

KILLING A CULTURE: THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE IN IRAQ AND SYRIA UNDER INTERNATIONAL LAW

Caitlin V. Hill*

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* J.D., University of Georgia School of Law, 2017; B.A., Clemson University, 2013. I would like to thank my family, fiancé, and dear friends for their love and support throughout this process.

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I. INTRODUCTION

As the list of atrocities committed against cultural heritage in the Middle East by the Islamic State continues to grow, it is clear that the intention is to deprive the people of Iraq and Syria of their cultural identity and history.¹ The international community continues to condemn the actions taken by the Islamic State, but as each historical site is bulldozed or laced with explosives, the world watches helplessly.²

The Middle East is no stranger to the destruction of cultural heritage during armed conflicts. Just over a decade ago, the world watched as the Taliban destroyed the Buddhas of Bamiyan, two enormous statues of the Buddha that had been carved into the cliffs at Bamiyan during the sixth century.³ This intentional destruction of cultural heritage led the United Nations (UN) to pass a resolution in 2001 and later led to the adoption of the United Nations Educational Scientific and Cultural Organization (UNESCO) Declaration Concerning the Intentional Destruction of Cultural Heritage in 2003.⁴ However, no group or individual has ever been prosecuted for these crimes.⁵

In the past months, the Islamic State has released several videos documenting the destruction of ancient cultural sites in Syria and Iraq, including several UNESCO World Heritage Sites.⁶ The Director-General of UNESCO, Irina Bokova, has stated that the Islamic State's campaign of destruction amounts to "cultural cleansing" and is unprecedented in

¹ Director-General Irina Bokova firmly condemns the destruction of Palmyra's ancient temple of Baalshamin, Syria, UNESCO (Sept. 8, 2015, 10:17 AM), <http://en.unesco.org/news/director-general-irina-bokova-firmly-condemns-destruction-palmyra-s-ancient-temple-baalshamin> ("The systematic destruction of cultural symbols embodying Syrian cultural diversity reveals the true intent of such attacks, which is to deprive the Syrian people of its knowledge, its identity and history. One week after the killing of Professor Khaled al-Assaad, the archaeologist who had looked after Palmyra's ruins for four decades, this destruction is a new war crime and an immense loss for the Syrian people and for humanity . . .").

² Thiago Velozo & Lucas Bento, *ISIS Is Destroying Priceless Artifacts. Here's How to Stop Them*, THE DIPLOMAT (Mar. 17, 2015), <http://thediplomat.com/2015/03/isis-is-destroying-priceless-artifacts-heres-how-to-stop-them/> ("Despite public denouncements, no concrete action has so far been taken by any government or intergovernmental organization.").

³ Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and The Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT'L L. 245, 246 (2006).

⁴ Ana Filipa Vrdoljak, *Intentional Destruction of Cultural Heritage and International Law*, 1, 1 (2007), http://works.bepress.com/ana_filipa_vrdoljak/3/.

⁵ Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT'L L. 619, 643 (2003).

⁶ Susannah Cullinane et al., *Tracking a trail of historical obliteration: ISIS trumpets destruction of Nimrud*, CNN WORLD (Apr. 13, 2015), <http://www.cnn.com/2015/03/09/world/iraq-isis-heritage/>.

contemporary history.⁷ In May of 2015, in response to the recent bulldozing at Nimrud, the UN passed a resolution aimed at saving the cultural heritage of Iraq.⁸

The intentional destruction of cultural heritage is a war crime under international law,⁹ but there is no uniform body to prosecute these crimes.¹⁰ Could destruction of cultural heritage amount to a crime against humanity, and how would these crimes be prosecuted under international law? UNESCO has unequivocally classified these acts of destruction by the Islamic State as both war crimes and as cultural cleansing. However, cultural cleansing is not a term that arises in the international law governing cultural heritage.¹¹ In a report for the UNESCO International Conference held on December 4, 2014, cultural cleansing was defined as, “an intentional strategy that seeks to destroy cultural diversity through the deliberate targeting of individuals identified on the basis of their cultural, ethnic or religious background, combined with deliberate attacks on their places of worship, memory and learning.”¹² By systematically destroying cultural heritage, the Islamic State is seeking to destroy all cultural diversity within their declared caliphate.

It is the position of this Note that individually these acts are war crimes, but collectively this systematic cultural cleansing is a crime against humanity and should be codified as such. Further, an ad-hoc tribunal should be created to prosecute these crimes. This Note will discuss the body of international law that governs the protection of cultural heritage generally and explore how these crimes might be prosecuted under the current body of international law. Next, this Note will then address the International Criminal Tribunal for the Former Yugoslavia (ITCY), proposing that a similar tribunal should be implemented for the crimes being committed in the Middle East by the Islamic State. Finally, this Note will suggest that the crime of cultural

⁷ Michele Neubert & Alexander Smith, *UNESCO's Irina Bokova Laments ISIS' 'Cultural Cleansing' of Antiquities*, NBC NEWS (July 7, 2015), <http://www.nbcnews.com/storyline/isis-terror/unesco-boss-irina-bokova-laments-isis-cultural-cleansing-antiquities-n386291>.

⁸ G.A. Res. 69/281, U.N. Doc. A/RES/69/281 (May 28, 2015); Rick Gladstone, *U.N. Resolves to Combat Plundering of Antiquities by ISIS*, N.Y. TIMES (May 28, 2015), <http://www.nytimes.com/2015/05/29/world/middleeast/un-resolves-to-combat-plundering-of-antiquities-by-isis.html>.

⁹ UNESCO, *supra* note 1; Press Release, Secretary-General, Calling Attacks ‘a War Crime,’ Secretary-General Strongly Condemns Destruction of Cultural Heritage Sites in Iraq, U.N. Press Release, SG/SM/16570-IK/701 (Mar. 6, 2015).

¹⁰ Major Kevin D. Kornegay, *Destroying the Shrines of Unbelievers: The Challenge of Iconoclasm to the International Framework for the Protection of Cultural Property*, 221 MIL. L. REV. 153, 166 (2014).

¹¹ Neubert & Smith, *supra* note 7.

¹² UNESCO, *Heritage and Cultural Diversity at Risk in Iraq and Syria*, 1, 3 (Dec. 3, 2014), <http://www.unesco.org/culture/pdf/iraq-syria/IraqSyriaReport-en.pdf>.

cleansing be codified as a crime against humanity, allowing for it to be prosecuted as a human rights violation.

II. THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE BY THE ISLAMIC STATE

The Islamic State, also known as ISIS or ISIL, or by its Islamic name *Da'esh*, is an Islamic militant group that has gained control of large swaths of territory in Iraq and Syria and can be traced back to al Qaeda in Iraq.¹³ ISIS's goal has been to establish an independent Islamic state in the Middle East based on radical anti-Western principles.¹⁴ The Islamic State has come to be known for its extremely brutal tactics and was disavowed by al Qaeda in early 2014.¹⁵

Known for their video footage documenting the atrocities they commit, the Islamic State uses the destruction of cultural heritage as a means of cultural cleansing; literally erasing the culture and history of Iraq and Syria, considering all religious shrines and archaeological sites to be idolatrous.¹⁶ One commentator explained that by destroying idols, the Islamic State is trying to establish the legitimacy of their caliphate:

Initially . . . it seems ISIS' motive was to elevate their status amongst Muslims and other Jihadist groups by drawing a link from themselves to Muhammad. The fact that hardly any of the statues in the Mosul Museum were cultic images did not matter. Muhammad destroyed idols, so ISIS needed to find some idols to destroy in order to legitimize their claim to a caliphate as successors to Muhammad.¹⁷

¹³ Faisal Irshaid, *Is IS or Death? One group many names*, BBC (Dec. 2, 2015), <http://www.bbc.com/news/world-middle-east27994277>.

¹⁴ Tim Lister, *What does ISIS Really Want*, CNN (Dec. 11, 2015), <http://www.cnn.com/2015/12/11/middleeast/isis-syria-iraq-caliphate>

¹⁵ Richard Greene & Nick Thompson, *ISIS: Everything you need to know*, CNN NEWS (Aug. 11, 2016), <http://www.cnn.com/2015/01/14/world/isis-everything-you-need-to-know/>.

¹⁶ Cullinane et al., *supra* note 6.

¹⁷ Christopher Jones, *What is ISIS' Media Strategy*, GATES OF NINEVEH (Apr. 22, 2015), <https://gatesofnineveh.wordpress.com/2015/04/22/what-is-isis-media-strategy/>; see also Kristin Romey, *Why ISIS Hates Archaeology and Blew Up Ancient Iraqi Palace*, NAT'L GEOGRAPHIC (Apr. 14, 2015), <http://news.nationalgeographic.com/2015/04/150414-why-islamic-state-destroyed-assyrian-palace-nimrud-iraq-video-isis-isil-archaeology/> ("By invoking the sins of *shirk*, or idolatry, the Islamic State is trying to establish their legitimacy as the proper heirs to the legacy of earlier 'destroyers of idols,' including the prophets Abraham and Muhammed.").

The Islamic State will continue to destroy cultural heritage sites as long as there is no strong deterrent to stop them, and even then, deterrence likely is not enough.¹⁸ The Iraqi Ministry of Tourism and Antiquities has said:

We have warned previously and warn now that these gangs with their sick, *takfiri* ideology will continue to destroy and steal [artifacts] as long as there is no strong deterrent, and we still await a strong international stand to stop the crimes of Daesh that are targeting the memory of humanity.¹⁹

Understanding the Islamic State's motivations helps shed light on why they are targeting cultural heritage sites. The Islamic State has destroyed several important cultural heritage sites in the past few years, including Palmyra, Nimrud, Khorsabad, the Mosul Museum and Library, Jonah's Tomb, and Hatra.²⁰ The 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage defines "intentional destruction" as:

an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience, in the latter case in so far as such acts are not already governed by fundamental principles of international law.²¹

The Islamic State has released several videos of their systematic destruction of cultural heritage, making it clear that the destruction is intentional as defined by the 2003 Declaration.²² Each of these sites has incredible cultural and historical significance, and their destruction constitutes a great loss to humanity.

¹⁸ Kareem Shaheen, *Isis attacks on ancient sites erasing history of humanity, says Iraq*, THE GUARDIAN (Mar. 9, 2015), <http://www.theguardian.com/world/2015/mar/09/iraq-condemns-isis-destruction-ancient-sites>.

¹⁹ *Id.*

²⁰ Cullinane et al., *supra* note 6; Dion Dassanayake, *Islamic State: What is IS and why are they so violent?*, EXPRESS NEWS (Feb. 13, 2015), <http://www.express.co.uk/news/world/558078/Islamic-State-IS-what-is-ISIS-why-are-ISIL-so-violent>.

²¹ UNESCO General Conference, *Records of the General Conference*, UNESCO Doc. 32 C/Resolutions (Vol. 1) (29 September to 17 October 2003) [hereinafter 2003 Declaration].

²² Ben Wederman & Dana Ford, *Video Shows ISIS militants destroying antiquities in Iraq*, CNN (Feb. 27, 2015), <http://cnn.com/2015/02/26/middleeast/isis-antiquities-vandalism/>.

A. Cultural Heritage Sites in Syria

In August 2015, the Islamic State destroyed the nearly 2,000-year-old Temple of Baalshamin, along with several other historic structures, located at the ruins of Palmyra.²³ When the Islamic State occupied Palmyra, archaeologists and the international community immediately feared that the militant group would destroy the site.²⁴ In an attempt to locate the site's most valuable archaeological treasures, the Islamic State targeted Khaled al-Assad, head of antiquities at Palmyra.²⁵ However, al-Assad refused to direct the Islamic State to the many artifacts that had been hidden, and was publicly beheaded as a result.²⁶ Shortly thereafter, the Islamic State surrounded the temple with explosives and detonated them.²⁷ Palmyra is a World Heritage Site of great importance to the history of Syria.²⁸ UNESCO described the site as “[a]n oasis in the Syrian desert” which contained “the monumental ruins of a great city that was one of the most important cultural centres of the ancient world. From the first to the second century, the art and architecture of Palmyra, standing at the crossroads of several civilizations, married Graeco-Roman techniques with local traditions and Persian influences.”²⁹ Further, the Temple of Baalshamin, also known as the Temple of Ba'al located in Palmyra, “is considered one of the most important religious buildings of the 1st century A.D. in the East and of unique design.”³⁰ After the site was destroyed, Director-General Bokova released statements expressing “consternation” at the destruction of the temple, calling the act a “war crime.”³¹

²³ Jethro Mullen et al., *ISIS reported to have blown up ancient temple in Palmyra*, CNN WORLD (Sept. 8, 2015, 10:11 AM), <http://www.cnn.com/2015/08/24/middleeast/syria-isis-palmyra-ruins-temple/>; Adam Frank, *Science, Knowledge and Darkness*, NPR (Sept. 18, 2015, 10:00 AM), <http://www.npr.org/sections/13.7/2015/09/01/436519649/science-knowledge-and-darkness>.

²⁴ Frank, *supra* note 23.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*; Mullen et al., *supra* note 23.

²⁸ Frank, *supra* note 23; *Site of Palmyra*, UNESCO, <http://whc.unesco.org/en/list/23>.

²⁹ *Site of Palmyra*, *supra* note 28.

³⁰ *Id.*

³¹ *Director-General Irina Bokova expresses consternation at the destruction of the Temple of Bel in Palmyra*, UNESCO (Sept. 1, 2015), <http://whc.unesco.org/en/news/1341/>; UNESCO, *supra* note 1 (“The systematic destruction of cultural symbols embodying Syrian cultural diversity reveals the true intent of such attacks, which is to deprive the Syrian people of its knowledge, its identity and history. . . . Such acts are war crimes and their perpetrators must be accountable for their actions. UNESCO stands by all Syrian people in their efforts to safeguard their heritage, a heritage for all humanity.”).

B. Cultural Heritage Sites in Iraq

Mosul, the second-largest city in Iraq, has been under the control of the Islamic State since June 2014.³² In July 2014, a video was released showing the destruction of Jonah's Tomb, which was inside a Sunni Mosque in Mosul.³³ The holy site was said to be the burial site of the Prophet Jonah from the Islamic and Judeo-Christian traditions.³⁴ Then, in February 2015, videos were released showing the Islamic State taking sledgehammers to artifacts in the Mosul Museum, and it was reported that they were also burning books and manuscripts from the Mosul Library.³⁵ This loss of cultural heritage is extreme, as both of these centers housed antiquities that can never be replaced.³⁶ Bokova stated in a press release that, "[t]his destruction marks a new phase in the cultural cleansing perpetrated in regions controlled by armed extremists in Iraq . . . It adds to the systematic destruction of heritage and the persecution of minorities that seeks to wipe out the cultural diversity that is the soul of the Iraqi people."³⁷ Unfortunately, the destruction of cultural heritage has continued, and the rhetoric surrounding the news coverage of these events has continued to be that of dismay and disgust, as the Director-General continues to classify these acts as war crimes, condemning them, and calling on the international community to act.

Nimrud, a cultural heritage site in Iraq, was bulldozed and bombed by the Islamic State in March 2015.³⁸ The site, which dated back to the thirteenth century B.C., was considered the second capital of the Assyrian Empire³⁹ and was located on the Tigris River.⁴⁰ King Ashurnasirpal II built the site as the

³² Martin Chulov, *Isis insurgents seize control of Iraqi city of Mosul*, THE GUARDIAN (June 10, 2014), <http://www.theguardian.com/world/2014/jun/10/iraq-sunni-insurgents-islamic-militants-seize-control-mosul>.

³³ Cullinane et al., *supra* note 6.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Press Release, UNESCO, UNESCO alarmed by news of mass destruction of books in Mosul, UNESCO Office for Iraq (Feb. 3, 2015), http://www.unesco.org/new/en/iraq-office/about-this-office/single-view/news/unesco_alarmed_by_news_of_mass_destruction_of_books_in_mosul/#.Vil4NYQk_ww.

³⁸ Sara Malm, *Shock new video shows ISIS thugs smashing historic Iraqi city of Nimrud with barrel bombs, bulldozers and jackhammers in orgy of destruction slammed as a war crime by the United Nations*, DAILY MAIL (Apr. 12, 2015), <http://www.dailymail.co.uk/news/article-3035534/Video-Islamic-State-group-destroys-ancient-ruins-Nimrud.html>.

³⁹ *Nimrud, Global Strategy: Tentative List*, UNESCO: WORLD HERITAGE CENTRE, <http://whc.unesco.org/en/tentativelists/1463/>.

⁴⁰ Klaudia Englund, *The Northwest Palace at Nimrud*, <http://cdli.ucla.edu/projects/nimrud/index.html> (last visited Oct. 22, 2015).

capital of his empire, and it remained a royal residence for over a century.⁴¹ This site is listed on the UNESCO World Heritage Centre's list of Tentative Sites, meaning that the site was being considered for nomination for inclusion on the World Heritage List.⁴² Again, Bokova condemned the destruction, deeming it a war crime.⁴³

Also in March 2015, the world learned that the Islamic State had destroyed Hatra, another World Heritage Site in Iraq.⁴⁴ Hatra, which dates back to 330 B.C., was established by the successors of Alexander the Great and became the capital of the first Arab Kingdom.⁴⁵ UNESCO described Hatra as “[a] large fortified city under the influence of the Parthian Empire and capital of the first Arab Kingdom,” that “withstood invasions by the Romans in A.D. 116 and 198 thanks to its high, thick walls reinforced by towers. The remains of the city, especially the temples where Hellenistic and Roman architecture blend with Eastern decorative features, attest to the greatness of its civilization.”⁴⁶ Hatra provided one of the best-preserved examples of a circular fortified city and was incredibly important to early Islamic civilization.⁴⁷ After receiving reports that the site had been destroyed, Bokova and Dr. Abdulaziz Othman Altwajri, the Director General of the Islamic Educational, Scientific and Cultural Organization (ISESCO), released a statement that the “destruction of Hatra marks a turning point in the appalling strategy of cultural cleansing underway in Iraq . . . This is a direct attack against the history of Islamic Arab cities, and it confirms the role of destruction of heritage in the propaganda of extremists groups.”⁴⁸

Yet another attack occurred in March 2015 when the Islamic State ransacked and destroyed the ancient site of Khorsabad in northeastern Iraq.⁴⁹

⁴¹ *Id.*

⁴² *Nimrud*, *supra* note 39; *Tentative Lists*, UNESCO: WORLD HERITAGE CENTRE, <http://whc.unesco.org/en/tentativelists/> (“A Tentative List is an inventory of those properties which each State Party intends to consider for nomination.”).

⁴³ *UNESCO Director-General condemns destruction at Nimrud*, UNESCO: WORLD HERITAGE CENTRE (Apr. 13, 2015), <http://whc.unesco.org/en/news/1260/>; *UNESCO Director General condemns destruction of Nimrud in Iraq*, UNESCO: WORLD HERITAGE CENTRE (Mar. 6, 2015), <http://whc.unesco.org/en/news/1244/>.

⁴⁴ Cullinane et al., *supra* note 6; *Hatra*, *The World Heritage List*, UNESCO: A WORLD HERITAGE CENTER, <http://whc.unesco.org/en/list/277>.

⁴⁵ Cullinane et al., *supra* note 6; *Hatra*, *supra* note 44.

⁴⁶ *Hatra*, *supra* note 44.

⁴⁷ Cullinane et al., *supra* note 6.

⁴⁸ “*Destruction of Hatra marks a turning point in the cultural cleansing underway in Iraq*” *say Heads of UNESCO and ISESCO*, UNESCO (Mar. 7, 2015), http://www.unesco.org/new/en/unesco/about-us/who-we-are/director-general/singleview-dg/news/destruction_of_hatra_marks_a_turning_point_in_the_cultural_cleansing_underway_in_iraq_say_heads_of_unesco_and_iseco/#.Vilo54Qk_ww.

⁴⁹ Cullinane et al., *supra* note 6.

Like Nimrud, Khorsabad also served as the capital of the Assyrian Empire during the reign of King Sargon II.⁵⁰ According to the Oriental Institute, the site of Khorsabad was unique “because of its stylistic innovations, the preservation of paint on its reliefs, and the extensive ancient written documentation concerning the organization of the building project.”⁵¹ Although the site does not appear on any of the UNESCO World Heritage lists, its cultural significance cannot be overstated.

After the destruction of these sites in Iraq, the Director-General of UNESCO and the French President held a press conference at the Louvre Museum, condemning in the strongest terms the destruction of cultural heritage sites in Iraq, including Khorsabad, Hatra, and Nimrud.⁵² Bokova stated: “[i]t is because Daesh wants to destroy the people, that Daesh is destroying culture . . . It’s part of a strategy of ‘cultural cleansing’ under which minorities are being persecuted and their heritage destroyed along with everything that embodies diversity and free thinking.”⁵³ Again, it was emphasized that these acts of destruction constitute a war crime.⁵⁴

III. THE INTERNATIONAL LAW OF CULTURAL HERITAGE

Cultural heritage, in its variety of forms, is the manifestation of a peoples’ knowledge, identity, and history. By targeting sites that contain centuries of history and tradition, militant groups aim to annihilate another group’s cultural identity and history. As one commentator has explained, these “[a]cts are motivated by the same intent which drives discrimination, persecution, or genocide — the elimination of diversity, the elimination of those characteristics which defined the ‘group as a group’, and, ultimately, the elimination of the group from time and space of the territory under the perpetrators’ control.”⁵⁵ For this reason, the crime of cultural cleansing committed through the destruction of cultural heritage should be a humanitarian crime and must be codified in the body of international law governing and protecting cultural heritage.

⁵⁰ *Id.*; *Khorsabad Relief Project, The Oriental Institute*, UNIV. OF CHI., <http://oi.uchicago.edu/research/projects/khorsabad-relief-project>.

⁵¹ *Khorsabad Relief Project*, *supra* note 50; see also Cullinane et al., *supra* note 6.

⁵² “*We stand together*” to protect Iraq’s cultural heritage, says French President with UNESCO Director-General, *Media Services*, UNESCO (Mar. 18, 2015), http://www.unesco.org/new/en/media-services/single-view/news/we_stand_together_to_protect_cultural_heritage_says_french_president_with_unesco_director_general#.ViljDIQk_ww.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Ana Filipa Vrdoljak, *Genocide and Restitution: Ensuring Each Group’s Contribution to Humanity*, 22 EUR. J. INT’L L. 17, 18 (2011).

Throughout human history, the destruction of a peoples' cultural identity by way of the targeting and looting of their cultural heritage has been used as a tool of war.⁵⁶ In particular, theft of valuable property, including art and cultural artifacts, has been a well-documented tradition of war; one need only look to the museums of the world to see the antiquities taken during war and conquest.⁵⁷ In response to this phenomenon, international law has long aimed to stop such acts. As early as the 1500s, moral theologians and legal philosophers proposed rules that aimed to regulate both the plunder and the destruction of cultural property during times of war.⁵⁸

The first legal document that forbade the destruction of cultural property was the U.S. Lieber Code, prepared by Francis Lieber and promulgated by President Abraham Lincoln in 1863.⁵⁹ It stated, in pertinent part:

Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.⁶⁰

The notion of protecting immovable property was later adopted by the Hague Convention of 1907 on the Laws and Customs of Wars on Land.⁶¹ It stated that "all necessary steps must be taken to spare . . . 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

⁵⁶ See Robert Bejesky, *A Theorization on Equity: Tracing Causal Responsibility for Missing Iraqi Antiquities and Piercing Official Immunity*, 27 PACE INT'L L. REV. 399, 399–402 (2015).

⁵⁷ See *id.* at 400; see generally ROGER O'KEEFE, *THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT* (2006).

⁵⁸ O'KEEFE, *supra* note 57, at 5.

⁵⁹ *Id.*; see also Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC*, 23 PENN. ST. INT'L L. REV. 857, 859–60 (2005).

⁶⁰ Instructions for the Government of Armies of the United States in the Field, Arts. 35–36, promulgated as General Order No. 100 by Abraham Lincoln (Apr. 24, 1863); see also Gottlieb, *supra* note 59.

⁶¹ Gottlieb, *supra* note 59, at 860.

being used at the time for military purposes.”⁶² Unfortunately, World War I and World War II proved that the protections in place for cultural property were insufficient.

All major developments in international law aimed at protecting cultural heritage have been reactionary in nature; it is not until there has been great loss that a more potent measure is taken to prevent such atrocities.⁶³ Specially, the two World Wars helped the international community realize that an instrument with the sole purpose of protecting cultural property was needed.⁶⁴ This led to the passage of the 1954 Hague Convention, discussed below. Since then, several international treaties have been ratified, usually in response to an event causing grave damage to cultural property, but as one commentator has lamented: “[e]very time the protection has increased, this increase has subsequently proven inadequate.”⁶⁵

A. *The 1954 Hague Convention*

The preamble to the 1954 Hague Convention states that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world”⁶⁶ The Convention emphasizes that the “preservation of the cultural heritage is of great importance for all peoples of the world,”⁶⁷ and because of this, cultural heritage should receive international protection.⁶⁸ The treaty set forth protections for cultural property during armed conflict and binds State Parties that choose to ratify it. By emphasizing that cultural property belongs to the heritage of all mankind, the Convention establishes a system of universal protection.⁶⁹

The 1954 Hague Convention broadly defines the concept of cultural property. The definition provided in Article 1 includes “movable and immovable property” that is culturally important, including archaeological

⁶² Convention Respecting the Laws and Customs of War on Land reg. art. 27, 1907, 36 Stat. 2277 (a907), T.S. 277, 3 Martens Nouveau Recueil (ser. 3) 461, <https://www.icrc.org/applic/ihl/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6?OpenDocument>.

⁶³ See David Keane, *The Failure to Protect Cultural Property in Wartime*, 14 DEPAUL-LCA J. ART & ENT. L. 1, 1 (2004).

⁶⁴ Gottlieb, *supra* note 59, at 860.

⁶⁵ Keane, *supra* note 63, at 1.

⁶⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention pmbl., May 14, 1954, 249 U.S.T. 240 [hereinafter *The 1954 Hague Convention*].

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Connie Brenner, *Cultural Property Law: Reflecting on the Bamiyan Buddhas' Destruction*, 29 SUFFOLK TRANSNAT'L L. REV. 237, 243 (2006).

sites, both religious and secular, and museums and other compendiums of history and art.⁷⁰ The Convention requires that States that are parties to the Convention (State Parties) protect cultural property by safeguarding and respecting it, both within their own territories and within the territories of other State Parties.⁷¹ The Convention applies “in the event of declared war or of any other armed conflict which may arise between two or more of the [State] Parties, even if the state of war is not recognized by, one or more of them.”⁷² It also addresses situations in which only one of the State Parties in conflict is a party to the Convention, stating that “the Powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations.”⁷³ The Convention applies to both international and non-international armed conflicts.⁷⁴ In short, the Convention seeks to protect cultural heritage in times of armed conflict when one or more State Parties is involved. Additionally, the Convention provides for the protection of cultural property during times of peace.⁷⁵ Article 3 requires that State Parties prepare “for the safeguarding of cultural property,” by taking measures which they see as “appropriate” during times of peace.⁷⁶

Unfortunately, the 1954 Hague Convention contains a major exception for “cases where military necessity imperatively requires” it.⁷⁷ Nowhere in the Convention is the term “military necessity” defined, leaving a loophole by which destruction of cultural property could be justified.

The Convention provides for sanctions in order to hold parties accountable and to ensure that cultural heritage is in fact protected. The Convention requires that State Parties “undertake to take, 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.”⁷⁸ In other words, the Hague Convention relies on State actors to prosecute cultural heritage crimes. This is the main criticism of the 1954 Hague Convention: that it lacks a provision for punishing either Parties or individuals who violate its terms.⁷⁹ Commentators have explained that the Convention “lacks teeth because no international body exists to impose sanctions. Instead, the creation and scope of sanctions are left to the parties

⁷⁰ The 1954 Hague Convention, *supra* note 66, art. 1.

⁷¹ *Id.* arts. 2–4.

⁷² *Id.* art. 18.

⁷³ *Id.*

⁷⁴ *Id.* art. 19.

⁷⁵ Kornegay, *supra* note 10, at 165.

⁷⁶ The 1954 Hague Convention, *supra* note 66, art. 3.

⁷⁷ *Id.* art. 4.

⁷⁸ *Id.* art. 28.

⁷⁹ Gerstenblith, *supra* note 3, at 264; Kornegay, *supra* note 10, at 166.

actually effected by the crime to impose as they see fit.”⁸⁰ If a State Party is the actor that destroys cultural heritage within its borders, then those crimes will never be punished. This is the reason no one was held accountable for the destruction of the Buddhas at Bamiyan; the Taliban would have had to hold the Taliban accountable. Clearly, this would never happen.

The 1954 Hague Protocol provides a good initial framework for the protection of cultural property and took the necessary first step in providing for the protection of cultural property in international law. However, due to the lack of an enforcement mechanism, its deterrent value is not strong enough. Further, the Convention does not enumerate what specific acts constitute international crimes under the Convention, nor does it provide for increased liability where the acts are systematic or intentional.

B. The Second Protocol

By the 1990s, the 1954 Hague Convention and its First Protocol were being greatly questioned, primarily because they had proven ineffective at preventing, and later sanctioning, damage to and pillaging of cultural property during the Second Gulf War and the Balkan Wars.⁸¹

The Second Protocol takes the same view of cultural property as the 1954 Hague Convention. The purpose of the Second Protocol was to “improve the protection of cultural property in the event of armed conflict and to establish an enhanced system of protection for specifically designated cultural property.”⁸² In essence, the Second Protocol aimed to introduce new elements for the protection of cultural property, and to clarify certain provisions of the 1954 Hague Convention.⁸³

The Second Protocol narrows the instances in which the waiver for “military necessity” would be allowed under the 1954 Convention by restricting the availability of the waiver to instances where “[the] cultural property has . . . been made into a military objective,” and there is “no feasible alternative” to obtain a similar military advantage.⁸⁴

Perhaps most importantly, the Second Protocol clarifies the criminal responsibility and jurisdiction as it applies to the Convention and its

⁸⁰ David A. Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence Into Customary International Law*, 11 B.U. INT'L L.J. 349, 357 (1993).

⁸¹ Kruti J. Patel, *Culture Wars: Protection of Cultural Monuments In A Human Rights Context*, 11 CHI.-KENT J. INT'L & COMP. L. 1, 7 (2011); Gerstenblith, *supra* note 3, at 267.

⁸² Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict pmb., March 26, 1999, 2253 U.N.T.S. 212 [hereinafter *The Second Protocol*].

⁸³ Patel, *supra* note 81.

⁸⁴ *The Second Protocol*, *supra* note 82, art. 6; Gerstenblith, *supra* note 3, at 267.

Protocols.⁸⁵ Chapter 4 of the Second Protocol contains several articles that enumerate the criminal liability and jurisdiction requirements as they apply to international law and cultural property.⁸⁶ Article 15 provides for serious violations of the Second Protocol, stating that “any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts.”⁸⁷ Article 15 goes on to list instances which constitute an offense, including when a State Party’s cultural property is an “object of attack,” when cultural property is extensively destroyed or appropriated, or when cultural property is used for military purposes.⁸⁸ Paragraph 2 of Article 15 then goes on to reiterate that each Party shall adopt the measures necessary to establish criminal offenses under its domestic laws.⁸⁹

The Second Protocol sets out how criminal jurisdiction should be established with regard to cultural property crimes, requiring Parties to take the “necessary legislative measures to establish its jurisdiction over offenses set forth in Article 15.”⁹⁰ Parties must do so: “a) when such an offence is committed in the territory of that State; b) when the alleged offender is a national of that State; c) in the case of offences set forth in sub-paragraphs (a) to (c) of the first paragraph of Article 15, when the alleged offender is present in its territory.”⁹¹ Furthermore, the Second Protocol does not preclude the “incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law.”⁹² Therefore, unlike the 1954 Hague Convention, the Second Protocol makes it clear what constitutes an offense and how that offense might be prosecuted. Additionally, the Second Protocol contains a prosecute or extradite clause, requiring the Party in whose territory the offense occurred to either extradite the perpetrators or prosecute them.⁹³

Again, there is a key exception. The Second Protocol goes on to explain that except Non-party States that choose to apply this provision, this Protocol does not apply to: “members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a State which is a Party to this Protocol.”⁹⁴ Those individuals

⁸⁵ The Second Protocol, *supra* note 82, ch. 4.

⁸⁶ *Id.*

⁸⁷ *Id.* art. 15.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* art. 16.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* art. 17.

⁹⁴ *Id.*

who commit crimes against cultural heritage “do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them.”⁹⁵ This provision therefore exempts from individual criminal liability members of a State not a party to the Second Protocol, unless that State chooses to impose criminal liability under this Protocol.

These provisions of the Second Protocol were meant to add more weight to the 1954 Hague Convention by clarifying aspects of the Convention that were unclear and by providing more detail about criminal liability, prosecution, and jurisdiction. Although the Second Protocol added to the 1954 Hague Convention, because it still relies on State Parties to prosecute crimes under the Convention and its Protocols it does not carry enough deterrent value to be effective.

C. The 1972 World Heritage Convention

The Convention Concerning the Protection of the World Cultural and Natural Heritage differs from the previously discussed international law concerning cultural heritage in that it is meant to protect cultural heritage at all times, not just times of war.⁹⁶ The preamble to the World Heritage Convention echoes the sentiments of previous international law meant to protect cultural heritage, namely that cultural heritage of any nation also belongs to all mankind, and any loss of cultural heritage is a loss for humanity. The preamble states that the “deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world.”⁹⁷ Further, the World Heritage Convention recognizes that cultural and natural heritage are “increasingly threatened with destruction not only by traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction.”⁹⁸ Finally, the World Heritage Convention recognizes that the current body of international law protecting cultural heritage is often not sufficient to prevent its loss and that there is a need for more protection.⁹⁹

This Convention seeks to set up a system by which a State Party identifies and delineates properties situated in its territory for protection.¹⁰⁰ Article 7

⁹⁵ *Id.*

⁹⁶ Convention Concerning the Protection of World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37 [hereinafter World Heritage Convention].

⁹⁷ *Id.* pmb1.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* art. 3.

of the World Heritage Convention sets forth the international protection awarded to State Parties, stating that it takes the form of “the establishment of a system of international co-operation and assistance designed to support State Parties to the Convention in their efforts to conserve and identify that heritage.”¹⁰¹ Therefore, although the Convention seeks to add protection for important cultural heritage sites, it does not include a mechanism by which to punish States or individuals who damage or destroy these sites, either intentionally or collaterally. Instead, it establishes a system by which State Parties can request assistance from the international community, generally in the form of financial support.¹⁰²

Although the World Heritage Convention allows States that have ratified the Convention to add cultural heritage sites to the World Heritage List, the Convention does nothing to prevent the destruction of these sites with regard to armed conflict or intentional destruction. While it is meant to identify and protect sites that carry importance for all of humanity, it does not deter their destruction through the threat of criminal prosecution. In fact, the Convention does not contain any provision for punishment of any kind and therefore is not effective at protecting cultural heritage against intentional destruction.

D. The Rome Statute of the International Criminal Court

In 1998, a conference of 160 states established the first treaty-based and permanent international criminal court.¹⁰³ The Rome Statute,¹⁰⁴ which is the treaty that established the International Criminal Court (ICC), sets out the crimes that the ICC has jurisdiction over and the rules and procedures the ICC will follow.¹⁰⁵ The ICC was established to “investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.”¹⁰⁶ Like other treaties, states must ratify the Rome Statute in order for it to bind them under its provisions.

The Rome Statute, like many of the previous treaties, identifies that one of the purposes of international law is the protection of shared heritage. The

¹⁰¹ *Id.* art. 7.

¹⁰² *Id.* arts. 19–26.

¹⁰³ *Understanding the International Criminal Court*, INT’L CRIM. CT. 3 (Oct. 14, 2015), <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>.

¹⁰⁴ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (July 17, 1998) [hereinafter *The Rome Statute*].

¹⁰⁵ *Id.*

¹⁰⁶ *About*, International Criminal Court, <http://www.icc-cpi.int/about?ln=en>.

Rome Statute is not aimed to protect cultural heritage; although it is not precluded from being used to do so. The jurisdiction of the ICC is limited to the “most serious crimes of concern to the international community as a whole.”¹⁰⁷ The Statute defines crimes against humanity as an act committed as part of a widespread or systematic attack directed against a civilian population, including: murder, extermination, enslavement, forcible transfer of a population, imprisonment, torture, rape, persecution, and other crimes.¹⁰⁸

Commentators have argued that the crime of persecution is the crime against humanity under which crimes against cultural heritage may fall.¹⁰⁹ A court could find the intentional destruction of cultural heritage, if discriminatory, to be persecution when applying the Rome Statute.¹¹⁰ Several trial chambers for the International Criminal Tribunal for the Former Yugoslavia (ICTY) found such destruction to be persecution.¹¹¹ One commentator has stated that “[i]n the final analysis, therefore, it is sufficiently clear that the discriminatory plunder of cultural property is capable of constituting under customary international law the crime against humanity of persecution.”¹¹² This is partially because the Rome Statute defines persecution broadly enough to encompass the destruction of cultural heritage, as it includes persecution based on political, racial, national, ethnic, cultural, religious, gender, and other grounds.¹¹³ Persecution is defined as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”¹¹⁴

Cultural heritage crimes can also be prosecuted as war crimes. The Rome Statute defines a war crime as, “[g]rave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention” and goes on to list several specific crimes.¹¹⁵ It includes in the list of enumerated war crimes: “(iv) [e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and

¹⁰⁷ The Rome Statute, *supra* note 104, art. 3.

¹⁰⁸ *Id.* art. 7.

¹⁰⁹ Roger O’Keefe, *Protection of Cultural Property Under International Criminal Law*, 11 MELBOURNE J. INT’L L. 339, 382 (2010) (“Since unlawful destruction of cultural property constitutes a war crime in both international and non-international armed conflicts under art 8 of the *Rome Statute*, it can also constitute a crime against humanity under art 7(1)(h).”); Vrdoljak, *supra* note 55, at 24 (stating that the International Criminal Tribunal for the Former Yugoslavia (ICTY) found that destruction of cultural heritage could amount to the crime of persecution and therefore a crime against humanity). Gottlieb, *supra* note 59, at 873–74.

¹¹⁰ O’Keefe, *supra* note 109, at 383.

¹¹¹ *Id.* at 381.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ The Rome Statute, *supra* note 104, art. 7.2(g).

¹¹⁵ *Id.* art. 8.2(a).

wantonly.”¹¹⁶ Further, war crimes include “[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law,” which would include all of the previously discussed treaties.¹¹⁷ Specifically, commentators have pointed to the war crime of “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.”¹¹⁸

The Rome Statute creates a permanent international criminal tribunal and sets forth its jurisdiction over crimes, including crimes against cultural heritage.¹¹⁹ Under the Rome Statute, the crime of intentionally destroying cultural heritage could be categorized as either the crime against humanity of persecution or as a war crime as it is defined by the body of international law discussed above.¹²⁰ However, like the other treaties discussed, in order for the Rome Statute to be enforced and to have jurisdiction, a State must be party to the treaty.¹²¹ Neither Iraq nor Syria ratified or signed the Rome Statute.¹²² This is the major shortcoming of the Rome Statute and ICC. Without establishing universal jurisdiction, the Rome Statute is no more effective at preventing or prosecuting crimes against cultural heritage in Iraq and Syria than the 1954 Hague Convention is, which contains no enforcement mechanism.

E. 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage and Recent UN Resolutions

More recently, after the Taliban destroyed the Buddhas at Bamiyan in 2001, the United Nations passed a resolution that was later adopted by the UN Security Council. The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage¹²³ was passed as a reaction to the “growing number of acts of intentional destruction of cultural heritage,” specifically as a response to the destruction of the Buddhas by the Taliban.¹²⁴ The 2003 Declaration was not meant to be binding on States, but instead was meant to

¹¹⁶ *Id.* art. § 8.2(a)(iv).

¹¹⁷ *Id.* art. § 8.2(b).

¹¹⁸ *Id.* art. § 8.2(b)(IX); see O’Keefe, *supra* note 109, at 345.

¹¹⁹ The Rome Statute, *supra* note 104, arts. 1, 5.

¹²⁰ *Id.* arts. 7–8.

¹²¹ *Id.* art. 12.

¹²² *The States Party to the Rome Statute*, International Criminal Court, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Oct. 14, 2014).

¹²³ 2003 Declaration, *supra* note 21.

¹²⁴ *Id.*

reiterate and reinforce the fundamental principles which current international law had put into place.¹²⁵ The Declaration states that, “cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights,”¹²⁶ again emphasizing that cultural heritage has universal value and is an aspect of human rights law. This refrain, which is seen in the preamble of several treaties dealing with cultural heritage law, is important when determining how these crimes may be punished. The 2003 Declaration goes on to define “intentional destruction” as an:

act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience, in the latter case in so far as such acts are not already governed by fundamental principles of international law.¹²⁷

The 2003 Declaration relies on states to take appropriate measures to prevent, avoid, and stop intentional destruction and to adopt appropriate legislative and judicial measures to deal with such acts, much like the 1954 Hague Convention and other treaties do.¹²⁸ It suggests that states become parties to the various international treaties, which are the basis of international law protecting cultural heritage.¹²⁹ Further, the Declaration addresses criminal liability for both state actors and individuals. A state that intentionally destroys or fails to take appropriate measures to “prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity,” bears the responsibility for such destruction, to the extent provided for by international law.¹³⁰

Further, the Declaration explains that in order for there to be individual criminal liability, states must take the “appropriate measures, in accordance with international law”¹³¹ to establish jurisdiction over and create criminal sanctions against individuals who commit acts of intentional destruction of cultural heritage.

¹²⁵ O’Keefe, *supra* note 109, at 391.

¹²⁶ 2003 Declaration, *supra* note 21.

¹²⁷ *Id.* § II.2.

¹²⁸ *Id.* § III.

¹²⁹ *Id.* § III.4.

¹³⁰ *Id.* § VI.

¹³¹ *Id.* § VIII.2.

Unfortunately, because this Declaration is not binding and does not create any mechanism for enforcing violations, so it is toothless. The sentiments it contains are mean well; however, it does not add anything to the body of law currently in place to protect cultural heritage without adding a new crime or allowing for violations to be universally prosecuted. Until this Declaration is adopted by the UN Security Council, it does not deter exactly that which it aims to deter: the intentional destruction of cultural heritage.

The 2003 Declaration was adopted by the UN General Assembly in 2003, but began as a resolution passed in 2001. A similar resolution was recently passed by the UN General Assembly on May 28, 2015, in response to the cultural heritage destruction perpetrated by the Islamic State in Iraq and Syria.¹³² This 2015 Resolution, entitled “Saving the Cultural Heritage of Iraq,” was passed shortly after the Islamic State pillaged the Mosul Museum.¹³³ It expresses extreme concern and condemnation of the Islamic State’s policy of destroying cultural heritage as a war tactic.¹³⁴ The Preamble to the Resolution reiterates the importance of cultural heritage to the world as a whole, as well as the importance of protecting it.¹³⁵

The Resolution condemns the “barbaric acts of destruction and looting” committed by the Islamic State and calls for an “immediate halt” to the destruction.¹³⁶ It also calls for intensified efforts by States to prevent such destruction.¹³⁷ Although this Resolution speaks specifically to the destruction of cultural heritage in Iraq, it applies more generally to all intentional destruction of cultural heritage committed by the Islamic State. Vice-President of the General Assembly, Álvaro Mendonça e Moura, speaking on behalf of the General Assembly President, expressed concern “that barbaric and senseless attacks on irreplaceable [artifacts] of humanity’s shared cultural heritage were taking place with alarming frequency not only in Iraq but also in Afghanistan, Syria, Mali and elsewhere.”¹³⁸ He further expressed that “by destroying invaluable cultural icons . . . extremists were exacerbating conflicts, instigating hostilities and perpetuating fear among societies.”¹³⁹

¹³² G.A. Res. 69/281, U.N. Doc. A/RES/69/281 (May 28, 2015).

¹³³ *Id.*

¹³⁴ *Id.*; Gladstone, *supra* note 8.

¹³⁵ G.A. Res. 69/281, U.N. Doc. A/RES/69/281 (May 28, 2015).

¹³⁶ *Id.* at 3.

¹³⁷ *Id.*; *Expressing Outrage over Attacks on Cultural Heritage of Iraq, General Assembly Unanimously Adopts Resolution Calling for Urgent Action*, Meetings Coverage and Press Releases, UNITED NATIONS (May 28, 2015), <http://www.un.org/press/en/2015/ga11646.doc.htm>.

¹³⁸ *Expressing Outrage over Attacks on Cultural Heritage of Iraq, supra* note 137.

¹³⁹ *Id.*

Like the 2003 Declaration, the 2015 Resolution is not binding. It makes it clear that the international community will not stand for the destruction of cultural heritage, but without an enforcement mechanism, this is certainly not enough. Condemnation of acts means nothing if they are allowed to continue unabated and unpunished.

IV. UNDER CURRENT INTERNATIONAL LAW, HOW COULD ISIS' CRIMES BE PROSECUTED?

A. Parties to the Above Mentioned Treaties

Both Iraq and the Syrian Arab Republic are State Parties to the 1954 Hague Convention and the World Heritage Convention, but neither is a State Party to the Second Protocol to the 1954 Hague Convention or the Rome Statute.¹⁴⁰ Both states are bound to uphold each of the Conventions that they have ratified. Under the 1954 Hague Convention and the Second Protocol, failure to adhere to the Conventions would be a crime under international law. Under the Rome Statute, any genocide, crime against humanity, war crime, or other such crime in a jurisdiction that has ratified the Rome Statute is also a crime under international law.¹⁴¹

B. Liability as a State

It is less clear whether criminal liability can be found where the group who intentionally destroys cultural heritage is neither a state party to these conventions nor a state at all under international law.

The Convention on Rights and Duties of States defines a state as possessing the following qualifications: "a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."¹⁴² Although the Islamic State identifies itself as a state,¹⁴³ it is unclear whether or not they actually qualify as one under the Montevideo Convention of 1933. In addition to the four elements above, it is accepted that there are often two additional elements: independence and legitimacy.¹⁴⁴ The Islamic State has succeeded in taking over large areas of territory in Iraq

¹⁴⁰ The 1954 Hague Convention, *supra* note 66; World Heritage Convention, *supra* note 96; The Second Protocol, *supra* note 82; *The States Party to the Rome Statute*, *supra* note 122.

¹⁴¹ The Rome Statute, *supra* note 104.

¹⁴² Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097.

¹⁴³ Evan Kohlmann, *Everything you need to know about ISIS*, MSNBC (Nov. 16, 2015, 10:15 PM), <http://www.msnbc.com/msnbc/what-you-need-know-about-isis> (explaining ISIS stands for "The Islamic State in Iraq and Greater Syria").

¹⁴⁴ Yuval Shany et al., *ISIS: Is the Islamic State Really a State?* (Sept. 14, 2014), <http://en.idi.org.il/analysis/articles/isis-is-the-islamic-state-really-a-state/>.

and Syria and has declared a Muslim caliphate in those areas.¹⁴⁵ It appears as though the Islamic State have at least arguably met the four elements of the Montevideo Convention.¹⁴⁶ However, the Islamic State is not legitimate. Legitimacy follows when an entity is “regarded as a form of realization of the right to self-determination of the people in the territory they control.”¹⁴⁷ As one commentator explains:

In the case of the caliphate, it cannot be argued that the establishment of the State was based on one of the scenarios that would justify the secession of a group from a region that is under the sovereignty of Iraq or Syria. In fact, it seems that it is actually the new regime that is systematically violating the human rights of the people in the territory, including the right to life, the right to liberty, freedom of religion, and freedom of expression.¹⁴⁸

As a result, the Islamic State is not recognized as a legitimate state and therefore likely would not be treated as one under international law. Therefore, because the Islamic State is not only not a state party to the above-discussed Conventions, but also not a state under international law, these treaties could not be used to prosecute the Islamic State as a whole.

C. *Individual Criminal Liability*

For a State to be bound to the 1954 Hague Convention, the Second Protocol, the World Heritage Convention, or the Rome Statute, that State must have ratified the specified treaty. As discussed above, Iraq and Syria are only State Parties to the 1954 Hague Convention and the World Heritage Convention. However, because it is not the state who is committing the atrocities perpetrated by the Islamic State, this is of little consequence. None of the above-discussed treaties are binding on states who are not a party to them, nor are they binding on other groups, such as the Islamic State. As a result, the acts committed by the Islamic State in Iraq and Syria would certainly be prohibited under international law, but the Islamic State cannot

¹⁴⁵ Rebecaa Collard, *What We Have Learned Since ISIS Declared a Caliphate One Year Ago*, TIME (June 25, 2015), <http://time.com/3933568/isis-caliphate-one-year/>.

¹⁴⁶ *Id.* For a more detailed analysis of each element, as well as the two additional elements, see Shany et al., *supra* note 144. See also Safia Aoude, *The State of Things to Some: The statehood of ISIS between practice, international law and religion*, https://www.academia.edu/9951214/The_Statehood_of_ISIS_between_practice_international_law_and_religion.

¹⁴⁷ Aoude, *supra* note 146.

¹⁴⁸ *Id.*

ultimately be held to have breached these treaties, as they are not a party to them.

However, international criminal law allows for prosecution of individuals who have committed international crimes, including the crimes defined by the above-discussed statutes. Jurisdiction under the Rome Statute is limited, however, because the Rome Statute is a treaty and must be ratified; therefore ICC's jurisdiction is limited to those states who are party to the Statute.¹⁴⁹ Again, neither Iraq nor Syria is a State Party to the Rome Statute. Therefore, in order for a member of the Islamic State to be prosecuted by the ICC for intentionally destroying cultural heritage, they would have to be a national of a state that is a party to the Rome Statute.

A gaping hole exists in the effectiveness of the body of international law that protects cultural heritage; it does not provide an enforcement mechanism to regulate, or jurisdiction over, groups or individuals who have committed egregious crimes, crimes that amount to crimes against humanity or war crimes, because the States they were nationals of have not ratified the treaties that criminalize such behavior. In fact, none of the treaties governing the protection of cultural heritage have ever been used as the basis for prosecution in national or international proceedings for breaches of these treaties, demonstrating that, although they mean well, they are ineffective.¹⁵⁰

D. Prosecuting the Islamic State' Crimes Under Current International Law Protecting Cultural Heritage

Because the body of international law governing the protection of cultural heritage is treaty-based, Islamic State as a group cannot be prosecuted as a state for its crimes against cultural heritage. Additionally, prosecution of individuals who have perpetrated such crimes or ordered such crimes to be committed is limited to those individuals who are citizens of a state that has ratified one of the above treaties. Because the Islamic State would be up to either Iraq or Syria respectively to prosecute such crimes and neither has ratified the Rome Statute, no international body has jurisdiction to prosecute these crimes.

E. Customary International Law

Aside from the extensive treaty-based law discussed above, several war crimes and crimes against humanity also fall under customary international law. The International Committee of the Red Cross defines customary law

¹⁴⁹ The Rome Statute, *supra* note 104.

¹⁵⁰ O'Keefe, *supra* note 109, at 358.

as consisting of: “rules that come from ‘a general practice accepted as law’ and that exist independent of treaty law. Customary [international law] is of crucial importance in today’s armed conflicts because it fills gaps left by treaty law . . . and so strengthens the protection offered to victims.”¹⁵¹ In order to prove that something falls under customary law, one must prove that it is “reflected in state practice and that the international community believes that such practice is required as a matter of law.”¹⁵²

Customary law is important to the discussion of the intentional destruction of cultural heritage because even when a state has not ratified any relevant international treaties, that state is still bound by customary law.¹⁵³ Therefore, if it could be shown that an action is prohibited by customary international law, it could still be prosecuted even a state is not a party to the relevant international treaties. For example, because the Geneva Convention has been universally accepted, it is now considered customary international law.¹⁵⁴ This allows for war crimes and crimes against humanity to be prosecuted even where they might otherwise not be actionable if the state in which they occurred had not ratified a treaty to allow them to be prosecuted. Furthermore, customary international law strengthens the claims that ad hoc criminal tribunals have over crimes and over the individuals who have committed those crimes.

Because several of the relevant treaties have not been adopted by Iraq and Syria, classifying the intentional destruction of cultural property as a crime against humanity is even more important. This is because it is generally accepted that war crimes and crimes against humanity, while codified in international treaties, also fall under customary international law.¹⁵⁵

F. Proposal for the New Crime of Cultural Cleansing and a Humanitarian Regime

In response to the intentional destruction of cultural heritage committed by ISIS, the Director General of UNESCO, and others have called ISIS’ actions cultural cleansing several times.¹⁵⁶ However, as was seen in the

¹⁵¹ Customary International Humanitarian Law, Int’l Comm. of the Red Cross (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/overview-customary-law.htm>.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Bejesky, *supra* note 56, at 403.

¹⁵⁵ International Committee of the Red Cross, Rule 156 Definition of War Crimes: From Customary International Humanitarian Law, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1rulrule156>.

¹⁵⁶ Press Release, UNESCO alarmed by news of mass destruction of books in Mosul, *supra* note 37; “*Destruction of Hatra marks a turning point in the cultural cleansing underway in*

above analysis of the international law governing cultural heritage, none of the treaties make reference to a crime of cultural cleansing.

Each time the Islamic State intentionally destroys a cultural heritage site or artifacts of cultural heritage, those actions constitute a war crime. However, it seems that the continued and systematic destruction of cultural heritage amounts to much more. It is the position of this Note that alone, each act of destruction is a war crime, but together, this series of acts destroying cultural heritage are a crime against humanity. Specifically, the Islamic State is committing the crime against humanity of persecution.¹⁵⁷

Cultural cleansing is not codified in the body of international law protecting cultural heritage. However, it has been used to describe the actions taken by the Islamic State and should be codified as a new crime, punishable under the crime against humanity of persecution. Cultural cleansing has been defined by UNESCO as “an intentional strategy that seeks to destroy cultural diversity through the deliberate targeting of individuals identified on the basis of their cultural, ethnic or religious background, combined with deliberate attacks on their places of worship, memory and learning.”¹⁵⁸ It has also been described as a “‘strategy by certain forces to destroy the legitimacy of the other, deprived of his fundamental right of existence and expression,’ exemplified by physical aggression against people, objects, memory and traces of memory”¹⁵⁹ Therefore, cultural cleansing includes more than just the destruction of cultural heritage, but it also encompasses violence against people and their ways of life.

Although cultural cleansing seems to bear some resemblance to the concept of ethnic cleansing and genocide, it is not considered to be a form of genocide. Mr. Adama Dieng, the Special Adviser of the Secretary-General on the Prevention of Genocide has explained that “the destruction of ‘property of cultural and religious significance’ is an indicator for ‘increased risk of genocide, ethnic cleansing and crimes against humanity when combined with other risk factors.’”¹⁶⁰ Genocide does not extend to include

Iraq,” *supra* note 48; “*We stand together*,” to protect Iraq’s cultural heritage, *supra* note 52; UNESCO, *Heritage and Cultural Diversity at Risk in Iraq and Syria*, *supra* note 12.

¹⁵⁷ UNESCO, *supra* note 12. The Executive Summary for this UNESCO Report states that “the purpose of the Conference was also to highlight that the destruction of cultural heritage and the persecution of minorities are not merely a cultural emergency, but a political and security imperative for which adequate responses at the political and humanitarian levels are needed.” *Id.* at 3.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 9.

¹⁶⁰ *Id.* at 10.

the destruction of cultural heritage, despite suggestions to the contrary.¹⁶¹ However, the fact that the cultural cleansing is not a form of genocide in no way prevents it from being treated as a human rights violation. Many commentators have suggested that by treating the destruction of cultural heritage as a human rights violation instead of a crime against property, prosecution of such crimes will be more successful.¹⁶² One successful example of a human rights based regime is the ICTY statute.¹⁶³

G. Establishing an Ad-Hoc Criminal Tribunal for Prosecution of Cultural Cleansing and other War Crimes and Crimes Against Humanity by the Islamic State in Iraq and Syria

The first ad hoc criminal tribunal was the International Military Tribunal at Nuremberg, established to prosecute crimes committed by individuals during World War II.¹⁶⁴ State actors could prosecute such crimes.¹⁶⁵ However, it was understood that only by punishing the men, instead of an abstract entity, who committed the war crimes and crimes against humanity could international law be effectively enforced.¹⁶⁶ Ad-hoc tribunals were again formed in the 1990s, following the atrocities committed during the Yugoslav Wars and the genocide committed in Rwanda.¹⁶⁷ These ad hoc tribunals were based on the Nuremburg precedent.¹⁶⁸

One of the most successful examples of a human rights based regime for the prosecution of cultural heritage crimes is the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹⁶⁹ Like the Rome Statute of the ICC, the ICTY statute sets out the basis for jurisdiction and prosecution of crimes, for the purpose of prosecuting serious violations of humanitarian law committed in the territory of the former Yugoslavia.¹⁷⁰ Article 1 of the Statute states that the Tribunal will “have the power to

¹⁶¹ O’Keefe, *supra* note 109, at 341; Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT’L L. 1209, 1212 (2004).

¹⁶² See Patel, *supra* note 81; see also Kornegay, *supra* note 10 (“[A] ‘crimes-against-humanity’ approach to prosecutions for willful destruction of cultural property offers greater potential to strengthen the protections afforded to cultural property under international law.”).

¹⁶³ Patel, *supra* note 81.

¹⁶⁴ Charles Garraway, *Courts and Tribunals*, CRIMES OF WAR, <http://www.crimesofwar.org/a-z-guide/courts-and-tribunals/> (last visited Sept. 18, 2016).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Statute of the International Tribunal for the Former Yugoslavia, May 3, 1992, U.N. Doc. S/25704 (1993) [hereinafter ICTY Statute], http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; see Patel, *supra* note 81.

¹⁷⁰ ICTY Statute, *supra* note 169, at introduction.

prosecute persons who have committed serious breaches of humanitarian law.”¹⁷¹ Article 2 of the Statute articulates the “grave breaches” of the Geneva Conventions of 1949 which this Statute incorporates, and Article 3 enumerates violations of the laws or customs of war which this Statute incorporates.¹⁷² Among violations is the extensive destruction of property, including historic monuments.¹⁷³ Article 5 of the Statute enumerates the crimes against humanity which are incorporated into this Statute, including the crime of persecution.¹⁷⁴ The Statute establishes personal jurisdiction over natural persons and provides for individual criminal responsibility for any person who has committed a crime enumerated in the Statute.¹⁷⁵

The ICTY Statute governs one of many ad-hoc criminal tribunals that have been established to prosecute humanitarian crimes in territories where there have been armed conflicts that breach international law.¹⁷⁶ In application, the ICTY Statute has shown that the intentional destruction of cultural heritage can and will be prosecuted as a crime against humanity in certain cases. For example in *Prosecutor v. Blaškić*, the Tribunal found that the crime against humanity of persecution, which is included in the ICTY Statute, “encompasses not only bodily and mental harm and infringements upon individual freedom but also acts . . . such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community.”¹⁷⁷ Several other ICTY cases have affirmed that the systematic and discriminatory destruction of cultural heritage can amount to persecution under customary international law, acts we should now classify as cultural cleansing.¹⁷⁸

In response to the cultural cleansing underway in Iraq and Syria, the UN Security Council should establish an ad-hoc criminal tribunal for the prosecution of humanitarian crimes committed in Iraq and Syria since 2014. In the statute establishing this tribunal, the crime of cultural cleansing should be included as one way of proving the crime against humanity of persecution. By establishing such a tribunal, the international community will have a way of prosecuting those individuals who have committed acts of cultural cleansing in Iraq and Syria by intentionally and systematically destroying important cultural heritage sites and artifacts. Without the establishment of such a tribunal, it is unlikely that these crimes will be

¹⁷¹ *Id.* art. 1.

¹⁷² *Id.* arts. 2–3.

¹⁷³ *Id.*

¹⁷⁴ *Id.* art. 5.

¹⁷⁵ *Id.* art. 6.

¹⁷⁶ Bejesky, *supra* note 56, at 432.

¹⁷⁷ *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, ¶ 233 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000). See O’Keefe, *supra* note 109, at 380–81.

¹⁷⁸ O’Keefe, *supra* note 109, at 383 & n.210.

prosecuted, and those who have committed them will not be brought to justice, as either Iraq or Syria would have to prosecute these individuals because the ICC lacks jurisdiction. The fact that the 1954 World Heritage Convention, its Protocols, or any of the other international law protecting cultural heritage has never been used to prosecute crimes against cultural heritage illustrates that the body of international law protecting cultural heritage is ineffective at punishing the crimes it creates.¹⁷⁹ Without an ad-hoc tribunal, it is almost certain that the crimes against cultural heritage committed by ISIS will not be punished. By codifying the crime of cultural cleansing, as it is defined by UNESCO in the Report *Heritage and Cultural Diversity at Risk in Iraq and Syria*,¹⁸⁰ it will be ensured that the acts of destruction at Palmyra, Nimrud, Khorsbad, Mosul, Jonah's Tomb, Hatra, and all other destruction of cultural heritage perpetrated by the Islamic State will be punishable.

V. CONCLUSION

The atrocities being committed by the Islamic State in Iraq and Syria are almost incomprehensible. The list of crimes committed against cultural heritage in the Middle East by ISIS continues to grow, and it has become clear that the purpose behind such actions is, at least in part, to deprive the people of Iraq and Syria of their cultural identity and history.¹⁸¹ As Irina Bokova has stated: "The systematic destruction of cultural symbols embodying Syrian cultural diversity reveals the true intent of such attacks, which is to deprive the Syrian people of its knowledge, its identity and history."¹⁸² The same is clearly true for the destruction taking place in Iraq. Unfortunately, as the body of international law currently stands, it appears as though all the world may do is watch, and "[d]espite public denouncements, no concrete action has so far been taken by any government or intergovernmental organization."¹⁸³

The body of international law must be strengthened so that these crimes do not go unpunished. Although cultural cleansing has not been codified in the body of international law protecting cultural heritage, it is widely recognized and condemned. The atrocities being committed in the Middle East by the Islamic State are numerous and, as one commentator put it, "[t]here is enough horror surrounding ISIS to stagger the heart."¹⁸⁴

¹⁷⁹ See O'Keefe, *supra* note 109, at 358.

¹⁸⁰ UNESCO, *supra* note 12, at 3.

¹⁸¹ UNESCO, *supra* note 1.

¹⁸² *Id.*

¹⁸³ Velozo & Bento, *supra* note 2.

¹⁸⁴ Frank, *supra* note 23.

The most effective way to ensure these crimes are prosecuted is by creating an ad-hoc criminal tribunal. Without such a tribunal, it is likely these crimes will go unpunished. The 1954 Hague Convention, the Second Protocols, the World Heritage Convention, and the Rome Statute each provide for the protection of cultural heritage, but none are sufficient. Furthermore, none of the above treaties address instances in which the destruction of cultural heritage is being used as a means of persecution specifically. By codifying such a crime, the international community can recognize once again the importance of cultural heritage and its value to all of humanity and also provide a means for punishing such acts.