, charitable, and educational institutions, and those of arts and science" as well as to "historical monuments [and]

---

[5] MILES, *supra* note 1, at 349-52. Miles attributes the inclusion of the protection of cultural property to Lieber's training in the Classics and Cicero's Verrine orations.

[6] TOMAN, *supra* note 1, at 7-8 .

[7] The relevant sections of the Lieber Code state:

> 31. A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete.
>
> 34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies or learning or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.
>
> 35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.
>
> 36. If such works of art, libraries, collections, or instruments 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 and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.
>
> In no case shall they be sold or given away, if captured by the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

Instructions for the Government of Armies of the United States in the Field (1863). The full text of the Lieber Code and other international instruments cited in this section may be found at: http://www.icrc.org/ihl.nsf/WebFULL?OpenView [hereinafter ICRC web site].

[8] *See*, *e.g.*, Prosecutor v. Strugar, IT-01-42-T, Trial Chamber II Judgment, Jan. 31, 2005, at 106, *available at* http://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf (describing that Article 27 had become part of customary international law and was the basis for Article 3d of the Statute of the International Criminal Tribunal for the former Yugoslavia).

works of art or science."[9] The Regulations annexed to the 1907 Hague Convention on Land Warfare expanded the 1899 Convention and had two key provisions pertaining to cultural property. The first, contained in Article 27, deals with the obligation to avoid damaging particular structures:

> In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.[10]

There are three important caveats for the protection granted to such buildings. First is that the obligation to avoid causing damage to these buildings is limited by the phrase "as far as possible," and therefore the obligation will give way to the exigencies of warfare. The second caveat is that two obligations are imposed on the besieged: to mark the buildings with a distinctive sign (which must be communicated to the enemy in advance) and to avoid using the buildings for military purposes. If the buildings are used for military purposes then the protection of this provision is forfeited.

The second provision is in Article 56:

> The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.[11]

In contrast to Article 27, the obligation in Article 56 to protect property belonging to institutions of a religious, charitable, educational, historic and artistic character from intentional damage is absolute. Furthermore, it complements Article 55, which emphasizes that an occupying power has an obligation to preserve and safeguard the

---

[9] Annex to Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, July 29, 1899, Regulations respecting the Laws and Customs of War on Land, ICRC web site, *supra* note 7.

[10] Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, Oct. 18, 1907, ICRC web site, *supra* note 7. Article 5 of Convention (IX) applies similar restrictions to naval bombardment and mandates the design of the emblem that marks such structures as consisting of "large, stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white." TOMAN, *supra* note 1, at 11-13.

[11] Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, Oct. 18, 1907, ICRC web site, *supra* note 7.

value of immovable property, including forests and agricultural lands, and to administer these properties "in accordance with the rules of usufruct."

Despite the widespread acceptance of these conventions by European nations, the conventions failed to protect cultural property during the two world wars.[12] During World War I, the library at the University of Louvain in Belgium and the Cathedral at Rheims were severely damaged. The Hague Conventions served in the Treaty of Versailles and the Treaty of Berlin as a means of forcing restitution of looted cultural objects or reparations when the objects could not be returned.[13] World War II saw the most extensive destruction, theft, and movement of cultural objects at any time in world history.[14] Following World War II, significant efforts were made to return those cultural objects that had survived the war. These efforts were initially the product of government mandate, but restitution efforts continue today largely as the result of private initiative and lawsuits instigated by the descendants of the original owners.[15]

B. Post-World War II Conventions

The horrific experiences of World War II led the international community to establish several intergovernmental organizations, including the United Nations and the United Nations Economic, Scientific and Cultural Organization (UNESCO), and to adopt several international conventions focused on humanitarian issues, including the four Geneva Conventions of 1949, the Universal Declaration of Human Rights, and the Genocide Convention. Soon after followed the first international convention to address exclusively the fate of cultural property during war time, the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention).

---

[12] Between the two world wars, a draft for a new international convention was written but not completed. Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Time of War, proposed by the International Museums Office (October 1936). The text may be found in CHAMBERLAIN, *supra* note 1, at 209-13. Twenty-one nations in the Americas joined the 1935 Washington Pact for the Protection of Artistic and Scientific Institutions and of Historic Monuments (the Roerich pact), but it had little impact on World War II. *Id*. at 208

[13] Bassiouni, *supra* note 1, at 291-92. Several tribunals were established to arbitrate restitution and reparations claims for property, including cultural objects and art works. Germany was required to return cultural objects to France taken during World War I and the war of 1870-1871, return objects taken from Britain, make restitution to the University of Louvain of manuscripts, maps, books and other archival materials comparable to those destroyed by Germany in the burning of the Library of Louvain and to return to Belgium two leaves from the Adoration of the Lamb triptych executed by the Van Eyck brothers in Ghent and the leaves of the triptych of the Last Supper by Dierick Bouts. TOMAN, *supra* note 1, at 337. The requirement that Germany restore art works particularly to France was one of the justifications utilized by Hitler for Nazi appropriations of art works during World War II.

[14] The destruction of cultural property during World War II falls outside the scope of this article but is extensively discussed and documented in the literature. The fullest discussion of the fate of cultural property during World War II is presented by LYNN NICHOLAS, THE RAPE OF EUROPA (1994).

[15] *See*, *e.g.*, Republic of Austria v. Altmann, 541 U.S. 677 (2004); Cassirer v. Kingdom of Spain, 616 F.3d 1019 (9th Cir. 2010); Vineberg v. Bissonnette, 529 F. Supp. 2d 300 (D.R.I. 2007), *aff'd*, 548 F.3d 50 (1st Cir. 2008); Bakalar v. Vavra, 619 F.3d 136 (2d Cir. 2010).

1. The Genocide Convention

The blueprint for perhaps the greatest of these treaties, the Convention on the Prevention and Punishment of the Crime of Genocide,[16] was laid in the inter-war period through the writings of the Polish lawyer, Rafael Lemkin. In 1933, Lemkin included cultural genocide as one of the eight dimensions of genocide: political, social, cultural, economic, biological, physical, religious, and moral, "each targeting a different aspect of a group's existence."[17] According to Lemkin, acts against the law of nations are those for which there should be "universal" jurisdiction (that is, if a person is apprehended in a different State than where the crime was committed, he or she can be prosecuted in that other State). Lemkin described two acts, acts of barbarism and acts of vandalism, to be added to the preexisting list of acts against the law of nations. In his work, "Acts of Vandalism," he wrote:

> An attack targeting a collectivity can also take the form of systematic and organized destruction of the art and cultural heritage in which the unique genius and achievement of a collectivity are revealed in fields of science, arts and literature. The contribution of any particular collectivity to world culture as a whole forms the wealth of all of humanity, even while exhibiting unique characteristics.
>
> Thus, the destruction of a work of art of any nation must be regarded as acts of vandalism directed against world culture. The author [of the crime] causes not only the immediate irrevocable losses of the destroyed work as property and as the culture of the collectivity directly concerned (whose unique genius contributed to the creation of this work); it is also all humanity which experiences a loss by this act of vandalism.
>
> In the acts of barbarity, as well as in those of vandalism, the asocial and destructive spirit of the author is made evident. This spirit, by definition, is the opposite of the culture and progress of humanity. It throws the evolution of ideas back to the bleak period of the Middle Ages. Such acts shock the conscience of all humanity, while generating extreme anxiety about the future. For all these reasons, acts of vandalism and barbarity must be regarded as offenses against the law of nations.[18]

---

[16] 78 U.N.T.S. 277 (1948).

[17] David Nersessian, Rethinking Cultural Genocide Under International Law, Human Rights Dialogue: "Cultural Rights" (Spring 2005) Carnegie Council for Ethics in International Affairs, *available at* http://www.carnegiecouncil.org/publications/archive/dialogue/2_12/section_1/5139.html.

[18] Rafael Lemkin, Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations (1933), *available at* http://www.preventgenocide.org/lemkin/madrid1933-english.htm. The Abbé Grégoire coined the term "vandalism" to describe the destruction of cultural property perpetrated during the French Revolution. Grégoire wrote that he "created the word to destroy the thing." As Sax commented, "Grégoire made cultural policy a litmus test of civilized values, and located it in the ideological geography of the French Revolution. The nation decides

Cultural genocide may be further understood as:

> Cultural genocide extends beyond attacks upon the physical and/or biological elements of a group and seeks to eliminate its wider institutions. This is done in a variety of ways, and often includes the abolition of a group's language, restrictions upon its traditional practices and ways, the destruction of religious institutions and objects, the persecution of clergy members, and attacks on academics and intellectuals. Elements of cultural genocide are manifested when artistic, literary, and cultural activities are restricted or outlawed and when national treasures, libraries, archives, museums, artifacts, and art galleries are destroyed or confiscated.[19]

Cultural genocide was included in the draft Genocide Convention. The elements of cultural genocide listed in the draft included: prohibition on the use of the national language, systematic destruction of books printed in the national language or of religious works; systematic destruction of historical or religious monuments or their diversion to alien uses, and destruction or dispersion of documents and objects of historical, artistic, or religious value, and of objects used in religious worship.[20] However, several of the States participating in the negotiations objected to these provisions and the concept of cultural genocide was ultimately excluded from the Convention itself.[21]

Despite its exclusion from the Convention on Genocide, the concept of cultural genocide has returned in different contexts. The International Criminal Tribunal for the former Yugoslavia (ICTY) used cultural heritage destruction during the Balkan Wars as a method of establishing the genocidal intent of the Serbs against the Bosnian Muslims.[22] Concern with cultural genocide tends to emphasize, to a greater extent, forms of intangible heritage, such as language, religious practices, and access to cultural and religious sites and structures.[23] Yet we can see ever more clearly the

---

what it will be as it stands before its artistic, historical, and scientific monuments, hammer in hand." Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1161 (1989-1990).

[19] Nersessian, *supra* note 17.

[20] HIRAD ABTAHI AND PHILIPPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES 234-36 (2008); *see also* Roger O'Keefe, *Protection of Cultural Property Under International Criminal Law*, 11 MELBOURNE J. INT'L L. 339, 386 (2010). Lemkin pointed out that cultural genocide is "a policy which by drastic methods, aimed at the rapid and complete disappearance of the cultural, moral and religious life of a group of human beings." ABTAHI AND . WEBB, at 235. Dr. Bramson, the representative of Poland, referred to the destruction of 50 million books in Poland during World War II as an example of cultural genocide, an act committed against a group as a whole. *Id*. at 193.

[21] *Id*. at 163-67; 726-31. For example, the French government held the position that cultural genocide should be excluded because it is a question addressed to the protection of minorities and therefore invited the risk of political interference in the domestic affairs of States. *Id*. at 383. *See also* LAWRENCE DAVIDSON, CULTURAL GENOCIDE 127-30 (2012).

[22] Nersessian, *supra* note 17; O'Keefe, *supra* note 20, at 388-89..

[23] These concerns are reflected in such legal instruments as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the more recent UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003), the

direct link between the ability to perform and observe traditional and religious practices and the ability to access tangible cultural heritage, including sites, historic structures and the physical embodiments of intangible culture in written documents and cultural artifacts.

While cultural genocide was ultimately excluded from the Convention, it may be worth revisiting the concept—perhaps not to explicitly incorporate it as a form of genocide, but to use this concept to modify the existing barriers to effective deterrence to the destruction of cultural heritage. The two primary barriers to effective deterrence are the presence and interpretation given to the concept of military necessity as applied to the protection of cultural heritage and the limitations imposed through restrictions on jurisdiction. As Davidson commented,

> Cultural genocide is alive and spreading in our world, and stands as a primary warning that if we do not break through the boundaries of our thought collectives we are doomed to reenact the wretched past, over and again. But it is doing so under the radar, so to speak, for there are no laws against it. And, as yet, it is not perceived to have reached the level of international scandal that makes for new laws and regulations. It would seem that such a scandal is what it would take for an event to break through the thought collectives of myriad cultures and peoples and get them to act collectively in their own interest. And even then, historical memory is all too brief.[24]

If the concept of cultural genocide were accepted more broadly by the international community, then these barriers might be eliminated or at least significantly reduced.

2. The 1949 Geneva Conventions and 1977 Additional Protocols

In addition to the Genocide Convention, the premier post-war international humanitarian law conventions were the four instruments that comprise the Geneva Conventions of 1949. However, cultural property, as such, was not protected under the Geneva Conventions, likely because cultural heritage destruction was not considered to be as serious as other war crimes.[25] The exclusion of this issue from the Geneva Conventions in the post-war period thus initiated a divide between cultural heritage protection and other aspects of international humanitarian law.[26] This may also have been the result of the characterization of the Geneva Conventions as part of international humanitarian law, rather than as part of the law of armed conflict—with the latter being a blueprint for restrictions on the methods of conducting armed conflict, subject to the exigencies of warfare and military

---

UNESCO Convention on the Preservation and Promotion of the Diversity of Cultural Expressions (2005), and the United Nations Declaration on the Rights of Indigenous Peoples (2007).

[24] DAVIDSON, *supra* note 21, at 131.

[25] *See infra* notes 38-39 & accompanying text.

[26] Article 33 of the Fourth Geneva Convention of August 12, 1949 Relative to the Protection of Civilian Persons in Time of War forbids pillage and Article 53 prohibits the destruction of real or personal property, whether publicly or privately owned, and this can be extended to include cultural property.

objectives, while the former gave greater emphasis to protection of human life and civilian objects with less deference to military necessity.[27] Thus preservation of cultural heritage was clearly placed within the parameters of the law of armed conflict, rather than within that of international humanitarian law. Its inclusion within the Additional Protocols heals that rift, to some extent, but the provisions in the Additional Protocols are largely reflective of and subordinate to the provisions of the 1954 Hague Convention.[28]

The 1977 Protocols I and II Additional to the 1949 Geneva Conventions protect cultural property in Article 53 of Protocol I, which applies in international armed conflict, and Article 16 of Protocol II, which applies in cases of non-international armed conflict. These provisions prohibit acts of hostility directed against historic monuments, works of art, or places of worship and the use of such property for military purposes. Article 53 of Protocol I also prohibits reprisals against such property.[29] While the 1949 Conventions have received almost universal ratification, this is not the case with the 1977 Protocols. Additional Protocol I adds important concepts that apply to civilian objects, in general, and not only to cultural property. The first of these is the principle of distinction—that is, the parties to a conflict must distinguish between civilian objects and military objectives—and the second is the principle of proportionality.[30]

3. The Rome Statute of the International Criminal Court

The final significant legal instrument is the Rome Statute, which created the International Criminal Court.[31] At this time, 124 States have ratified the Rome Statute and several others are signatories. Article 8 of the Statute of the International Criminal Court includes, among its serious violations, "intentionally

---

[27] This dichotomy between the law of armed conflict and international humanitarian law was arguably terminated with the 1977 Additional Protocols to the Geneva Conventions, which contain elements of both. See the statement of France upon accession to Protocol I, *available at* https://www.icrc.org/casebook/doc/case-study/france-protocol-1-case-study.htm#part_b_para_13. Today the two terms are considered synonymous. Toman characterizes the law of armed conflict as "situated halfway between military necessity and the principles of humanity and chivalry which both determine the formation and application of the law." TOMAN, *supra* note 1, at 73. Forrest views the development of the military necessity doctrine as moving away from a limitation on the conduct of warfare, expressed in the earlier conventions, and towards a justification for evading principles in the later conventions, an approach found also in Additional Protocol I. Craig J.S. Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts*, 37 CAL. W. INT'L L.J. 177, 191 (2007).

[28] Commentary of 1987 to the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), Article 53, INTERNATIONAL COMMITTEE OF THE RED CROSS, available at https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=501D619BA5E17158C12563CD00434AF5.

[29] Bassiouni, *supra* note 1, at 294-96; CHAMBERLAIN, *supra* note 1, at 14-16. For more on the provisions with respect to cultural property of the 1977 Additional Protocols to the 1949 Geneva Conventions, *see* O'KEEFE, *supra* note 1, at 207-18, 230-32.

[30] Additional Protocol I, Article 48 (principle of distinction); Article 57 (principle of proportionality in planning attacks).

[31] Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183/9, 37 I.L.M. 999 (July 17, 1998).

directing attacks against buildings dedicated to religion, education, art, science or charitable purposes [and] historic monuments . . . provided they are not military objectives."[32] It is important to note the two limiting factors in this provision. First is that the attack must be intentional, and second is that attacks on military objectives are considered permissible. This language is largely reflective of that in the early Hague Conventions, although the Rome Statute excludes from protection "military objectives" rather than focusing on whether the property is being used at the time for military purposes.

Based on these legal instruments, the term "atrocity crimes" refers to three categories of international crimes: genocide, crimes against humanity, and war crimes.[33] The Rome Statute clearly delineates these three categories of crimes. The crime of genocide is defined by the Convention on Genocide, as well as in the Rome Statute; crimes against humanity have not been codified in a distinct treaty but their definition relies on a variety of international sources, including the Rome Statute and the Statute of the International Criminal Tribunal for the former Yugoslavia; war crimes are defined in the 1949 Geneva Conventions and Additional Protocol I, as well as the Rome Statute.[34] According to this tripartite classification, destruction of cultural heritage fits only as a war crime.

C. Cultural Property Specific Treaty Regime: The 1954 Hague Convention and its Two Protocols

Although based on the earlier Hague Conventions, the Roerich (Washington) Pact, and a draft convention started before the outbreak of World War II, the 1954 Hague Convention was the first international convention to address exclusively the subject of cultural property.[35] There are currently 127 States Parties to the main Convention, 104 to the First Protocol, and 68 to the Second Protocol, which entered into force in March 2004.[36] The United Kingdom is now the only major military power that has not ratified at least the main Convention.[37]

---

[32] Statute of the International Criminal Court, art. 8(2)(b)(ix) (applying to international armed conflict) and Article 8(2)(e)(iv)(applying to non-international armed conflict).

[33] United Nations, FRAMEWORK OF ANALYSIS FOR ATROCITY CRIMES: A TOOL FOR PREVENTION 1-2 (2014).

[34] *Id*. at 26-31.

[35] As discussed above, *see* note 27 & accompanying text, some have debated the extent to which the 1954 Hague Convention should be viewed as part of the development of humanitarian law and related to the 1949 Geneva Conventions. Bassiouni, *supra* note 1, at 294-96; CHAMBERLAIN, *supra* note 1, at 6. For more detailed description of the provisions of the Convention and the two protocols, *see* TOMAN, *supra* note 1; CHAMBERLAIN, *supra* note 1, and O'KEEFE, *supra* note 1. For discussion of the Second Protocol, in particular, *see* JIRÍ TOMAN, CULTURAL PROPERTY IN WAR: IMPROVEMENT IN PROTECTION (2009). Other international conventions provide protection to cultural property, although fairly limited during armed conflict. These include the 1970 UNESCO Convention on the Means of Preventing and Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1972 UNESCO Convention on the World Cultural and Natural Heritage (which, among other provisions, creates the lists of World Heritage Sites and World Heritage Sites in Danger), the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects, and the 2001 UNESCO Convention on Underwater Cultural Heritage.

[36] For the text of the Convention, its two protocols and list of States Parties, *see Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution*

While one may suggest that having a distinct convention, devoted only to the subject of cultural property, brings a higher status to cultural property protection, this bifurcation may have had the opposite effect. Different, although related, reasons may be seen as to why cultural property was not addressed in the Geneva Conventions. These include the view that the destruction of cultural property did not carry the same degree of egregiousness as other war crimes and crimes against humanity or that the early Hague Conventions gave overly broad protection to cultural property.[38] To those who interpret the definition of cultural property in the 1954 Hague Convention narrowly, as referring primarily to cultural sites of outstanding universal value, the Convention aims to protect such property "for itself, because of its intrinsic value and importance to humanity, above and beyond its everyday use by civilians, the civilian casualties that could be caused by acts against such property, and the consequences that its destruction could bring on civilians living nearby."[39] Whatever the exact reasons for this bifurcation between the protection given to civilian objects and that given to cultural property and whether the result accords with the drafters' intent, this phenomenon has reduced, rather than enhanced, the level of protection given to cultural property. The long delay in ratification by the United States and the ongoing failure of the United Kingdom to ratify have meant that cultural property protection principles are not given the same degree of recognition in military training and in the development of military doctrine.

The Convention lays out the basic principles for protecting cultural property. It begins with a Preamble, which sets out the reasons for the adoption of the Convention. It is worth noting two of the introductory paragraphs in particular:

> 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;
>
> Considering 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 . . . .

---

of the Convention 1954, UNESCO, *available at* http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[37] Since 2004, the 50th anniversary of the Convention, the U.K. Government has repeatedly announced its intention to ratify all three instruments (the main Convention and both Protocols) but has still failed to do so. *See*, *e.g.*, Anny Shaw, *Lords put pressure on UK government to sign Hague Convention this year*, THE ART NEWSPAPER, (Jan. 21, 2016), *available at* http://theartnewspaper.com/news/conservation/lords-put-pressure-on-uk-government-to-sign-hague-convention-this-year/.

[38] *See*, *e.g.*, Marina Lostal, *Syria's World Cultural Heritage and Individual Criminal Responsibility*, 3 INT'L REV. L. 1, 7-8 (2015), *available at* http://dx.doi.org/10.5339/irl.2015.3. Lostal suggests that the provisions in the 1907 Hague Convention pertaining to cultural property were viewed as overbroad and that a convention that was narrower in scope but with a higher standard of protection was thought desirable. *Id*.

[39] Micaela Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 EUR. J. INT'L L. 203, 205 (2011).

These phrases are part of a tradition of imposing obligations on nations to care for the cultural property located within their borders and to safeguard both their own and their adversaries' cultural property during warfare.[40]

Article 1 of the Hague Convention offers a broad definition of cultural property as "movable or immovable property of great importance to the cultural heritage of every people." The breadth of this definition is, however, tempered by the requirement that the property be of "great importance" to "every people" and not just to the people of the particular State. There follows a list of examples of cultural property, which is clearly intended not to be an exhaustive list, but includes "monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books . . . ." In addition to movable and immovable property, cultural property also includes repositories of cultural objects, such as museums, libraries and archives, as well as refuges created specifically to shelter cultural property during hostilities. [41]

Article 2 defines the "protection of cultural property" as consisting of two components: "the safeguarding and respect for such property." Safeguarding refers to the actions a nation is expected to take during peacetime to protect its own cultural property. This is embodied in Article 3, which elaborates that nations are obligated to safeguard cultural property located within their territory during peacetime from "the foreseeable effects of an armed conflict." Demonstrating "respect" refers to the actions that a nation must take during hostilities to protect both its own cultural property and the cultural property of another State. This obligation is embodied in the two main substantive provisions of the Convention: Article 4, which regulates conduct of parties during hostilities, and Article 5, which regulates conduct during occupation.

Under Article 4(1), States are to avoid jeopardizing cultural property located in their own territory by refraining from using such property in a way that might expose it to harm during hostilities. This means that nations should not locate strategic or military equipment near cultural property. Also under Article 4(1), a belligerent State should not target the cultural property of another State. In what is perhaps the most controversial aspect of the Hague Convention, Article 4(2) provides that the obligations of the first paragraph "may be waived only in cases where military necessity imperatively requires such a waiver."[42]

---

[40] Robert K. Paterson and Dennis S. Karjala, *Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples*, 11 CARDOZO J. INT'L & COMP. L. 633, 653 (2003).

[41] The Hague Convention definition requires protected cultural property to be of "great importance," not of "outstanding universal value"(which is the definition used in the 1972 World Heritage Convention), and it therefore protects a broader range of cultural property than suggested by Lostal, *supra* note 38, and Frulli, *supra* note 39. The 1972 World Heritage Convention also does not protect movable cultural property or repositories of movable cultural property (unless the repository is itself considered to be a World Heritage Site).

[42] This provision is arguably one of the greatest drawbacks of the Hague Convention and the approach of other legal instruments to protection of cultural property. This point will be discussed in greater detail later in this article. *See infra* notes 104-140 & accompanying text.

Article 4(3) sets out the obligation "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 . . . ."[43] Paragraph 3 also prohibits the requisitioning of movable cultural property located in the territory of another Party to the Convention. Paragraph 4 prohibits carrying out acts of reprisal against cultural property. Paragraph 5 states that a State Party's failure to comply with Article 3 by not preparing to safeguard its cultural property during peacetime does not mean that another State Party can evade its obligations under Article 4. Unlike the obligations in Article 4(1), these other Article 4 duties are not subject to the military necessity exception.

Article 5 sets out the obligations of an Occupying Power, emphasizing that the primary responsibility for securing cultural property lies with the competent national authority of the State that is being occupied. Article 6, permitting the distinctive marking of cultural property by a special emblem, and Article 7, requiring that State Parties undertake to educate their military and introduce regulations concerning observance of the Convention, complete the general substantive provisions of the Convention. Articles 8-14 are concerned with the conditions of special protection, which may be accorded to certain categories of cultural property under specific conditions. These provisions, however, have rarely been used. One of the main criticisms of the Hague Convention is that it does not contain provisions for punishment of those who violate its terms but, rather, relies on national domestic law to establish criminal liability.[44]

---

[43] Until the looting of the Iraq Museum in Baghdad in April 2003, this provision received relatively little notice. This provision is best interpreted to mean that a military is required to prevent its own troops from engaging in theft, pillage or misappropriation, not that it is required to prevent third parties from doing so. *See* Gerstenblith, *From Bamiyan to Baghdad*, *supra* note 1, at 308-11. O'Keefe, however, disagrees with this interpretation and reads into the Article 4(3) prohibition an obligation to prevent the acts in question, apparently regardless of who the actors are. O'Keefe, *supra* note 20, at 363 and n. 123. The U.S. Department of Defense Law of War Manual, issued in June 2015, takes a somewhat nuanced view of the interpretation of this provision. The Manual states that "[m]ilitary commanders have an obligation to take reasonable measures to prevent or stop any form of theft, pillage . . . ." It describes this obligation as "part of the obligation to take feasible precautions to reduce the risk of harm to cultural property." Department of Defense, LAW OF WAR MANUAL (2015) ¶ 5.18.6.1, at 278 (2015), *available at* http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf. What constitutes reasonable measures will depend on a variety of factors and is subject to a determination of feasibility. It seems the U.S. military learned the lesson of the looting of the Iraq Museum: "efforts to identify cultural property . . . and secure it from theft or pillage are a prudent part of the planning process of military operations. For example, such efforts may deny opposing forces the opportunity to exploit harm to cultural property for propaganda purposes." *Id.* For further discussion of the Law of War Manual, *see* Elizabeth, Varner, "US Obligation to Cultural Heritage in Armed Conflict and Occupation under the Law of War", Talk at the Intersections in International Cultural Heritage Law Conference, Georgetown University Law Center (March 29, 2016) (submitted for publication).

[44] *See infra* notes 162-167 & accompanying text for discussion of the obstacles to prosecution of cultural property crimes in the absence of domestic criminal legislation under the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

The First Protocol, written at the same time as the main Convention, refers exclusively to the status of movable cultural objects.[45] This subject was split off from the main Convention because of objections raised by the United States and to make it easier for the United States to ratify the main Convention without having to confront the question of movable objects.[46] The Protocol addresses the obligations of a State Party to prevent the export of cultural objects from occupied territory and to return any such exported cultural objects. It also requires that any cultural property removed from one State Party and placed in the territory of another State Party for safekeeping during armed conflict must be returned at the end of the conflict.[47]

Following the Balkan Wars of the 1990s, the Convention was updated in its Second Protocol of 1999.[48] Some of the key provisions of the Second Protocol were drafted to respond to criticisms outlined in the Boylan Report[49] and to difficulties that were recognized during the Balkan conflict of the early 1990s.[50] Two of the most serious problems in applying the 1954 Hague Convention to the Balkan conflict were, first, the question of treatment of conflicts that had not yet risen to the level of armed conflict, which is covered in Article 19, and, second, lack of clarity as to each State Party's obligation to create a criminal offense under its domestic law. Prosecution of war crimes committed against cultural property in the Balkans relied on the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), which did not rely directly on the State Party's ratification of the 1954 Convention but rather

---

[45] For more detailed discussion of the First Protocol, *see* Patrick J. O'Keefe, *The First Protocol to the Hague Convention Fifty Years On*, 9 ART ANTIQUITY AND LAW 99 (2004). On the problem of domestic implementation of the First Protocol, *see* Stephan Matyk, *The Restitution of Cultural Objects and the Question of Giving Direct Effect to the Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 9 INT'L J. CULTURAL PROP. 341 (2000).

[46] TOMAN, *supra* note 1, at 344; CHAMBERLAIN, *supra* note 1, at 99-100. Several provisions of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property would also apply to the theft or illegal removal of cultural objects from occupied territory, most particularly Article 11, which states: "The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit." It seems largely incongruous that at the same time that the United States was leading an effort to return cultural objects looted by the Nazis to their original owners and heirs, the United States seemed to be concerned that it not have any responsibility for restoring looted cultural objects to their owners in future wars.

[47] At the time that the United States was considering ratification of the First Protocol, the State Department recommended utilizing an opt-out provision that would have relieved the United States of the responsibility to return cultural property removed from occupied territory. The Transmittal of the Convention and First Protocol to the Senate Foreign Relations Committee. The Hague Convention and The Hague Protocol, Treaty Doc. 106-1, 106th Cong., 1st Sess. Iii-iv, ix (1999), *available at* https://www.congress.gov/106/cdoc/tdoc1/CDOC-106tdoc1.pdf. The United States has still not ratified the First Protocol.

[48] For more discussion of the Second Protocol, *see* TOMAN, *supra* note 35; NOUT VAN WOUDENBERG & LIESBETH LIJNZAAD (eds), PROTECTING CULTURAL PROPERTY IN ARMED CONFLICT: AN INSIGHT INTO THE 1999 SECOND PROTOCOL TO THE HAGUE CONVENTION OF 1954 FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (2010).

[49] Patrick J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)*, UNESCO Doc. CLT-93/WS/12 101 (1993).

[50] O'Keefe cites, in addition to the failure to protect cultural sites in the Balkans, failures during the Iran-Iraq war of the 1980s and during Iraq's invasion of Kuwait in 1991 as providing impetus for the creation of the Second Protocol. O'KEEFE, *supra* note 1, at 236-39.

cited it and the earlier Hague Conventions as evidence of customary international law.[51]

The Second Protocol defines more narrowly the concept of military necessity by focusing on the question of whether a cultural site had become a military objective, delineated more specifically questions of universal jurisdiction, and replaced the Convention's system of special protection (which had rarely been used) with a system of enhanced protection (Articles 10-13).[52] Article 15 clarifies what constitutes a breach of the Second Protocol and the criminal responsibility of individuals, including "extending criminal responsibility to persons other than those who directly commit the act," for violations of the Second Protocol. Article 16 requires nations that are party to the Protocol to establish criminal offenses under their domestic law and to extend jurisdiction to non-nationals for certain offenses.[53] Article 22 tries to make a fine distinction between applying to conflicts not of an international character but not applying to "situations of internal disturbances and tensions."

D. Customary International Law

Another significant source of international law is customary international law. Customary international law is defined as "a general practice accepted as law."[54] The rule must be a part of State practice (*usus*) and there must be "a belief that such practice is required, prohibited or allowed . . . as a matter of law (*opinio juris sive necessitates*)."[55] The first element, that of State practice, is evaluated by two criteria. The first criterion is State selection of rules, as demonstrated through their methods of combat, types of weaponry used, national legislation, and training of their militaries. The second criterion is an assessment of State practice in that the practice must be "virtually uniform, extensive and representative." Even if a particular rule is violated, the rule may still be viewed as uniform if the violation is widely condemned. To determine if the rule is extensive, one must evaluate not only the number of States that adhere to it, but also which States, in particular whether States "whose interests are specially affected" follow the rule. A rule does not need universal acceptance but must be generally accepted.

The element of *opinio juris* is more difficult to demonstrate because it is often difficult to determine whether a State engages in or refrains from an act because it is a matter of practice or of legal conviction. A final consideration in determining whether a rule has become part of customary international law is whether the rule

---

[51] *See* ICTY, Art. 3(d), *available at* http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb08-e.pdf, where "seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science" are included as violations of the laws or customs of war. Article 27 of the 1907 Hague Regulations, the 1954 Hague Convention, Article 53 of Additional Protocol I, and Article 16 of Additional Protocol II were cited as "sources in international customary and treaty law" to define the elements of the offense in Article 3(d) of the ICTY in 132-35. Prosecutor v. Strugar, IT-01-42-T (31 January 2005).

[52] O'KEEFE, *supra* note 1, at 263-64.

[53] For more discussion of Articles 15 and 16, *see* O'Keefe, *supra* note 20, at 370-79.

[54] Statute of the International Court of Justice, Art. 38(1)(b).

[55] Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. OF THE RED CROSS 175, 178-82 (2005).

has been embodied in a multilateral treaty and, if so, the extent of the ratification of the treaty and particularly whether States that are not a party consistently follow the rule and how States that have ratified the treaty act with respect to States that are not party to it.

Several elements of the 1954 Hague Convention had reached the status of customary international law before ratification by the United States in 2009 and as evidenced by Article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia. These core provisions would include, at a minimum, the substantive obligations to refrain from targeting cultural property in the absence of imperative military necessity (Article 4(1) and (2)) and to prevent one's own military from engaging in vandalism, theft and misappropriation of cultural property (Article 4(3)).[56] However, it is an open question whether the narrowing of these provisions in the Second Protocol have also attained the status of customary international law.

E. Shortcomings of International Treaty Law

Several characteristics of the operation of international treaty law insert serious shortcomings and limit the effectiveness of these agreements. The shortcomings may be viewed from two perspectives: first, the manner in which and the extent to which these instruments become binding on particular States;[57] second, difficulties in prosecuting war crimes and, in the realm of cultural heritage, the paucity of such prosecutions mean that it is very much open to question whether these legal provisions provide any actual deterrence to the commission of these violations.

To demonstrate the limited effect of the provisions in international conventions that relate to the protection of cultural heritage among the States of the Middle East and North Africa, the following chart illustrates the extent of signature and ratification:

---

[56] *Id.* at 193; CHAMBERLAIN, *supra* note 1, at 16-17.

[57] Signature indicates only the intent to ratify and not to act in ways that are contrary to the purpose of the treaty. However, the treaty becomes binding only upon ratification. In the case of the United States, many decades separated the time of signature of the 1954 Hague Convention and the time of ratification (2009), while the United Kingdom still has not ratified it. Even once a State has ratified a particular treaty or convention, that State may determine whether the agreement is viewed as self-executing in nature, that is, it is given immediate domestic effect without need for implementing legislation, or whether it is viewed as executory, which means that such implementing legislation is necessary. As an example, the United States viewed the 1954 Hague Convention as self-executing and therefore did not enact implementing legislation, but it did state several declarations and reservations as to its interpretation of the obligations under the Convention. Even once a convention is ratified and implemented, unless it explicitly states otherwise, it is not given retroactive effect.

Cultural Heritage International Conventions in the States of the Middle East and North Africa[58]													
	Egypt	Iran	Iraq	Israel	Jordan	Kuwait	Lebanon	Libya	Saudi Arabia	Syria	Tunisia	Turkey	Yemen
1954 Hague	R	R	R	R	R	R	R	R	R	R	R	R	R
1st Prot	R	R	R	R	R	R	R	R	R	R	R	R	R
2nd Prot	R	R			R			R	R	S			
1970 UNESCO[59]	R	R	R		R		R	R	R	R	R	R	
1972 WH Conv[60]	R	R	R	R	R	R	R	R	R	R	R	R	R
GC Add't Prot I	R		R		R	R	R	R	R	R	R		R
GC Add't Prot II	R				R	R	R	R	R		R		R
Rome Statute	S	S			R	S				S	R		S

[58] "R" indicates ratification or accession (whether with or without prior signature); "S" indicates signature without ratification. Not all international conventions and instruments that address cultural heritage have been included. Those excluded include the 1995 Unidroit Convention on Stolen and Illegally Exported Cultural Objects; the 2001 UNESCO Convention on Underwater Cultural Heritage; the 2003 UNESCO Convention on the Intangible Cultural Heritage, and the 2005 Convention on Safeguarding the Diversity of Cultural Heritage. However, these conventions are deemed to have only tangential, or less, relationship to protection of cultural heritage during armed conflict. For more on the procedures and background to the promulgation and ratification of international conventions concerning cultural heritage, *see* PATRICK J. O'KEEFE & LYNDEL V. PROTT (eds.), CULTURAL HERITAGE CONVENTIONS AND OTHER INSTRUMENTS: A COMPENDIUM WITH COMMENTARIES 1-15 (2011).

[59] The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property addresses primarily the international movement of cultural objects through the market and measures that States Parties should take to protect their heritage. Article 11 addresses the removal of cultural objects from occupied territory and thus tracks the First Protocol to the Hague Convention.

[60] The 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage. This Convention, which has achieved nearly universal ratification, does not directly address the protection of cultural heritage during armed conflict, but Article 6 imposes obligations of protection.

> 1. 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 co-operate.
> 2. The States Parties undertake, in accordance with the provisions of this Convention, to give their help in the identification, protection, conservation and presentation of the cultural and natural heritage . . . if the States on whose territory it is situated so request.
> 3. Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage . . . situated on the territory of other States Parties to this Convention.

However, these obligations are limited in nature and, more important, the "penalty" for a violation of these obligations is only the delisting of a site from the World Heritage List, essentially punishing only the cultural heritage site and not the perpetrator of the damage or destruction.

The more recent and more effective instruments have the smaller number of ratifications. This situation may change in the future. However, there has been ample opportunity to ratify some of these instruments, such as the Rome Statute, and some States seem reluctant to do so.

III. RECENT AND CURRENT CONFLICTS

The conflicts that resulted from the "Arab spring" uprisings, which began in Tunisia in the fall of 2010 but first attained significant effect on cultural heritage during the Egyptian revolution of January 2011,[61] have been disastrous for cultural heritage, as well as for the people of the region. Nonetheless, the effect of conflict on cultural heritage in the Middle East actually began with the U.S.-led invasion of Iraq in 2003. The looting of the Iraq Museum in Baghdad[62] and the looting and burning of other cultural repositories including the Iraqi archives[63] in April of 2003 received the most media attention. Of greater significance for cultural heritage than the looting of the Museum was the intensive looting of archaeological sites, particularly those of

---

[61] The damage to heritage in Egypt has consisted primarily of thefts from museums and historic structures, including mosques and the Malawi Museum in Minya; some damage done to museums and repositories as a result of riots and disturbances, especially in Cairo; destruction done to Coptic churches as part of sectarian violence, and large-scale looting at archaeological sites. *See*, *e.g.*, Monica Hanna, *What Has Happened to Egyptian Heritage after the 2011 Unfinished Revolution?*, 1:4 J. EASTERN MEDITERRANEAN ARCHAEOLOGY & HERITAGE STUDIES 371-75 (2013); Selima Ikram and Monica Hanna, *Looting and Land Grabbing: The Current Situation in Egypt*, 202 BULLETIN OF THE AMERICAN RESEARCH CENTER IN EGYPT 34 (2013); Sarah Parcak, David Gathings, Chase Childs, Greg Mumford & Eric Cline, *Satellite evidence of archaeological site looting in Egypt: 2002-2013*, 349 ANTIQUITY 188 (2016); Sarah Parcak, *Archaeological Looting in Egypt: A Geospatial View (Case Studies from Saqqara, Lisht, and el Hibeh)*, 78:3 NEAR EASTERN ARCHAEOLOGY 196 (2015). Two guards at the site of Deir el-Bersha, located in Middle Egypt, were killed while trying to fend off looters. "Second Sentry guard shot at incident at the Deir el-Bersha archaeological site has died," Art Crime Blog (Feb. 21, 2016), *available at* http://art-crime.blogspot.it/2016/02/second-sentry-guard-shot-at-incident-at.html.

The country that is likely at most risk today (other than Syria and Iraq) is Libya, which is embroiled in an intense civil war and growing presence of ISIL. *See*, *e.g.*, Susan Kane, *Archaeology and Cultural Heritage in Post-Revolution Libya*, 78:3 NEAR EASTERN ARCHAEOLOGY 204 (2015); Neil Brodie, *"Why is No One Talking about Libya's Cultural Destruction?"* 78:3 NEAR EASTERN ARCHAEOLOGY 212 (2015). The most recent Middle Eastern country to fall victim to armed conflict is Yemen where the civil war and, in particular, bombing raids carried out by Saudi forces have also destroyed archaeological sites and at least one museum. *See*, *e.g.*, Rick Gladstone, *Explosion Destroys Ancient Cultural Heritage Site in Yemen Capital*, N.Y. TIMES, (June 12, 2015), *available at* http://www.nytimes.com/2015/06/13/world/middleeast/yemen-sana-explosion-houthis-saudi-arabia.html?_r=0; Garry Shaw, *Yemen's historic sites damaged in airstrikes after ceasefire fails*, THE ART NEWSPAPER, (May 19, 2015), *available at* theartnewspaper.com/news/conservation/yemen-s-historic-sites-damaged-in-airstrikes-after-ceasefire-fails/; Lamya Khalidi, Yemeni Heritage, Saudi Vandalism, N.Y. TIMES, (June 26, 2015), *available at* http://www.nytimes.com/2015/06/27/opinion/yemeni-heritage-saudi-vandalism.html.

[62] MILBRY POLK & ANGELA M.H. SCHUSTER, THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD: THE LOST LEGACY OF ANCIENT MESOPOTAMIA (Harry N. Abrams, 1st Ed. 2005).

[63] Jeff Spur, *Indispensable yet Vulnerable: The Library in Dangerous Times A Report on the Status of Iraqi Academic libraries and a Survey of Efforts to Assist Them, with Historical Introduction*, Middle East Librarians Association Committee on Iraqi Libraries (July 20, 2005), *available at*: http://oi.uchicago.edu/OI/IRAQ/mela/indispensable.html.

the 3rd to 2nd millennia B.C.E. and those of the later Achaemenid and Parthian time periods.[64] The loss of the contextual information, as well as of many of the artifacts that were considered less desirable on the international market, produced a devastating effect on our knowledge and understanding of the past.

The looting of the Museum and of sites produced a number of unintended, and perhaps ironically mostly beneficial, consequences for international and domestic law concerning cultural heritage. These included: broad enactment of import and trade restrictions on cultural materials illegally removed from Iraq,[65] an increase in ratification and implementation of the 1954 Hague Convention, including final ratification by the United States in early 2009,[66] and an increase in ratification and implementation of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural

---

[64] For the effect of the 2003 Gulf War on the cultural heritage of Iraq in general, *see* Gerstenblith, *Bamiyan to Baghdad*, *supra* note 1, at 286-99; LAWRENCE ROTHFIELD, ET AL., ANTIQUITIES UNDER SIEGE: CULTURAL HERITAGE PROTECTION AFTER THE IRAQ WAR (AltaMira Press, 2008); PETER G. STONE & JOANNE FARCHAKH BAJJALY, THE DESTRUCTION OF CULTURAL HERITAGE IN IRAQ (Boydell Press, 2008); GEOFF EMBERLING & KATHARYN HANSON, CATASTROPHE! THE LOOTING AND DESTRUCTION OF IRAQ'S PAST (Oriental Institute of the University of Chicago, 2008). For the patterns of looting at sites in southern Iraq, *see* Elizabeth C. Stone, *Patterns of looting in southern Iraq*, 82 ANTIQUITY 125 (2008); *An Update on the Looting of Archaeological Sites in Iraq*, 78:3 NEAR EASTERN ARCHAEOLOGY 178 (2015). The destruction of cultural heritage in the wake of the 2003 Gulf War never stopped and its link to sectarian violence presaged the current conflict in Syria and Iraq. This is exemplified by the 2006 bombing of the Golden al-Askari Mosque in Samarra, located to the north of Baghdad and in an area dominated by Sunnis. However, the mosque is particularly holy to Twelver Shi'a Muslims, the largest branch of Shi'a Islam, as the burial place of the tenth and eleventh Imams and the traditional place of occultation of the twelfth Imam. Robert F. Worth, *Blast Destroys Shrine in Iraq, Setting Off Sectarian Fury*, N.Y. TIMES, Feb. 22, 2006, *available at* http://www.nytimes.com/2006/02/22/international/middleeast/22cnd-iraq.html?_r=0. Caused by predecessors to ISIL, the explosion is considered to have ignited sectarian violence and civil war. Michael Crowley, *How the Fate of One Holy Site Could Plunge Iraq Back into Civil War*, TIME, June 26, 2014, *available at* http://time.com/2920692/iraq-isis-samarra-al-askari-mosque/.

[65] United Nations Security Council Resolution 1483, passed on May 22, 2003, called for the lifting of the broad trade sanctions against Iraq that had been in place since 1990, when Iraq invaded Kuwait. However, it also states in paragraph 7 that the Security Council

> Decides that all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph.

The resolution was adopted under Chapter VII of the United Nations Charter and is therefore legally binding on all UN member States. These trade restrictions were enacted on a broad scale, particularly among Western market nations, including the United States.

[66] Twenty-one States ratified the 1954 Hague Convention following the 2003 Gulf War. For United States ratification, *see* 110TH Cong. 2d Sess. Exec. Rep. 110-26 (Sept. 16, 2008), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:er026.pdf.

Property.[67] Some of these efforts at ratification began before the 2003 invasion, particularly for the 1970 UNESCO Convention, but it is arguable that the sight of widespread looting provided an additional impetus.

This article will turn now to focus on two areas of conflict that raise particular questions for the enforcement of international law concerning cultural heritage. One case is Mali, which raises the question of non-state actors. The other is Syria, which addresses both the status of non-state actors and armed conflict not of an international character. While some of these legal principles are well-established in other aspects of international humanitarian law, their application to cultural heritage protection is not frequently considered.

A. Mali

In January 2012, the Islamist group Al-Qaeda in the Islamic Maghreb joined with Tuareg rebels in the northern part of Mali as part of a revolt against the government with the goal of establishing an independent country, Azawad, under the control of a militant group, Ansar al-Dine.[68] Several aspects of Sharia law were imposed on the local population, but of greatest relevance here was the attacks on the shrines and mausolea of Timbuktu. Perhaps one of the most consistent aspects of the destruction of religious sites in the "Arab spring" and other recent conflicts is attacks on Sufi shrines by Al-Qaeda-linked elements (in the case of Mali, Ansar Dine and Al-Qaeda in the Islamic Maghreb). These groups oppose Sufism, viewing its focus on saints and shrines as heretical. Sufi shrines have been damaged or destroyed in Mali, particularly in Timbuktu, and elsewhere in Egypt, Tunisia, and Libya as well as in Syria.[69]

Timbuktu, a World Heritage Site, was an important center of Islamic learning, especially during the 15th and 16th centuries with the University of Sankore, numerous schools, and three of its most important mosques, including the Sankore Mosque, the Djingareyber Mosque and the Sidi Yahia Mosque. As an important trade entrepot, Timbuktu was well situated to spread Islamic culture and learning and it was particularly famed for its significant collections of medieval and later Islamic manuscripts.[70]

---

[67] Twenty-nine States ratified the 1970 UNESCO Convention following the 2003 Gulf War, including some of the largest market countries, such as Switzerland, Germany, Belgium, and Austria.

[68] National Counter-Terrorism Center, Counter-Terrorism Guide, http://www.nctc.gov/site/groups/aqim.html.

[69] *See* David D. Kirkpatrick, *Libya Officials Seem Helpless as Sufi Shrines Are Vandalized*, N.Y. TIMES, (Aug. 29, 2012), at A5; *Islamist Militants in Mali Continue to Destroy Shrines*, N.Y. TIMES, (Jul. 2, 2012), at A6; *Islamist Militants in Mali Continue to Destroy Shrines*, N.Y. TIMES, (Jul. 2, 2012), at A6; Kiran Alvi, *Islamists Make Sufi Shrines A Target In North Africa*, National Public Radio, (Feb. 10, 2013), *available at*: http://www.npr.org/blogs/thetwo-way/2013/02/10/171508858/islamists-make-sufi-shrines-a-target-in-north-africa. For more general discussion of the underlying issues, *see* Emily O'Dell, *Slaying Saints and Torching Texts*, JADALIYYA, (Feb. 1, 2013), *available at*: http://www.jadaliyya.com/pages/index/9915/slaying-saints-and-torching-texts. Similarly, Coptic churches have been targeted in Egypt, and churches and monasteries in Syria and Iraq.

[70] World Heritage List, "Timbuktu," http://whc.unesco.org/en/list/119.

During the time when Timbuktu was under the control of Ansar Dine, many of the Sufi shrines were attacked and destroyed. In addition, it was reported that large caches of the manuscripts had been burned. When French and Malian forces liberated northern Mali in early 2013, smoldering piles of ash were found in some of the mosques and libraries. However, it turned out that most of the manuscripts were untouched and that a considerable number had been spirited out of Timbuktu to Bamako, the capitol of Mali, before the Ansar al-Dine forces took control.[71]

B. Syria

The most disastrous of the "Arab Spring" conflicts for cultural heritage is the ongoing conflict in Syria and the closely related destruction in northwestern Iraq, centered around the city of Mosul. The archaeological heritage of Syria spans from the earliest time periods, through the Bronze Age with the advent of major cities, such as Ebla and Mari, and trade routes from northern Mesopotamia into central Anatolia (modern Turkey). Significant architectural remains are found from the Hellenistic, Roman, Byzantine and Umayyad periods at such sites as Palmyra, Dura-Europos and the Umayyad period mosque complex in Aleppo. Historic structures of the Ottoman period remain and extensive collections of artifacts, manuscripts and sacred architecture, decorations and ritual implements of the Jewish, Christian and Islamic faiths were extant. Parts of Syria and northern Iraq have been home for centuries to different branches and minority sects of these three faiths, as well as smaller religious groups, such as the Yazidis, Druze and Zoroastrians.[72]

Destruction of cultural heritage in Syria has come in many different forms—the bombing of and fighting in urban centers, attacks on religious structures and archaeological remains as part of the ever-increasing sectarian violence, the use of archaeological sites as strategic vantage points or militarily useful locations, and the looting of sites and museums for objects to be sold on the international market to raise funds for a variety of purposes, including the purchase of arms and munitions. The Islamic State of Iraq and the Levant (ISIL) has focused on the destruction of shrines belonging to minority sects of Islam, as well as Christian and ancient structures, out of a stated desire to purify the region from what are considered to be heretical depictions and faith. In the first few years of the conflict, the most detailed documentation was made publicly available through a Facebook page, *Le patrimoine archéologique syrien en danger*,[73] maintained by a Syrian archaeologist living in

---

[71] Joshua Hammer, *The Race to Save Mali's Price-less Artifacts*, SMITHSONIAN MAG., (Jan. 2014), *available at* http://www.smithsonianmag.com/history/Race-Save-Mali-Artifacts-180947965/?no-ist; Kellie Morgan, "Saved from Islamists, Timbuktu's Manuscripts Face New Threat," CNN, (May 28, 2013), http://edition.cnn.com/2013/05/28/world/africa/timbuktu-manuscripts/index.html. The new threat to the manuscripts is posed by the humid climate of Bamako, which contrasts with the desert conditions of Timbuktu.

[72] A fuller discussion of the significance of the cultural heritage of Syria falls outside the scope of this article, *but see generally* PETER M.M.G. AKKERMANS AND GLENN M. SCHWARTZ, THE ARCHAEOLOGY OF SYRIA: FROM COMPLEX HUNTER-GATHERES TO EARLY URBAN SOCIETIES (C. 16,000-300 BC) (2004).

[73] *See* https://www.facebook.com/Archeologie.syrienne.

France, Cheikhmous Ali. General media sources now report incidents of bombing of sites and structures and looting. Several academic and research groups are using various forms of remote sensing and satellite imagery to document the ongoing destruction in Syria and northwestern Iraq.[74]

While the full extent of damage and destruction cannot be recounted here,[75] a few of the more disastrous effects are summarized. Among the sites suffering damage or destruction, the worst example is probably Aleppo, where the Ottoman souk (or bazaar) was largely destroyed by fire. In addition, the minaret of the Great Mosque of Aleppo was shelled and much of the historic core of the city has been destroyed or severely damaged in the ongoing fighting for control of the largest city in Syria.[76] The *New York Times* documented the looting of the site of Tell Mardikh, the ancient city of Ebla where large numbers of ancient texts from the second millennium have been excavated.[77] Portions of the Hellenistic and Roman site of Palmyra suffered damage. Refugees are inhabiting abandoned villages of the

---

[74] The first of these groups was the Safeguarding the Heritage of Syria and Iraq, a consortium of the Smithsonian, the University of Pennsylvania Cultural Heritage Center and the American Association for the Advancement of Science. Salam al Quntar, et al., *Responding to a Cultural Heritage Crisis: The Example of the Safeguarding the Heritage of Syria and Iraq Project*, 78:3 NEAR EASTERN ARCHAEOLOGY 154 (2015). It released two reports in the fall of 2014, the first of which documented the damage and destruction at the six World Heritage Sites located in Syria and the second of which documented damage and destruction at six of the Tentative World Heritage Sites in Syria. Susan Wolfinbarger et al., *Ancient History, Modern Destruction: Assessing the Status of Syria's World Heritage Sites Using High-Resolution Satellite Imagery* (2014), *available at* http://www.aaas.org/page/ancient-history-modern-destruction-assessing-current-status-syria-s-world-heritage-sites-using; Susan Wolfinbarger et al., *Ancient History, Modern Destruction: Assessing the Status of Syria's Tentative World Heritage Sites Using High-Resolution Satellite Imagery*, (2014), *available at* http://www.aaas.org/page/ancient-history-modern-destruction-assessing-status-syria-s-tentative-world-heritage-sites-7. The Cultural Heritage Initiative of the American Schools of Oriental Research releases weekly reports on the status of cultural heritage in Syria. Jesse Casana, *Satellite Imagery-Based Analysis of Archaeological Looting in Syria*, 78:3 NEAR EASTERN ARCHAEOLOGY 142 (2015). For an index of these reports, *see* http://www.asor-syrianheritage.org/index-weekly-reports/. Still other groups tracking cultural heritage destruction in Syria include Heritage for Peace, http://www.heritageforpeace.org/, and the EAMENA Project (Endangered Archaeology in the Middle East & North Africa), http://eamena.org/. Some twenty organizations that are engaged in various aspects of documenting and attempting to preserve Syria's cultural heritage participated in a summit sponsored by the Archaeological Institute of America and the American Schools of Oriental Research with funding from the National Endowment for the Humanities and National Geographic. *See* https://archaeological.org/events/20680. For a comprehensive review of responses to the current situation in the Middle East, *see* Salam Al Quntar and Brian I. Daniels, *Responses to the Destruction of Syrian Cultural Heritage: A Critical Review of Current Efforts*, INT'L J. ISLAMIC ARCHITECTURE (2016)(in press).

[75] A map prepared by the State Department depicting cultural heritage sites at risk and current as of April 2013 may be found at: https://hiu.state.gov/Products/Syria_CulturalSites_2013Apr11_HIU_U771.pdf. The Antiquities Coalition released its Map of Culture under Threat in early 2016, https://theantiquitiescoalition.org/culture-under-threat-map/. *See also* the reports cited in note 74 *supra*.

[76] Emma Cunliffe, Nibal Muhesen and Marina Lostal, *The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations*, 23 INT'L J. CULTURAL PROP. 1, 5-6, 8 (2016).

[77] C.J. Chivers, *Grave Robbers and War Steal Syria's History*, N.Y. TIMES, (Apr. 7, 2013), at A1. A video is *available at*: http://www.nytimes.com/2013/04/07/world/middleeast/syrian-war-devastates-ancient-sites.html?pagewanted=all.

Byzantine period, known as the "Dead Cities," and may be removing artifacts to sell on the international market. The medieval castle of Craq des Chevaliers, the best preserved castle of the European medieval design, was bombed by Assad forces between 2012 and 2014 after rebel factions took refuge there and then recaptured by Assad forces in early 2014.[78] In June 2013, UNESCO placed all six of Syria's World Heritage sites on its List of World Heritage in Danger.[79]

The situation became dramatically worse when the Islamic State of Iraq and the Levant (ISIL) swept through eastern Syria, with its "capital" in Raqqa, and captured Mosul, the second largest city in Iraq, located in northwestern Iraq, in the summer of 2014. Since that time, videos placed on YouTube have purported to show intentional destruction of artifacts stored and on display in the museum in Mosul, intentional destruction of the site of Nineveh, located in Mosul, and explosion and leveling of numerous religious sites, particularly Sufi and Shi'a shrines such as that of Nebi Yunus (the Prophet Jonah) in Mosul and Christian monasteries. In Syria, ISIL has intentionally detonated standing structures of the Roman period at Palmyra, including the Temple of Baalshamin and the Temple of Bel, as well as murdered members of the civilian population in nearby Tadmor and the long-time guardian of the site of Palmyra, Dr. Khaled al-Assad.[80]

As with the case of looting of sites in southern Iraq following the 2003 U.S.-led invasion, looting has been carried out in Syria on an industrial scale. Anecdotal reports reveal that ISIL takes a financial cut from the looting of these sites by charging a 20% tax on the looters[81] and takes an additional cut by taxing the smugglers who move the artifacts across the Syrian border. While wildly varying estimates have appeared in the media,[82] at this point in time, the question of how

---

[78] James Rush, *It was fought over repeatedly during the Crusades—now this amazingly preserved 900-year-old Syrian castle is being destroyed as war returns to its walls*, DAILY MAIL, (May 5, 2014), *available at* http://www.dailymail.co.uk/news/article-2620468/Revealed-Crusaders-castle-real-life-siege-Syrian-civil-war-badly-damaging-900-year-old-fortifications.html.

[79] The six sites are: ancient city of Damascus, site of Palmyra, ancient city of Bosra, ancient city of Aleppo, Crac des Chevaliers and Qal-at Salah el-Din, and the ancient villages of Northern Syria (the "Dead Cities"). *See* http://whc.unesco.org/en/news/1038/. For the list of World Heritage Sites in Danger, *see* http://whc.unesco.org/en/danger/.

[80] *See* ASOR Cultural Heritage Initiatives, Special Report: Update on the Situation in Palmyra (Sept. 3, 2015), *available at* http://www.asor-syrianheritage.org/special-report-update-on-the-situation-in-palmyra/. In late March 2016, with the assistance of Russian air power, the Assad regime recaptured Palmyra from ISIL. In a propaganda coup and despite the ongoing civil war, the St. Petersburg Marlinsky Theater performed a concert in the Roman amphitheater where not long before ISIL had carried out a mass execution of residents of the neighboring town of Tadmor. Ishaan Tharoor, *How ancient ruins are perfect propaganda in the Middle East*, WASH. POST (May 6, 2016), *available at* https://www.washingtonpost.com/news/worldviews/wp/2016/05/06/how-ancient-ruins-are-perfect-propaganda-in-the-middle-east/.

[81] This was first reported by Amr al-Azm, Salam al-Kuntar and Brian I. Daniels, *ISIS' Antiquities Sideline*, Op-Ed, N.Y. TIMES, (Sept. 2, 2014), http://www.nytimes.com/2014/09/03/opinion/isis-antiquities-sideline.html?_r=0. The exact amount of the tax apparently varies depending on circumstances and the types of artifacts discovered. It is clear from information gained through a raid carried out in May 2015, *see infra* notes 84-85 & accompanying text, that ISIL tightly controls and organizes the looting of sites and the smuggling of antiquities.

[82] For the most recent and extensive summary of what is known of ISIL's involvement in antiquities looting and trafficking, *see* Yaya J. Fanusie and Alexander Joffe, *Monumental Fight: Countering the Islamic State's Antiquities Trafficking*, Report of the Foundation for Defense of

much revenue ISIL is realizing from the trade in looted and stolen artifacts is an ultimately known "unknown." We can gain some sense of the extent of the looting, at least that which is being carried out at the major sites that have been documented through the various projects utilizing satellite imagery,[83] but no scholar or researcher has as yet studied the questions of the types of artifacts that are likely coming out of the looters' pits, the numbers of such artifacts, or the price at which these artifacts are being sold initially.

The few things that we do know is that ISIL is taking its cuts upfront, regardless of whether these objects are being sold directly onto the international market or are being warehoused in different parts of the world, including other parts of the Middle East, awaiting a time when the world's attention is less focused on undocumented artifacts coming from the Middle East. The only direct evidence of ISIL's revenue stream comes from a raid carried out by U.S. special forces on the compound of Abu Sayyaf, informally described as the chief financial officer of ISIL, in the spring of 2015. Information posted on the Department of State's website indicates the types of objects found in the compound, including coins, figurines and manuscripts.[84] Based on information obtained from this raid, U.S. government officials estimate that ISIL earned several million dollars during an approximate year from mid-2014 to mid-2015.[85]

The Abu Sayyaf raid also gave an important indication of ISIL's motive and method of operation with respect to antiquities. While ISIL garnered public attention and outrage at the intentional destruction of cultural sites, monasteries and Islamic shrines and publicized these widely through the Internet, ISIL has not "advertised" the looting of sites. Their stated reason for destroying sites of the pre-Islamic period, non-Islamic sites and structures, and Islamic structures that do not meet their orthodox beliefs is that these structures do not conform to and therefore pollute their version of Islam. However, found among Abu Sayyaf's records was an image of a pagan deity, something that surely should have offended religious precepts.[86] Objects found include what seems to be a Christian book,[87] which presumably should also have been offensive. However, because these objects were

---

Democracies (Nov. 2015), *available at* http://www.defenddemocracy.org/content/uploads/documents/Monumental_Fight.pdf. For an early discussion of unreliable media reporting on the extent of ISIL's revenue from antiquities looting and smuggling, *see* Danti's Inference: The Known Unknowns of ISIS and Antiquities Looting, Chasing Aphrodite Blog, (Nov. 18, 2014), *available at* http://chasingaphrodite.com/2014/11/18/dantis-inference-the-known-unknowns-of-isis-and-antiquities-looting/.

[83] *See supra* note 74.

[84] *See ISIL Leader's Loot*, U.S. Department of State, Bureau of Educational and Cultural Affairs, http://eca.state.gov/cultural-heritage-center/iraq-cultural-heritage-initiative/isil-leaders-loot.

[85] Receipts found on Abu Sayyaf's hard drive indicate a tally of $265,000 as being realized from the sale of antiquities. However, it is not known over how long a period of time these profits were gained or over how large a territory. Remarks of Andrew Keller, Deputy Assistant Secretary Bureau of Economic Affairs, U.S. Department of State, Sept. 29, 2015, *available at* http://eca.state.gov/video/conflict-antiquities-panel-1-video/transcript.

[86] *Supra* note 84.

[87] *Id.* Other objects found include a large number of ancient coins of different time periods, ceramics and a Neo-Assyrian ivory plaque. Some of these objects had Iraq Museum numbers. It is not known whether ISIL looted these from the Mosul Museum, where they had perhaps been sent at some time in the past, or whether they came from the initial looting of the Iraq Museum in 2003 and had been warehoused somewhere in Iraq or Syria that subsequently came under ISIL control.

likely thought to have market value, then apparently they were not destroyed. From this we can see that ISIL destroys on a large and public stage immovable structures, such as temples and shrines, and objects either too large to move or too well known to sell on the international market. However, away from public view, it orchestrates the looting of non-Islamic materials, preserves them, and sells them or taxes their sale for profit.

IV. APPLYING INTERNATIONAL LAW

As with many examples of armed conflict, the human cost in deaths, injuries and displacement cannot be measured and the destruction of cultural heritage may seem to be of secondary importance. Yet, we can observe that both types of destruction are present in tandem and that the Syrian conflict presents us with the most widespread destruction of cultural heritage, both intentional and collateral, since the Balkan Wars of the 1990s. The link between people and cultural heritage is particularly apparent in the intentional destruction of religious and ancient sites that are located within communities and that have been places of religious veneration, as well as economic livelihood, for decades and centuries. ISIL's intentional and very public destructions are serving a multiplicity of purposes, ranging from furtherance of religious ideology, to terrorizing of the local populations, and to creating a performance of destruction played out as a means of attracting fighters from different parts of the world and displaying the impotence of the West, which has claimed this heritage as part of its own as the heritage of "all [hu]mankind." However, as also with the case of the Balkan Wars, the available international legal instruments that are intended to protect cultural heritage during armed conflict leave open questions of applicability and effectiveness.

A. Non-State Actors and Conflicts Not of an International Character

One question raised by the current conflict in Syria is the extent to which the 1954 Hague Convention applies to internal conflicts. Article 18 states the Convention's applicability to formal, declared war, while Article 19 applies to armed conflict "not of an international character."[88] The Second Protocol to the 1954 Hague Convention specifies that it does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."[89] The challenge that this poses is determining when a situation of internal disturbance, in which the 1954 Hague Convention and its protocols do not

[88] Article 18 states that the Convention "shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . ." Article 19 provides that "In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions" of the Convention.

[89] Second Protocol, Art. 22(2). This definition tracks the exclusion found in Additional Protocol II to the 1949 Geneva Conventions, Article 1, Paragraph 2. *See* CHAMBERLAIN, *supra* note 1, at 52 n.7.

apply, evolves into a conflict not of an international character,[90] in which the Convention does apply, such as occurred with the current conflict in Syria.[91] Thus, while the law of armed conflict has expanded to apply to non-international as well as inter-state conflicts to alleviate suffering caused in both situations,[92] the prerequisite of armed conflict remains before international humanitarian legal principles become relevant.[93] The definitional test is therefore one of "armed conflict."

---

[90] Armed conflicts not of an international character are defined in Article 1 of Additional Protocol II to the 1949 Geneva Conventions as conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations . . . ." Article 1 of Additional Protocol I expands the definition of international conflicts to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . . ." Kevin Chamberlain commented on Articles 18 and 19 of the Hague Convention: "purely internal conflicts not involving the intervention of an outside power would not fall within the scope of Article 18 but would, provided they achieved the right level of intensity, fall under Article 19." CHAMBERLAIN, *supra* note 1, at 50-51. Chamberlain raises the question of whether the expansion of the definition of international conflicts in Article 1, paragraph 4 of Additional Protocol I to the Geneva Conventions to include wars of national liberation would apply to Article 18 of the 1954 Hague Convention. *Id.* at 51. However, it is not necessary to resolve this because whether a conflict falls under Article 18 or Article 19 of the Hague Convention does not affect the applicability of the Convention's substantive provisions. The conflict in Syria would, at this point, fit either the definition of international conflict or the definition of conflict not of an international character and the provisions concerning respect for cultural property apply under either Article 18 or Article 19. Finally, Chamberlain points out that peacekeeping forces operating under the auspices of the United Nations are also obligated to abide by the Convention. *Id.*

[91] The conflict in Syria may be viewed as having evolved through three stages. It began with riots and other internal disturbances in March 2011. As will be discussed here, it evolved into a non-international armed conflict over the following 15 months. At this time, it may be viewed as an international conflict with several state actors (the Syrian Arab Republic government, the United States and Russia) overtly involved and several non-state actors (ISIL, Hezbollah, the Kurdish Peoples Protection Units (or YPG), the Free Syrian Army and its various affiliates and subgroups, and al-Nusra Front) also involved. Some of the non-state actors are aligned with various of the state actors. Some elements of other states also seem to be involved, such as Iranian military members operating in tandem with or as part of the Syrian military, and other Arab countries are involved as part of a coalition with the United States and intermittently other European countries. As such, at this point, it would now qualify as an international armed conflict. *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment in the Appeals Chamber, at 35-51 (Int'l Cr. Trib. for the Former Yugoslavia, 15 July 1999), *available at* http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (discussing the criteria for determining whether "armed forces fighting against the central authorities *of the same State* in which they live and operate may be deemed to act on behalf of another State").

[92] Bassiouni points out that different international humanitarian legal consequences flow from the different characterizations, including the question of whether the crime of genocide and crimes against humanity can be committed by non-state actors. M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 712 (2008)..

[93] Laurie R. Blank and Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law and the Pragmatics of Conflict Recognition*, 46 VANDERBILT J. TRANSNAT'L L. 693, 695 (2013). While international humanitarian law applies to situations of armed conflict, in the absence of armed conflict, human rights law applies, which, in the view of the authors, is not well-equipped to deal with situations of massive use of military force, particularly in terms of accountability for war crimes. *Id*. at 699-700.

The expansion of international law to apply to internal armed conflict, which was arguably an infringement on national sovereignty, was introduced in Common Article 3 of the 1949 Geneva Conventions with the intention of having the law "apply as broadly as possible to conflicts occurring between states and non-state entities in order to maximize its effectiveness and reach."[94] In 1994, the ICTY offered a comprehensive definition of armed conflict as "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[95] Two elements for defining armed conflict were identified based on the ICTY's statement—intensity of the fighting and organization of the parties—but this test arguably became overly technical by requiring that both elements be independently satisfied, rather than being viewed as factors within an overall assessment.[96] In turn, this led to unnecessary delay in recognition that the rebellion in Syria, which began in March 2011, had risen to the level of "armed conflict," thus triggering the humanitarian protections of the law of armed conflict. It was only in July 2012 that the International Committee of the Red Cross concluded that it viewed the situation in Syria as constituting a non-international armed conflict.[97]

However, even once the conclusion that a conflict qualifies as a non-international armed conflict is reached, this does not end the analysis as not all the same principles of cultural property protection apply as in a situation of inter-state conflict. Article 19(1) of the 1954 Hague Convention states "each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property." One of the important elements to note is the use of "party" with a lowercase "p" and without the word "State." Thus, this provision applies to all the parties to a non-international conflict and not merely to the State Party (or High Contracting Party, in the terminology of the 1954 Convention) that has ratified the Convention.

This therefore answers another question closely related to that of non-international armed conflict—whether the 1954 Convention's provisions apply to non-state actors,[98] such as the rebels in Syria (including the Free Syrian Army in

---

[94] *Id*. at 698.

[95] *Id*. (quoting Prosecutor v. Tadic, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, P 70 (Int'l Cr. Trib. for the Former Yugoslavia Oct. 2, 1995).

[96] *Id*. The Commentary to Common Article 3 to the 1949 Geneva Conventions enumerates several factors to be considered in determining whether a genuine armed conflict exists rather than an unorganized and short-lived insurrection. COMMENTARIES ON THE 1949 GENEVA CONVENTIONS, Art. 3, Chapter 1, General Provisions (1949), at 49-50, *available at* http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=BAA341028EBFF1E8C12563CD00519E66. Blank and Corn suggest that overwhelming satisfaction of the intensity of the conflict prong could satisfy the test of armed conflict, even if the level of organization of the opposition is relatively weak, *supra* note 93, at 741-42. The situation in Mali, which presented both an internal rebellion (initiated by the Tuaregs) and invasion from external, but non-state, forces (al-Qaeda in the Maghreb), would also seem to qualify as a non-international armed conflict. Ultimately, French forces entered the conflict, although on the side of the Malian army.

[97] Stephanie Nebehay, Exclusive: Red Cross Ruling Raises Questions of Syrian War Crimes, Reuters, (July 15, 2012), *available at*: http://www.reuters.com/article/2012/07/14/us-syria-crisis-icrc-idUSBRE86D09H20120714; *see* Blank and Corn, *supra* note 93, at 725-30, for a description of the escalation of the conflict in Syria between March 2011 and July 2012.

[98] Conflicts involving non-state actors, almost by definition, involve asymmetrical warfare leading non-state actors to engage in unacceptable means of warfare with little or no expectation

Syria); ISIL, operating in both Syria and Iraq; or the al-Qaeda forces in Mali. Non-state actors are often excluded from international humanitarian law and are viewed as common criminals under the domestic law of the States within which they operate. As Bassiouni describes, "non-state actors fight 'in a twilight zone between lawful combatancy and common criminality.'"[99]

Perhaps it is necessary to coin a term such as "quasi-state actors" to denote groups that operate with a command structure and with control over territory, so that the conflict meets the requirements of armed conflict, and simultaneously acknowledges that they are not part of recognized States. Thus, even though these groups are not States and have not ratified or are not part of a government that has ratified these international conventions, the 1954 Convention should still be considered as binding on such groups. Any group, whether the de jure government or not, would have responsibility for fulfilling international obligations within the territory over which it exercises control.[100] Furthermore, all actors are bound by customary international law,[101] non-state actors equally as States that have formally ratified the Convention. This approach is even more relevant in a situation such as that in Syria, which is a State Party, where the various non-state actors wish to become the leaders of that state or to establish a new state.

Another distinction between international and non-international armed conflicts is that Article 19(1) requires that parties to the conflict only demonstrate "respect" for cultural property while not requiring adherence to the provisions for safeguarding cultural property, found in Article 3. Safeguarding refers to preparing during time of peace to protect cultural property from the foreseeable effects of armed conflict. It makes sense to exclude this requirement from non-international armed conflict because the State Party government will have (presumably) complied with this requirement during peacetime, before there was the presence or awareness of an armed conflict.

On the other hand, all parties to the non-international armed conflict need to follow the requirements of respecting cultural property, which are embodied in

---

that they will ultimately be held accountable. Bassiouni, *supra* note 92, at 713-15. Bassiouni categorizes different types of non-state actors and points out that the more organized a group is with a command structure, the more it should be held accountable under international humanitarian law. *Id*. at 715-17 and note 11.

[99] Bassiouni, *supra* note 92, at 725.

[100] CHAMBERLAIN, *supra* note 1, at 53-54. Chamberlain relies on the Commentaries to common Article 3 of the 1949 Geneva Conventions:

> The words "each Party" mark the great progress which the passage of a few years had brought about in international law. Until recently it would have been considered impossible in law for an international Convention to bind a non-signatory Party, a Party, moreover, which was not yet in existence and which need not even represent a legal entity capable of undertaking international obligations . . . . [W]hat justification is there for the obligation on the adverse Party in revolt against the established authority? At the Diplomatic Conference doubt was expressed as to whether insurgents could be legally bound by a Convention, which they had not themselves signed. But if the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country.

See CHAMBERLAIN, *supra* note 1, at 53 (quoting the ICRC Commentary on Common Article 3).

[101] *See supra* notes 54-55 & accompanying text. This would incorporate any provisions of the First and Second Protocols that have become a part of customary international law.

Article 4 of the main Convention and which apply during armed conflict. As Kevin Chamberlain points out, it is logical to apply certain provisions of the Convention only during peacetime. However, with the goal of giving cultural property the widest protection possible, many provisions beyond those contained in Article 4 would apply equally in non-international conflicts. These include the marking of cultural property with the Blue Shield (Articles 6, 16-17), special treatment for those properties recognized as under special protection (Articles 9-11), military regulations to ensure protection of cultural properties (Article 7), maintenance of specialists within the military who will ensure respect for cultural property (Article 7), and provisions for protection of transports and personnel involved in cultural property protection (Articles 13-15).[102]

B. Military Necessity and Military Objects

Despite the applicability of international legal instruments to conflicts not of an international character, thus subjecting the various actors in the Middle East to the existing international instruments, an inability to actually protect or to effectively punish and thereby deter future destruction of cultural heritage prevails. Two reasons for this incapacity are discussed here: one, the prevalence of the military necessity waiver, accompanied in many legal instruments by a requirement of intentionality and, second, the limits of jurisdiction based on ratification and implementation of particular instruments. While the latter has been previously discussed,[103] the former will be considered here in some detail.

1. Origins of Military Necessity

International instruments that protect cultural heritage limit that protection when the damage or destruction is necessitated by military exigencies or when the cultural site has become a legitimate military target.[104] This limit is generally referred to as the "military necessity exception" but, however it is formulated, underlying it is the basic concept that the obligation to protect cultural heritage is not absolute. Rather, the obligation is judged by the necessities of war and imposes an obligation to protect only to the extent possible within the parameters of the purpose of the armed conflict.[105] This concept was incorporated into the law of armed

---

[102] CHAMBERLAIN, *supra* note 1, at 54.

[103] *See supra* notes 57-60 & accompanying text.

[104] *See*, *e.g.*, the Regulations for the 1907 Hague Convention, Article 27 ("all necessary steps must be taken to spare, *as far as possible*, buildings dedicated to religion, art, science, or charitable purposes, historic monuments . . .") (italics added); Rome Statute, Article 8 ("intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes [and] historic monuments . . . *provided they are not military objectives*.") (italics added). The Roerich Pact does not contain an express exception or limitation due to military necessity but protection is lost if the cultural site is used for military purposes (Art. 5). For discussion of the military necessity doctrine generally, *see* Forrest, *supra* note 27.

[105] These questions touch on the debate concerning the 19th century Germany military view in which *Kriegsraison* prevailed over *Kriegsmanier*—that is, military necessity was viewed as a justification for a conflict, rather than as a limitation on the way in which the conflict was

conflict, to a considerable extent, based on Lieber's view that the legitimacy of an act would be measured "by reference to its intended object."[106]

The primary animating principle of the Lieber Code was that of necessity. Thus, property could be appropriated and taxed when necessary for the war effort, although private property was otherwise to be protected. Cultural objects that could be removed without harm could be taken by a conqueror, although the peace treaty that concluded the conflict would later determine "ultimate ownership."[107] Underlying this was the insistence that "'useless destruction' be prohibited, and that all destruction and appropriation be in the service of the nation and its war effort" and similarly neither officers nor soldiers were to benefit personally from any property that was confiscated.[108] As Witt characterized it, "necessity was both a broad limit on war's violence and a robust license to destroy."[109] Lieber wrote, "'[m]ilitary necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.'"[110]

The term "indispensable" for securing the ends of the war is open to interpretation. On the one hand, it could mean having no other choice, but, according to Witt, this is not what Lieber intended. Nor did he intend to prohibit acts for which there were less destructive alternatives.[111] While a few specific acts,

---

conducted; if the purpose of the conflict was legitimate, then any method that would help accomplish the goal of the conflict was also legitimate. Kevin Riordan, *Protecting Fundamental Human Rights in Times of War—The Means and Methods of Warfare*, HUMAN RIGHTS RESEARCH J. 9 (2005), *available at* http://www.victoria.ac.nz/law/centres/nzcpl/publications/human-rights-research-journal/publications/vol-3/Riordan.pdf; Forrest, *supra* note 27, at 186. As Toman points out, that view was ultimately rejected because it is "destructive of the entire body of the law of war." TOMAN, *supra* note 1 , at 73. Toman refers to Article 22 of the 1907 Hague Regulations, which provides that belligerents "do not have an unlimited choice as to the means that they may deploy in order to harm the enemy" and thus concludes that there is no general principle of military necessity, but rather the exception must be explicitly stated in the relevant legal instrument. *Id*.

[106] WITT, *supra* note 4, at 182. The essence of the rules of warfare that Lieber proposed was whether "the destruction [was] 'greater than necessary'" *Id*. at 183. Inflicting cruelty or loss for their own sake was unnecessary and therefore was not permitted. *Id*. The Swiss jurist Vattel had developed a series of strict rules to regulate warfare, regardless of the legitimacy of the aims of the combatants. Lieber, on the other hand, was influenced by the beliefs of Carl von Clausewitz who largely rejected the notion that rules should limit the conduct of warfare. Lieber thus took a somewhat intermediary position on the question of the extent to which war should be constrained by humanitarian principles and argued that almost any method of warfare was permissible (with a few exceptions such as torture) so long as its purpose was to prevail and even to shorten the time of conflict, which is itself a humanitarian goal. *Id*. at 177-86.

[107] *Id*. at 233-34. Witt seems to imply that Lieber was following Napoleon's precedent by permitting the removal of cultural objects.

[108] *Id*. at 234.

[109] *Id*.

[110] WITT, *supra* note 4, at 235 (quoting Article 14 of the Code); *see also* Forrest, *supra* note 27, at 184 (describing one of the Code's "lasting legacies" as "the emergence of the humanitarian law principle that the conduct of war is subject to the concept of military necessity").

[111] WITT, *supra* note 4, at 235. Witt points out that humanitarian lawyers have tried to interpret necessity as "a least-destructive-means requirement." However, Lieber would have arguably rejected this because such an approach would likely prolong a war and it would reduce human suffering more to end a war quickly, even though this was accomplished through sharper means. *Id*. Sherman followed this approach in his March to the Sea in which he undertook

such as torture and the use of poison, were forbidden under all circumstances, Lieber's approach permitted a broad range of military actions so long as these were viewed as furthering the goal of military victory. Yet, even within the Code itself, the protection granted to "[c]lassical works of art, libraries, scientific collections, or precious instruments" seems broader in that they "must be secured against all avoidable injury, *even when* they are contained in fortified places whilst besieged or bombarded."[112] Thus, while the scope of what is covered is narrow in comparison to what we think of as cultural heritage today, the protection is relatively strong even if the cultural objects are located in a legitimate military target. Further, and perhaps of significance for future developments particularly with respect to cultural heritage, Lieber also propounded that "military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult."[113]

The two other legal instruments created before World War II also granted relatively strong protection for cultural heritage. The 1907 Hague Regulations in Article 27 stated that "[i]n sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, . . . provided they are not being used at the time for military purposes." Thus the waiver applies only when the protected site is being used for military purposes, although there is a general exception encompassed within the phrase "as far as possible." While this would make the site a legitimate target, it is an objective standard as to whether the site is being used at that moment for military purposes. The standard "as far as possible" seems to follow the definition of necessity as "having no other choice." In contrast, Article 56 of the 1907 Hague Regulations, which prohibits appropriation, seizure, destruction and intentional damage, contains no necessity limitation. The Roerich Pact goes a step further in containing no exception at all for military necessary.[114] However, this protection is lost if the monuments and institutions are used for military purposes.[115]

2. Military Necessity in The 1954 Hague Convention and Its Progeny

As previously discussed, the 1954 Hague Convention contains its primary military necessity exception provision in Article 4(2). This allows derogation from both the obligation to refrain from targeting cultural property and the obligation to avoid the use of cultural property in such a way that is likely to expose it to damage during armed conflict found in Article 4(1) on the grounds of imperative military

---

virtually widespread and indiscriminate destruction of property to attack the morale of the southern population and "to destroy the population's willingness to fight." *Id*. at 277.

[112] Lieber Code Art. 35 (italics added).

[113] WITT, *supra* note 4, at 236-37 (quoting Article 16 of the Code).

[114] Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), Washington, 15 April 1935, *available at* http://wcjp.unicri.it/db_legislation/international/docs/Treaty%20on%20the%20Protection%20of%20Artistic%20and%20Scientific%20Institutions%20and%20Historic%20Monuments_1935.pdf. Article 1 states, in part: "The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents." Although the Parties to the Roerich Pact are located in the Americas and, as such, it has limited effect, it is the first international agreement to address exclusively cultural heritage.

[115] *Id*. Art. 5.

necessity.[116] However, the exception does not extend to the provisions that prohibit theft, pillage, vandalism, misappropriation and requisitioning of cultural property; these obligations are absolute.[117] Article 4(5) provides that the protections of the Convention are not lost if a State Party fails to protect the cultural property according to other provisions of the Convention.[118]

The question arises as to how the phrase and degree of necessity should be interpreted. The UNESCO Draft of the Convention attempted to elucidate this by quoting General Eisenhower's instructions:

> Nothing can stand against the argument of military necessity. This is an accepted principle. The phrase 'military necessity' is sometimes used where it would be more truthful to speak of military convenience or even of personal convenience. I do not want it to cloak slackness or indifference.[119]

The States participating in the Conference disagreed as to whether any military necessity exception should be included, in large part because of its lack of clarity and the possibility that it would create the opportunity for destruction of cultural property on relatively weak grounds.[120] In the end, the exception was included both as a matter of practicality and in order to attract more ratifying States, especially among the major military powers. The term "imperative" is included here, which

---

[116] 1954 Hague Convention, Article 5, referring to the obligations of an occupying power to preserve cultural property in occupied territory, is qualified by the phrase "as far as possible." Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 5, May 14, 1954, *available at* http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-hague-convention/text-of-the-convention-and-its-1st-protocol/. Article 8(1)(b) also has a military necessity exception for cultural property under special protection, which provides that the special protection is lost if the property is used for military purposes. *Id*. art. 8(1)(b) So long as property under special protection is not used for a military purpose and the State Party undertakes not to make use of any important military objective located near the property, such property is entitled to special protection. *Id*. art. 9. Otherwise, immunity of property under special protection may be withdrawn only in "exceptional cases of unavoidable military necessity, and only for such time as that necessity continues." *Id*. art. 11(2). However, the system of special protection has been applied to only very few properties and is now largely defunct, having been replaced by the system of enhanced protection created by the Second Protocol.

[117] This division between the obligations that are subject to the military necessity exception and those that are not reflects the provisions in Articles 27 and 56 of the 1907 Hague Regulations.

[118] TOMAN, *supra* note 35, at 93-94 (discussing the proposal of the UNESCO Legal Adviser to add a second basis for derogation from the obligation to respect). This may be viewed as an advance over the earlier Hague Conventions in which such protection is lost if the property is used for a military purpose, regardless of the presence of military necessity.

[119] Order of the Day of 24 December 1943, quoted by TOMAN, *supra* note 1, at 74. In his Order of the Day of 26 May 1944, General Eisenhower repeated that it was the duty of every commander to spare "in so far as compatible with the supreme necessity of sparing the lives of combatants" the cultural heritage of the European countries.

[120] TOMAN, *supra* note 1, at 75-79. Forrest views that the inclusion of an express military necessity exception "ensure[s] that military concerns have taken a privileged position in relation to humanitarian concerns . . . . [H]umanitarian law has acted to legitimize certain conduct, and serves to promote such conduct." The treatment of cultural property exemplifies this approach. Forrest, *supra* note 27, at 196.

seems to indicate a high threshold of necessity. However, the Convention offers no further guidance as to how the exception should be applied.

The Second Protocol[121] makes significant changes to the concept of military necessity and clarifies some of the questions that were left open in the main Convention. The definition of military necessity in the context of targeting of cultural sites changed from a static to a dynamic one, focusing on whether the property has become a military objective, based on the use or function to which the property is put.[122] Imperative military necessity would apply only when the cultural property has been made into a military objective and "there is no feasible alternative available to obtain a similar military advantage."[123] The use of cultural property for purposes that are likely to expose it to harm or destruction is excused "when and for as long as no choice is possible between such use . . . and another feasible method for obtaining a similar military advantage."[124]

The extent of applicability of Article 6 of the Second Protocol is unclear. Technically, it applies only to ratifying States. However, Toman describes Article 6 as "only the explanatory complement" to Article 4(2) of the main Convention.[125] He also comments that "[p]ractically speaking, Article 6 will undoubtedly exert an influence on the interpretation of Article 4 of the Convention."[126] This also opens the question of the extent to which Article 6 of the Second Protocol has been or may become incorporated into customary international law.

Article 7 introduces several additional concepts. The most significant of these is proportionality in that a Party must "refrain from deciding to launch any attack which may be expected to cause incidental damage . . . which would be excessive in relation to the concrete and direct military advantage anticipated."[127] State Parties

---

[121] For discussion of the background and process by which the military necessity provisions of the Second Protocol were formulated, *see* TOMAN, *supra* note 35, at 96-120. The Second Protocol is discussed only briefly here because Jordan is the only State in the immediate region of Syria that has ratified it. Syria signed but did not ratify it. Some States that are involved in the conflict, although it is unclear to what extent, such as Iran and Saudi Arabia, have ratified it. None of the larger military powers that are involved in the conflict, including the United States, Turkey and Russia, has ratified it.

[122] This shift to military objective, rather than military necessity, reflects changes in international humanitarian law recognized in Protocol I to the 1949 Geneva Conventions. At the Conference concerning the 1954 Hague Convention Second Protocol, several States, including the United States, that have not ratified the Geneva Convention Protocols confirmed that this understanding is a part of customary international law. TOMAN, *supra* note 35, at 111 (quoting the ICRC delegate).

[123] Second Protocol, Article 6(a). Forrest is critical of the drafting of Article 6 in that this provision reduces the standard from one of "necessity" to one of "advantage." Forrest, *supra* note 27, at 211-12.

[124] Second Protocol, Article 6(b). Other provisions of Article 6 require that the decision to invoke military necessity shall be taken only by the commander of a force the size of a battalion or larger, unless circumstances do not allow, and advance warning of an attack should be given when possible. A higher standard of military necessity applies in cases of cultural property under enhanced protection.

[125] TOMAN, *supra* note 35, at 96.

[126] *Id.* at 97.

[127] Second Protocol, Art. 7(c). Article 7 of the Second Protocol tracks closely Article 57 of Additional Protocol I to the 1949 Geneva Conventions (applying to civilian populations and civilian objects). *See* TOMAN, *supra* note 35, at 125-27.

also have an obligation to minimize incidental damage[128] and to take other precautions to avoid accidental targeting of cultural sites.[129] The Second Protocol also establishes a category of cultural property that is eligible for enhanced protection.[130]

3. The Balkan Conflict

In two examples during the Balkan conflict, military leaders were indicted for a variety of war crimes and crimes against humanity, which were based, in part, on damage to or destruction of cultural heritage that did not consist of religious sites, such as mosques and churches. The best-known example is the shelling of the city of Dubrovnik, which had been recognized as a World Heritage Site in 1979, and for which no defense based on military necessity was considered plausible.[131] The more interesting case is raised by the destruction of the Old Bridge ("Stari Most") at Mostar in Bosnia-Hercegovina.[132] Mimar Hayruddin, a student of the preeminent

---

[128] Second Protocol,. Art. 7(b).

[129] *Id*. Art. 7(a).

[130] *Id*. Art. 13-14. Articles 13 and 14 set out the circumstances in which enhanced protection may be withdrawn or cancelled. The system of enhanced protection is inspired by or based on the World Heritage List established under the 1972 UNESCO Convention on the World Cultural and Natural Heritage. It has been suggested that any site on the World Heritage List should automatically qualify for the enhanced protection offered by the Second Protocol. However, there are differences in that repositories of cultural objects, such as museums, libraries and archives, will not qualify as World Heritage sites (unless the structure housing the collection is itself of great historic value). On the other hand, natural sites would not qualify for protection under the Second Protocol. Nonetheless, significant overlap should be expected. At this time, only ten sites located in five countries (Azerbaijan, Belgium, Cyprus, Italy and Lithuania) have achieved enhanced protection. *See* http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/protection-of-cultural-property/. In contrast, at this time, there are 1031 sites inscribed on the World Heritage List (of which 197 are natural sites), *see* http://whc.unesco.org/en/list/, and 1641 sites on the List of Tentative World Heritage Sites, *see* http://whc.unesco.org/en/tentativelists/.

[131] Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Annex, 67-68, Paras 285-294, S/1994/674 (May 24, 1994), *available at* http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf (concluding that the shelling of Dubrovnik "did not in any way contribute to the military action and could in not in any way be considered necessary in terms of the military objectives pursued"); Destruction of Cultural Property Report, Final Report of the United Nations Commission of Exports established pursuant to security council resolution 780 (1992), Annex XI, S/1994/674/Add.2 (Vol. V) (28 Dec. 1994), *available at* http://www.phdn.org/archives/www.ess.uwe.ac.uk/comexpert/ANX/XI.htm. Prosecutor v. Strugar, Case No. IT-01-42-T (31 Jan. 2005). Charges were based on damage to the Dubrovnik historic center in the prosecution of three defendants. ICTY United Nations Press Release, The Hague, 23 October 2003, CT/P.I.S./793e. Pavle Strugar and two other Serbian commanders, Vladimir Kovačević and Miodrag Jokić, were indicted and found guilty or pled to the charge. Case Information Sheet, "Dubrovnik" Pavle Strugar, *available at* http://www.icty.org/x/cases/strugar/cis/en/cis_strugar_en.pdf. The defendants attempted to justify or excuse the shelling of the Old City on various grounds, but the court found that the cause of the damage was "extensive, deliberate and indiscriminate shelling." *Id*. at 5. This seems to be one of the few examples of damage to cultural heritage that was determined to be deliberate and not involving a military necessity defense.

[132] Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Annex, 68, Paras 295-297, S/1994/674 (May 24, 1994), *available at* http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf (concluding, in

Ottoman architect (Mimar) Sinan, designed the Bridge, and it was completed in 1566. It spanned the Neretva River and was viewed as a link among the ethnically and religiously diverse neighborhoods of Mostar before the outbreak of the Balkan conflict. During the fighting in Mostar in 1992-1993, religious structures belonging to all three faiths (Serbian Orthodox, Catholic and Islamic) were destroyed. Croatian forces were responsible for the destruction of the Bridge in late 1993. Six of the Croatian commanders were indicted for a series of crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws or customs of war, including murder, rape, inhuman treatment, and persecution.

Also included was a charge of destruction or willful damage to institutions dedicated to religion or education (Count 21).[133] The definition of Count 21 relied on both Article 52 of Additional Protocol I, which protects civilian property, and Article 53 of Additional Protocol I, which prohibits "any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples."[134] In Mostar, this included the destruction of numerous mosques and other religious properties, as well as the destruction of the Old Bridge.

The shelling of the Bridge raised interesting questions concerning military necessity because the Bridge served a vital role in support of the Bosnian Muslim forces, providing a crossing of the river and a means of bringing supplies and transporting troops.[135] The Chamber made a specific finding that the Bridge was a military target at the time of the attack but that its destruction also served to isolate the Muslim civilian population on the right bank of the river, thus exacerbating the

---

contrast to the decision of the Tribunal, that the Mostar Bridge was "devoid of any military significance"); Destruction of Cultural Property Report, Final Report of the United Nations Commission of Exports established pursuant to security council resolution 780 (1992), Annex XI, S/1994/674/Add.2 (Vol. V) (Dec. 28, 1994), *available at* http://www.phdn.org/archives/www.ess.uwe.ac.uk/comexpert/ANX/XI.htm. Prosecutor v. Prlic et al., Judgment, 29 May 2013, Vol. II, *available at* http://www.icty.org/x/cases/prlic/tjug/en/130529-2.pdf, at 347, ¶ 1282 (describing the exceptional character of the Bridge and noting its significance as one of the major symbols of the Balkan region, with particular value to the Muslim community).

[133] Prosecutor v. Prlic, Stojic, Praljak, Petkovic, Coric and Pusic, IT-04-74-T, Indictment, Count 21, March 2004, ¶ 116, *available at* http://www.icty.org/x/cases/prlic/ind/en/prl-ii040304e.htm; Second Amended Complaint, 11 June 2008, Count 21, *see, e.g.*, ¶ 17.3(k), ¶ 60, ¶ 72, ¶¶ 97 and 116 (describing the destruction of several mosques in Mostar and the Old Bridge in ¶ 116), *available at* http://www.icty.org/x/cases/prlic/ind/en/080611.pdf.

[134] Prosecutor v. Prlic et al., Judgment, 29 May 2013, Vol. I, *available at* http://www.icty.org/x/cases/prlic/tjug/en/130529-1.pdf, at 58-59, ¶¶ 172-73. The Chamber suggested that the protection of Article 52 is broader because it prohibits acts that are intended to cause serious damage, regardless of whether the damage is actually caused. In addition, the protections of Article 53 of Additional Protocol I are stronger than those of the 1954 Hague Convention because the former does not include a military necessity exception, although these protections last only so long as the property has not been made into a military object. One of the defendants, Praljak, argued that these protections applied only if the property was marked. The Chamber acknowledged that such marking was contemplated but also held that protection was not withdrawn in the absence of marking. *Id*. at 60, ¶ 177.

[135] Prosecutor v. Prlic et al., Judgment, 29 May 2013, Vol. II, *available at* http://www.icty.org/x/cases/prlic/tjug/en/130529-2.pdf, at 348-49.

humanitarian situation.[136] Further, the Chamber concluded that the destruction of the Bridge had a serious psychological impact on the Muslim population of Mostar.[137]

As a result, although the destruction of the Bridge was justified by military necessity under Article 3(d) of the ICTY statute, the damage to the civilian population was "indisputable and substantial" and the impact on the Muslim civilian population was "disproportionate to the concrete and direct military advantage expected by the destruction of the Old Bridge."[138] The Chamber acknowledged the "immense cultural, historical and symbolic value" of the Bridge, particularly for the Muslim population, yet found the crime committed was that of wanton destruction of cities, towns or villages, or devastation not justified by military necessity under Article 3(b) of the ICTY.[139]

As in the case of both the historic town of Dubrovnik and the Old Bridge at Mostar, all of the defendants were charged with a series of other crimes against humanity and war crimes. Yet the fact that the Chamber did not find a crime committed for the destruction of the Bridge as cultural property and specifically found that military necessity excused the destruction leaves open questions as to how destruction of cultural sites should be evaluated in future cases. All six defendants were found guilty in 2013.[140]

C. Prosecuting Cultural Heritage Destruction in Syria and Iraq

1. Destruction by the Islamic State of Iraq and the Levant

As has previously been outlined,[141] ISIL has perpetrated extensive damage and destruction to known and unknown cultural heritage sites and objects without even a semblance of a justification based on imperative military necessity. Such destruction has included the blowing up of the Nebi Yunus mosque in Mosul, several Christian churches and monasteries in the northwest region of Iraq, and several components of the ancient site of Palmyra. In addition, ISIL released videos of the jackhammering of one of the *lamassu* at the Gate of Nineveh and the destruction of objects in the Mosul Museum. In these cases,[142] ISIL seems to follow a similar modus operandi in that it undertakes the elaborate placement of explosives around the site, warns

---

[136] Prosecutor v. Prlic et al., Judgment, 29 May 2013, Vol. III, at 459-60, *available at* http://www.icty.org/x/cases/prlic/tjug/en/130529-3.pdf,.

[137] Judgment, Vol. II, *supra* note 135, at 372.

[138] Judgment, Vol. III, *supra* note 136, at 460.

[139] *Id*. at 460-61. This result is not to ignore that the Chamber found crimes were committed based on the destruction of mosques under Article 3(d). Disproportionate acts are included as violations in Article 51 of Additional Protocol I to the 1949 Geneva Conventions.

[140] *111 Years in Prison for Herceg Bosna Leaders*, Sense Tribunal, (May 29, 2013), *available at* http://www.sense-agency.com/icty/111-years-in-prison-for-herceg-bosna-leaders.29.html?cat_id=1&news_id=14991.

[141] *See supra* notes 80-87 & accompanying text.

[142] These are just a few of the better known structures intentionally destroyed by ISIL. It is very likely that ISIL has destroyed a large number of other religious structures, but these incidents are not as well documented, either through ISIL media releases or through independent, objective research, usually conducted through satellite imagery and other forms of remote sensing.

people away from the vicinity (at least in the case of the Nebi Yunus mosque) and then detonates the explosives, achieving the maximum visual effect. In some cases, it then levels the area where the structure once stood so that all physical traces and visual memory of the structure are erased. As these destruction scenarios seem carefully orchestrated, one may conclude that these are carried out to have maximum effect on the local populations through terror and display of control, as well as on the international community, which has consistently lamented these episodes without the ability to prevent them in any way.

Without even a pretense of military activity in the vicinity of these sites or that the historic and religious structures are military objects, it is clear that these actions constitute a violation of the 1954 Hague Convention, customary international law, and other international legal instruments. In light of the prior discussion concerning non-state actors and conflicts not of an international character, one concludes that the provisions of the 1954 Hague Convention apply to ISIL, regardless of whether it holds the status of a recognized State. While these destructions are not carried out in the course of military engagement, they are occurring in the context of armed conflict and this satisfies another element required for the 1954 Hague Convention and other legal instruments concerning the law of armed conflict to apply. However, these are only the first steps in determining whether appropriate punishment can ever be given. The difficulty of imposing any criminal punishment on these actors becomes one of an applicable legal instrument under which to prosecute them and of a venue in which to do so.

2. Destruction by the Syrian Arab Republic Government (SARG)

In contrast to the circumstances under which ISIL has intentionally and without military necessity destroyed cultural sites, the damage and in some cases destruction carried out by SARG fall into a very different category. Because it has not yet been possible to determine the precise factual circumstances of many incidents involving cultural sites and because it will be difficult to do so with reliability after the conflict eventually ends, there is no attempt to assign blame, only to discuss some of these cases in a hypothetical guise.[143] Examples of damage caused by SARG include the bombing of the medieval Crac des Chevaliers castle in western Syria; the use of the vicinity of Palmyra as a military base, which made Palmyra a military objective and was easily foreseen to expose Palmyra to damage and destruction, and extreme damage to civilian objects and populations in such cities as Aleppo, accompanied by damage to the Umayyad mosque complex and Ottoman structures in the historic core of Aleppo. Unlike the case with ISIL destruction, many of these incidents were carried out during armed conflict and therefore SARG would likely defend its action based on imperative military necessity. In fact, in some situations it is not possible

[143] Until the United States initiated bombing raids against ISIL, which focused primarily on eastern parts of Syria, SARG had the only air power in the conflict. Therefore any damage caused by aerial bombardment could be easily attributed to SARG. However, once Russia initiated its own bombing raids in the fall of 2015 and these were not limited to actions against ISIL but rather cover significant portions of Syria, it became significantly more difficult to determine which party to the conflict may have been responsible for what episode of destruction.

to determine how much of the damage was done by SARG and how much may have been done by the various rebel factions.

In one example, efforts at protection were taken at the Ma'arra Mosaics Museum, perhaps Syria's best collection of Roman mosaics located in Idlib province in western Syria and at the time in an area controlled by the Free Syrian Army. These efforts were carried out by Syrian curators who had been trained by the Safeguarding the Heritage of Syria and Iraq consortium in how to protect mosaics in situ through the use of simple materials such as sandbags and tyvek.[144] In June 2015, a barrel bomb launched by SARG forces landed in the courtyard of the museum.[145] Most of the unprotected areas of the museum were destroyed, but the mosaics that had been sandbagged survived. The challenge would be determining whether the museum was intentionally targeted; if not, would the targeting be excused by imperative military necessity if rebel troops were fighting in the vicinity.[146] We do not know these facts at this time and it may be very difficult to determine these facts later, although it is fairly certain that SARG forces were responsible for the destruction. Therefore, it seems unlikely whether a violation of the 1954 Hague Convention could be determined.

At this point, however, it might be useful to recall the prosecution of the Croatian military leaders for the destruction of the Mostar Bridge.[147] The Mostar Bridge was considered to be a valid military objective because of its use by the Muslim forces. Therefore, the leaders responsible for the Bridge's destruction were not convicted for violating Article 3(d) of the ICTY, which relied on the 1907 and 1954 Hague Conventions as evidence of customary international law, but rather under Article 3(b) because the destruction of the Bridge was held to be excessive.[148] The principles of distinction and proportionality are incorporated into the Second Protocol of the 1954 Hague Convention; however, Syria is not a State Party. On the other hand, it has ratified Additional Protocol I to the Geneva Conventions and so it is

---

[144] Eden Stiffman, *Cultural Preservation in Disasters, War Zones Presents Big Challenges*, CHRONICLE OF PHILANTHROPY, May 11, 2015, *available at* https://philanthropy.com/article/Cultural-Preservation-in/230055.

[145] Diane Orson, Syrian Cultural Heritage Site Allegedly Bombed by Assad Regime, WNPR, (June 16, 2015), *available at* wnpr.org/post/syrian-cultural-heritage-site-allegedly-bombed-assad-regime. According to Dr. al-Azm, the museum was struck by either a barrel bomb, a crude explosive device often filled with scrap metal and notoriously difficult to aim with any precision, or possibly a naval mine. Dr. al-Azm also reported that the Assad regime had been warned of the museum (although it would have been well aware of the museum's location and significance) and asked to avoid hitting it.

[146] Cunliffe, *et al*., *supra* note 76, at 8-9, discuss that many sites were "targeted for no obvious military reason"; other sites were used for military purposes and then subsequently targeted. They state, without any supporting evidence, that the Ma'arra Mosaics Museum was targeted "only after the site was subject to military use." *Id*. at 10. Anecdotal reports indicate that while Free Syrian Army forces were protecting the museum, none was engaged in military activity at the time of the attack and the museum had not been repurposed for a military use; if this is correct, then an attack would not be excused if the Museum was not being used for military purpose at the time of the attack. Historic sites that had, in the past, offered strategic advantage such as Craq des Chevaliers continued to offer the same strategic advantages.

[147] *See supra* notes 132-140 & accompanying text.

[148] *See supra* notes 138-139 & accompanying text. While the Chamber's decision does not precisely refer to this, Article 51 of Additional Protocol I of the Geneva Conventions applies both the principles of distinction and of proportionality.

feasible to conclude that the Assad regime violated Article 51 and possibly Article 57 in its bombing of the Ma'arra Museum.[149]

3. Looting and Theft

The significant increase in the looting of archaeological sites, such as at Dura-Europos and Mari, both Tentative World Heritage Sites, after they fell under ISIL control is well documented through the studies of the American Association for the Advancement of Science.[150] Other studies have revealed the looting of sites in Assad regime-controlled territory. Two images of the site of Apamea, a Tentative World Heritage Site, one taken in July 2011 and the other in April 2012, reveal the shocking amount of damage done, likely in the search for Hellenistic and Roman period mosaics.[151] Another site in western Syria, the third and second millennium B.C.E. site of Ebla is yet another Tentative World Heritage Site that reveals damage both from military activity and installations and from looting.[152] In the case of both ISIL and Assad regime-controlled areas, it is not suggested that either entity conducts the looting itself. Rather, they are allowing the looting to go on; in some cases, they are organizing the looting. They are reaping economic reward through a variety of means including taxation, control of smuggling routes and direct selling of artifacts. This is certainly the case with ISIL and it is logical that the same may be occurring with some segments of the Assad regime.

The only explicit provision in the 1954 Hague Convention that prohibits looting and theft of cultural objects from repositories is found in Article 4(3). However, this

---

[149] Article 51 of Additional Protocol I prohibits indiscriminate attacks against civilian objects and is absolute (that is, without a military necessity exception) unless the civilians partake in hostilities. Article 51(4)(c) prohibits indiscriminate attacks, including "those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction." Article 51(5)(b) further defines indiscriminate attacks as "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects . . . which would be excessive in relation to the concrete and direct military advantage anticipated." It is worth noting that Article 51 prohibits "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population." The principles of proportionality and distinction also appear in Article 57 ("Precautions to be taken in case of attack") in language that is very similar to that later adopted in the 1954 Hague Convention Second Protocol. Thus these principles apply to a State Party to Additional Protocol I to the Geneva Conventions, even if that State has not ratified the Second Protocol to the 1954 Hague Convention. O'Keefe points out that the Rome Statute and other international legal instruments explicitly make excessive incidental damage a war crime only in the context of international (but not non-international) armed conflict and the status of such an attack is therefore unclear in a non-international conflict. O'Keefe, *supra* note 20, at 353. The Second Protocol to the 1954 Hague Convention does not make this distinction. Therefore, the question of whether the armed conflict in Syria at this time would be considered international or non-international may be determinative, unless the same principles apply to non-international armed conflict as a matter of customary international law.

[150] *See supra* note 74.

[151] Trafficking Culture, *Looting at Apamea recorded via Google Earth*, *available at* http://traffickingculture.org/data/data-google-earth/looting-at-apamea-recorded-via-google-earth/. Apamea is located in the far western part of Syria and has not been under ISIL control.

[152] *See supra* note 77.

refers to the obligation of a military power to prevent its own troops from engaging in theft, vandalism and misappropriation of cultural property.[153] The other relevant international legal instruments would be the First and Second Protocols to the 1954 Hague Convention, the latter only with respect to Article 9. However, these provisions refer to circumstances in which one State Party is occupying the territory of another State Party[154] and therefore they are not applicable to the current conflict.

Nonetheless, what we are witnessing here is an unprecedented level of looting of archaeological sites carried out in an organized fashion and on an industrial scale and, in all likelihood, thefts from museums and other collections.[155] The purpose of these depredations is not only for typical subsistence economic gain but within a very specific context of economic gain for the purpose of funding terrorism and armed conflict being perpetrated by organized entities in the case of ISIL and perhaps other rebel groups and the Assad regime as well. As such, when carried out on such a large scale and for the purpose of promoting armed conflict, the looting of archaeological sites should be characterized as simply another form of destruction of cultural property. Thus, this should be viewed as a violation of the 1954 Hague Convention and actionable under other legal instruments as a form of targeted and intentional destruction of cultural sites.

The international legal regime has imposed an artificial dichotomy on our thinking about cultural heritage destruction and this makes it difficult to envision the looting of archaeological sites as a war crime. In the past, while theft and pillage were carried out as a part of armed conflict and so was prohibited by the various legal instruments that form the law of armed conflict, looting of archaeological sites is traditionally considered a product of market demand. It is therefore addressed in

---

[153] Gerstenblith, *From Bamiyan to Baghdad*, *supra* note 1, at 309-11. O'Keefe, however, disagrees with this interpretation. He reads into the Article 4(3) prohibition an obligation to prevent the acts in question, regardless of who the perpetrators are. O'Keefe, *supra* note 20, at 363 and n. 123. Prohibitions on the theft of cultural objects by militaries are found as long ago as the Lieber Code and have been carried forward in subsequent legal instruments. O'Keefe discusses the status of plunder of public or private property as a war crime under customary international law, as evidenced in Article 6(b) of the Nuremberg Charter. *Id*. at 356-58.

[154] The earlier Hague Conventions and the 1949 Geneva Conventions impose an obligation to maintain the safety of the civilian population during occupation. Fourth Geneva Convention, Art. 53; 1907 Hague Convention, Art. 43 & 55. Article 55 of the 1907 Hague Regulations states that "[t]he occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." While it may seem incongruous to consider the "capital" of archaeological sites, sites are not only a source of knowledge in which the whole world might share, they are also a source of sustainable economic benefit to the people of the nation where the sites are located. However, as with the 1954 Hague Convention First and Second Protocols, these apply in the context of occupation. Lostal also notes the lack of criminal provisions in international instruments concerning the wholesale looting of sites. Lostal, *supra* note 38, at 15.

[155] It is perhaps ironic that it is easier to document looting at archaeological sites, which is perceptible through a variety of remote sensing techniques, than it is to learn what has happened to objects stored in public or private collections. For example, the Kurdistan Democratic Party, in an entirely unconfirmed story, reported that ISIL had stolen 99 archaeological pieces from the Mosul University Museum and taken them to Raqqa. *ISIS steals 99 rare archaeological pieces from Mosul University Museum*, (Mar. 6, 2016), *available at* http://en.abna24.com/service/middle-east-west-asia/archive/2016/03/06/739189/story.html. It is unlikely that we will ever know whether this report is accurate.

the 1970 UNESCO Convention and the 1995 Unidroit Convention as a problem of international movement of cultural objects, rather than as a part of the law of armed conflict. This dichotomy is an artificial construct that resulted from the separation after the Second World War of cultural heritage issues into two distinct treaty regimes—the 1954 Hague Convention and its Protocols as a part of the law of armed conflict and international humanitarian law, on the one hand, and the 1970 UNESCO Convention, on the other. While this connection was only too apparent and well documented during World War II, the international community lost sight of this close nexus in the crafting of international legal instruments. However, the current conflict in Syria reminds us of the close nexus, as well as the necessity of uniting these two branches of cultural heritage law. This may be accomplished by viewing the large-scale and organized looting of sites, particularly when done for the purpose of providing funding for armed conflict, as the war crime of intentional and targeted destruction.[156]

4. Venues for Prosecution

In considering what violations of international law have occurred, it is necessary to consider also the possible relevant judicial venues in which these violations could be prosecuted.[157] The first option would be prosecution for violations of domestic Syrian law in a Syrian court or perhaps in a war crimes tribunal established in Syria that adopted Syrian domestic law. The Syrian law on antiquities prohibits damage to immovable and movable antiquities.[158] While ISIL figures may be prosecuted under Syrian domestic law, it is less likely that any individuals on the ultimately prevailing side in the conflict will be.[159] Penalties under Syrian law are relatively harsh, particularly those for smuggling.[160] In the case of the destruction carried out in Iraq, ISIL figures could be prosecuted for violations of Iraq's antiquities law.[161] It

---

[156] The parallel with the large-scale thefts of cultural objects perpetrated by the Nazis during World War II finds another parallel in that stolen works of art were at times sold onto the international art market in order to raise hard currency for the Nazi war effort.

[157] In the absence of ratification of the Second Protocol, universal jurisdiction is not available.

[158] Antiquities Law, Legislative Decree N. 222, October 26th 1963, as amended by Legislative Decree N. 295 (2/12/1969) and Law N. 1 (28/2/1999). Article 7 states: "It is prohibited to destroy, transform, and damage, both movable and immovable antiquities by writing on them, engraving them, or changing their features, or removing parts of them." Antiquities are defined in Article 1 to include any remains that are more than 200 hundred years old. The General Directorate of Antiquities and Museums is charged in Article 2 with protecting antiquities. Article 30 prohibits the sale of State-owned antiquities. Article 42 prohibits the excavation of archaeological sites, even on privately owned land, without a properly issued license. The Syrian antiquities law is also discussed in Lostal, *supra* note 38, at 12-14.

[159] Lostal, for example, refers to the problem of "victor's justice." *Id*. at 14.

[160] Articles 56-68 of the Syrian Antiquities Law, *supra* note 158, set out the penalties for violation of different provisions. These include: 15-25 years imprisonment for smuggling an antiquity (Article 56); 10-15 years imprisonment for theft of an antiquity, carrying out an excavation in violation of the law or trading in antiquities (Article 57); 5-10 years imprisonment for damaging or destroying a movable or immovable antiquity. These prison terms are accompanied with varying monetary fines.

[161] *See, e.g.*, Antiquities and Heritage Law, Law No. 55 of 2002 Art. 3 (prohibiting disposing of Iraq's antiquities, articles of cultural heritage, and historical sites, unless done in accordance with

does not seem that Syria has established criminal responsibility for violation of the 1954 Hague Convention. It would therefore not be possible to prosecute any individuals for violations directly under the 1954 Hague Convention within the context of Syrian domestic law.

Prosecutions in Cambodia for atrocities committed during the Khmer Rouge period, including the deaths of up to 2 million people, illustrate this point. Among other crimes was the destruction and dismantling of ancient Cambodian temples, the latter for the purpose of smuggling sculptures and architectural elements out of the country and eventual sale on the international market.[162] In addition, there was widespread destruction of religious sites, including Buddhist temples and shrines, mosques and Catholic churches.[163] Following the Khmer Rouge period and the extended civil war, in 2001, the Cambodian National Assembly created the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.[164]

Article 7 of the Law on the Establishment of the Extraordinary Chambers states that the Extraordinary Chambers "have the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict . . . ."[165] Toman points out the difficulty with this provision in that the 1954 Hague Convention does not itself contain a criminal provision, the breach of which constitutes a crime, nor does it establish individual liability for a breach of the Convention. Rather the Convention requires States Parties to establish their own criminal provisions as a matter of domestic law.[166] Toman suggests that this omission from the Convention may make the Tribunal reluctant to prosecute on the basis of a crime inferred from a convention that does not explicitly establish the crime,[167] and, as of this writing, there does not seem to be any such indictment against a Khmer Rouge leader for cultural property destruction. One must therefore

---

the law); id. Art. 15 (prohibiting trespass on archaeological, cultural heritage, and historical sites; tearing down an archaeological or cultural heritage building or using a building "in such a way as to risk damaging it, harming it or altering its distinguishing features"); *id*. art. 32 (prohibiting excavation for antiquities without a license from the Antiquities Authority); *id*. art. 38-47 (establishing penalties for violation of the law, including a prison term of seven to fifteen years for stealing an antiquity owned by the Antiquities Authority and the death penalty for knowingly taking or contemplating taking an antiquity out of Iraq).

[162] For a study of the looting, theft and smuggling of Cambodian sculptures during the Khmer period, *see* Simon Mackenzie and Tess Davis, *Temple Looting in Cambodia: Anatomy of a Statue Trafficking Network*, 54:5 BRIT. J. CRIMINOLOGY 722 (2014).

[163] *See* CAROLINE EHLERT, PROSECUTING THE DESTRUCTION OF CULTURAL PROPERTY IN INTERNATIONAL CRIMINAL LAW 180-85 (2013). However, the temple complex of Angkor Wat was left relatively undisturbed, although it suffered from neglect. I want to thank Terressa Davis for providing this reference.

[164] TOMAN, *supra* note 35, at 791.

[165] *Id*. at 794; EHLERT, *supra* note 163, at 198-200. Cambodia ratified the 1954 Hague Convention in 1962. However, the Additional Protocols to the 1949 Geneva Conventions had not yet come into force during the Khmer Rouge period.

[166] TOMAN, *supra* note 35, at 794-95. Ehlert recounts that "the UN Group of Experts held that the destruction of cultural property incurs individual criminal responsibility" under the Hague Convention, even though the Convention does not mention this. EHLERT, *supra* note 163, at 200.

[167] TOMAN, *supra* note 35, at 795.

conclude that it is unlikely that any prosecution for violation of the 1954 Hague Convention could or would be carried out directly under Syrian law.[168]

The most logical international venue for a war crimes prosecution would be the International Criminal Court. However, this is not feasible because neither Syria nor Iraq is a State Party to the Rome Statute. Once a country becomes a State Party, Article 11 of the Rome Statute limits the Court's jurisdiction "to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration."[169] While Iraq could accept the Court's jurisdiction for the purpose of prosecuting cultural property crimes committed by ISIL, the situation in Syria presents additional challenges. Another drawback of a prosecution in the International Criminal Court is that the Rome Statute does not incorporate the principles of proportionality and distinction as applied to the destruction of cultural property.[170] On the other hand, the provisions that relate to destruction and appropriation of property and those that refer to attacks on civilian objects incorporate[171] to some extent these principles of Additional Protocol I to the Geneva

---

[168] *Accord* Lostal, *supra* note 38, at 11. In contrast, according to the Chatauqua Blueprint, because Syria is a Party to the International Covenant on Civil and Political Rights, international crimes are punishable even though there is no domestic criminalizing statute at the time the crime was committed. The Chatauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes, *available at* http://publicinternationallawandpolicygroup.org/wp-content/uploads/2014/01/Chautauqua-Blueprint-2014.pdf. Yet another obstacle to prosecution under the 1954 Hague Convention is the lack of a provision for universal jurisdiction, which would permit a perpetrator to be prosecuted in the court of any State Party to the Convention. Lostal, *supra* note 38, at 12.

[169] *See* Rome Statute, Art. 11. A State that is not a Party to the Statute may accept the jurisdiction of the court by declaring that it "accept[s] the exercise of jurisdiction by the Court with respect to the crime in question." *Id.* Art. 12(3). In addition to acting upon the referral of a situation by a State Party, the Court may exercise its jurisdiction if a situation is referred to the Prosecutor by the Security Council acting under Chapter VII of the United Nations Charter. *Id.* Art. 13(b). However, an attempt in the Security Council to refer the situation in Syria to the ICC was vetoed by Russia and China. Draft Resolution, U.N. Doc. S/2014/348 (May 22, 2014); *Recent Draft Resolution*, 128 HARV. L. REV. 1055, 1057-58 (2015).

[170] The relevant provisions prohibiting attacks against buildings dedicated to religion, education, art, science or charitable purposes, and historic monuments incorporate the requirement of intentionality and excuse an attack if the target is a military objective. Rome Statute, Art. 8(2)(b)(ix) (in the case of international armed conflict) and 8(2)(e)(iv) (in the case of non-international armed conflict). Rome Statute, Art. 8(2)(b)(iv) (referring to "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental . . . damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated") applies to international armed conflicts but not to non-international armed conflicts.

[171] Rome Statute, Art. 8(2)(a)(iv) (referring to "[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" as a grave breach of the 1949 Geneva Conventions); Rome Statute, Art. 8(2)(b)(ii)(referring to "[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives"); Rome Statute, Art. 8(2)(b)(iv)(referring to "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental . . . damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."). However, these provisions do not apply to non-international armed conflict. The only provision that applies to non-international armed conflict and that has some possible relevance is Article 8(2)(e)(xii)(referring to "[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict"). However, it is unlikely that the cultural

Conventions.[172] However, Additional Protocol I incorporates these principles more explicitly and does not require as specific a knowledge or intent element but rather relies on a gross negligence or willful standard, particularly as interpreted by the ICTY in the attack on the Mostar Bridge.

The final option would be the establishment of a special tribunal, similar to the ICTY. In such a scenario, the tribunal could operate under customary international law, incorporating the 1954 Hague Convention and the earlier Hague Conventions, as well as relevant sections of Additional Protocol I. Again, this scenario with respect to the Assad regime is fairly unlikely for political reasons but possible with respect to ISIL.

A draft of an indictment, known as the Chatauqua Blueprint, has been prepared but is very disappointing with respect to its provisions concerning cultural property.[173] It adopts the same language that has been seen in other international instruments going back to the 1907 Hague Convention, prohibiting "[i]ntentionally directing attacks against buildings that are dedicated to religion, education, art, science or charitable purposes, [and] historic monuments, . . . provided they are not military objectives."[174] As such, the same obstacles of intentionality on the part of a perpetrator and status of the cultural property as a military objective would prevent effective prosecution, other than for ISIL. It is unfortunate the world community has not advanced in its understanding of the significance of cultural heritage so that the principles of proportionality and distinction, present in both Additional Protocol I of the Geneva Conventions and the Second Protocol of the 1954 Hague Convention, were not incorporated into a document, which should have been forward-thinking in terms of the wanton destruction of cultural heritage unprecedented since the Balkan conflict and possibly unprecedented since the Second World War. The further irony

---

property within Syria, which belongs to the Syrian people, would be viewed as the "property of an adversary" with respect to the Assad regime (although this could apply in the case of ISIL).

[172] *See supra* notes 132-140 & accompanying text (discussing the ICTY prosecution for destruction of the Mostar Bridge in Bosnia-Herzegovina).

[173] Chatauque Blueprint, *supra* note 168. The crimes listed in the Chatauqua Blueprint are the same as those in the Rome Statute. *Id*. at 13 n.30. *See also* Lostal, *supra* note 38, at 14-16.

[174] Chatauque Blueprint, *supra* note 168, Art. 20(b)(10)(referring to international armed conflict); *id.* Art. 20(d)(4)(referring to non-international armed conflict. Lostal, *supra* note 38, at 14-15, rightly criticizes the use of this archaic language to describe protected cultural property. However, she defines cultural property that should be protected in terms of the 1972 UNESCO World Heritage Convention—that is, Syria's twelve Tentative World Heritage Sites, as well as its six World Heritage Sites. *Id.* at 10. However, this definition is too narrow. Protection would not extend to the myriad of other significant sites in Syria (there are some 1500 cultural sites listed on the U.S. Committee of the Blue Shield's cultural inventory for Syria) and would exclude cultural repositories, such as museums, archives and libraries, that are clearly worthy of protection under the 1954 Hague Convention and any definition of cultural property of great significance. Furthermore, the process of listing of sites on the World Heritage List has become politicized to a considerable extent, thereby decreasing the legitimacy of using the List as a marker of significant cultural property. The imbalance of the List, which is skewed toward cultural over natural sites and European sites over sites in the rest of the world, and the internal and external political nature of the nomination and inscription processes are well recognized. *See*, *e.g.*, Lynn Meskell and Christoph Brumann, *UNESCO and New World Orders*, *in* GLOBAL HERITAGE: A READER 22, 28, 33-35 (Lynn Meskell ed. 2015); Lynn Meskell, *World Heritage and WikiLeaks: Territory, Trade, and Temples on the Thai-Cambodian Border*, 57 CURRENT ANTHROPOLOGY 72, 74-76 (2016).

is that the Syrian domestic law on antiquities is the most likely source of punishment for the cultural devastation that we are witnessing.[175]

V. A PATH FORWARD

The preceding discussion has pointed out shortcomings in the current legal regime for the effective protection of cultural heritage during armed conflict, including challenges in the definition of cultural heritage to be protected, the military necessity waiver, and limitations in terms of non-international armed conflict.[176] As discouraging as the analysis is for the likelihood of a war crimes prosecution for the destruction of the cultural heritage of Syria, the picture is not entirely bleak. In this final section, this article turns to recent developments and creative thinking that indicate some progress in our understanding of the role that cultural heritage plays in the lives of present and future generations. This article suggests that the development of the law may incorporate two approaches.[177] One is a re-examination of those sections of existing legal instruments and other legal sources that pertain to cultural property protection to determine the extent to which they may have become a part of customary international law, thereby giving them broader applicability. One goal of this re-examination is to incorporate underlying principles of reckless disregard or extreme negligence into the intentionality requirement for the commission of an attack against cultural property to be considered criminal. The best way of doing this is to understand these provisions in light of the principles of proportionality and distinction. The second approach is to refocus on the role of cultural heritage as an integral component of humanity. The goal of this approach is not to reframe cultural heritage destruction in terms of violations of human rights

---

[175] Lostal, *supra* note 38, at 9-10, focuses on the 1972 UNESCO World Heritage Convention, which requires States Parties to refrain from taking "any deliberate measures which might damage directly or indirectly the cultural and natural heritage . . . situated on the territory of other States Parties . . . ." (Article 6(3)). Article 4, on the other hand, refers to actions that a State Party must take to protect its own world heritage, including the duties of protection and conservation. A significant obstacle to using the World Heritage Convention as a source of substantive law is that the only remedy it provides is placement of a damaged site on the World Heritage List of Sites in Danger, which has been done for Syria, and the possibility of de-listing from the World Heritage List—a measure that arguably punishes the site and not the perpetrators.

[176] An additional impediment not discussed is the lack of universal jurisdiction for crimes against cultural property in any of the instruments other than in the Hague Convention Second Protocol. *See*, *e.g.*, The Rome Statute, Article 12(2).

[177] Probably the most effective way of realizing these goals is through ratification of the Second Protocol to the 1954 Hague Convention, as Frulli has suggested, *supra* note 39, at 216-17. In 2004, the United Kingdom announced its intent to ratify all three 1954 Hague Convention instruments at the same time and viewed the Second Protocol as curing the deficiencies in the main Convention that had previously inhibited ratification, Press Release, "UK To Ratify Convention Safeguarding Cultural Heritage in War-Time", May 14, 2004, *available at* http://webarchive.nationalarchives.gov.uk/20121204113822/http://www.culture.gov.uk/global/press_notices/archive_2004/dcms053_04.htm. However, the United Kingdom has still not ratified these instruments. *See supra* note 37. In a report presented to UNESCO in November 2015, President Hollande proposed that France would ratify the Second Protocol. Vincent Noce, *France builds grand alliance to protect cultural heritage*, THE ART NEWSPAPER, (Jan. 4, 2016), *available at* http://theartnewspaper.com/news/news/france-builds-grand-alliance-to-protect-cultural-heritage/. The United States has not yet taken a position on the Second Protocol.

instruments, as these tend not to contain mechanisms of enforcement. Rather the goal is to bend the arc toward more effective cultural heritage preservation by suggesting that viewing existing international law through the lens of human rights offers a more flexible and nuanced approach to existing law. Creating a closer connection between cultural heritage and people may further these goals.

A. Reading the Tea Leaves

Many developments of the past fifteen years indicate a growing recognition of the significance of cultural heritage that goes beyond the literal wording of the relevant legal instruments. These developments may be viewed as "tea leaves" in the sense that they give brief, sometimes cryptic, indications of what developments in international cultural heritage law may lie in the future.

1. UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage

In March 2001, the Taliban destroyed the two monumental Buddha statues that had been carved into the cliffs at Bamiyan in Afghanistan, probably in the sixth century.[178] Francioni and Lenzerini suggest that the destruction was a violation of customary international law.[179] Among the sources they cite are the 1954 Hague Convention, the ICTY statute, several UNESCO recommendations, and the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage.[180] Francioni and Lenzerini also rely on the principle of intentional destruction of religious sites as a form of discriminatory persecution, as evinced in the ICTY case, *Prosecutor v. Dario Kordic and Mario Cerkez*, where the defendants

---

[178] Gerstenblith, *From Bamiyan to Baghdad*, *supra* note 1, at 246-48.

[179] Francesco Francioni and Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUROPEAN J. INT'L L. 619, 630-38 (2003). The main impediment to viewing the destruction of the Buddhas as a violation of international law is that the destruction did not occur in the context of armed conflict, which makes the international legal instruments inapplicable.

[180] The 1972 World Heritage Convention states, in Article 4:

> Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage . . . situated on its territory, belongs primarily to that State. It will do all it can to 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.

Convention Concerning The Protection of the World Cultural and Natural Heritage, Art. 4, UNESCO, (Nov. 16, 1972), *available at* http://whc.unesco.org/archive/convention-en.pdf. Afghanistan ratified this convention in 1979, but the Bamiyan Valley was only inscribed on the World Heritage List in 2003. However, one might suggest that Afghanistan's obligation to protect cultural heritage located within its territory should apply regardless of whether the site was formally listed on the World Heritage List so long as the site meets the World Heritage Convention's criterion of outstanding universal value.

were charged with discriminatory attacks on mosques in Bosnia and Herzegovina, and the Nuremberg International Military Tribunal.[181] They conclude:

> We are aware that one may object to the applicability of the customary principle that prohibits the commission of acts of violence against cultural property in internal armed conflicts. Such objection lies in the fact that this principle should be limited to international conflicts, to situations of military occupation of foreign territory, and not be applicable to opposite factions fighting in non-international armed conflicts. However, the universal value of cultural heritage seems to exclude such a conceptual discrimination. In the last decades, international practice has extended the scope of application of all main principles of humanitarian law, originally meant for international armed conflicts, to civil wars, ethnic conflicts and conflicts of a non-international character . . . .[182]

In response to the destruction, UNESCO adopted the Declaration concerning the Intentional Destruction of Cultural Heritage on October 17, 2003.[183] In addition to the reasoning offered by Francioni and Lenzerini that the destruction was already prohibited by customary international law, this Declaration may be considered to be an element or evidence of customary international law.[184]

There are three important elements that the Declaration adds. One is that the destruction took place during peacetime. To the extent that a war crime can be committed only during armed conflict, the Declaration extends similar protections to cultural heritage in the absence of armed conflict.[185] Therefore such destruction moves beyond the status of a war crime to the level of a crime against humanity. The second element is that it applies to destruction committed by the governing authority within its own territory, as was the case with the Taliban in Afghanistan at that time, and therefore encompasses acts that constitute "an unjustifiable offence to the principles of humanity and dictates of public conscience . . . " beyond the context of armed conflict[186] The third element is in the Declaration's definition of State responsibility in that a State that "intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop and punish any intentional

---

[181] Francioni and Lenzerini, *supra* note 179, at 637.

[182] *Id.*

[183] *UNESCO Declaration concerning the International Destruction of Cultural Heritage*, UNESCO, (Oct. 17, 2003), *available at* http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html. For a critique of the Declaration, *see* Lostal, *supra* note 38, at 16-17.

[184] While a Declaration does not have the same force as a treaty or convention among States that have ratified the instrument, in United Nations practice, a Declaration is "a formal and solemn instrument"; it carries a strong expectation that Members of the international community will abide by it and "in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down Rules binding upon States." *General introduction to the standard-setting instruments of UNESCO*, *available at* http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html#name=3.

[185] The Preamble refers to "the development of rules of customary international law . . . related to the protection of cultural heritage in peacetime as well as in the event of armed conflict."

[186] Declaration Article II(2), *supra* note 183.

destruction of cultural heritage of great importance for humanity . . . bears the responsibility for such destruction to the extent provided for by international law."[187] These three elements would all have significant bearing on the evaluation of the question of whether the Assad regime violated international law in the bombing of cultural sites, such as occurred at the Ma'arra Museum.

2. ICJ Opinion of Judge Trindade in the Preah Vihear Case

In two separate opinions in the decision of the International Court of Justice, *Cambodia v. Thailand*, concerning the Temple of Preah Vihear, Judge Cançado Trindade sought to link the human elements to the Temple cultural heritage site.[188] The case technically involved a boundary dispute between Cambodia and Thailand, the outcome of which would determine which country has sovereignty over the Temple, a site inscribed on the World Heritage List. The border dispute had erupted into fighting between the two countries, which resulted in the loss of human life and also endangered the historic structure.

While acknowledging that the case involved technical questions of determining the proper border and of interpreting the court's earlier opinion on this issue, Judge Trindade sought to link territoriality, preservation of human life, and the cultural and spiritual heritage dimension, in the interest of preventing spiritual damage. As he later described the Court's opinion, in establishing a demilitarized zone around the Temple, the Court "encompassed the human rights to life and to personal integrity, as well as cultural and spiritual world heritage . . . . [T]he Court's order went 'well beyond State territorial sovereignty, *bringing territory, people and human values together,*' well in keeping with the *jus gentium* of our times."[189] His opinion that the preservation of cultural heritage plays an important role in the spiritual and cultural lives of the local community who live among the heritage leads to a melding of human values and cultural heritage values as a part of customary international law.

3. United Nations Security Council Resolution 2100 (Mali)

The United Nations Security Council addressed the situation in Mali in several resolutions. The most significant for cultural heritage preservation is

---

[187] *Id*. Article VI. A drawback to the Declaration is its emphasis on intentionality in the definition of "intentional destruction", its narrow definition of "destruction", and its reliance on individual States to establish criminal liability. For these and other criticisms of the Declaration, *see* Lostal, *supra* note 38, at 16.

[188] Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Summary of the Order of 18 July 2011, Separate opinion of Judge Cançade Trindade, 5-6, ¶¶ 20-26, *available at* http://www.icj-cij.org/docket/files/151/16584.pdf; Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (11 Nov. 2013), Separate opinion of Judge Cançade Trindade, 333-34, ¶¶ 30-33, *available at* http://www.icj-cij.org/docket/files/151/17708.pdf.

[189] *Cambodia v. Thailand*, (11 Nov. 2013), at ¶ 33 (italics in original)(omitting internal citations).

Resolution 2100 of 2013.[190] In the preamble to Resolution 2100, the Security Council strongly condemned "all abuses and violations of human rights and violations of international humanitarian law," including the "destruction of cultural and historical heritage."[191] It is significant that the Security Council included destruction of cultural and historical sites, while omitting specific reference to religious sites, which are presumably subsumed within the categories of cultural and historical heritage, as a violation of international humanitarian law.[192] Resolution 2100 also established the Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) with the mission of peacekeeping and stabilization in Mali. The mandate of MINUSMA included cultural preservation by "assist[ing] the transitional authorities of Mali, as necessary and feasible, in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO."[193] Cultural heritage preservation was thus put on a par with several other humanitarian and civil protection goals, including humanitarian assistance and promotion and protection of human rights.

4. UN Security Council Resolutions 1483 (Iraq) and 2199 (Syria)

In contrast to the Security Council Resolutions that addressed the situation in Mali and that focused on a holistic goal of preserving cultural heritage, two other U.N. Security Council Resolutions, 1483 (2003) and 2199 (2015), referring to Iraq and Syria respectively, focused primarily on only a narrow subset of cultural heritage preservation—namely, the deterrence of looting of cultural institutions and archaeological sites. Security Council Resolution 1483 was adopted on May 22, 2003, in response to the looting of the Iraq National Museum and other cultural institutions in Baghdad. It called for all U.N. member states to take actions to prevent trade in cultural materials illegally removed from Iraq and to facilitate the return of such objects to Iraq.[194]

In February 2015, the Security Council took similar action, reaffirming its earlier commitment to preventing trade in cultural materials illegally removed from Iraq and calling for new prohibitions on trade in cultural materials illegally removed from Syria after the beginning of the rebellion in March 2011.[195] The Resolution

---

[190] United Nations Security Council Resolution 2100, S/RES/2100 (April 25, 2013), *available at* http://www.un.org/en/peacekeeping/missions/minusma/documents/mali%20_2100_E_.pdf.

[191] *Id*. at 2.

[192] United Nations Security Council Resolution 2085, S/RES/2085 (December 20, 2012). In Resolution 2085, The Security Council similarly condemned "all abuses of human rights" including "pillaging, theft, [and] destruction of cultural and religious sites . . ." The omission of "religious" and replacement with "historical" in the later Resolution may turn out to have been significant in light of the first prosecution under the ICC for cultural destruction. *See infra* notes 199-207 & accompanying text.

[193] Resolution 2100, *supra* note 190, at Section 16(f).

[194] *See supra* note 65.

[195] United Nations Security Council Resolution 2199, S/RES/2199 (February 12, 2015), *available at* http://unscr.com/en/resolutions/doc/2199. The Resolution has been implemented by the European Union, Council Regulation (EU) No. 1332/2013 of 13 December 2013 amending Regulation (EU) No. 36/2012 concerning restrictive measures in view of the situation in Syria, Article (4) adding Article 11c; Annex XI, by the United Kingdom as a criminal provision, The Export Control (Syria Sanctions (Amendment)) Order 2014, No. 1896, para. 2 (inserting Article 12A), *available at*

condemned the destruction of cultural heritage in Iraq and Syria, "whether such destruction is incidental or deliberate, including targeted destruction of religious sites and objects."[196] The condemnation of incidental destruction marks a departure from the narrower provisions of the 1954 Hague Convention and indicates an incorporation of the principles of proportionality and distinction, perhaps as a reflection of customary international law. However, the substantive provisions are limited to calling on all UN Member States to prevent the trade in Iraqi and Syrian cultural property.[197] In the case of Iraq, the focus on looting, particularly from cultural institutions, made sense because the Resolution was adopted in the wake of the looting of the Iraq Museum and other cultural institutions throughout the country. In the case of Syria, the focus on looting of repositories and archaeological sites as a source of funding for ISIL seems to narrow the scope.[198]

5. ICC Prosecution for Cultural Heritage Destruction in Mali

In September 2015, Ahmad Al Faqi Al Mahdi was arrested pursuant to an arrest warrant issued by the ICC and transferred to the Hague.[199] The indictment alleged that he was active in Timbuktu between May and September 2012 as a member of Ansar Dine, head of the *Hisbah* (the body established to uphold public morals and prevent vice), and a member of the Islamic Court.[200] The Chamber found that the Prosecutor had established reasonable grounds to believe that he committed a war crime and is "criminally responsible for having committed, individually and jointly with others, facilitated or otherwise contributed to the commission of war crimes" by intentionally directing attacks against nine mausolea and the Sidi Yahia mosque in Timbuktu.[201]

---

http://www.legislation.gov.uk/uksi/2014/1896/made, and by Switzerland, Verordnung über Massnahmen gegenüber Syrien (Ordinance on Sanctions against Syria), revised on 17 December 2014, art. 9A, para. 1, available at http://www.admin.ch/opc/de/official-compilation/2015/45.pdf. The United States finally acted to implement the Resolution when, in April 2016, Congress passed the Protect and Preserve International Cultural Property Act, H.R. 1493, https://www.govtrack.us/congress/bills/114/hr1493, and the President signed it into law on May 9, 2016. This legislation provides for import restrictions on cultural materials illegally removed from Syria after March 2011.

[196] UNSCR 2199, *supra* note 195, ¶ 15.

[197] The wording here repeats that of UNSCR 1483, *supra* note 67 & accompanying text.

[198] *Supra* note 195, at ¶ 16. A subsequent Security Council Resolution, United Nations Security Council Resolution 2254, S/RES/2254 (18 December 2015), included a demand that all parties cease attacks against civilians and civilian objects and "any indiscriminate use of weapons, including through shelling and aerial bombardment . . ." *Id.* ¶ 13. Although cultural property is not specifically mentioned, it is included as a subset of civilian objects.

[199] Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, *available at* https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Pages/situation%20index.aspx.

[200] *Id.*

[201] *Id.* According to the statement of the Prosecutor, Al Faqi has been charged under Rome Statute Art. 8(2)(e)(iv). Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr. Ahmad Al-Faqi Al Mahdi (01/03/2016) [hereafter Prosecutor Statement], *available at* https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-01-03-16.aspx.

This is the first international criminal prosecution for cultural heritage destruction in which the alleged perpetrator did not commit other war crimes and crimes against humanity. It thus recognizes the distinct nature of the crime against cultural heritage and a significant advance in the seriousness with which such crimes will be regarded under international law. In her opening statement of the confirmation of charges hearing, the Prosecutor cited three bases for the significance of the shrines and mosque at Timbuktu. First, she referred to their significance for the ongoing religious practices of the local community.[202] Second, she cited the close link of these structures to the cultural heritage and history of Timbuktu, as the mausolea were the identifying symbol of the city.[203] Finally, she described the cultural historical significance of these structures for the region of Africa and for all of humanity.[204] There was speculation that the defense would focus on the political and religious justifications for the destruction of the mausolea and would argue that these actions were not a crime but rather the expression of a different worldview.[205] The Prosecutor commented,

> this case is not about determining who was right or wrong from a religious point of view. The bottom line is that the attacked monuments had a religious use and had an historic nature. To intentionally direct an attack against such monument is a war crime under the Rome Statute, regardless of the judgment by other people on the religious practices by the inhabitants of Timbuktu.[206]

This prosecution for cultural heritage destruction, divorced from attacks on civilians and other civilian objects, moves the pendulum toward elevating the status of cultural heritage destruction as a crime. The Prosecutor emphasized the cultural, rather than solely the religious value, of the historic structures. Structures that are

---

[202] Prosecutor Statement, *supra* note 201. The Prosecutor stated it "became impossible for the inhabitants of Timbuktu to devote themselves to their religious practices. These practices were deeply rooted in their lives. These practices signified the deepest and most intimate part of a human being: Faith. These practices were part of their shared life together."

[203] Prosecutor Statement, *supra* note 201. The Prosecutor described the cultural value as: "To destroy Timbuktu's mausoleums is to erase this element of collective identity that the people of Timbuktu built throughout the ages." The Malian Minister of Culture called the destruction "'an attack on the lifeblood of our souls, on the very quintessence of our cultural values. Their purpose was to destroy our past, . . . our identity, and, indeed, our dignity.'"

[204] Prosecutor Statement, *supra* note 201. The Prosecutor noted that all but one of the structures was a World Heritage Site and that therefore the mausolea "constituted a chapter in the history of humanity. Humanity as a whole was affected by this loss."

[205] One of the defense attorneys is quoted as saying that "[f]undamentalism is a political plan or project and . . . a political project that is not a crime . . . . [His client was] seeking the means to allow his conception of good over evil to prevail . . . . We're talking about two visions of the world that are in contradiction." Quoted by Mark Kersten, *Prosecuting the Destruction of Shrines at the ICC—A Clash of Civilizations?,* Justice in Conflict blog, March 4, 2016, *available at* http://justiceinconflict.org/2016/03/04/prosecuting-the-destruction-of-shrines-at-the-icc-a-clash-of-civilizations/#more-6502; *See also* Geoffrey York, *ICC trial on destruction of Timbuktu shrines debates meaning of Islam*, GLOBE AND MAIL, (Mar. 1, 2016), *available at* http://www.theglobeandmail.com/news/world/icc-trial-on-destruction-of-timbuktu-shrines-debates-meaning-of-islam/article28989152/.

[206] Prosecutor Statement, *supra* note 201.

part of contemporary religious practice are easily tied to the communities that live among them and that depend on them as part of their ability to access their basic human rights. However, in this case, we can see a movement toward recognizing that cultural and historic structures can play the same role in the life of a community, as well as in the larger world. The Defendant has pled guilty and now awaits sentencing.[207]

6. A Return to Cultural Genocide

The question of inclusion of cultural genocide in the Convention on Genocide and its rejection were discussed previously. While cultural genocide is unlikely to be accepted as an independent category of genocide, recent decisions of the United States courts indicate an evolving definition of physical genocide as including within it acts that might be termed cultural genocide. Two federal Courts of Appeals, in determining whether expropriations of property from Jews during the Holocaust were done in violation of international law, turned to the definition of genocide because genocide is "universally recognized as a violation of customary international law."[208] The Genocide Convention defines as genocide an act "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group" including "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[209] The D.C. Circuit Court of Appeals emphasized that the conditions of life included both ghettoization of the Jews and the large-scale taking of property. But the court went further, in stating: "In our view, the alleged takings did more than effectuate genocide or serve as a means of carrying out genocide. Rather, we see the expropriations *as themselves genocide*."[210] This analysis was extended in *DeCsepel v. Republic of Hungary* to include the expropriation of works of art.[211] In this case, the art works were not a means of support to the victims, and thus their expropriation did not have a direct effect on victims' conditions of life. However, in some cases, the expropriated art works were sold onto the international market for the purpose of raising much needed hard

---

[207] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following admission of guilt by the accused in Mali war crime case, March 24, 2016, *available at* https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/160324-otp-stat-al-Mahdi.aspx.

[208] The plaintiffs in these cases were attempting to establish jurisdiction over a foreign sovereign under the "expropriation exception" of the Foreign Sovereign Immunities Act. 28 U.S.C. § 1605(a)(3). One of the prongs of this analysis is whether the taking of the property was in violation of international law. Simon v. Republic of Hungary, 812 F.3d 127, 142-43 (D.C. Cir. 2016); Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 675 (7th Cir. 2012).

[209] Convention on the Prevention and Punishment of the Crime of Genocide, Art. 2(c).

[210] *Simon*, 812 F.3d at 142 (internal citation omitted)(emphasis in original). *See also Abelesz*, 692 F.3d at 675 (emphasizing that the genocidal components included theft of property to fund the genocide itself and deprivation of the means of support for those who survived).

[211] de Csepel v. Republic of Hung., 2016 U.S. Dist. LEXIS 32111, Civ. 10-1261 (ESH) (D.D.C. 2016)

currency.[212] Thus the expropriations helped to perpetuate the genocide itself. The fact that the expropriations were done within the broader context of genocide rendered the takings of the art works as acts of genocide and therefore a violation of customary international law.

Secretary of State John Kerry made this linkage clear in the context of the current conflict when he declared that ISIL is committing genocide against minority religious and ethnic groups, including Christians, Yazidis and Shiite Muslims who are within ISIL-controlled territory in northern Iraq and Syria. His statement described how "[t]he militants . . . have tried to slaughter whole communities, enslaved captive women and girls for sex, and sought to erase thousands of years of cultural heritage by destroying churches, monasteries and ancient monuments."[213] While destruction of cultural heritage by itself is not cited as constituting genocide, when viewed within a broader context of genocide, it becomes an act of genocide, as well as evidence of genocidal intent.

B. Reuniting Cultural Heritage with Humanity

Examination of these recent developments allows us to construct two approaches that would widen the scope of protection required for cultural heritage—one is the extent to which principles have been incorporated into customary international law and the other is the more flexible interpretation of existing provisions of treaty law. The unifying theme underlying these developments is the recognition that cultural heritage is closely connected to humanity and to human rights, as can be seen from the statements of the Prosecutor in the Al-Faqi prosecution. Seeing cultural heritage through the lens of human rights assists us in reaching a more integrated understanding of the role that cultural heritage plays in the lives of human beings—the local community that lives among the heritage, the regional and national communities, and the world community.[214]

The protection of cultural heritage is fragmented. It is divided among the legal instruments that pertain broadly to international humanitarian law and those that deal specifically with cultural property. Second, the destruction of cultural heritage is typically punishable as a war crime rather than as a crime against humanity. Third, the protection of cultural heritage is divided between the international treaty regime that addresses the law of armed conflict/international humanitarian law and that which addresses cross-border movement of cultural objects, primarily through

---

[212] Uwe Fleckner, *Marketing the Defamed: On the Contradictory Use of Provenances in the Third Reich*, *in* PROVENANCE: AN ALTERNATE HISTORY OF ART 137, 145 (Gail Feigenbaum and Inge Reist eds. 2012).

[213] Matthew Rosenberg, *Citing Atrocities, John Kerry Calls ISIS Actions Genocide*, N.Y. TIMES, (March 18, 2016), at A12. Kerry further stated "We know that in areas under its control, Daesh has made a systematic effort to destroy the cultural heritage of ancient communities—destroying Armenian, Syrian Orthodox, and Roman Catholic churches; blowing up monasteries and the tombs of prophets; desecrating cemeteries; and in Palmyra, even beheading the 83-year-old scholar who had spent a lifetime preserving antiquities there." John Kerry, *Remarks on Daesh and Genocide*, U.S. DEPARTMENT OF STATE, (March 17, 2016), *available at* http://www.state.gov/secretary/remarks/2016/03/254782.htm.

[214] Kanishk Tharoor, *Life Among the Ruins*, NY TIMES, (Mar. 20, 2016) (recounting the human element behind the ancient ruins of Palmyra).

the market. Each of these "separations" has had a detrimental effect on our ability to provide sufficient protection and adequate punishment and deterrence to destruction of cultural heritage. The goal of the principles derived from the discussion of recent developments is to stitch together these various divisions in order to achieve a more holistic and effective result.

The first principle is elimination of the divide between the protection given to cultural heritage during armed conflict and that given to cultural heritage outside of the context of conflict. This would permit the elevation of cultural heritage destruction to a crime against humanity, rather than as solely a war crime. The second principle, which is closely related, is that a sovereign cannot destroy the cultural heritage located within its own territory with impunity. We find these principles in both the 2003 UNESCO Declaration and Judge Trindade's decision in the Preah Vihear case. Judge Trindade emphasized the human right to cultural and spiritual heritage, which should be viewed as a part of customary international law. While conceding that this principle should be reserved for the more extreme examples of intentional destruction, we can recall that the 2003 UNESCO Declaration underscores this point as the destruction of the Bamiyan Buddhas did not occur within the context of armed conflict. The failure in the past to recognize this obligation to protect cultural heritage was largely the result of the bifurcation of the treatment of cultural heritage between the law of armed conflict treaties and those that deal with peacetime threats. This false dichotomy needs to be superseded.

The third principle focuses on the definition of intentionality. The UN Security Council Resolution on Syria referred to both intentional and unintentional destruction and damage to cultural heritage. As part of a broader perspective, the intentionality element present in many legal instruments, including the earlier Hague Conventions and the Rome Statute, needs to be understood in light of a standard of reckless disregard or willful negligence for the consequences of an attack that is likely to cause collateral damage to cultural heritage. This standard is perhaps more easily understood as a part of the principles of proportionality and distinction applied by Additional Protocol I to civilian objects and by the Second Protocol to the 1954 Hague Convention to cultural heritage. If cultural heritage can be protected as a civilian object and its destruction limited by a proportionality provision as in the case of the Mostar Bridge, then cultural heritage should be protected by the same principle for its distinctive value as cultural heritage.

This dichotomy between cultural heritage and civilian objects may be the result of the separation of the protection of cultural heritage into a distinct convention (the 1954 Hague Convention), a move that one might have supposed would have elevated the protection of cultural heritage. However, it seems to have had the opposite effect. The 1954 Hague Convention's principles receive secondary attention, in comparison to the broader international human rights treaties, such as the 1949 Geneva Conventions and the Additional Protocols. This dichotomy is exasperated by the length of time that separated the incorporation of these principles into international humanitarian law through the 1977 Additional Protocols and the adoption of these principles in the specific cultural property treaty regime through the 1999 Second Protocol. Nonetheless, cultural heritage is entitled, at a minimum, to the same level of protection as are other civilian objects. At least this portion of the Second Protocol should be recognized as constituting a part of customary international law and the

provisions of the 1954 Hague Convention should be interpreted in light of these principles.

This leads to the fourth principle—that the concepts of proportionality, distinction and feasible precautions, found explicitly in the 1954 Hague Convention Second Protocol should be considered as part of customary international law and as a gloss for interpreting the provisions of the 1954 Hague Convention and for defining imperative military necessity in particular. These principles should therefore be applied to the conduct of hostilities even among States that have not ratified the Second Protocol. In evaluating the status of these principles under customary international law, we can turn to the U.S. Department of Defense Law of War Manual as an example of both State practice and *opinio juris*, particularly as the United States has not ratified the Second Protocol.

The Manual makes clear that the principles of proportionality, distinction and reduction of collateral damage are accepted and apply to cultural property. In defining the military necessity waiver in the 1954 Hague Convention, the Manual states, "the risk of harm to the cultural property must be considered in a proportionality analysis and feasible precautions should be taken to reduce the risk of harm to the cultural property."[215] In language that echoes that of the Second Protocol, the Manual explicitly adopts the proportionality rule, stating that "[c]ombatants must refrain from attacks in which the expected . . . damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained."[216] The taking of feasible precautions or reduction of collateral damage includes selection of weapons that may lower the risk of incidental harm and identifying areas that are more likely to include objects that should not be harmed.[217]

The fifth principle is to consider explicitly the widespread and systematic looting of archaeological sites as a type of damage and destruction to cultural heritage as currently provided in legal instruments. These acts constitute intentional destruction to cultural heritage when local authorities permit and encourage such looting as official policy. Broader looting and theft of cultural objects can be analogized, when accompanied with other discriminatory and genocidal actions, as an act of genocide when the proceeds from such thefts and looting are used to perpetuate the genocide itself, as we see occurring now with minority religious and ethnic groups in the Middle East. The destruction of cultural heritage is also a deprivation of a group's economic means of survival as such sites are often a source of sustainable economic development for the local communities. The discriminatory destruction of religious structures and shrines belonging to these minority groups should be shown as well to indicate genocidal intent, as was concluded in the ICTY prosecutions for the Balkan conflict. Finally, the destruction of cultural heritage in Syria and Iraq is a form of terrorism carried out against the local population and, in the words, of the Lieber Code, "makes the return to peace unnecessarily difficult."[218].

---

[215] LAW OF WAR MANUAL, *supra* note 43, ¶ 5.18.5.1, at 277. The Manual also reiterates the principle of distinction in referring to the determination of the location of cultural property and the compiling and promulgating of lists of cultural property that are not be attacked as feasible precautions to be taken to reduce risk of harm to cultural property. *Id.* ¶ 5.18.4, at 275.

[216] *Id.* ¶ 5.12, at 241; *cf.* Second Protocol Article 7(c).

[217] LAW OF WAR MANUAL, *supra* note 43, ¶¶ 5.11.3-4, at 240-41.

[218] WITT, *supra* note 4, at 236-37 (quoting Article 16 of the Code).

These elements indicate that we should return to Lemkin's vision that destruction of culture and cultural heritage should be regarded if not as a distinct form of genocide, then as a part of physical genocide. It is not realistic to expect that the Genocide Convention will be amended or, if it were, that such changes would become broadly accepted. Nonetheless, evaluating cultural heritage destruction through the lens of Lemkin's statements should prompt us to take these crimes more seriously and to encourage their suitable punishment. The ICC prosecution of Al-Faki is a first step in this direction, as it recognizes that cultural heritage destruction is punishable as a crime against culture and therefore an international crime in its own right.

The new Special Rapporteur on Cultural Rights for the United Nations Council on Human Rights, Professor Karime Bennoune, took a significant step in her recent report[219] by including cultural heritage destruction among the threats to cultural rights. As she noted,

> Cultural heritage is significant in the present, both as a message from the past and as a pathway to the future. Viewed from a human rights perspective, it is important not only in itself, but also in relation to its human dimension, in particular its significance for individuals and groups and their identity and development processes. Cultural heritage is to be understood as the resources enabling the cultural identification and development processes of individuals and groups which they, implicitly or explicitly, wish to transmit to future generations.[220]

The relevance of the human dimension of the heritage of Syria is clear when one recalls the evolving meanings and uses of this heritage among the local inhabitants over centuries. Salam al-Kuntar, a Syrian refugee scholar, recounted her grandparents' life among the ruins of Palmyra where successive generations lived and where the pagan temple of Baal had evolved into a Byzantine church to a mosque and to a center of village life.[221] Cultural heritage often also serves as a link among communities of different religions and ethnicities, whether the Bridge at Mostar or the Mar Elian monastery near Al Qaryatain in Syria or the shrine of Nebi Yunus in Mosul.

Cultural heritage destruction constitutes a crime against people, not simply a loss of property. This becomes clear when we recognize the paramount human dimension of cultural heritage, whether from a local, regional or global perspective.

> When lamenting the masonry and sculpture destroyed by the Islamic State, we can easily overlook this shifting human story. We too readily consign antiquities to the remote province of the past. But they can remain meaningful in surprising and ordinary ways. "This is the meaning of heritage," Ms. Kuntar said. "It's not only

---

[219] Report of the Special Rapporteur in the field of cultural rights, A/HRC/31/59 (Feb. 3, 2016), *available at* http://www.ohchr.org/Documents/Issues/CulturalRights/A-HRC-31-59_en.doc.

[220] *Id*. at 11 (internal citations omitted).

[221] Tharoor, *supra* note 214.

> architecture or artifacts that represent history; it's these memories and the ancestral connection to place."[222]

The international community should honor this human dimension by moving beyond the restraints and shortcomings that have characterized its approach and by taking more fundamental and effective steps for the preservation of this heritage for future generations.

---

[222] *Id.*