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Legal Frameworks for Protecting Cultural Heritage in Conflict Zones

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Legal Frameworks for Protecting Cultural Heritage in Conflict Zones

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Abstract

Cultural heritage has always been at risk during times of war. UNESCO first endeavored to address the issue shortly after World War II, in 1954, when it passed the first of three signature conventions to protect against the damage, destruction, and pillage of cultural property in times of armed conflict. Lacunae and other deficiencies in their frameworks, however, rendered these conventions difficult to enforce and largely ineffectual. This study offers an assessment of the strengths and limitations of the UNESCO system of cultural-heritage protection, with a particular focus on the 1954 Hague Convention. It is argued that, by superseding certain key liabilities therein, the International Criminal Tribunal for the Former Yugoslavia, the Second Protocol to the 1954 Hague Convention, and the Rome Statute of the International Criminal Court (ICC) proved particularly influential in shaping more effective legal frameworks for protecting cultural heritage, as reflected in subsequent measures taken by UNESCO, the ICC, and the Security Council. The question of whether and to what extent the imperative to protect cultural heritage has achieved broad normative status is likewise evaluated. The study concludes with a brief assessment of recent cultural crimes in Iraq, Mali, and Syria, followed by a consideration of possible new frameworks for protecting cultural heritage that seek to improve on the limitations of existing systems and respond to the unique risks that currently imperil culture in conflict zones.

I. Introduction

Cultural heritage has always been at risk during times of war. Indeed, as historian Richard J. Evans asserts, "The history of wartime plunder goes back to Jason and the Argonauts looting the Golden Fleece."[1] Though glib, Evans's comment speaks to a collection of practices that, since the wars of the ancients, have posed a threat to *cultural heritage*, a term used here to refer to historic monuments, architectural structures, works of art both large and small, and other objects of cultural significance. (The term *cultural property* is used largely analogously.)[2] These practices include damage and outright destruction, whether collaterally in active combat or deliberately in targeted attacks, as well as looting and trafficking. Risks to cultural heritage are particularly acute in *conflict zones*, whether an active theater of war like present-day Syria or a place of sustained violence and instability, such as Mali in 2012–13, when armed insurgents seized control of large tracts of the north. The term *armed conflict* may apply to conflicts of either an international or a non-international character. Increasingly, the belligerents who engage in armed conflict and make targets of cultural property are *nonstate actors* (NSAs) such as Islamist militants, although state actors have proven equally capable of such conduct.

Cultural losses can have an adverse impact on both local populations and our broader human civilization. The significance of the issue is threefold. At its most fundamental, the destruction and theft of cultural property represents a material loss of objects of value, thus depriving states, peoples, and individuals of resources that comprise part of their wealth. Seventy-five years after World War II, ongoing efforts to restitute artworks stolen by the Nazis to their original Jewish owners attest to the enduring ramifications of this crime. Material losses are compounded when they happen at a large scale, as was the case with the National Museum of Iraq in Baghdad, from which an estimated fifteen thousand antiquities were looted following the U.S.-led invasion in 2003.[3]

Together with the theft and deliberate destruction of large portions of the Mosul Museum collection by Islamist militants in 2015, Iraq's cultural patrimony has been irredeemably impoverished, with both the richness of its artistic holdings and its position as a steward of antiquity forever diminished.

Less easily quantifiable than material loss, but potentially more symbolically resonant, is a second category of loss, that of collective and individual notions of identity. The reaction to the 2019 fire at the Cathedral de Notre-Dame de Paris, eulogized by French president Emmanuel Macron in an address to the nation as "the epicenter of our life" and "the cathedral of all the French,"[4] provides a stark example of how culturally significant landmarks can instill a sense of identity, worth, and community. It is for this reason that armed belligerents have used targeted attacks on cultural property as a way to victimize populations they seek to control. In a practice that has been called both *cultural erasure* and *cultural cleansing*,[5] perpetrators attempt to erode victims' sense of being and way of life by destroying the cultural touchstones that help define those aspects of identity. Edward C. Luck, former Special Adviser to the UN Secretary-General for the Responsibility to Protect, has gone so far as to call the practice *cultural genocide*.[6]

A third indication that the destruction of cultural heritage is of pressing global concern is the threat it poses to international peace and security when used as a tactic of terrorism. These strategies most often take the form of intentional destruction of cultural touchstones, or the looting of salable antiquities to finance arms purchases and/or acts of violence. As illicit trafficking and terrorist attacks routinely transgress national borders and impact citizens of multiple countries, the issue is one of global significance, and all states are implicated in the effort to safeguard against it.

At the international policy level, efforts to prevent these crimes or to prosecute those who carry them out are best represented by the passage of three conventions by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in the decades following World War

II. Unfortunately, however, these conventions—for the Protection of Cultural Property in the Event of Armed Conflict (1954); on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970); and Concerning the Protection of the World Cultural and Natural Heritage (1972)—have eluded effective enforcement, rendering them unsatisfactory on their own as a reliable form of deterrence or prosecution.[7] UNESCO attempted to correct some of these deficiencies in the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, which entered into force in 1999. Roughly contemporaneously, the International Criminal Tribunal for the Former Yugoslavia (ICTY), convened in 1993 to prosecute war crimes committed during the Balkan conflict of the 1990s, achieved a number of convictions for crimes against cultural property. Its case law established precedents that, together with improvements introduced by the Second Protocol and by another legal instrument to emerge around that time, the Rome Statute of the International Criminal Court (ICC), succeeded in advancing protections for cultural property at the international level.

Other, more recent developments likewise suggest a more robust international response to crimes against culture. Since 2015, the UN has become more vocal in its recognition of this particular danger. Direct appeals from Irina Bokova, former Director-General of UNESCO, and from her successor, Audrey Azoulay, have helped raise awareness of and mobilize resistance to these practices.[8] Both the ICC and the Security Council have heeded the call to action by issuing, respectively, a criminal conviction and two resolutions that speak directly to the problem of culture at risk. At the level of civil society, cultural nongovernmental organizations and museums have likewise played their part, funding preservation and education initiatives and sponsoring fieldwork by conservators and art historians. In some instances, the political and civil branches of this effort have crossed over. For instance, in 2017 the State Hermitage Museum in Saint Petersburg signed a

Memorandum of Understanding with UNESCO under which each organization pledged to apply its resources and unique comparative endowments toward defending culture in peril, thus compounding the potential impact of their efforts.[9]

That the international community of states seems to be taking more decisive action to protect cultural heritage at risk suggests a growing normative consensus around the notion that culture is in need of more robust protections. The aim of this study is to examine the various international legal frameworks that have led to this point of consensus and to analyze which elements thereof have had the broadest resonance and benefit.

This study looks at the ways in which cultural heritage has been imperiled since World War II, a point that coincides with UNESCO's earliest efforts to safeguard against such threats. The strengths and limitations of the UNESCO framework are considered in relation to its implementation up to the present, particularly with respect to its relevance as the dangers to cultural heritage have evolved. A chapter is devoted to the ICTY's pioneering jurisprudence regarding cultural crimes, and another to comparable advances introduced by the Second Protocol and the Rome Statute. It is argued that key elements of these three legal instruments—the ICTY, the Second Protocol, and the Rome Statute—have been especially influential in shaping ensuing frameworks for protecting cultural heritage, as reflected in more recent actions taken by UNESCO, the ICC, and the Security Council. The study concludes with a brief assessment of recent cultural crimes in Iraq, Mali, and Syria, and offers possible new frameworks for protecting cultural heritage that seek to improve on existing ones and respond to the unique nature of the risks that currently imperil culture in conflict zones.

II. Literature Review

Any exploration of this topic must begin with the question, What is cultural heritage? Building on the definition offered above—historic monuments, architectural structures, works of art both large and small, and other objects of cultural significance—cultural heritage may be understood to take both tangible and intangible forms. In its tangible form it is often referred to by the analogous term *cultural property*, which was first defined by UNESCO in 1954, in its Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter, the 1954 Hague Convention), as:

> movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives, or of reproductions of the property defined above.[10]

The convention considers repositories of such material, for instance, museums and archives, to be cultural property, as well.[11] Intangible cultural heritage, which includes such things as cuisine, folk traditions, and language, is less easily quantifiable but just as intrinsic to the cultural life of a people or community. According to Thomas G. Weiss and Nina Connelly, what unites tangible and intangible heritage as something worth protecting is the actual or perceived value assigned to it.[12] Interestingly, they define this value by its absence—that is, by the degree of loss experienced when it has been eradicated. They see such loss as "ruinous for cultural identity," not only for the communities that experience it directly, but also for "humanity as a whole."[13]

While the loss of cultural property to violence and theft is a problem with long historical roots, concern over the issue began to resonate most acutely in the modern consciousness after World War II. That conflict witnessed the systematic looting of artworks from public and private

collections by the Nazis, and it left the built environment of Europe in ruins. It was the latter in particular—the conspicuous loss of vaunted European treasures—that proved especially shocking to certain sectors of the international community. As the architectural historian Nicholas Adams explains, using the damage wrought to the city of Florence as a specific example, "the great monuments of Italy represent, for many of us, a kind of cultural *patria* [patrimony] and so it is understandable that we feel damage to them as damage to us."[14] This sense of a shared culture, at least among those in the West, galvanized opinions that something more had to be done to safeguard the world's art and culture, prompting the passage of the 1954 Hague Convention. However, as Richard J. Evans makes clear, despite this "international legislation in place to preserve cultural artifacts in times of war, it is still very difficult to enforce it effectively."[15]

That effective enforcement of this legal framework remains elusive is likewise a concern of Adams, who regards attacks against cultural property—architecture in particular—as a weapon of would-be genocidaires: "It is as if the protagonists, unable to strangle the last living representatives of an alien culture, seem to think that with the destruction of place, an architectural cleansing, as it were, they can eradicate the people who inhabit that place."[16] Adams's sentiment is shared by Robert Bevan, who elaborates the position in his book-length exploration of architectural destruction as a form of cultural erasure.[17] Bevan contends that there are clear links between the decimation of tangible cultural heritage and more ambitious campaigns of genocide. He supports his argument in part using examples of mass atrocities committed during the conflict in the former Yugoslavia in the 1990s. For example, he identifies the 1993 razing of the Mostar Bridge in Bosnia-Herzegovina as a deliberate tactic within the larger Croatian effort to eliminate the Bosniak Muslim population from contested territories.[18] According to Bevan, the eradication of such a significant touchstone from the Bosnian people's built environment—of both the sense

of place and the framework of memories it embodied—occasioned a loss of identity that was tantamount to ethnic cleansing.[19]

Bevan's suggestion that culture is fundamental to human identity finds support within the broader international political community. Former UNESCO Director-General Irina Bokova has spoken of how "such acts of destruction cannot be decoupled from the killing of people," calling the two practices "part of the same global strategy, which I call 'cultural cleansing,' intended to destroy identities, tear apart social fabrics, and fuel hatred."[20] It is noteworthy that Bokova considers attacks against cultural property to be a threat not only to individuals and peoples, but also to international peace and security. Accordingly, she urged the international community of states to recognize both the value of heritage and the gravity of its endangerment, calling on both the Security Council and the ICC to apply their authority more forcefully within the cultural arena.[21]

Bokova's call to action was issued in response to a significant uptick in both the frequency and severity of targeted attacks against culture since 2001, predominantly but not exclusively in the Middle East. As Metropolitan Museum curators Blair Fowlkes-Childs and Michael Seymour explain in their appraisal of threats to the region's ancient heritage, "Some of the most important archaeological sites of the Roman and Parthian Middle East are now also scenes of modern destruction."[22] Large-scale losses—and, in some instances, complete annihilation—of important architectural and sculptural monuments have been a characteristic of the ongoing armed conflicts in Syria, Iraq, Yemen, and Afghanistan. Sometimes this damage is collateral to military operations, as was the case with the Great Mosque of Aleppo, one of the most tragic casualties to date of the Syrian Civil War. Other times, the vandalism is deliberate, as was the case with the Bamiyan Buddhas in Afghanistan. These ancient sculptures, vestiges of the region's pre-Islamic past, were blown up by fundamentalist Islamists who deemed them an apostasy. They are but one example

of a trend among ideologically driven NSAs to co-opt culturally resonant antiquities as proxy weapons in their ongoing struggles against the West.[23]

Theft and trafficking of art objects is likewise an increasingly frequent practice of NSAs, becoming in recent years "one of the larger transnational markets in illegal goods."[24] Studies suggest that the so-called Islamic State (ISIL) garners hundreds of thousands of dollars from its trade in stolen antiquities, which furnishes the Islamist group with the financial resources it needs to carry out its terrorist violence.[25] Bokova has called such looting a "hidden crisis" in the broader fight to protect heritage in conflict zones, worthy of further study and a tougher international response.[26]

And just what *has* been the international response to such threats against cultural heritage? The 1954 Hague Convention was followed, in 1970 and 1972, by the passage of two additional UNESCO conventions concerning the protection of cultural property. However, as will be explored in the following chapter, all three suffer from weaknesses and lacunae that render them insufficient on their own as a framework for cultural-heritage protection. Indeed, several commentators—including UNESCO itself—have lamented the consistent failure of these legal instruments to deter the ruin of cultural property.[27] Joris D. Kila attributes this fact, in part, to the changing nature of armed conflict since World War II—namely, the involvement of belligerent NSAs, which do not consider themselves subject to the rules of combat as defined by international law.[28] The changing dynamics of contemporary conflict compound the obsolescence of the UNESCO conventions, which were designed with traditional interstate wars and mutually agreed-upon rules of engagement in mind. Another factor standing in the way of the conventions' effectiveness is the built-in loophole of "military necessity," whereby damage to structures and monuments during "necessary" combat operations is dismissed as a regrettable but justifiable corollary of war.[29]

Not all legal instruments designed to counter cultural crimes are proving ineffective, however. Bokova's appeal to the ICC to wield its authority witnessed its first success in 2016, with the Court's conviction of Ahmad Al Faqi Al Mahdi for overseeing the destruction of cultural property in Timbuktu, Mali. As argued by the legal scholar Patty Gerstenblith, legal precedents established through cases such as Al Mahdi's offer an effective means of protecting cultural heritage for future generations.[30] She and other jurists look back further, to the 1990s, when the ICTY convicted several individuals for cultural-property crimes committed in the former Yugoslavia, to demonstrate how the resulting case law has been successfully invoked in subsequent trials of this nature—Al Mahdi's among them.[31] There is evidence to suggest that the jurisprudence of the ICTY has also helped cement the imperative to protect cultural heritage into customary law, thus fostering its acceptance as a broad normative principle.[32] Such status has been contested at various points since the passage of the 1954 Hague Convention but, as asserted by Jean-Marie Henckaerts, Legal Adviser to the International Committee of the Red Cross, it should now be regarded as unequivocal.[33]

Beyond the existing tools currently available to combat the destruction of cultural heritage, Weiss and Connelly consider the possibility of framing the issue within the responsibility to protect (R2P), the international norm that calls on states to recognize their three-pronged duty to "prevent, react, and rebuild" in the face of mass atrocity.[34] Though the norm was developed with the protection of human life in mind, the authors point out that R2P's tripartite formulation could apply to the protection of cultural heritage: (1) conservation efforts to *prevent* disaster; (2) swift and decisive *reaction* to smaller acts of vandalism before they become larger tragedies; and (3) *rebuilding* structures and monuments after they have fallen victim to conflict.[35] The authors contend that broadening the set of responsibilities encompassed by R2P to include the protection

of culture would allow the full heft of its attendant legal obligations to apply, thereby facilitating both deterrence and prosecution.

The R2P framework finds further relevance when considered in relation to the idea that attacking cultural property is a form of cultural erasure. Viewed in this light, the practice becomes a tool of genocide—or, in Edward C. Luck's estimation, a discrete practice that he calls *cultural genocide*.[36] As such, it would fall squarely under R2P's jurisdiction, which includes genocide and ethnic cleansing among the mass atrocities it was designed to combat. Luck supports his position by looking closely at the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, in particular, the efforts made by its primary framer, Raphael Lemkin, to include "assaults on a group's culture as an essential element of what he would later call genocide."[37] Per Lemkin:

> Genocide does not necessarily mean the immediate destruction of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups.[38]

The term *genocide*, at least in the estimation of the man who coined the term, could thus apply to more than the bodily extermination of human beings. It could pertain to a host of practices that chip away at a people's sense of identity, worth, and security in the effort to destroy their way of life. And in Lemkin's view, "attacks on culture usually came first" in such campaigns of destruction.[39]

Luck recounts how Lemkin intended the Genocide Convention to include an article specifically condemning assaults on cultural heritage, but political infighting over its inclusion threatened to derail the convention altogether, and the article was ultimately scrapped. Luck, however, feels that time might be ripe for a reappraisal of cultural genocide and its acceptance as a legitimate policymaking concept. He acknowledges certain obstacles, foremost among them that "cultural genocide has never been defined, accepted, or codified by the world's governments,"

rendering more difficult its adoption as a universalizing framework for preventing and prosecuting cultural crimes.[40] To this point may be added that, in the broader public consciousness, the destruction of property is superseded in importance by the killing of people, thus relegating the former to a place of secondary concern.[41]

Nevertheless, the imperative to protect cultural heritage continues to gain currency as a normative principle, and efforts to do so at the international level are on the rise. The chapters that follow trace the evolution of these efforts from the first half of the twentieth century up to the present, evaluating which frameworks of protection have been the most influential in shaping the current international response to this perennial problem.

III. The UNESCO System for Safeguarding Cultural Heritage

While it is often invoked in the literature as the preeminent legal instrument for the protection of cultural heritage,[42] the 1954 Hague Convention, signed on May 14, 1954, was not the first international treaty that sought to define cultural property or to outline measures for its protection. Rather, that distinction belongs to the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, sponsored by the Roerich Museum, New York, and signed in Washington on April 15, 1935.[43] With only ten states parties—the United States plus nine fellow-members of what is now the Organization of American States—the Roerich Pact was limited in its jurisdiction, and therefore in its efficacy, yet it remains exceptional as the first document to build consensus around the idea "that the treasures of culture [ought to] be respected and protected in time of war and in peace."[44] Its definition of said treasures is modest, extending to (immovable) "monuments, museums, [and] scientific, artistic, educational and cultural institutions," but not specifically to any (movable) contents contained therein.[45] Nevertheless, the Roerich Pact was a pioneering legal instrument in two respects. First, by singling out the "cultural treasures of peoples" as a category in need of particular protections, it implied the now well-established principle that cultural property has a broader, collective significance that distinguishes it from private property, which at that time already enjoyed certain protections under the 1899 and 1907 Hague Conventions on the Laws and Customs of War.[46] The idea of cultural property as something distinct and exceptional is compounded by the assertion that cultural treasures warrant protection not only during periods of armed conflict, but also in times of peace, a notion theretofore unprecedented.

The Roerich Pact in many ways proved prescient, for the onset of World War II just a few years later ushered in a devastation of property, both private and patrimonial, on a scale not seen since the Napoleonic Wars.[47] Likewise troubling with regard to cultural property was the large-scale

pillage of privately held artworks undertaken by the Nazis, notably under the auspices of the Einsatzstab Rosenberg, an illicit "cultural ministry" of sorts that carried out systematic looting campaigns, primarily of Jewish households, and "re-catalogued" the spoils as the patrimony of the Reich. While the indictments issued by the International Military Tribunal against the war criminals tried at Nuremberg included charges for crimes against cultural property,[48] the war made clear that more robust legal instruments were needed to keep culture safe.

The 1954 Hague Convention was the first of three such instruments issued by UNESCO in the following decades to safeguard cultural property and to sanction those who committed crimes against it. It was followed, in 1970 and 1972, by the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter, UNESCO 1970) and the Convention Concerning the Protection of the World Cultural and Natural Heritage (UNESCO 1972).[49] Despite overlap in their aims and content, each convention puts forth a discrete understanding of cultural property and the nature of the crimes perpetrated against it. The result is an additive system of protections that attempts to address the full range of crimes against culture.[50] The following section examines how each of these documents defines both cultural property (or cultural heritage) and cultural crimes, taking the 1954 Hague Convention as the foundational document to which the 1970 and 1972 conventions act as corollaries. It also assesses some of their merits and deficiencies as legal instruments, noting their suggested penalties for such crimes and their positions on how and by whom cultural property ought to be protected.

Convention on the Protection of Cultural Property in the Event of Armed Conflict (1954)

The 1954 Hague Convention is unequivocal in its recognition of both the existence and the distinct value of cultural property, asserting in its preamble that "damage to cultural property belonging to

any people whatsoever means damage to the cultural heritage of all mankind." The text goes on to define cultural property in terms considerably more expansive than those given in the Roerich Pact, which it nonetheless invokes as a precedent, together with both Hague Conventions on the Laws and Customs of War, before asserting the following:

> For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:
>
> (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives, or of reproductions of the property defined above;
>
> (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
>
> (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b).[51]

Article 4 of the convention identifies the "use of the property . . . for purposes which are likely to expose it to destruction or damage in the event of armed conflict" and "any act of hostility directed against such property," as well as "any form of theft, pillage or misappropriation of, and any acts of vandalism," as crimes worthy of sanction.[52] However, determining the appropriate penalty for such a breach is left to the discretion of states parties, which are charged with taking, "within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention."[53]

As for the prevention of such crimes, article 2 outlines the twofold responsibility of states parties: "safeguarding of" and "respect for" the property in question. To fulfill the first of these responsibilities, parties must act preventively "to prepare in time of peace for the safeguarding of

cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate."[54] Showing "respect for" cultural property is to refrain from undertaking the sanctioned activities outlined in article 4, as well as to "prohibit, prevent and, if necessary, put a stop to" such actions should they be undertaken by other parties. The convention does not provide specifics as to how states parties should carry out their charge. However, article 6 mandates a system by which parties must first identify and inventory their cultural treasures, and article 16 orders that these properties be marked as such with a distinctive emblem, so as to forewarn belligerents against targeting them. Moreover, chapter 2 of the 1954 Hague Convention is devoted to outlining a system whereby "there may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centers containing monuments and [of] other immovable cultural property of very great importance."[55]

The most immediate and enduring contribution of the 1954 Hague Convention lies in its use, for the first time in any international treaty, of the term *cultural property*, thereby entering into the lexicon of international law a class of property distinct from private property, deserving of distinct protections.[56] Moreover, the text's definition thereof is notably comprehensive,[57] improving on the Roerich Pact by including movable property within its protections while allowing for a broad interpretation of its scope by extending to property of either a religious or a secular significance.

Equally laudable is the convention's equation of "damage to cultural property" with "damage to the cultural heritage of all mankind," thus making clear from the outset that it elevates cultural property to a level of importance beyond the mere material (as the word *property* might imply).[58] While its subtle distinction of *property* from *heritage* suggests that the former is a sub-element of, and not an interchangeable term for, the latter, as has become the case in the literature,[59] the 1954

Hague Convention remains a crucial normative instrument that has helped embed the now broadly accepted notion of a shared global humanity sustained by its collective cultural achievements. And indeed, more recent efforts to protect cultural property imperiled by armed conflict have been bolstered by such universalist conceptions of the value of culture, which have helped not only to galvanize the international response in defense of humankind's shared heritage, but also to shape normative consensus around the increasingly urgent need to protect culture at risk.[60]

Despite these considerable merits, the 1954 Hague Convention carries certain liabilities. Its first and arguably most glaring defect is that it all but negates its protections in cases of "military necessity"—that is, cultural property can be targeted, damaged, or destroyed if doing so is deemed necessary to advance a military objective.[61] The military waiver represents a continuum from earlier treaties: the Roerich Pact, as well as Hague Convention (IV) and the Geneva Conventions, contain similar caveats allowing for instances of lawful destruction of property when military operations require it.[62] But, what constitutes "military necessity," and who is authorized to declare it? The concept is not defined in the treaty and thus left open to subjective interpretation, rendering it apt to manipulation or easy deployment. Indeed, a warning that such a proviso could be exploited to serve individual interests was issued as early as 1943 by General Dwight D. Eisenhower. Speaking to Allied troops, he reminded them that "the phrase 'military necessity' is sometimes used where it would be more truthful to speak of military convenience. . . . I do not want it to cloak slackness or indifference."[63]

Second, it cannot be forgotten that the 1954 Hague Convention was issued in response to, and therefore directly shaped by, the proceedings of World War II. That conflict was, perhaps, the last war of the modern era to conform to the "old war" format—that is, large-scale or "total" war, fought by the official armed forces of state-level belligerents and conducted across national borders

for the purpose of conquering territory.[64] Armed conflicts in the decades since have, by contrast, been primarily intrastate, and they often involve at least one NSA, whether a terrorist or other ideologically motivated group whose purpose is to control populations, or members of a resistance movement acting in opposition to a repressive government.[65] While article 19 of the convention does ensure that its provisions apply to "conflicts not of an international character," meaning that its mandate can extend to intrastate disputes, debate continues as to whether NSAs are bound to abide by the convention and are subject to sanction if they breach it (discussed further in chapter 6).[66] As damage to or destruction of cultural property becomes less a corollary of total war and increasingly a tool wielded by NSAs in their campaigns of terror and cultural erasure, the 1954 Hague Convention seems almost quaint in its insistence that belligerents take care not to target each other's cultural heritage when planning their battlefield attacks. Moreover, by failing to address NSAs and the tactics of the "new wars," the convention's legal reach is limited in ways that render it insufficiently effective for our contemporary moment.

Third, the convention places an undue burden of both prevention and prosecution on states parties. With regard to prevention, the call for states to inventory and visibly mark all their cultural property with a distinctive emblem is both onerous and unrealistic, particularly for those states that lack adequate resources and/or infrastructure to do so.[67] That such under-resourced states are those that are also prone to instability, and therefore to outbreaks of armed conflict, means that their cultural heritage is often at more sustained risk, underscoring the futility of such a system of prevention. One need only look to the example of the National Museum of Iraq, the large-scale looting of which in 2003 was facilitated by insufficient cataloguing by a staff inadequately equipped to do so, thus allowing much of what was stolen to vanish without a trace.[68] As for prosecution, article 28 of the convention mandates that states parties "take within the framework of their ordinary

criminal jurisdiction all necessary steps to prosecute and impose penal or disciplinary sanctions" on those who have breached the convention. Not only are these provisions too vaguely worded and broadly interpretable to effectively criminalize specific offences against cultural property,[69] but they also rely on states to have in place domestic legislation pertaining to the same subject-matter jurisdiction as the convention.

It should also be noted that, like all treaties, the 1954 Hague Convention is limited in application to only those states that have ratified it. Moreover, it is not merely the *number* but the *identity* of states parties that matters in establishing a treaty's ultimate influence and efficacy; the buy-in of certain influential states is key. The U.S., for instance, only ratified the convention in 2009, and the U.K. in 2017, meaning that, for much of its existence, the convention has lacked the added legitimacy that ratification by these world powers would have offered.[70] Official state buy-in is less crucial if the elements of a treaty are adopted as customary law, as reflected through *usus* (state practice) and *opinio juris* (broad acceptance as legal principle). Legal and scholarly opinions have varied as to whether and/or when the 1954 Hague Convention attained customary status,[71] a consideration that will be explored in greater depth in the chapters that follow.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970)

With its focus on import, export, and transfer, the UNESCO convention signed on November 14, 1970, addresses movable items of cultural property, namely those which, "on religious or secular grounds," are designated "as being of importance for archaeology, prehistory, history, literature, art or science."[72] The nature of the objects that fall under its mandate thus crosses over with those object covered by the 1954 Hague Convention, but per the 1970 treaty, such a designation might extend as readily to "products of archaeological excavations," "pictures, paintings and drawings," and "rare manuscripts" as it does to "specimens of fauna," "objects of ethnological interest," or even "postage,

revenue and similar stamps."[73] The variety of objects named in the convention thus suggests a broadening understanding of what constitutes culture, as well as an incipient conflation of artistic treasures with those from the natural world.

As to the crimes it sets out to prohibit, UNESCO 1970 states succinctly that "the import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under the Convention by the States Parties thereto, shall be illicit."[74] The immediate implications are theft and looting, perpetrated by groups or individuals motivated by personal profit. However, articles 5 to 7 of the convention make clear that such crimes are on a par with those committed by stewards of cultural property, for instance, museums or government ministries, that either fail to ensure the proper transfer of objects under their stewardship or engage in the trade or acquisition of objects of questionable or unknown provenance. These practices are, according to the convention, a comparable form of theft, one that causes the "impoverishment of the cultural heritage of the countries of origin of such properties."[75] Article 5 thus requires the inventorying of cultural treasures by trained, knowledgeable personnel, and article 6 mandates a system of certification for all items of cultural property so that their transfer between parties can be traced. Article 7 forbids parties to acquire or deaccession cultural property outside the system thus prescribed.

As for the prosecution of these crimes, like the 1954 Hague Convention, UNESCO 1970 defers to states' domestic legal systems "to impose penalties or administrative sanctions on any person responsible for infringing the prohibitions" outlined in the convention.[76] Herein lies one of UNESCO 1970's merits, for most states have existing, and frequently robust, legislation pertaining to the theft or misappropriation of property. Accordingly, they can readily apply the same subject-matter jurisdiction to cultural property, thus facilitating the prosecution of crimes of this nature. On the other hand, UNESCO 1970 likewise shares with its predecessor the placement of a

significant burden of responsibility on states parties to safeguard their own cultural property, not least through the establishment of systems of registration and inventory that may lie beyond the capabilities of states that lack the resources and infrastructure to do so. However, it can be regarded overall as a constructive complement to the 1954 Hague Convention in that it expands the definition of cultural property, addresses crimes against culture beyond damage and destruction, and is applicable in peacetime, not only in periods of armed conflict.

Convention Concerning the Protection of the World Cultural and Natural Heritage (1972)

UNESCO 1972 is notable for its use of the term *cultural heritage* rather than *cultural property*. It defines the term as follows:

> Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
>
> Groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
>
> Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.[77]

As with UNESCO 1970, the type of object addressed in UNESCO 1972 is similar to that referred to as *cultural property* in the 1954 Hague Convention, yet it is important to note here the mention of their "universal value," through which they take on the new designation of *cultural heritage.* The use of the qualifier *universal* underscores the notion, discussed briefly above, that cultural property is a constituent part of a broader, less tangible concept of a culture shared across humanity, irrespective of nationality or ethnicity. In this way it represents a significant departure from its immediate predecessor, UNESCO 1970, which advances a state-centric attitude toward cultural patrimony and its preservation within its territory of origin.[78] Accordingly, UNESCO 1972

shifts some of the burden of protecting cultural heritage onto the collective community of states, asserting that "it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage."[79] While the convention still calls on each state party "to identify and delineate" the properties that comprise its cultural patrimony,[80] as well as to recognize its own "duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage . . . situated on its territory,"[81] it also provides for the establishment of an intergovernmental World Heritage Committee and an associated fund to help maintain and protect said heritage.[82]

UNESCO 1972 is distinct from its predecessors in that its focus is neither to address crimes against culture nor to suggest a means of prosecuting them. Rather, it provides for the administration of international assistance to states whose heritage is in peril. It also introduces the opportunity to designate significant cultural properties as World Heritage sites. Though the designation is something of an honorific—it affords a site a certain measure of prestige, as well as provisions to assist in its preservation, but it does not carry specific penalties if sites thus designated are damaged or destroyed—it has been invoked in legal cases and used to determine the punishment for crimes against culture (to be discussed further in subsequent chapters).

Conclusion

The three conventions that comprise UNESCO's original system of cultural protection are in many ways laudable and exceptional. They speak to a recognition at the international level that cultural heritage is of distinct character and value, and therefore deserving of distinct protections. Inherent weaknesses in their frameworks, however, particularly in the 1954 Hague Convention, rendered these treaties ineffectual on their own as either a preventative or a punitive measure against cultural crimes. These failings became especially lamentable in 1991, when violence engulfed the Balkan

region and generated the gravest threat to cultural heritage since World War II. As will be explored in the following chapter, it was not the UNESCO system but the workings of an ad hoc criminal tribunal that proved to be a more effective tool in the effort to protect cultural heritage at the international level.

IV. The Innovative Case Law of the ICTY

Despite provisions laid out in the 1954 Hague Convention to facilitate its execution in the event of armed conflict, as recently as 2006, its system of regulations was noted to have "never operated as designed," nor even to have been "implemented in whole."[83] The weaknesses of the UNESCO system are perhaps most evident in the fact that it would take forty years after the convention came into force to see the first convictions for cultural-property crimes. These were handed down in the former Yugoslavia (SFRY), which during a series of civil wars throughout the 1990s witnessed a searing devastation of its cultural heritage. The convictions were issued by the International Criminal Tribunal for the Former Yugoslavia (ICTY), the ad hoc tribunal established in 1993 by the UN to investigate wartime atrocities committed in the SFRY beginning in 1991. By addressing crucial lacunae in the 1954 Hague Convention, as well as fulfilling key but untested provisions therein, the proceedings of the ICTY offered a legal framework for protecting cultural heritage that succeeded where the UNESCO framework had failed. Among the lacunae filled or provisions bolstered by the tribunal's jurisprudence were: (1) recourse to individual criminal responsibility; (2) the "military necessity" loophole; (3) respect for cultural property per se; and (4) the linking of cultural destruction to atrocity crimes prosecutable under international humanitarian law (IHL). The workings of the tribunal also fostered the acceptance of the 1954 Hague Convention into customary law and helped embed the normative consensus that cultural heritage warrants robust international protections.

Destruction of Culture in the Former Yugoslavia

While a full accounting of the decade-long conflict in the SFRY is beyond the scope of this study, it is relevant to note that the dissolution of the formerly Communist federation into its six[84] constituent republics was characterized by extreme sectarian violence along ethnic, nationalistic, and religious lines.[85] Among the most heinous acts investigated by the tribunal concerned ethnic cleansing, a

practice by which members of a certain demographic group are purged from a territory for no other reason than their belonging to that demographic.[86] In the case of the SFRY, forced displacement and systematic rape were among the tactics used to purge or, in the case of births occasioned by rape, "dilute" the purity of ethnic or religious populations living in areas claimed by belligerent factions.

The demographic affiliations of both perpetrators and victims of war crimes in the SFRY varied throughout the course of the conflict, but a particularly high level of violence was leveled against Muslim populations in Bosnia-Herzegovina, known as Bosniaks. Bosniaks were victimized by both Croats and Serbs, who sought to purge them from areas within their territorial borders or from Bosnian lands that each claimed as part of their respective republics. In their turn, Croats (who are predominantly Roman Catholic) and Serbs (predominantly Eastern Orthodox) were likewise targeted for their ethnic and/or religious identities. Beyond the genocidal methods noted above, one tactic used in these campaigns of violence involved the destruction of houses of worship and other cultural touchstones that formed the fabric of life in these communities. According to a report by the Council of Europe, in only the first two years of fighting, from 1991 to 1993, an estimated 468 churches and 42 monasteries in Croatia were damaged or destroyed, while 613 mosques suffered the same fate in Bosnia-Herzegovina.[87] In addition to these religious structures, a number of secular sites of historic and architectural importance were also devastated, among them the Old Town of Dubrovnik, Croatia (discussed further below), and the sixteenth-century Mostar Bridge in Bosnia-Herzegovina, which crumbled into the Neretva River in 1993 after sustaining months of artillery fire.[88]

The ICTY Statute

Such destruction did not go unnoticed: when drafting the statute of the ICTY,[89] the framers turned to a precedent set by the International Military Tribunal (IMT), which had overseen the trials at

Nuremberg for war crimes committed during World War II. Article 6 of the IMT charter, adopted in 1945, asserts the tribunal's power to prosecute "plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity."[90] This language was adopted almost wholescale by the ICTY in article 3 of its statute, which reads:

> The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
>
> (d) 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;
>
> (e) plunder of public or private property.[91]

With the addition of sub-article 3(d), the ICTY went a step further than its predecessor, invoking the protected status of "institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art." As such, the tribunal signaled its acknowledgment of cultural property as understood by the UNESCO system.

Nevertheless, it is important to note that, when determining the international conventions that would form the basis for its subject-matter jurisdiction, the ICTY did not include the 1954 Hague Convention, for at that time, the Security Council and the UN Secretary-General were unconvinced that the convention had yet attained the status of customary law.[92] In the view of the tribunal,

> The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.[93]

While both the Geneva Conventions and Hague Convention (IV) include basic proscriptions against targeting cultural sites in times of war,[94] the omission of the 1954 Hague Convention from this assembly of legal instruments speaks both to its deficiencies and to its sparing implementation. As has been noted, acceptance into customary law is contingent on not only *opinio juris* (acceptance as legal principle), but also *usus* (state practice), and both were lacking with respect to the 1954 Hague Convention, lending credence to the ICTY's failure to recognize it as custom. Nevertheless, the tribunal's case law tells a different story, revealing a subscription to the convention's values while clarifying and fulfilling a number of its as-yet untested provisions.

Individual Criminal Responsibility

Article 28 of the 1954 Hague Convention requires states parties to defer to their own domestic legal codes in order to prosecute crimes against culture.[95] The idea is admirable in theory but weak in practice, for the convention fails to provide states parties with a specified listing of prosecutable offences. Instead, using generalized terms, the convention condemns only the "*use of* [cultural] property for purposes which are likely to expose it to destruction or damage in the event of armed conflict," as well as "any act of hostility directed against such property."[96] Not only is the understanding of these provisions left open to interpretation, but also, "without a clear-cut definition of offences . . . it becomes more difficult to set the boundaries within which individual criminal liability may be upheld."[97] The convention thus lacks legitimacy with respect to both quantifying cultural crimes worthy of sanction and holding individuals responsible for them.

The failure of the 1954 Hague Convention to adequately address individual criminal responsibility is one of five weakness cited in a report issued by UNESCO in 1993 following a broad review of the treaty's efficacy (hereinafter, the 1993 Review).[98] Taking aim at the vague language

of article 28,[99] the 1993 Review notes in particular the convention's failure to define either jurisdiction (instead implicating offenders "of whatever nationality") or a prosecutorial process that could be upheld in any state, regardless of variations in systems of governance or criminal justice.[100] The absence of such clarifications creates obstacles to prosecution, not least the identification of individual perpetrators and the nature and extent of their offences.

International criminal tribunals, on the other hand, exist for the very purpose of assigning individual culpability for crimes of an international nature.[101] In one of its earliest cases, the ICTY made clear that it would count crimes against cultural property among such offences. Dusko Tadic was a leader of the Serbian Democratic Party (SDS), the principal party of ethnic Serbs living within the territorial boundaries of Bosnia-Herzegovina. The SDS, under Tadic's command, led systematic campaigns of violence against Bosniaks. In 1995 the ICTY convicted Tadic for an array of crimes, including the targeting of mosques in Bosniak communities.[102] Tadic appealed, and in the process of both upholding his conviction and reaffirming its own jurisdiction to issue it, the ICTY delineated four conditions that had to be met for an offence to be subject to prosecution under article 3 of its statute. According to the fourth "Tadic Condition," as these provisions have subsequently become known, "the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule."[103]

That Tadic's conviction was upheld confirms that the ICTY considered him individually culpable for his crimes, despite their execution under the aegis of the SDS. These crimes included the targeting of cultural property, specifically, the razing of mosques. Thus itemized, the act became a quantifiable offence, and the sentence handed down for it could provide guidance on appropriate sanctions for future crimes of the sort. The Tadic ruling thus gave body to the indeterminate violations and sanctions only suggested by article 28 of the 1954 Hague Convention, and established

a template for criminalizing individual acts against culture that could—and would—be applied in subsequent ICTY cases.[104] One of these cases itself bolstered the principle of individual criminal responsibility with respect to cultural property. In its conviction of Pavle Strugar and Miodrag Jokic for their part in destroying the Old Town of Dubrovnik (discussed in further detail below), the tribunal held that individual criminal responsibility could be assigned to attacks on cultural targets during conflicts of either a civil or an interstate nature.[105] It thus fulfilled the untested provision of article 19 of the 1954 Hague Convention, which asserts the convention's applicability to conflicts of a non-international character. Additionally, the tribunal's sentencing of the two men established precedent for assigning the maximum allowable penalties for commissions of cultural crimes.[106]

Military Necessity Loophole

As noted in the previous chapter, the 1954 Hague Convention failed to correct a flawed inheritance. With its article 4(2), it maintained a feature shared by the Roerich Pact, the Geneva Conventions, and Hague Convention (IV) that allowed for a revocation of its protections when the target of destruction was one of "military necessity." The 1993 Review is unequivocal in its stance toward this loophole, calling on states parties to renounce any provisions that allow for military waivers.[107] Elaborating on this suggestion, Patrick J. Boylan, the author of the report, asserts:

> Those drafting the 1954 Convention probably envisaged war in terms of well-defined international conflicts between structured and well-disciplined military commands on the pattern of the two World Wars. However, looking back over history this was probably a mistake. . . . It has to be recognised that the deliberate targeting and destruction of important monuments and collections have become increasingly common features of both internal and international conflicts in many parts of the world.[108]

In other words, as the nature of armed conflicts and their belligerents evolved since 1954, the idea that an important monument or work of architecture might be targeted for any reason other than to inflict intentional damage on an enemy had become obsolete.

The ICTY cast judgments on questions of military necessity a number of times, and in almost all cases found the provision to be inapplicable.[109] Notably, the tribunal tackled two aspects of the issue about which the 1954 Hague Convention was silent—that is, converting the use of cultural properties in ways that would render them military targets, and targeting proximate structures in an effort to underhandedly eradicate others of cultural value. This last strategy was employed by Mladen Naletelic, who, as a commander of the Croatian Defense Council (HVO), the military arm of a Croat political faction, ordered the destruction of mosques in the Bosnian cities of Sovici and Doljani in an effort to drive out Muslim populations there.[110] He claimed that the mosques were destroyed collateral to lawful attacks on adjacent buildings, which he cited as legitimate military targets. The tribunal, however, rejected the argument that "the mere fact that an institution is in the 'immediate vicinity of a military objective' justifies its destruction."[111] The ruling thus plugged a gaping hole in the 1954 Hague Convention while adding further clarity to a provision that had long been susceptible to broad interpretation and/or exploitation.

Cultural Property Per Se

The use in the 1954 Hague Convention of the term *cultural property* introduced into IHL a class of property distinct from private property, not only casting light on its unique characteristics, but also endowing it with unique forms of protection. As such, the convention went an important step further than both Hague Convention (IV) and the Geneva Conventions. While these foundational instruments of IHL recognized the need to protect cultural heritage,[112] they did so according to what legal scholar Micaela Frulli calls a "civilian-use" approach to the protection of property—that is, for the primary purpose of preventing injury or death to the people who use it or who live in its vicinity.[113] A museum or house of worship would therefore be pegged for protection for the same reasons that a hospital or school would be: not for its intrinsic value,

artistic merit, or cultural significance but, rather, for its use by a population that might be harmed by its destruction. By distinguishing cultural property as something unique, the 1954 Hague Convention took an important step in advancing a "cultural-value" approach—that is, one based on intrinsic merit.[114] This effort was bolstered by the passage of UNESCO 1972, with its suggestion of a universal heritage shared across humanity.

A judgment issued by the ICTY in 2001 finally gave body the 1954 Hague Convention's enshrinement of cultural property per se. In it, the gravity of the perpetrators' crime was determined solely on the intrinsic cultural merit of the targets. Pavle Strugar was a commander in the Yugoslav Peoples' Army (JNA), a subunit of which was directed by Miodrag Jokic; both men were instrumental in the JNA's devastation of Dubrovnik in late 1991. A sustained campaign of aerial bombardment decimated large portions of the Croatian city, including the historic Old Town, designated a UNESCO World Heritage site in 1979 for the richness of its cityscape. The indictment of Strugar and Jokic is notable for its enumeration of these architectural treasures, as well as its lengthy accounting of the city's storied history dating back to the medieval period.[115] These factors were instrumental in securing the two men's conviction for "unjustified devastation," "unlawful attacks," and "wilful damage to historic monuments," among other crimes.[116] The Jokic trial judgment in particular lays bare the extent to which the tribunal considered the Old Town's cultural significance when rendering its decision:

> 51. The whole of the Old Town of Dubrovnik was considered . . . an especially important part of the world cultural heritage. . . . The shelling attack on the Old Town was an attack not only against the history and heritage of the region, but also against the cultural heritage of humankind.
>
> 52. Restoration of buildings of this kind, when possible, can never return the buildings to their state prior to the attack because a certain amount of original, historically authentic, material will have been destroyed, thus affecting the inherent value of the buildings.
>
> 53. [I]t is a crime of even greater seriousness to direct an attack on an especially protected site. . . . The unlawful attack on the Old Town must therefore be viewed as especially wrongful conduct.

> 55. The gravity of the crimes committed by the convicted person also stems from the degree of his participation in the crimes. . . . The parties have agreed that Miodrag Jokic was aware of the protected status of the whole of the Old Town as a UNESCO World Cultural Heritage site.[117]

Here, we see a number of remarkable assertions: that losses of cultural property impoverish the heritage of all humankind; that full restitution or compensation for such losses is impossible, for the value of cultural property is intrinsic and therefore unquantifiable; and that attacking a World Heritage site warrants a graver punishment than attacking a site of lesser cultural importance. The judgment was therefore groundbreaking with respect to the valuation of cultural property per se, establishing legal precedent that renders indisputable the heightened gravity of its destruction compared with that of other forms of property.

Destruction of Culture as an Atrocity Crime

Persecution—that is, "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity"[118]— is defined in IHL as a crime against humanity. Article 27 of the Universal Declaration of Human Rights, meanwhile, asserts that "everyone has the right freely to participate in the cultural life of the community, [and] to enjoy the arts."[119] It follows, then, that depriving people of their inherent human right to partake in arts and culture by destroying touchstones of cultural life could qualify as a form of persecution when carried out systematically against a specific demographic. Accordingly, doing so would be subject not only to laws that address cultural property, but also to those provisions of IHL that address crimes against humanity and other atrocity crimes.

The 1993 Report recognized the potential of linking cultural destruction to atrocity crimes. Indeed, it recommended an investigation as to "whether the deliberate obliteration of all evidence of the existence of an ethnic, religious or other group identity through destruction of their physical

symbols of identity could in extremis fall within the definition of the crime of genocide under the 1948 Genocide Convention."[120] The idea was not unprecedented: as noted at the start of this study, Raphael Lemkin, the principal framer of the Genocide Convention, held similar ideas.[121] For its part, the ICTY decided that "customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group," concluding that "an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements . . . would not fall under the definition of genocide."[122] Nevertheless, in its 2001 conviction of Radislav Krstic for his participation in the genocide at Srebrenica, the ICTY pointed out that, "where there is physical or biological destruction, there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group."[123] And indeed, Krstic's attacks against mosques were cited as corroborating evidence of his crime.

Per its statute, the ICTY's subject-matter jurisdiction extended to war crimes (defined as "grave breaches of the Geneva Conventions of 1949" and "violations of the laws and customs of war"), genocide, and crimes against humanity; listed among the latter are "persecutions on political, racial and religious grounds."[124] The tribunal's jurisprudence in several cases, among them that of Radoslav Brdjanin, made clear that "destruction of cultural property may amount to persecution and thus to a crime against humanity."[125] As vice president of the self-declared Republika Srpska (Serbian Republic) of Bosnia-Herzegovina, Brdjanin led attacks against non-Serb populations, both Muslim and Croat, within the breakaway territory. His 1999 indictment by the ICTY included one count of persecution for activities that included not only murder, sexual assault, and forcible deportation, but also "wanton destruction of Bosnian Muslim and Bosnian Croat villages and areas, including the destruction of religious and cultural buildings."[126] The trial

judgment found Brdjanin guilty on this count, deeming his destruction of property to "occupy the same level of gravity as the other crimes enumerated."[127] It likewise noted Brdjanin's "specific discriminatory intent" in targeting only Muslim and Roman Catholic sites, leaving Serbian Orthodox properties almost wholly intact.[128] The mention of intent is significant, because it suggests the presence of *mens rea*—that is, a foreknowledge or understanding by the accused of the wrongdoing inherent in the commission of a particular crime. According to Hirad Abtahi, Legal Adviser to the Presidency of the ICC, persecution "requires a mental element specific to crimes against humanity" to qualify as such.[129] The tribunal thus succeeded in connecting cultural destruction to the atrocity crime of persecution, establishing precedent for the application of certain provisions of IHL to crimes of this nature.

Conclusion

UNESCO heeded the recommendations of the 1993 Review, and in 1999 introduced a protocol to the 1954 Hague Convention that sought to fill lacunae, correct missteps, and shore up weaknesses. That some of these deficiencies had already been addressed by the ICTY suggests that the imperative to protect cultural heritage had resonance as a normative concept, despite holes in the existing legal framework. As will be examined in the following chapter, the succession of developments that began with the 1954 Hague Convention and continued through the proceedings of the ICTY would find further, more potent expression in the Second Protocol, as well as the Rome Statute of the ICC. The latter was developed at roughly the same time as the Second Protocol and would likewise include helpful provisions for the protection of cultural property.

V. Traces of ICTY Precedent in the Second Protocol and the Rome Statute

In 1991, just as the crisis in the SFRY was taking root, delegates at the twenty-sixth session of the UNESCO General Conference came to the grim conclusion that "the international system of safeguards of the world cultural heritage [did] not appear to be satisfactory, as indicated by the ever-increasing dangers due to armed conflicts."[130] The ensuing devastation of cultural property in the Balkans would prove this assessment correct, but evidence of the system's weakness could already be seen in the widespread looting of temples in Cambodia during and after the Khmer Rouge regime (1975–79) and in the damage wrought to a number of significant Iranian cultural sites during the Iran–Iraq War (1980–88). It was for this reason that UNESCO ordered its abovementioned review of the 1954 Hague Convention, resulting in the 1993 Report.[131] The latter concluded that an additional protocol to the convention was needed to correct the following key deficiencies: (1) the exception granted to "military necessity"; (2) recourse to individual criminal responsibility; (3) the system of precautionary measures; (4) the system of special protection; and (5) institutional impediments that hindered full and effective implementation of the convention.[132]

The Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter, the Second Protocol) came into force in 1999. UNESCO hoped that, by redressing the five main problems identified in the 1993 Report, the protocol would prove the lynchpin in securing once and for all the protective intentions of the 1954 Hague Convention and its corollary conventions of 1970 and 1972.[133] The Second Protocol came into being contemporaneous to the ICTY, and while it did so independently of that tribunal,[134] in several ways it can be said to have codified into treaty law some of the precedents established by its jurisprudence. Evidence of this consonance can be seen in the protocol's approach to three of the four points cited as ICTY innovations in the preceding chapter: the military necessity loophole, cultural property per se, and individual criminal responsibility. With regard to

the fourth ICTY innovation explored in chapter 4—the linking of cultural crimes to atrocity crimes prosecutable under IHL—the tribunal's case law finds greatest crossover with another legal instrument to emerge at about the same time, the Rome Statute. Together with the Second Protocol, the Rome Statute reflects the prescience of ICTY case law in identifying effective ways to prosecute crimes against culture in conflict zones.

Military Necessity Loophole

Article 6 of the Second Protocol is a landmark in cultural-property protection, for it effectively ensures that "military necessity can never justify the demolition of cultural property."[135] As such, it plugs once and for all the loophole sustained by article 4(2) of the 1954 Hague Convention, which allows states to waive their obligations toward cultural property "in cases where military necessity imperatively requires such a waiver."[136] The ICTY had demonstrated a consistent skepticism toward defendants' claims of military necessity to justify their attacks on cultural property, rejecting them in several cases.[137] Article 6(a) of the Second Protocol codifies this skepticism into law by defining what is meant by "military necessity" and the circumstances that might "imperatively require" its invocation in an armed conflict:

> (a) a waiver on the basis of imperative military necessity . . . may only be invoked to direct an act of hostility against cultural property when and for as long as:
>
> i. that cultural property has, by its function, been made into a military objective; and
>
> ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.[138]

The first thing to note is the use in sub-article 6(a)(i) of the more precise term *military objective*, which is defined in the Geneva Conventions as targets which, "by their *nature, location, purpose*, or *use*, make an effective contribution to military action, and whose partial or total destruction,

capture, or neutralization . . . offers a definite military advantage."[139] It is generally agreed that cultural property could never, by its inherent nature or purpose, be considered a military objective.[140] It follows, therefore, that cultural sites could only be considered militarily advantageous for their location or use.

Regarding location, sub-article 6(a)(ii) requires that there be "no feasible alternative available to obtain a similar military advantage," which puts a significant burden of proof on those who would target a cultural site; after all, "there are almost always alternatives to circumvent [a] property."[141] As for use, a cultural property could only be *made into* something militarily useful—for instance, appropriated as a shelter for troops or a store for armaments—by those seeking to capitalize on its protected status and/or strategic location. Seeing that sub-article 6(b) of the protocol goes on to dictate that cultural property may only be exposed "to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage," it is all but assured that cultural sites cannot be readily appropriated for legitimate use. It likewise follows that cultural property damaged or destroyed in conflict could only have been targeted by belligerents for reasons other than those deemed permissible by law.

<u>*Cultural Property Per Se*</u>

Should there still be any doubt as to whether military necessity could ever be a feasible justification for targeting cultural sites, sub-article 7(c) of the Second Protocol dictates that belligerents must "refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property . . . which would be excessive in relation to the concrete and direct military advantage anticipated."[142] This provision not only serves to clarify the principles laid out in article 6 of the protocol, but also signals a "consideration of qualitative as well as quantitative factors"

with regard to the nature of cultural property and its heightened intrinsic value with respect to other forms of property.[143] Indeed, sub-article 7(c) has been interpreted as an acknowledgment that "the quantum of incidental damage caused to cultural property comprises not only the raw amount destroyed or otherwise harmed but also its cultural significance."[144] It thus invokes the principle of proportionality, which ensures that the damage wrought by combat does not exceed the advantage sought.[145] As such, it requires a value judgment by those who would seek to target a cultural property. And by asking belligerents to recognize that destroying cultural property is worse than destroying other forms of property, the protocol asserts the inherent and rarified value of cultural property per se.

The ICTY had underscored a similar point in its prosecution of Pavle Strugar and Miodrag Jokic for their destruction of the Old Town of Dubrovnik, citing the city's exceptional cultural and historical merits as aggravating factors of their crime.[146] As will be explored in greater detail in the next chapter, this precedent, having been codified into law by the Second Protocol, would be invoked in a landmark ruling of the ICC in 2016 regarding the destruction of cultural heritage sites in Mali.

Individual Criminal Responsibility

It is the nature of ad hoc tribunals such as the ICTY to take "norms initially applicable to states and transform them into individual criminal offences," thereby assigning to individual perpetrators responsibility for offences of an international nature.[147] That the list of offences tried by the ICTY included crimes against culture represented the first time since Nuremberg that individuals were held to account for the destruction of cultural heritage, even if carried out during a state-level conflict. The ICTY's efforts were also significant because, by itemizing such precise offences as Dusko Tadic's razing of mosques, they helped give shape to article 28 of the 1954 Hague Convention. This nebulous article defines neither specific, prosecutable offences against cultural property nor the

requisite penalties for committing them. It instead appeals to the "ordinary criminal jurisdiction" of states parties and defers to their own judgment as to what form of punishment—whether "penal or disciplinary"—would be most appropriate.[148] Indeed, article 28 was one of the foremost weaknesses highlighted by the 1993 Report, and its emendation was "one of the major raisons d'être of the Second Protocol."[149]

Article 15 of the protocol corrects the convention's omissions—and formalizes the precedent taken by the ICTY—by itemizing five prosecutable offences against culture: (1) extensive destruction or appropriation of cultural property; (2) making cultural property the object of attack; (3) theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property; (4) making cultural property under enhanced protection the object of attack; and (5) using cultural property under enhanced protection or its immediate surroundings in support of military action.[150] Further, the article specifies that, "each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties."[151] By requiring states to formalize the criminality of these specific offences, rather than simply deferring to existing, and potentially inadequate, elements of their domestic legal systems, the Second Protocol ensures that states afforded cultural crimes a level of seriousness that had theretofore been lacking.

It is worth noting that the last two items on the list of offences refer specifically to properties placed under the new system of enhanced protection,[152] while the first three refer to all cultural property in general. Establishing a system of enhanced protection was one of the primary aims of the Second Protocol, for the existing regime of "special protection" established under chapter 2 of the 1954 Hague Convention had been dismissed by the 1993 Review as more or less a failure.[153] While a full review of enhanced protection is beyond the scope of this study, it can be argued that

its establishment represents an effort to differentiate degrees of gravity in crimes against culture.[154] Doing so further reinforces recourse to criminal individual responsibility, for in the words of the legal scholar Micaela Frulli,

> introducing a differentiation in gravity between acts perpetrated against the different elements of cultural property . . . is utterly consistent with one of the main functions of criminal law: to express retribution and, more precisely, not only to express the fact of wrong-doing but also to articulate the degree of wrong-doing. And it better serves the interests of an effective criminal justice.[155]

Cultural Crimes as Atrocity Crimes

As the foundational document of the International Criminal Court, the Rome Statute is the preeminent international legal instrument addressing the proscription and prosecution of atrocity crimes—that is, genocide, war crimes, and crimes against humanity.[156] Included in its list of prosecutable war crimes is the act of "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, [and] historic monuments."[157] The language itself is not altogether unique; it offers a comparable variation of that used in the 1954 Hague Convention and its precedents, as well as in the ICTY Statute. However, its use in the Rome Statute signals once and for all an acknowledgement of the seriousness of such acts of violence, equating them in gravity with the crimes considered to be the most heinous in international law.[158]

In addition to war crimes, Thomas G. Weiss and Nina Connelly contend that the Rome Statute's definition of another atrocity crime, crimes against humanity, "contains two points that could readily be interpreted to include the destruction of cultural heritage."[159] These are:

> Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
>
> Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[160]

Connecting attacks on cultural property to persecution was an approach employed by the ICTY in its prosecution of Radoslav Brdjanin. Here, we see the Rome Statute expanding on the concept to include national, ethnic, and cultural grounds for discriminatory intent, which are absent from the ICTY's definition thereof (the ICTY Statute refers only to "persecutions on political, racial and religious grounds").[161] The continuity of the principle in broader form into the Rome Statute suggests that the ICTY's jurisprudence, which was in many ways groundbreaking with respect to cultural heritage, clearly had resonance as a normative concept.

Finally, the ICTY had proven more resilient than the 1954 Hague Resolution in part because it offered a clear mechanism—that is, a dedicated legal body—through which to try war criminals for specific crimes. The Rome Statute took this model and made it permanent in the form of the ICC. It adopted the legal framework of ad hoc criminal tribunals like the ICTY and not only enshrined it into a permanent body, but endowed it with more expansive subject-matter and territorial jurisdiction. The Rome Statute thus established a means of effecting justice in the universal public interest, for crimes of a global reach. Recognizing threats to cultural heritage within this rubric affirms the issue as one of international concern, worthy of the same attention afforded the most heinous international crimes, and prosecutable via the well-defined legal framework embodied by the ICC.

Conclusion

With the Second Protocol and the Rome Statute, aspects of the innovative jurisprudence of the ICTY found expression in treaty law. Both documents developed promising new frameworks for the protection of cultural heritage. The remainder of this study will examine how these frameworks have been exercised and what this practice suggests about the future of cultural-heritage protection.

VI. Recent Cultural Crimes in Iraq, Mali, and Syria

Has cultural heritage been safer since passage of the Second Protocol and the Rome Statute? Despite the improvements introduced by those two instruments, the ensuing twenty years have witnessed persistent threats to and losses of cultural property from damage, destruction, and pillage. This suggests that the Second Protocol and the Rome Statute have had a limited impact as preventative measures, on a par in this respect with the UNESCO instruments that preceded them. There have, however, been some gains with regard to prosecutions, as well as a notable wellspring of concern at the international level for cultural heritage in peril, prompting the passage of relevant new resolutions by both UNESCO and the Security Council. That threats to cultural heritage are now being considered by the Security Council indicates that they are increasingly seen as a matter of international peace and security, which augurs well for marshalling additional resources toward combatting cultural crimes.

Such resources will be necessary, for the civil war in Syria, ongoing since 2011, "presents us with the most widespread destruction of cultural heritage, both intentional and collateral, since the Balkan Wars of the 1990s."[162] This devastation has been wrought in three key ways, the first being combat between state and rebel forces. The second has been perpetrated by the so-called Islamic State (ISIL), which has been waging a sustained campaign of violence in the territories over which it lays false claim. Also threatening Syria's culture are looters, who have capitalized on a lack of oversight of museums and archeological sites to steal antiquities and sell them for personal profit or to finance terrorist activities. As the conflict in Syria is ongoing, we can only speculate as to what may be possible to prosecute the perpetrators of these crimes, to restitute stolen properties, and to ensure greater protections for cultural-heritage sites moving forward. In this respect, it is instructive to look at Iraq and Mali, two countries that have also experienced significant cultural losses in recent

years. How well has the system of cultural-heritage protection served these two countries, and what successes and failures from these experiences can be brought to bear on Syria and beyond?

Cultural Destruction in Iraq

Damage, destruction, and loss of cultural heritage in Iraq has been significant and ongoing for nearly thirty years, and has endured several discernible phases.[163] The phase that got underway at the time of the U.S.-led invasion of Iraq in 2003 was marked by a particularly grievous failure to protect culture, or to prosecute those responsible. Looters, exploiting the vacuum of governance precipitated by the invasion of Baghdad, ransacked the National Museum of Iraq, absconding with an estimated fifteen thousand antiquities, sculptural fragments, and art objects.[164] The perpetrators included not only organized criminal groups intending to traffic stolen property on the transnational black market, but also average Iraqi citizens simply seizing on the opportunity to acquire something of value. The lack of cataloguing of the museum's collection—a deficiency that plagues cultural institutions throughout the developing world, owing to a lack of funding, training, and staffing—meant that most of what was stolen has disappeared without any hope of restitution.

Several jurists and scholars have argued that, in addition to the looters, the U.S. military is complicit in this crime.[165] They implicate the U.S. twice over: for creating the chaotic and lawless conditions that left the museum vulnerable to pillage, and for failing to intervene or provide security for the museum upon learning of the thefts, electing instead to secure nearby oilfields. The latter is a violation of article 4(3) of the 1954 Hague Convention, which requires parties "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," a provision further buttressed by the Second Protocol.[166] While it is true that the U.S. did not ratify the 1954 Hague Convention until 2009, and was thus at the time not treaty-bound to uphold its tenets, legal scholar Wayne Sandholtz notes that,

> the United States' leading role in promoting protections for cultural treasures in wartime, and its consistent avowals of careful compliance with the requirements of the 1954 [Hague] Convention, support the conclusion that the United States should have recognized a legal obligation to protect the Iraqi National Museum.[167]

In other words, the U.S. was implicated by *usus*, and therefore compelled by customary law, to uphold protections for cultural property in times of armed conflict. The assessment supports the assertion that the 1954 Hague Convention has achieved customary legal status, which in theory should bode well for the future of heritage protection, both in Iraq and elsewhere. After all, with the heft of both treaty and customary law in its arsenal of legal protections, cultural heritage should be assumed to enjoy broad and robust support at the international level.

The U.S. however, has rejected any suggestion that it was at fault in this incident,[168] and it has never been officially tried or sanctioned for its role in this crime—which begs the question of whether the country's hegemonic stature frees it to be selective in its exercise of certain principles of *jus in bello*. (Its continued refusal to ratify the Rome Statute or to recognize the ICC instills further concern that the U.S. may be skeptical of its international legal commitments.) As the conduct of world powers generally sets the tone for the broader community of states, it is of grave concern that the U.S. established such a dangerous precedent in Iraq. It suggests an inherent precarity in the existing legal frameworks for cultural-heritage protection and implies a disregard for the principles of heritage protection when the political will to uphold them is lacking. Such indifference can be dangerous, not least for the signal it sends to would-be criminals. Indeed, the looting of Iraqi archaeological sites continues to be an acute problem in the country, best exemplified by the systematic pillage of the Mosul Museum by ISIL in 2015.[169]

As in Syria, ISIL began declaring control over parts of Iraq in 2013.[170] Since then, in addition to large-scale looting, the devastation of Iraqi cultural heritage has taken on a different

tenor, one in which monuments are destroyed deliberately in acts of ideologically driven violence. According to a 2016 report prepared for the UN Special Rapporteur in the Field of Cultural Rights,

> at least two globally significant [Iraqi] sites (the Assyrian capital cities of Nimrud and Nineveh) have been subjected to serious episodes of destruction by Daesh [ISIL] during their occupation of the Mosul region. . . . Additionally, multiple cultural sites of importance to ethnic and religious groups of northern and western Iraq, including churches, shrines, mosques, minarets and tombs, have been obliterated or severely damaged by Daesh [ISIL] in their attempt to eradicate the rich cultural and religious diversity that has always characterized this region of the Middle East.[171]

The first major act of this nature to get the world's attention had taken place in 2001, in Afghanistan, where the Islamist Taliban deliberately destroyed a pair of monumental Buddha sculptures carved into the cliffs at Bamiyan. The ancient Buddhas dated from before the introduction of Islam and were thus declared sacrilegious by the fundamentalist Taliban. The group's bombing of the sculptures was not connected to a military campaign but, rather, to its desire to eradicate Afghanistan's pre-Islamic heritage. The Taliban declared as much in an edict issued before the explosions, which they documented with photographs for propaganda purposes.[172] The brazen and purposeful nature of the assault prompted UNESCO to issue in 2003 the Declaration Concerning the Intentional Destruction of Cultural Heritage (hereinafter, the 2003 UNESCO Declaration),[173] which addresses attacks on culture that are premeditated, standalone acts of malice rather than corollaries to military campaigns. Such acts represent a kind of violence that exists outside the parameters of armed conflict as it has been traditionally understood, and to which the accepted laws of war do not precisely apply.[174] While there have been no prosecutions to date of the many acts of this nature that have been perpetrated in Iraq, some hope can be gleaned from a watershed case prosecuted by the ICC concerning the deliberate destruction of culture in Timbuktu, Mali.

Cultural Destruction in Mali

In 2016, Ahmad Al Faqi Al Mahdi, a Malian national, was convicted by the ICC of leading attacks

against nine mausolea and one mosque in Timbuktu in 2012. The charges were pursuant to article 8(2)(e)(iv) of the Rome Statute, which, as previously discussed, includes under its definition of war crimes the act of "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, [and] historic monuments." Al Mahdi's conviction followed a guilty plea in which he confirmed that the charges brought against him were accurate and correct.[175] He was sentenced to nine years in prison.

Al Mahdi carried out his crime in his capacity as an operative of Ansar Dine, the Islamist group that had seized control of Timbuktu in April 2012. As leader of the *hesbah*, or morality brigade, he worked with enforcers to ensure that citizens lived in strict accordance with Qur'anic law and to inflict punishments on transgressors. The people of Timbuktu generally adhere to moderate Islamic practices consistent with Sufism, a mystical branch of the faith.[176] As Sufism recognizes the existence of saints, it is dismissed as polytheistic, and therefore idolatrous, by Muslim fundamentalists such as Ansar Dine.[177] The religious buildings singled out for destruction were all burial places of Sufi saints whose veneration the group deemed heretical.

Al Mahdi and his team carried out their task visibly and methodically with handheld tools, underscoring the deliberately harmful nature of the act.[178] Typifying the kind of conduct that had inspired the 2003 UNESCO Declaration, Ansar Dine boldly publicized the attacks using traditional and social media. They issued videos of the vandals at work and statements in defense of their activities, none so damning as that made by a spokesman for the group when questioned about the city's status as a World Heritage site: "We are Muslims; what is UNESCO? . . . For us, their indignation is an atonement."[179] The group's intention to harm and to provoke outrage was indisputable, larding the crime with a symbolic value that heightened its heinousness in the eyes of the court.[180] In a move reminiscent of the ICTY's ruling on the destruction of the Old Town of

Dubrovnik, the cultural significance of the targeted properties served as an aggravating factor in Al Mahdi's sentencing.[181]

We see in this case the expression of three factors examined in the preceding chapters as being of critical use in the fight to protect cultural heritage. The first is the ascription of individual criminal responsibility to Al Mahdi. Proving culpability is easier when it can be assigned to a single person with an avowed criminal purpose, particularly if his violations (in this case, of specific provisions of the Rome Statute) can be identified, itemized, and quantified.[182] Second, there is no doubt that this case was prosecuting the destruction of cultural property per se. The targets were defined by their cultural value, and their destruction was sanctionable for precisely the same reason. Third, the attacks were recognized by the ICC for their "discriminatory religious motive"—that is, as measures taken against a group in an attempt to punish them for and prevent them from practicing their religion—therefore qualifying as form of persecution.[183] Linking the crime to persecution heightened its gravity in the eyes of the court, serving as yet another aggravating factor in Al Mahdi's conviction and sentencing.[184]

It is significant to note that, because Al Mahdi's crime was perpetrated in the absence of an official military campaign, there could be no claim of military necessity as a justification for the attack; indeed, none was put forth by the defense. This aspect of the Al Mahdi case underscores the fact that threats to cultural heritage increasingly take the form of targeted expressions of extremism, perpetrated by actors whose allegiance is not to a sovereign state but to one or more ideologies. Laura Hammond points out that the performative value of targeting cherished landmarks has made it a potent tactic of terrorism, for "It is the attention that the violence attracts . . . that gives it its power and thus its effectiveness. . . . [W]hat makes the violent act meaningful is its symbolic character."[185] The value of cultural touchstones has long been recognized by belligerents seeking to control or

coerce a group of people. It was not without reason that the Nazis torched Jewish temples on Kristallnacht or that Serbian and Croatian nationalists targeted mosques in Bosniak communities as a way of dismantling these groups' identities. It is therefore not surprising that, as ambitious terrorist networks seek to gain control over populations while signaling opposition to values or ideologies to which they object, they would actively seek out cultural targets for their added symbolic resonance. This approach has been readily apparent in Syria, where performative violence against heritage has reached new, conscience-shocking heights.

Cultural Destruction in Syria

The Syrian Civil War, ongoing since 2011, has devastated large swathes of the country's cultural heritage, including all six of its UNESCO World Heritage sites.[186] Both the scale and the nature of the destruction has garnered significant international attention, owing in large part to the brutality with which much of it is has been carried out. Of all the sites devastated during the conflict, the razing of the ancient city of Palmyra has perhaps incited the most alarm, not least because it was designated a World Heritage site in 1980 for the artistic and historical significance of its architectural topography. The city's Temple of Bel, built in the 1st century C.E. as a house of pagan worship, but ultimately repurposed as a mosque, was deemed a heresy by ISIL, which occupied Palmyra at various points between 2015 and 2017. The temple was one of the finest vestiges of Greco-Roman architecture remaining in the Levant, thus representing a link to the Western culture and values that ISIL openly disdained. The militants filmed their demolition of the temple for propaganda purposes—but not before using the site as a venue for human executions. Among those killed was Khaled al-Asa'ad, the retired Director of Antiquities of the Palmyra Museum, who was beheaded for refusing to assist the militants loot salable art objects from the museum.[187] The savagery of this "performance" elicited widespread revulsion and condemnation.

Before ISIL carried out this act, the architecture of Palmyra had already sustained damage during official combat operations between the Syrian state military and the rebel forces they countered in the civil war. Indeed, by the time ISIL targeted the Temple of Bel, its façade had been shelled and several of its columns toppled. Reports also suggest that belligerents on both sides of the conflict had sheltered illegally amid the ruins.[188] Together with the looting of the Palmyra Museum—thefts of antiquities were mitigated but not completely halted by Khaled al-Asa'ad's heroics—the city exemplifies the three key threats that plague cultural heritage today: damage sustained corollary to armed conflict; large-scale performative violence; and looting and trafficking of antiquities. How the international community of states responds to Syria, whether by harnessing the legal frameworks explored in the preceding chapters or by instituting new measures, will thus have resonance for years to come.

Possible Frameworks of Heritage Protection in Syria

With respect to the first threat—damage to cultural property during the course of official armed conflict—there is room for both skepticism and hope. The original UNESCO system of heritage protection was designed with traditional battlefields and forms of combat in mind, which could ostensibly apply to the conflict in Syria. With respect to the example of Palmyra discussed above, an offense such as sheltering amid cultural property is proscribed in article 4 of the 1954 Hague Convention, while article 6 of the Second Protocol effectively bans the repurposing of cultural property for any military use whatsoever. Syria, however, is party—and therefore beholden—to only the 1954 Hague Convention, and the weakness of that treaty as an enforceable legal tool has by this point been well elucidated.

At the same time, the ICTY's successful conviction of many individuals for violations against culture suggest that a criminal tribunal could be an effective forum for prosecuting heritage

crimes in Syria. It has been suggested that a dedicated ad hoc tribunal to investigate war crimes in Syria would be warranted, considering the length of the conflict and the breadth of the violence.[189] An early draft statute for such a tribunal, a document known as the Chautauqua Blueprint, does include basic provisions for crimes against cultural objects, though early assessments suggest that these may be too limited and/or modest to be effective.[190] Although the ICC demonstrated its own commitment to cultural-heritage protection with its conviction of Al Mahdi, Syria is not party to the Rome Statute and therefore outside the Court's jurisdiction—unless it were to declare that it "accept[s] the exercise of jurisdiction by the Court with respect to the crime in question."[191] Whether or not that were to happen, success in any criminal tribunal would be contingent on factors such as securely identifying perpetrators so that individual criminal responsibility could be conferred, and enumerating specific crimes deemed sanctionable by the existing legal instruments.

As for looting, there are some signs suggesting that perpetrators could be held to account. Of the original three UNESCO treaties, UNESCO 1970, concerning the illicit import, export, and transfer of ownership of cultural property, is comprehensive in its listing of sanctionable crimes and uses indisputable language to deem these crimes unequivocally illicit.[192] Moreover, while recourse to extant domestic legal systems proved a weakness of the 1954 Hague Convention, the fact that most states already have well established laws regarding the theft and transfer of property renders similar provisions in UNESCO 1970 more readily enforceable by states equipped to do so.[193] Syria, in fact, has an exemplary antiquities law,[194] with provisions for both movable and immovable property and a highly punitive set of sanctions, all of which bode well for securing convictions for art thefts committed during the war.[195] The law is bolstered at the international level by such resources as the UN Office on Drugs and Crime, which has pinpointed the illicit trafficking of cultural property as an "emerging crime" in its portfolio of priorities, and which, through its signature

Convention Against Transnational Organized Crime—ratified by all but three UN member states—has a robust mandate by which to tackle it.[196]

Perhaps most significantly, the Security Council has signaled its concern over the looting and black-market sale of art and antiquities, specifically as it pertains to the funding of terrorism. Indeed, it has been estimated that ISIL alone earns between $150 and $200 million a year from this illicit trade.[197] The Council made its first condemnation of the practice in Resolution 2199, passed in 2015, which notes with concern that terrorist groups are "generating income from engaging directly or indirectly in the looting and smuggling of cultural heritage items from archaeological sites, museums, libraries, archives, and other sites," and which calls on member states to take all necessary steps to prevent these practices.[198] Two years later, Resolution 2347 reaffirmed this mandate while also recognizing the broader threat that the destruction of cultural property poses to international peace and security,

> Emphasizing that the unlawful destruction of cultural heritage, and the looting and smuggling of cultural property in the event of armed conflicts, notably by terrorist groups, and the attempt to deny historical roots and cultural diversity in this context can fuel and exacerbate conflict and hamper post-conflict national reconciliation, thereby undermining the security, stability, governance, social, economic and cultural development of affected States.[199]

Accordingly, Resolution 2347 pertains to the third and perhaps most troubling threat now facing cultural heritage: intentional, performative violence. Crucially, the resolution notes "with grave concern the involvement of non-state actors, notably terrorist groups, in the destruction of cultural heritage and the trafficking in cultural property and related offences."[200] This acknowledgment of NSAs has direct bearing on ISIL's activity in Syria. ISIL is highly organized, mission driven, and well funded, but it is not a sovereign state and therefore not party to any of the treaties and legal instruments that hold international actors responsible for their actions. How, then, might those responsible for the campaign of destruction in Syria be held accountable?

Recognition by the Security Council is an important first step, for as it proved with its imposition of sanctions on the self-declared (i.e., unrecognized) government of Southern Rhodesia in the 1970s, "effective sovereignty over a territory is the only necessary requirement for imposing sanctions on a government, irrespective of whether such government may technically be considered a state under international law."[201] At the time of its destruction of Palmyra, the scope of ISIL's authority over the lands it claimed rendered it a de facto government, and thus eligible for sanction under international law. The ICC's conviction of Al Mahdi provides additional support for such an approach, for while the accused was by birth a Malian national, he acted under the auspices of a third party, Ansar Dine, which at the time of his crime was the de facto governing body in northern Mali.

As to which provisions of relevant conventions may be applicable to NSAs, the Vienna Convention on the Law of Treaties (1969) asserts that treaty obligations extend to third parties under two conditions: if the contracting parties to the treaty intended them to, and if the third party accepts said obligations.[202] Looking at the 1954 Hague Convention and its Second Protocol, article 19(1) of the former binds "each party to the conflict" to its obligations. It has been argued that the use of a lowercase "p" in *party* suggests that this statement extends to both states parties and third parties.[203] As for the Second Protocol, which uses an uppercase "P" in the word *Parties*, according to Jean-Marie Henckaerts, Legal Adviser to the International Committee of the Red Cross, who observed the deliberations that resulted in the protocol's drafting, "the understanding was that throughout the text, the word 'Party' in the phrase 'Party to the conflict' includes rebel groups."[204] In further support of this assertion, an official summary report of the Second Protocol notes that "the contracting parties intended the Protocol to apply to all parties in a non-international conflict, whether state parties or non-state parties."[205]

As for the second stipulation of the Vienna Convention, that NSAs must accept a treaty's obligations in order for it to apply, considering its avowed disdain for the international system, it is highly likely that ISIL—despite its claims to sovereignty and the obligations such status entails—would feel any onus to abide by the rules laid out in the 1954 Hague Convention, the Second Protocol, or any other international treaty. At this point, it is important to return to a question considered at various points throughout this study, as to whether protections for cultural heritage have been suitably enshrined into customary law. Such a consideration is key, for according to some jurists, customary international law is binding on NSAs, regardless of whether they have officially acceded to their international legal obligations.[206] It was noted earlier that, at the time of the drafting of the ICTY Statute in 1993, the customary status of cultural-heritage law remained a matter of debate. However, the jurisprudence of the ICTY, the passage of the Second Protocol, the activity of the ICC in support of the Rome Statute, and, more recently, the adoption of the 2003 UNESCO Declaration and Security Council Resolutions 2199 and 2347 provide convincing evidence that the imperative to protect cultural heritage at the international level is now a widely accepted normative principle, supported by both treaty and customary law. It is thus with a modest degree of optimism that we can look beyond the war in Syria and hope that the conclusion of the conflict will include some form of justice and restitution for the country's immeasurable cultural losses.

VII. Conclusion

In 1954, when UNESCO passed the first of three signature conventions to protect cultural heritage in times of armed conflict, the horrors of World War II were still fresh in the international political consciousness, and the idea that they might ever be repeated was unimaginable. Nevertheless, the damage, destruction, and pillage of cultural property witnessed during that war have not only persisted through the ensuing decades but redoubled. Indeed, it is clear that UNESCO's original framework of cultural-heritage protection proved insufficient on its own either to deter or to prosecute cultural crimes. Deficiencies including a failure to precisely define sanctionable offences, as well as fatal loopholes such as the one afforded to claims of "military necessity," rendered these well-intentioned legal instruments too broadly interpretable and too weakly enforceable. Crimes against culture thus continued unabated and unpunished until well into the 1990s.

It was the through the workings of an ad hoc criminal tribunal, the ICTY, that certain key liabilities in the UNESCO framework were superseded and its purpose finally borne out. Intriguingly, the tribunal achieved as much without directly invoking the 1954 Hague Convention or its corollary conventions of 1970 and 1972, suggesting that the principles these treaties espoused had broad normative resonance, even if the mechanisms through which they were originally intended to operate were flawed. These reverberations echoed beyond the ICTY, finding near-contemporaneous expression in the Second Protocol to the 1954 Hague Convention and the Rome Statute. Both represented critical steps forward in the effort to protect cultural heritage, the former by directly addressing the weaknesses and lacunae of UNESCO's signature convention, and the latter by establishing a permanent forum and decisive legal framework through which cultural crimes could be prosecuted.

Indeed, it is via the Rome Statute that the most prominent legal action to date against a cultural-property crime was realized. The ICC's prosecution of Ahmad Al Faqi Al Mahdi in 2016 sent a clear signal that the effacement of cultural heritage not only stands alone as a sanctionable offence under international law, but also stands alongside the grievous crimes adjudicated by the Court. Both the ICC's success in convicting Al Mahdi and the achievements of the ICTY suggest that criminal courts, whether ad hoc or permanent, offer the most effective frameworks for action against cultural crimes. As demonstrated in the preceding pages, this efficacy can be ascribed in part to the attention these legal instruments paid to principles that were inadequately addressed by the UNESCO framework, namely, sufficient recourse to individual criminal responsibility; the question of what constitutes "military necessity"; respect for cultural property per se; and linking the destruction of cultural heritage to atrocity crimes.

Equally important is the impact these frameworks have had on bolstering the now widely accepted normative consensus that cultural property is uniquely valuable and deserving of robust protections. Such newfound resolve is evident, for example, in the passage of the 2003 UNESCO Declaration and of Security Council Resolution 2347. Other factors beyond these improved legal frameworks have no doubt also contributed to the entrenchment of this norm. For one, it is undeniable that the nature of the attacks against culture is increasingly conscience-shocking, in some cases irrevocably altering an existing built environment and/or impoverishing a state's cultural patrimony. That the heritage in question is often effaced intentionally further establishes these acts as a moral affront, especially if perpetrated by NSAs whose avowed aim is to terrorize populations. It may be that the sum total of these factors has raised the perceived threat level posed by these destructive practices, and with it the impulse to respond. One might even draw parallels to the consensus that developed around the responsibility to protect (R2P), a now deeply embedded norm

that emerged in response to the failure to stop the 1994 genocide in Rwanda.[207] That atrocity shocked the international conscience into action, and one could argue that the high-profile nature of recent attacks against culture, such as those at Palmyra, has had a similarly galvanizing effect toward building normative consensus around the issue of protecting heritage.

Efforts to stop crimes against culture could benefit from the present international environment that is increasingly intolerant of the destruction of heritage sites and monuments. Reframing the issue in ways that further connect such acts of violence to atrocity crimes may thus prove effective. As noted earlier, Thomas G. Weiss and Nina Connelly argue convincingly for including heritage protection among the responsibilities inherent in the R2P rubric.[208] Doing so would harness the power of that norm's existing, broad recognition and lend heritage protection an added degree of legitimacy as an international priority. Similarly, Edward C. Luck's compelling argument for aligning the destruction of cultural heritage with genocide—an idea first broached by Raphael Lemkin in the mid-1940s and which resurfaced among the recommendations presented in the 1993 Report—warrants reconsideration today.[209] Drawing parallels between efforts to eradicate culture and those to eradicate populations would not only take full advantage of the legal instruments used to combat genocide, but also heighten the sense of repugnancy that is increasingly attached to crimes against culture, further galvanizing efforts to combat it.

As the so-called Global War on Terrorism continues to occupy a high priority for international policymakers, emphasizing the ways in which the looting and trafficking of cultural property can facilitate terrorism and the extent to which violence against culture has become a tactic of NSAs may also bolster efforts to protect cultural heritage, ensuring that they form part of the broader program to defeat global terrorism. Doing so would likewise recognize how the nature of armed conflict, and of belligerents, is changing. It has been noted throughout this study that the 1954

Hague Convention suffered from its circumscription by a model of warfare that has long been obsolete. It is therefore incumbent on contemporary policymakers to recognize the dynamics of the "new" wars and tailor the international response accordingly.

Finally, greater efforts should be made to work cross-sectionally with relevant stakeholders from both within and outside the UN system. Despite sharing a common aim, international policymakers work largely in parallel with museums and cultural NGOs in their efforts to safeguard cultural heritage, rather than in collaboration. Alternatively, they enter into bilateral partnerships, such as the Memorandum of Understanding signed by UNESCO and the State Hermitage Museum mentioned at the start of this study, rather than pursue a more coordinated approach across platforms. Max Hollein, Director of the Metropolitan Museum of Art, New York, attributes this limited crossover in part to bureaucratic obstacles that make large-scale collaboration difficult, and which encourage museums to instead pursue localized programs of research, education, and the provision of resources to peer institutions in conflict zones.[210] While such efforts benefit from being more easily and quickly implemented, it seems plausible that greater integration between policymakers and cultural institutions could only serve to compound resources and allow actors from across the civil and political branches of this movement to exercise their unique comparative advantage. The resulting policies would no doubt be more informed, and ultimately more effective, in ending the destruction of cultural heritage and redressing its harmful effects.

Notes

[1] R.J. Evans, "Art in the Time of War," *The National Interest* 113 (2011), p. 19.

[2] For a consideration of semantic differences between the terms *cultural property* and *cultural heritage*, see J.H. Merryman, "Two Ways of Thinking About Cultural Property," *The American Journal of International Law* 80, no. 4 (1986), pp. 831–853.

[3] R.M. Poole, "Looting Iraq," *Smithsonian Magazine* 38, no. 11 (2008), https://www.smithsonianmag.com/arts-culture/looting-iraq-16813540/ (accessed April 17, 2020).

[4] E. Cabot, "Devant Notre-Dame en flames, l'émotion du president," *Paris Match* (April 16, 2019), https://www.parismatch.com/Actu/Politique/Devant-Notre-Dame-en-flammes-l-emotion-du-president-1618639 (accessed April 17, 2020).

[5] See, e.g., I. Bokova, "Fighting Cultural Cleansing: Harnessing the Law to Preserve Cultural Heritage," *Harvard International Review* 36, no. 4 (2015), pp. 40–45; T.G. Weiss and N. Connelly, *Cultural Cleansing and Mass Atrocities: Protecting Cultural Heritage in Armed Conflict Zones* (Los Angeles: J. Paul Getty Trust, 2017).

[6] E.C. Luck, *Cultural Genocide and the Protection of Cultural Heritage* (Los Angeles: J. Paul Getty Trust, 2018).

[7] For arguments supporting this claim, see J.A.R. Nafziger and M.W. Janis, "The Development of International Cultural Law," *American Society of International Law, Proceedings of the Annual Meeting (March 29–April 1, 2006)*, pp. 317–323; Evans, "Art in the Time of War," p. 25; Weiss and Connelly, *Cultural Cleansing and Mass Atrocities*, pp. 17–20.

[8] Bokova, "Fighting Cultural Cleansing"; I. Bokova, "UNESCO's Role in Emergency Situations: What Difference Can Soft Power Make in Times of Crisis?," *Journal of International Affairs* 70, no. 2 (2017), pp. 59–68; A. Azoulay, "Address by Audrey Azoulay, Director-General of UNESCO, on the Occasion of the UN Security Council Session on 'Maintenance of International Peace and Security: Destruction and Trafficking of Cultural Heritage by Terrorist Groups and in Situations of Armed Conflict,'" DG/2017/004/AA (November 30, 2017).

[9] UNESCO, "UNESCO and the State Hermitage Museum Join Forces to Protect Heritage in Conflict Areas," press release (October 9, 2017), http://www.unesco.org/new/en/media-services/single-view/news/unesco_and_the_state_hermitage_museum_join_forces_to_protect/ (accessed April 17, 2020).

[10] UNESCO, *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention* (May 14, 1954), art. 1(a) (hereinafter, 1954 Hague Convention).

[11] In two additional sub-paragraphs, article 1 of the 1954 Hague Convention goes on to name the following under its definition of cultural property: "(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a)" and "(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b)."

[12] Weiss and Connelly, *Cultural Cleansing and Mass Atrocities*, p. 11.

[13] *Ibid.*, p. 13.

[14] N. Adams, “Architecture as the Target,” *Journal of the Society of Architectural Historians* 52, no. 4 (1993), p. 389.

[15] Evans, “Art in the Time of War,” p. 25.

[16] Adams, “Architecture as the Target,” p. 389.

[17] R. Bevan, *The Destruction of Memory: Architecture at War* (London: Reaktion Books, 2007).

[18] *Ibid*., p. 10.

[19] *Ibid*., pp. 9, 13.

[20] Bokova, “Fighting Cultural Cleansing,” pp. 40–41.

[21] *Ibid*., p. 41

[22] B. Fowlkes-Childs and M. Seymour, *The World Between Empires: Art and Identity in the Ancient Middle East* (New York: Metropolitan Museum of Art, 2019), p. 259.

[23] J.D. Kila, “Inactive, Reactive, or Pro-Active? Cultural Property Crimes in the Context of Contemporary Armed Conflicts,” *Journal of Eastern Mediterranean Archaeology and Heritage Studies* 1, no. 4 (2013), pp. 325–328; L. Allais, “Amplified Humanity and the Architectural Criminal,” in *Superhumanity: Design of the Self*, ed. N. Axel (Minneapolis: University of Minnesota Press, 2018), pp. 269–270; Weiss and Connelly, *Cultural Cleansing and Mass Atrocities*, pp. 12–13.

[24] D.C. Lane et al., “Time Crime: The Transnational Organization of Art and Antiquities Theft,” *Journal of Contemporary Criminal Justice* 24, no. 3 (2008), p. 243.

[25] UNSC, “Letter dated 31 March 2016 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council,” S/2016/296 (March 31, 2016).

[26] Bokova, “Fighting Cultural Cleansing,” p. 42

[27] In 1991, at the twenty-sixth session of the UNESCO General Conference, it was concluded that “the international system of safeguards of the world cultural heritage [did] not appear to be satisfactory, as indicated by the ever-increasing dangers due to armed conflicts”; see UNESCO, *Resolutions of the General Conference, 26th Session, Paris, 15 October–7 November 1991*, 26 C/Resolution 3.9 (1991), preamble. See also R. O’Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge: Cambridge University Press, 2006), p. 236; Evans, “Art in the Time of War,” p. 19; Bevan, *The Destruction of Memory*, p. 23; Nafziger and Janis, “The Development of International Cultural Law,” pp. 317–323; and Weiss and Connelly, *Cultural Cleansing and Mass Atrocities*, pp. 17–20.

[28] Kila, “Inactive, Reactive, or Pro-Active?,” p. 335. See also Weiss and Connelly, *Cultural Cleansing and Mass Atrocities*, p. 17.

[29] *Ibid*., pp. 336–338.

[30] P. Gerstenblith, “The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?,” *John Marshall Review of Intellectual Property Law* 15 (2016), p. 336.

[31] See, e.g., H. Abtahi, “The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia,” *Harvard Human Rights Journal* 14 (2001), pp. 1–32; M. Frulli, “Advancing the Protection of Cultural Property Through the Implementation of Individual Criminal Responsibility: The Case-Law of the International Criminal Tribunal for the Former Yugoslavia,” *Italian Yearbook of International Law Online* 15, no. 1, pp. 1–18; and O’Keefe, *The Protection of Cultural Property in Armed* Conflict, especially chap. 6, “Other Relevant Bodies of Law.”

[32] Gerstenblith, "The Destruction of Cultural Heritage," p. 336.

[33] J.-M. Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict," *International Review of the Red Cross* 87, no. 857, p. 193.

[34] Weiss and Connelly, *Cultural Cleansing and Mass Atrocities*, pp. 31–39.

[35] *Ibid*., p. 36

[36] Luck, *Cultural Genocide and the Protection of Cultural Heritage*, p. 5.

[37] *Ibid*., p. 18.

[38] R. Lemkin quoted in *ibid*., p. 18.

[39] *Ibid.*, p. 21.

[40] *Ibid*., p. 28.

[41] See U. Bishop-Burney, "Prosecutor v. Ahmad Al Faqi Al Mahdi," *American Journal of International Law* 111, no. 1 (2017), p. 128; and Fowlkes-Child and Seymour, *The World Between Empires*, p. 263.

[42] See, e.g., P.J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, CLT.93/WS/12 (1993), p. 7, paras. A(2), A(3); and J.-M. Henckaerts, "New Rules for the Protection of Cultural Property in Armed Conflict," *International Review of the Red Cross* 81, no. 835 (1999), p. 593.

[43] Roerich Museum, *Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments* (April 15, 1945).

[44] *Ibid*., preamble.

[45] *Ibid*., art. 1.

[46] Per article 56 of the 1907 *Hague Convention (IV) on the Laws and Customs of War*, which restates, with negligible variation in verbiage, article 56 of the 1899 *Hague Convention (II) on the Laws and Customs of War*, "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 willful 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." The full text of both conventions is available at https://ihl-databases.icrc.org/ihl/ (accessed April 17, 2020).

[47] See P. Gerstenblith, "From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century," *Georgetown Journal of International Law* 37, no. 2 (2006), pp. 251–252; and O'Keefe, *The Protection of Cultural Property in Armed Conflict*, pp. 13–22.

[48] The Einsatzstab Rosenberg was so named for its overseeing officer, Alfred Rosenberg, whose offences tried at Nuremberg included "plunder of public and private property" and "looting and destruction of works of art." Both offences were judged to be war crimes and crimes against humanity. For relevant materials concerning Rosenberg's indictment, trial, and conviction, see J.H. Merryman and A.E. Elsen, *Law, Culture, and the Visual Arts*, vol. 1, nos. 1.43–1.53 (New York: Matthew Bender, 1979).

[49] UNESCO, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (November 14, 1970) (hereinafter, UNESCO 1970); and UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage* (November 16, 1972) (hereinafter, UNESCO 1972).

[50] T. Papademetriou, "International Aspects of Cultural Property: An Overview of Basic Instruments and Issues," *International Journal of Legal Information* 24, no. 3 (1996), p. 272.

[51] 1954 Hague Convention, art. 1.

[52] *Ibid.*, arts. 4(1), 4(3).

[53] *Ibid*., art. 28.

[54] *Ibid*., art. 3.

[55] *Ibid.*, art. 8(1).

[56] M. Frulli, "The Criminalization of Offences Against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency," *European Journal of International Law* 22, no. 1 (2011), p. 205.

[57] Abtahi, "The Protection of Cultural Property in Times of Armed Conflict," pp. 7–8.

[58] See M. Frigo, "Cultural Property v. Cultural Heritage: A 'Battle of Concepts' in International Law?," *International Review of the Red Cross* 86, no. 854 (2004), pp. 367–368; and Merryman, "Two Ways of Thinking about Cultural Property," p. 831.

[59] Frigo, "Cultural Property v. Cultural Heritage," p. 369.

[60] Weiss and Connelly, *Cultural Cleansing and Mass Atrocities*, p. 11. See also Bokova, "Fighting Cultural Cleansing," pp. 40–45.

[61] UNESCO 1954, art. 4(2).

[62] Roerich Pact, art. 5, states that the "cultural treasures" identified in its article 1 "shall cease to enjoy the privileges recognized in the present Treaty in case they are made use of for military purposes." Hague Convention (IV), art. 23, states that "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." Geneva Conventions (I), art. 50; (II), art. 51; and (IV), art. 53, all require that damage of or destruction to property "not [be] justified by military necessity" in order to qualify as a breach of the convention. For the Roerich Pact, see note 43 above. For Hague Convention (IV) and all four Geneva Conventions, see, see https://ihl-databases.icrc.org/ihl/ (accessed April 17, 2020).

[63] D.D. Eisenhower quoted in Merryman, "Two Ways of Thinking about Cultural Property," p. 838.

[64] For definitions of "old war" and how it differs from contemporary forms of conflict, see M. Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Stanford: Stanford University Press, 1999).

[65] See P.J. Hoffman and T.G. Weiss, "New Wars and New Humanitarianisms in the 1990s," in *Humanitarianism, War, and Politics: Solferino to Syria and Beyond*, ed. P.J. Hoffman and T.G. Weiss (London: Rowman and Littlefield, 2018), pp. 92–94.

[66] See, e.g., Z. Howe, "Can the 1954 Hague Convention Apply to Non-State Actors? A Study of Iraq and Libya," *Texas International Law Journal* 47, no. 2 (2012), pp. 403–425.

[67] For a useful summary of the problems inherent in the system of special protection in the 1954 Hague Convention, see J. Hladík, "Different Legal Issues Related to the Protection of Cultural Property in Peacetime and Wartime," *Proceedings of the Annual Meeting of the American Society of International Law*, vol. 106, *Confronting Complexity*, p. 205.

[68] Poole, "Looting Iraq"; see also W. Sandholtz, "The Iraqi National Museum and International Law: A Duty to Protect," *Columbia Journal of Transnational Law* 44, no. 1 (2003), pp. 185–240.

[69] See Frulli, "The Criminalization of Offences Against Cultural Heritage," p. 206.

[70] For a discussion on the impact of the convention's ratification by the U.S. and other world powers, see P. Gerstenblith, "The Obligations Contained in International Treaties of Armed Forces to Protect Cultural Heritage in Times of Armed Conflict," in *Archaeology, Cultural Property, and the Military*, ed. Laurie Rush (Woodbridge: Boydell and Brewster, 2010), pp. 12–13.

[71] See, for instance, the varying opinions on this issue offered in Henckaerts, "New Rules for the Protection of Cultural Property in Armed Conflict," pp. 594, 601; Henckaerts, "Study on Customary International Humanitarian Law," p. 193; Howe, "Can the 1954 Hague Convention Apply to Non-State Actors?," p. 417; L. Walsh, "The Destruction of Cultural Property in the Former Yugoslavia as a War Crime," *Willamette Bulletin of International Law and Policy* 4, no. 1 (1996), p. 61; and Y. Gottlieb, "Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC," *Penn State International Law Review* 23, no. 4 (2005), pp. 869–870.

[72] UNESCO 1970, art. 1.

[73] *Ibid*. The motley categories earmarked for protection are: "(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; (i) postage, revenue and similar stamps, singly or in collections; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments."

[74] *Ibid*., art. 3.

[75] *Ibid*., art. 2.

[76] *Ibid*., art. 8.

[77] UNESCO 1972, art. 1.

[78] Weiss and Connelly, *Cultural Cleansing and Mass Atrocities*, p. 10.

[79] UNESCO 1972, preamble.

[80] *Ibid*., art. 3.

[81] *Ibid*., art. 4.

[82] *Ibid*., chaps. 3, 4.

[83] O'Keefe, *The Protection of Cultural Property in Armed Conflict*, p. 167.

[84] The six constituent republics are Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro, and Macedonia (now North Macedonia). A seventh republic, Kosovo, declared its independence from Serbia in

2008, but its secession has not been recognized by Serbia, nor has its sovereignty been universally acknowledged by the international community of states.

[85] See, for instance, S.L. Woodward, *Balkan Tragedy: Chaos and Dissolution after the Cold War* (Washington: Brookings Institution, 1995), especially pp. 114–145; and R. Holbrooke, *To End a War* (New York: Random House, 1998), especially pp. 60–75.

[86] Article 2 of the *Convention on the Prevention and Punishment of the Crime of Genocide* (December 9, 1948), defines *genocide* as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." This definition was adopted verbatim in article 6 of the Rome Statute.

[87] Council of Europe, *War Damage to the Cultural Heritage in Croatia and Bosnia-Herzegovina Presented by the Committee on Culture and Education, Second Information Report*, Doc. 6869 (July 17, 1993). See also Bevan, *The Destruction of Memory*, pp. 84–89.

[88] Bevan, *The Destruction of Memory*, p. 303.

[89] ICTY, *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (hereinafter, ICTY Statute), annex to UNSC, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, S/25704 (May 3, 1993).

[90] IMT, *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 U.N.T.C. 280 (August 8, 1945).

[91] ICTY Statute, art. 3.

[92] Walsh, "The Destruction of Cultural Property in the Former Yugoslavia as a War Crime," p. 61.

[93] UNSC, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, S/25704 (May 3, 1993), chap. II, art. 1(A), para. 35.

[94] International Peace Conference, *Hague Convention (IV) Respecting the Laws and Customs of War on Land*, art. 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"; and ICRC, *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287 (August 23, 1949), art. 53: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited."

[95] Article 28 reads: "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanction upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention."

[96] 1954 Hague Convention, art. 4(1) (emphasis added).

[97] Frulli, "Advancing the Protection of Cultural Property Through the Implementation of Individual Criminal Responsibility," p. 208.

[98] P.J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, CLT.93/WS/12 (September 3, 1993) (hereinafter, 1993 Review).

[99] *Ibid.*, p. 93: "It seems clear that the States represented at the 1954 Intergovernmental Conference [at which the convention was drafted] were reluctant to create a precedent by developing any explicit international criminal measures. Consequently, in the 1954 Convention, the High Contracting Parties entered into an obligation in relation to breaches in very general, and imprecise, terms."

[100] *Ibid*., pp. 93–94: "The crucial need is to ensure that in all appropriate cases there is proper and effective prosecution through some appropriate legal process, not least in order to send clear signals to both military personnel and civilians throughout the world that there are clear limits to both personal and collective conduct."

[101] M. Burgis-Kasthala, "Holding Individuals to Account Beyond the State? Rights, Regulation and the Resort to International Criminal Responsibility," in *Regulatory Theory: Foundations and Applications*, ed. Peter Drahos (Canberra: ANU Press, 2017), p. 430.

[102] *Prosecutor v. Dusko Tadic*, Case no. IT-94-1, Opinion and Judgment, ICTY Trial Chamber (May 7, 1997), para. 464.

[103] *Prosecutor v. Dusko Tadic*, Case no. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (October 2, 1995), para. 94. The other three Tadic Conditions are: "(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim."

[104] These convictions include those of Dario Kordic, Mladen Naletilic, Radoslav Brdjanin, Pavle Strugar, and Miodrag Jokic, the complete case files for all of which are available at https://icty.org/en/cases (accessed April 17, 2020).

[105] O'Keefe, *The Protection of Cultural Property in Armed Conflict*, p. 343, n. 157.

[106] *Ibid*., p. 281.

[107] 1993 Review, p. 13.

[108] *Ibid*., pp. 116, 118.

[109] See Frulli, "The Criminalization of Offences Against Cultural Heritage," p. 214.

[110] *Prosecutor v. Mladen Naletilic / Vinko Martinovic*, Case no. IT-98-34, Indictment, ICTY Trial Chamber (December 18, 1998), para. 56.

[111] *Prosecutor v. Mladen Naletilic / Vinko Martinovic*, Case no. IT-98-34, Judgment, ICTY Trial Chamber (March 31, 2003), para. 604.

[112] See note 94.

[113] Frulli, "The Criminalization of Offences Against Cultural Heritage," p. 204.

[114] *Ibid.*

[115] *Prosecutor v. Pavle Strugar / Miodrag Jokic / Milan Zec / Vladimir Kovacevic*, Case no. IT-01-42, Indictment, ICTY Trial Chamber (February 22, 2001), paras. 39–42.

[116] *Prosecutor v. Pavle Strugar*, Case no. IT-01-42, Judgment, ICTY Trial Chamber (January 31, 2005), counts. 10–12; and *Prosecutor v. Miodrag Jokic*, Case no. IT-01-42/1-S, Sentencing Judgment, ICTY Trial Chamber (March 18, 2004), counts. 10–12.

[117] *Prosecutor v. Miodrag Jokic*, Sentencing Judgment, paras. 51–55.

[118] UNGA, *Rome Statute of the International Criminal Court*, A/CONF.183/9 (July 17, 1998), art. 7(2)(g) (hereinafter, Rome Statute).

[119] UNGA, *Universal Declaration of Human Rights*, Res. 217 A (December 10, 1948), art. 27.

[120] 1993 Review, p. 121. For the definition of genocide per the 1948 Genocide Convention, see note 86 above.

[121] Luck, *Cultural Genocide and the Protection of Cultural Heritage*, p. 18.

[122] *Prosecutor v. Radislav Krstic*, Case no. IT-98-33-T, Judgment, ICTY Trial Chamber (August 2, 2001), para. 580.

[123] *Ibid.*

[124] These offenses are enumerated in articles 2–5 of the ICTY Statute. The stipulation on persecution appears in article 5(h).

[125] Gottlieb, "Criminalizing Destruction of Cultural Property," p. 873. Gottlieb also cites the cases of Tihomir Blaskic and Dario Kordic as examples linking the destruction of cultural property to a form of persecution.

[126] *Prosecutor v. Radoslav Brdjanin / Momir Talic*, Case no. IT-99-36, Amended Indictment, ICTY Trial Chamber (December 16, 1999), count 3, para. 36(3). Brdjanin's participation in killings is enumerated in count 3, para. 36(1); sexual assault, para. 36(2); and forcible displacement, para. 36(4).

[127] *Prosecutor v. Radoslav Brdjanin*, Case no. IT-99-36, Judgment, ICTY Trial Chamber (September 1, 2004), paras. 996, 1023.

[128] *Ibid*., para. 1024.

[129] Abtahi, "The Protection of Cultural Property in Times of Armed Conflict," p. 24.

[130] UNESCO, *Resolutions of the General Conference, 26th Session, Paris, 15 October–7 November 1991*, 26 C/Resolution 3.9 (1991), preamble. See also O'Keefe, *The Protection of Cultural Property in Armed Conflict*, p. 236.

[131] UNESCO, *Decisions Adopted by the Executive Board at Its 141st Session*, *Paris, 10–28 May 1993*, 141 EX/Decision 5.5.1 (1993), para. 6.

[132] For a helpful summary of these five issues, see Henckaerts, "New Rules for the Protection of Cultural Property," p. 595.

[133] 1993 Report, preamble.

[134] Frulli, "The Criminalization of Offences Against Cultural Heritage," p. 210.

[135] O'Keefe, *The Protection of Cultural Property in Armed Conflict*, p. 255

[136] 1954 Hague Convention, art. 4(2).

[137] See note 104 above.

[138] UNESCO, *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (March 16, 1999), art. 6(a) (hereinafter, Second Protocol).

[139] ICRC, "Military Objectives" (emphasis added), *Online Casebook: How Does Law Protect in War?*, https://casebook.icrc.org/glossary/military-objectives (accessed April 17, 2020).

[140] Henckaerts, "New Rules for the Protection of Cultural Property," p. 603.

[141] *Ibid*.

[142] Second Protocol, art. 7(c). See also O'Keefe, *The Protection of Cultural Property in Armed Conflict*, p. 257.

[143] O'Keefe, *The Protection of Cultural Property in Armed Conflict*, p. 258.

[144] *Ibid*.

[145] *Ibid*. For a definition of proportionality, see ICRC, "Proportionality," *Online Casebook: How Does Law Protect in War?*, https://casebook.icrc.org/glossary/proportionality (accessed April 17, 2020).

[146] O'Keefe, *The Protection of Cultural Property in Armed Conflict*, p. 348: "the presence of Dubrovnik on the World Heritage List appeared to add to the gravity of the offence."

[147] Burgis-Kasthala, "Holding Individuals to Account Beyond the State?," p. 430.

[148] 1954 Hague Convention, art. 28.

[149] O'Keefe, *The Protection of Cultural Property in Armed Conflict*, p. 275.

[150] Second Protocol, art. 15(1), which lists the offences in a different order. They have been reordered here the better serve the purposes of this study. See also Hladík, "Different Legal Issues Related to the Protection of Cultural Property in Peacetime and Wartime," p. 453.

[151] Second Protocol, art. 15(2).

[152] The system of enhanced protection is outlined in great detail in chapter 3, articles 10–14, of the Second Protocol.

[153] O'Keefe, *The Protection of Cultural Property in Armed Conflict*, p. 263.

[154] Frulli, "The Criminalization of Offences Against Cultural Heritage," p. 204; see also p. 206.

[155] *Ibid*., pp. 211–212.

[156] UN Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes: A Tool for Prevention* (New York: United Nations, 2014), p. iii. In addition to the four named atrocity crimes, the ICC has jurisdiction over the crime of aggression.

[157] Rome Statute, art. 8(2)(b)(ix).

[158] While serving as UN Secretary-General, Ban Ki-moon referred to genocide, war crimes, and crimes against humanity as "the most serious international crimes"; see UN Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes*, p. iii.

[159] Weiss and Connelly, *Cultural Cleansing and Mass Atrocities*, p. 18.

[160] Rome Statute, arts. 7(1)(h) and (k).

[161] ICTY Statute, art. 5(h); see also Gottlieb, "Criminalizing Destruction of Cultural Property," p. 873.

[162] Gerstenblith, "The Destruction of Cultural Heritage," p. 336.

[163] In its earliest phase, beginning roughly at the time of the 1991 Gulf War, this program of devastation was perpetrated under the Baathist regime of Saddam Hussein. The Iraqi Special Tribunal (IST) was established in 2003, after Hussein's removal from power, to investigate atrocity crimes perpetrated by his regime. Unlike the ICTY, however, and despite noted evidence of Baathist crimes against culture, the IST statute failed to qualify such offences as war crimes or even to criminalize them at all. The IST was not, however, an international tribunal and was purposefully established and run by Iraqis, which could explain this omission.

[164] Poole, "Looting Iraq."

[165] For cogent legal arguments in favor of implicating the U.S. military in the looting of the Iraqi museum, see, e.g., I.M. Ralby, "Prosecuting Cultural Property Crimes in Iraq," *Georgetown Journal of International Law* 37, no. 1 (2005), pp. 165–192; and Sandholtz, "The Iraqi National Museum and International Law." For similar arguments from an art-historical perspective, see, e.g., E.N. Luttwak, D. Rieff, and Z. Bahrani, *Cultural Heritage in War: Moral and Military Choices* (New York: Columbia Seminar on Art and Society: 2003).

[166] Article 9(a) of the Second Protocol states that "a Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory any illicit export, other removal or transfer of ownership of cultural property." Its applicability in the current situation is, however, debatable, as neither Iraq nor the U.S. is a party to the Second Protocol.

[167] Sandholtz, "The Iraqi National Museum and International Law," p. 222.

[168] The U.S., in fact, claimed military necessity as the reason for its neglect of the museum, citing the more important need of securing Iraqi infrastructure; see Howe, "Can the 1954 Hague Convention Apply to Non-State Actors?," p. 416.

[169] For an overview of the looting of Iraqi archaeological sites and the devastation of the Mosul Museum, see Fowlkes-Childs and Seymour, *The World Between Empires*, pp. 259–297. For a recent assessment of the market for these antiquities, see K. Zraick, "Now for Sale on Facebook: Looted Middle Eastern Antiquities," *The New York Times* (May 10, 2019), p. A10.

[170] The extent of the territory claimed by the Islamic State has varied since it first self-declared its "caliphate" over areas that include much of present-day Iraq and Syria. A coalition of Iraqi and allied military forces largely expelled the group from Mosul, its Iraqi stronghold, in the summer of 2017, though pockets of resistance remain. For a timeline of military efforts against the Islamic State, see Wilson Center, "The Rise, Spread, and Fall of the Islamic State," https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state (accessed April 17, 2020).

[171] RASHID, "The Intentional Destruction of Cultural Heritage in Iraq as a Violation of Human Rights," Submission for the United Nations Special Rapporteur in the Field of Cultural Rights (2016), pp. 7–8, https://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/NGOS/RASHID.pdf (accessed April 17, 2020). The annex to this report offers a comprehensive accounting of all 41 Iraqi heritage sites damaged or destroyed by ISIL between 2014 and 2016.

[172] F. Francioni and F. Lenzerini, "The Destruction of the Buddhas of Bamiyan and International Law," *The European Journal of International Law* 14, no. 4 (2003), pp. 626–627. See also F.B. Flood, "Between Cult and Culture: Bamiyan, Islamic Iconoclasm, and the Museum," *The Art Bulletin* 84, no. 4 (2002), p. 642, which distinguishes the bombing of the Buddhas from a longstanding Muslim tradition of avoiding figuration in art, defining it instead as a "calculated engagement with a culturally specific discourse at a particular historical moment" (i.e., a new form of iconoclasm specific to the extremist mindset).

[173] UNESCO, "UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage," *Records of the General Conference, 32nd Session, Paris, 29 September to 17 October 2003, v. 1: Resolutions*, 32 C/Resolutions (2003).

[174] P. Gerstenblith, "The Destruction of Cultural Heritage," p. 364: "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."

[175] *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case no. ICC-01/12-01/15, Trial Hearing, Admission of Guilt, ICC Trial Chamber (August 22, 2016), para. 12.

[176] On Sufism in Africa, see J.O. Hunwick, *West Africa, Islam, and the Arab World: Studies in Honor of Basil Davidson* (Princeton: Markus Wiener Publishers, 2006), p. 39.

[177] See Allais, "Amplified Humanity and the Architectural Criminal," p. 270.

[178] See K. Campion, "Blast Through the Past: Terrorist Attacks on Art and Antiquities as a Reconquest of the Modern Jihadi Identity," *Perspectives on Terrorism* 11, no. 1 (2017), pp. 32–33.

[179] Sanda Ould Boumama, quoted in Allais, "Amplified Humanity and the Architectural Criminal," p. 270. See also Campion, "Blast Through the Past," p. 33.

[180] *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case no. ICC-01/12-01/15, Indictment, ICC Trial Chamber VIII (August 24, 2016), para. 11. See also Bishop-Burney, "Prosecutor v. Ahmad Al Faqi Al Mahdi," p. 128.

[181] Bishop-Burney, "Prosecutor v. Ahmad Al Faqi Al Mahdi," p. 128.

[182] Kila, "Inactive, Reactive, or Pro-Active?," pp. 331–332.

[183] *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case no. ICC-01/12-01/15, Judgment and Sentence, ICC Trial Chamber VIII (September 27, 2016), para. 81.

[184] Bishop-Burney, "Prosecutor v. Ahmad Al Faqi Al Mahdi," p. 128.

[185] L. Hammond, "The Power of Holding Humanitarianism Hostage and the Myth of Protective Principles," in *Humanitarianism in Question: Politics, Power, Ethics*, ed. M. Barnett and T.G. Weiss (Ithaca: Cornell University Press, 2008), p. 178.

[186] For an accounting of cultural property destroyed in Syria since the start of the conflict, see the *Syrian Heritage Archive Project*, a digital documentation and preservation initiative of the Staatliche Museen zu Berlin, https://project.syrian-heritage.org/en/ (accessed April 17, 2020).

[187] Fowlkes-Childs and Seymour, *The World Between Empires*, pp. 260–261.

[188] Syrian government forces were even more egregious with these sorts of illegal practices in Aleppo, where they appropriated the city's medieval-era citadel as a military stronghold, occasioning its destruction; see M. Lostal, "Syria's World Cultural Heritage and Individual Criminal Responsibility," *International Review of Law* 3 (2015), pp 3–4.

[189] See E. Cunliffe, N. Muheshen, and M. Lostal, "The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations," *International Journal of Cultural Property* 23 (2016), p. 19.

[190] Lostal, "Syria's World Cultural Heritage and Individual Criminal Responsibility," p. 2. For the "Chautaqua Blueprint," which is unpublished but available in draft form from the Institute for Security Policy and Law at Syracuse University, see https://securitypolicylaw.syr.edu/wp-content/uploads/2013/09/Chautauqua-Blueprint1.pdf (accessed April 17, 2020).

[191] Rome Statute, art. 12(3).

[192] UNESCO 1970, passim., but see especially articles 3 and 11: "The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit"; "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."

[193] S. Brady, "Policing TOC—The National Perspective: Challenges, Strategies, Tactics," in *International Law and Transnational Organised Crime*, ed. P. Hauck and S. Peterke (New York: Oxford University Press, 2016), p. 475.

[194] Syrian Arab Republic, Ministry of Culture, General Directorate of Antiquities and Museums, "Antiquities Law, Passed in Legislative Decree n. 222 of October 26, 1963, with All Its Amendments," English translation available at https://zh.unesco.org/sites/default/files/sy_antiquitieslaw1963_engtof.pdf (accessed April 17, 2020).

[195] Lostal, "Syria's World Cultural Heritage and Individual Criminal Responsibility," pp. 5–6.

[196] UNGA, *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* (September 29, 2003). See also UNODC, "Emerging Crimes," https://www.unodc.org/unodc/en/organized-crime/intro/emerging-crimes.html#Trafficking_in_cultural_property (accessed April 17, 2020).

[197] UNSC, "Letter dated 31 March 2016 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council," S/2016/296 (March 31, 2016).

[198] UNSC, *Resolution 2199 (2015)*, S/RES/2199 (February 12, 2015), para. 16.

[199] UNSC, *Resolution 2347 (2017)*, S/RES/2347 (March 24, 2017), preamble.

[200] *Ibid*.

[201] Francioni and Lenzerini, "The Destruction of the Buddhas of Bamiyan and International Law," p. 630.

[202] UNGA, *Vienna Convention on the Law of Treaties* (May 23, 1969), arts. 34–36.

[203] Howe, "Can the 1954 Hague Convention Apply to Non-State Actors?," p. 420.

[204] Henckaerts, "New Rules for the Protection of Cultural Property in Armed Conflict," p. 618.

[205] Howe, "Can the 1954 Hague Convention Apply to Non-State Actors?," p. 420. For the conference summary, see UNESCO, *Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, March 15–26, 1999*, Summary Report (June 1999).

[206] A. Clapham, "The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement," *Social Science Research Network* (February 1, 2010), pp. 1–45.

[207] For more on the embedding of the R2P norm since its passage, see R. Thakur, "The Responsibility to Protect at 15," *International Affairs* 92, no. 2 (2016), pp. 427–428.

[208] Weiss and Connelly, *Cultural Cleansing and Mass Atrocities*, pp. 31–39.

[209] Luck, *Cultural Genocide and the Protection of Cultural Heritage*, passim.

[210] Max Hollein, personal communication with the author, August 20, 2019.

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