

NOTE

INTERNATIONAL CULTURAL HERITAGE LAW: THE LINK BETWEEN CULTURAL NATIONALISM, INTERNATIONALISM, AND THE CONCEPT OF CULTURAL GENOCIDE

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INTRODUCTION

Throughout history, there has existed in human civilizations an almost universal urge to create. Whether the result of hubris or hope, these creations can be found in countless cultures, often taking the form of objects or structures that possess great meaning and symbolic significance. The urge to create, however, is closely accompanied by the urge to destroy, and history has borne witness to the destruction of many cultural objects and sites. Some of this destruction has been carried out for an insidious purpose; rather than destruction incidental to a military victory or territorial conquest, many of the most harmful and aggressive acts against cultural objects and sites have been committed in order to annihilate the religious or cultural identities of the people connected to them.¹ The link between genocide and attacks on cultural heritage was explicitly made by Heinrich Heine, a German Jewish poet, who wrote: “Where they have burned books, they will end in burning human beings.”² In 1933, Heine’s books were among those burned on Berlin’s Opernplatz, foreshadowing the murder of more than six million Jews.³

Despite the connection between genocide and the destruction of cultural heritage, the cause-and-effect nature between the two is not readily apparent, and to some, it doesn’t exist at all. As one journalist wrote during the Balkan conflict, “is it wrong to weep for buildings?”⁴ Croatian journalist, Ksenija Drakulic, considered this conundrum:

¹ Federico Lenzerini, *The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage*, in ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW 40, 56–57 (Francesco Francioni & James Gordley eds., 2013). One example of the destruction of cultural heritage in ancient times is

the . . . case of the Temple of Serapis in Alexandria, the destruction of which was ordered by the Roman emperor Theodosius in 391 AD with the purpose of defeating the last refuge of the pagan gods’ faithful (who—on their part—preferred to lose their lives in the temple rather than surrender to the enemies).

Id. at 57.

² Edward C. Luck, *Cultural Genocide and the Protection of Cultural Heritage*, J. PAUL GETTY TR. OCCASIONAL PAPERS IN CULTURAL HERITAGE POL’Y, 2018, at 1, 4 (2018), http://www.getty.edu/publications/pdfs/CulturalGenocide_Luck.pdf [<https://perma.cc/9NRH-V6ZJ>].

³ *Id.*

⁴ Amy E. Schwartz, *Is It Wrong to Weep for Buildings?*, WASH. POST (May 10, 1994), https://www.washingtonpost.com/archive/1994/05/10/is-it-wrong-to-weep-for-buildings/6123a1c1-c29c-4803-aa7b-3a6a8d125885/?noredirect=on&utm_term=.c2e1f735395c [<https://perma.cc/4L3H-S7H8>].

Why do we feel more pain looking at the image of the destroyed bridge than the image of the massacred people? . . . Perhaps because we see our own mortality in the collapse of the bridge . . . We expect people to die; we count on our own lives to end. The destruction of a monument to civilization is something else. The bridge, in all its beauty and grace, was built to outlive us; it was an attempt to grasp eternity. It transcended our individual destiny.⁵

This close link between the intangible and the tangible—the psychological connection between cultural objects or sites and a people’s sense of heritage and identity—conveys the true significance of cultural heritage property and the vast damage that its destruction can do to a single community, or an entire people.

However, since 2015, nationalist and protectionist campaigns have swept across some of the world’s greatest powers, turning a new page that will inevitably have repercussions for international cultural heritage law.⁶ Hostility toward international cooperation has increased, caused by aggressive nationalism and self-interest that has undermined systems of global cooperation. In light of these global trends, how can cultural heritage be protected when the international community will no longer cooperate to protect it?

Part I of this Note will explain the theoretical underpinnings of what constitutes “cultural heritage,” why it deserves protection, and what obstacles stand in the way of protection. Part II will discuss the existing international legal framework aimed at protecting cultural heritage, as well as the flaws within that framework. Part III will analyze the most recent developments in international cultural heritage law, the criticism these developments have faced, and the difficulty in rec-

⁵ *Id.* (quoting Ksenija Drakulic, OBSERVER, Nov. 14, 1993, ROBERT BEVAN, THE DESTRUCTION OF MEMORY: ARCHITECTURE AT WAR 26 (2006)).

⁶ Jack Snyder, *The Broken Bargain: How Nationalism Came Back*, FOREIGN AFF. (Mar./Apr. 2019), <https://www.foreignaffairs.com/articles/world/2019-02-12/broken-bargain> [<https://perma.cc/S9MU-YWT7>]; Michael Crowley & David E. Sanger, *Trump Celebrates Nationalism in U.N. Speech and Plays Down Iran Crisis*, N.Y. TIMES (Sept. 24, 2019), <https://www.nytimes.com/2019/09/24/us/politics/trump-nationalism-united-nations.html> [<https://perma.cc/UL9H-2CD2>]; Chris Anyfantis, *EU Elections 2019: Rise of Nationalist Trends and Populism in Europe Challenges the EU Edifice*, EUR. STING (May 8, 2019), <https://europeansting.com/2019/05/08/eu-elections-far-right-sentiments-and-populisms-rise-in-europe-cause-severe-turbulences-to-the-eu-edifice/> [<https://perma.cc/4FGY-Z5LV>]; John T. Bennett, *Trump, Brazil’s Bolsonaro Flaunt Nationalist Bromance*, ROLL CALL (Mar 19, 2019, 4:35 PM), <https://www.rollcall.com/news/whitehouse/trump-brazils-bolsonaro-flaunt-nationalistic-bromance> [<https://perma.cc/Z63U-U27Y>].

onciling the protection of people with the protection of property. Ultimately, this Note concludes that a new prosecutorial strategy and interpretation of existing legal instruments, as well as the concepts of cultural nationalism, cultural internationalism, and cultural genocide, are necessary to achieve a more effective legal regime for the protection of cultural heritage.

I

WHAT IS CULTURAL HERITAGE?

Due to history and evolution, international cultural heritage law has evolved into “a complex web” of overlapping international conventions, rife with contradictions, revolving goals and enforcement mechanisms, and changing attitudes toward internationalism and nationalism.⁷ Much like this “cacophon[ic]” body of law,⁸ the term “cultural heritage” itself is difficult to pin down—it has an “ever expanding scope [that] defies easy description or definition.”⁹ Indeed, the term’s definition is elusive precisely because the concept of “cultural heritage” is “constantly evolving.”¹⁰ While early legal documents often used the term “cultural property,” there is no accepted distinction between the terms “cultural property” and “cultural heritage.”¹¹ Today, “cultural heritage” is the more widely-used term, as it is often seen as “broader in scope and implying less personal and more widespread ‘ownership.’”¹² Thus, a broad definition of “cultural heritage” has garnered a degree of international consensus:

⁷ CRAIG FORREST, *INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE* xxi (2010). Indeed, Marina Lostal notes that once we actually take a closer look at the field of international cultural heritage law, we find that it is composed of “many laws but little law.” MARINA LOSTAL, *INTERNATIONAL CULTURAL HERITAGE LAW IN ARMED CONFLICT: CASE-STUDIES OF SYRIA, LIBYA, MALI, THE INVASION OF IRAQ, AND THE BUDDHAS OF BAMIYAN* 1 (2017) (citing NICOLAS DE SADELEER, *ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES* 262 (Susan Leubusher trans., 2002)).

⁸ LOSTAL, *supra* note 7, at 2.

⁹ FORREST, *supra* note 7, at 1; see also Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 338 n.2 (2016). Like Gerstenblith, this Note uses the term “cultural heritage” as generally synonymous with the term “cultural property.”

¹⁰ FORREST, *supra* note 7, at 2.

¹¹ Thomas G. Weiss & Nina Connelly, *Cultural Cleansing and Mass Atrocities: Protecting Cultural Heritage in Armed Conflict Zones*, J. PAUL GETTY TR. OCCASIONAL PAPERS IN CULTURAL HERITAGE POL’Y 2018, at 1, 9, https://www.getty.edu/publications/pdfs/CulturalCleansing_Weiss_Connelly.pdf [<https://perma.cc/DQ73-V4P6>].

¹² *Id.*

- 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 subparagraph (a) . . . ;
- c) centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as “centres containing monuments.”¹³

As this body of international law grows, the definition of cultural heritage has taken on a “markedly holistic perspective” characterized by the “view of ‘cultural heritage’ [as] belonging to humanity as a whole.”¹⁴ The downfall of this definition, however, is that as the meaning of cultural heritage expands, the thing itself becomes less concrete and more abstract.¹⁵ Cultural heritage now encompasses a “more mystical and intangible value” that considers the “spiritual significance of cultural heritage for specific peoples, groups, or communities,”¹⁶ as well as the “intrinsic importance to people and individuals, to their identity, and their enjoyment of their human rights.”¹⁷ What was once a concrete term for a building or object has collapsed into a heap of concepts and ideas.

A. Cultural Nationalism and Cultural Internationalism

The complexity of the body of cultural heritage law, as well as the evolving nature of the “cultural heritage” definition, stems from the fact that its “normative framework . . . is essen-

¹³ Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Convention] (emphasis added).

¹⁴ Lenzerini, *supra* note 1, at 55–56 (emphasis omitted).

¹⁵ *Id.* at 56.

¹⁶ *Id.*

¹⁷ ELISA NOVIC, THE CONCEPT OF CULTURAL GENOCIDE: AN INTERNATIONAL LAW PERSPECTIVE 122 (2016). See also Orna Ben-Naftali, *Introduction: International Humanitarian Law and International Human Rights Law: Pas de Deux*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 9 (Orna Ben-Naftali ed., 2011) (citing Ana Filipa Vrdoljak, *Cultural Heritage in Human Rights and Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 250, 281 (Orna Ben-Naftali ed., 2011)).

tially adversarial”¹⁸ and its international treaties are at cross-purposes with each other.¹⁹ Ultimately, these contradictions in the law are related to jurisdiction—who is responsible for protecting specific pieces of cultural heritage, and who is responsible for prosecuting instances of cultural heritage destruction? Further, who is responsible for deciding what constitutes “cultural heritage”?

In *Two Ways of Thinking About Cultural Property*, John Merryman defines these two conflicting viewpoints as cultural nationalism and cultural internationalism.²⁰ Cultural nationalism sees cultural heritage as part of one nation’s cultural heritage—the nation of origin or the present location—and as such, it is under the jurisdiction, control, and dominion of that nation and *only* that nation.²¹ This view seems to leave it up to each state to decide whether to preserve, protect, or even destroy the cultural heritage located therein. Such an outlook can pose a threat to cultures that span multiple nations, or nations that disdain or discriminate against certain cultures or minorities. An example of this is the case of the Bamiyan Buddhas,²² the destruction of which was not even considered a loss of cultural heritage to the Afghan state because the Taliban government did not view it as such.²³ Another example is the protection of the cultural heritage of minority groups—such as Rohingya and Uyghur mosques in Myanmar and China’s Xinjiang province, or churches and synagogues in Syria, or Yazidi shrines anywhere—which “depends on the designation by and request from a government that may or may not value them and in many cases is committed to destroying them.”²⁴ Suddenly, the broad, holistic definition of “cultural heritage” becomes a manipulatable term that states can use to their individual advantages.

The other side of this coin is cultural internationalism, the view that, regardless of place of origin or present location, all cultural heritage is part of a common, universal human culture that is important to the international community as a whole.²⁵

¹⁸ James A. R. Nafziger, *A Blueprint for Avoiding and Resolving Cultural Heritage Disputes*, 9 ART ANTIQUITY & L. 3, 3 (2004).

¹⁹ John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 837, 843–44 (1986).

²⁰ *Id.* at 831–32.

²¹ *Id.* at 832, 842.

²² See *infra* Section II.C.1.a.

²³ Weiss & Connelly, *supra* note 11, at 11.

²⁴ *Id.*

²⁵ Merryman, *supra* note 19, at 831–32.

Under this approach, cultural heritage is seen as “independent of property rights or national jurisdiction,” thereby entitling it to protection by the entire international community.²⁶ However, this viewpoint can also threaten the safety of cultural heritage because the international community generally pursues a “Western State-centred approach” by seeing cultural heritage through the lens of Western society and by protecting only what that lens deems to be “cultural heritage.”²⁷

While, historically, international instruments aimed at protecting cultural heritage were created in the vein of cultural internationalism, current global trends tell a different story. Today, cultural nationalism is on the rise.²⁸ In *Cultural Cleansing and Mass Atrocities: Protecting Cultural Heritage in Armed Conflict Zones*, Thomas Weiss and Nina Connelly describe a blooming paradox: “[A]s the world grows smaller and more connected through the forces of globalization, modern states claim exclusive ownership over shared cultural heritage. Cosmopolitan perspectives, or cultural internationalism, [has] become politically incorrect as cultural nationalism comes to the fore.”²⁹ Hence, as the international community has come to use the term “cultural heritage” in a broader sense, states have become more exclusive and protective of the cultural heritage residing within their boundaries.³⁰ Oftentimes, because state-centric views characterize intergovernmental deliberations, cultural heritage may be put in jeopardy “when what is required clashes with what a state decides to do.”³¹

To protect cultural heritage going forward, Kate Fitz Gibbon argues that Weiss and Connelly’s proposal is that the international cultural policy debate needs to be shifted toward broader concepts of “global stewardship and international protection of heritage.”³² However, how can we make this shift without somehow resolving the underlying debate between cultural internationalism and cultural nationalism?

²⁶ *Id.* at 831.

²⁷ Novic, *supra* note 17, at 122.

²⁸ *See supra* note 6.

²⁹ Weiss & Connelly, *supra* note 11, at 10.

³⁰ *Id.*

³¹ *Id.*

³² Kate Fitz Gibbon, *Getty Paper Challenges Nationalist Cultural Heritage Policies*, CULTURAL PROP. NEWS (Jan. 4, 2018), <https://culturalpropertynews.org/getty-paper-challenges-cultural-heritage-policies/> [<https://perma.cc/2LFH-5ASJ>].

B. The Lens of Cultural Genocide

The destruction of cultural heritage cannot be discussed without addressing its connection to genocide, or more specifically, “cultural genocide.” The idea of cultural genocide was first introduced in a draft for the Convention on the Prevention and Punishment of the Crime of Genocide³³ by the Polish lawyer, Raphael Lemkin.³⁴ In 1933, Lemkin saw cultural genocide as just one dimension of the overarching concept of genocide—to him, genocide was a hydra with many heads, representing not only cultural genocide, but also genocide pertaining to the political, social, economic, biological, physical, religion, and moral dimensions of a group’s existence.³⁵ In *Acts of Vandalism*, Lemkin wrote:

An attack targeting a collectivity can also take the form of systematic and organized destruction of the art and cultural heritage in which the unique genius and achievement of a collectivity are revealed in fields of science, arts and literature. The contribution of any particular collectivity to world culture as a whole, forms the wealth of all of humanity, even while exhibiting unique characteristics.

Thus, the destruction of a work of art of any nation must be regarded as acts of vandalism directed against world culture. The author [of the crime] causes not only the immediate irrevocable losses of the destroyed work as property and as the culture of the collectivity directly concerned (whose unique genius contributed to the creation of this work); it is also all humanity which experiences a loss by this act of vandalism.³⁶

Lemkin believed that, for these acts, there should be universal jurisdiction, meaning that if the offender is apprehended in a different state from where the crime was committed, he or she could still be prosecuted in that other state.³⁷ Thus, he believed in an expansive definition of genocide, and the draft

³³ G.A. Res. 260 A (III), Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948).

³⁴ Gerstenblith, *supra* note 9, at 342.

³⁵ *Id.* (citing David Nersessian, *Rethinking Cultural Genocide Under International Law*, HUM. RTS DIALOGUE, Spring 2005, at 7, 7).

³⁶ RAPHAËL LEMKIN, LES ACTES CONSTITUANT UN DANGER GÉNÉRAL (INTERÉTATIQUE) CONSIDÉRÉS COMME DÉLITS DE DROIT DES GENS (1933), *translated in* Raphael Lemkin, *Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations*, PREVENT GENOCIDE INT’L, (emphasis omitted), <http://www.preventgenocide.org/lemkin/madrid1933-english.htm> [<https://perma.cc/N6WJ-S3V>].

³⁷ *Id.* at Proposed Legislation, art. 7.

Genocide Convention embodied this in its list of the elements of cultural genocide, which included:

[P]rohibition on the use of the national language; systematic destruction of books printed in the national language or of religious works; systematic destruction of historical or religious monuments or their diversion to alien uses; and destruction or dispersion of documents and objects of historical, artistic, or religious value, and of objects used in religious worship.³⁸

Because of these original provisions, the concept of cultural genocide tends to refer to forms of intangible cultural heritage—language, religious practices, and access to cultural and religious sites and structures.³⁹

With this concept of cultural genocide in mind, the destruction of cultural heritage is seen as an attack not only against those specific peoples, groups, or communities that identify with that heritage, but also against the common interest of “humanity as a whole.”⁴⁰ Cultural heritage is often intrinsically tied to the cultures, identities, and groups that create it, and when a group is deprived of these spiritual points of reference, its “defensive strength and willingness to resist the enemies’ attacks are contextually impaired, making its physical elimination easier.”⁴¹ In *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, Patty Gerstenblith notes that there is a “direct link between the ability to perform and observe traditional and religious practices and the ability to access tangible cultural heritage, including sites, historic structures and the physical embodiments of intangible culture in written documents and cultural artifacts.”⁴² Lawrence Davidson emphasizes this important link between cultural heritage and discrimination and highlights the consequences of ignoring such a foreboding connection:

Cultural genocide is alive and spreading in our world, and stands as a primary warning that if we do not break through

³⁸ Gerstenblith, *supra* note 9, at 343. Several states participating in the Genocide Convention negotiations objected to these provisions, and cultural genocide was excluded from the Convention. As an example, Gerstenblith notes that “the French government held the position that cultural genocide should be excluded because it is a question addressed to the protection of minorities and therefore invited the risk of political interference in the domestic affairs of States.” *Id.* at 343 n.21.

³⁹ *Id.* at 344.

⁴⁰ Lenzerini, *supra* note 1, at 55–56.

⁴¹ *Id.* at 57.

⁴² Gerstenblith, *supra* note 9, at 344.

the boundaries of our thought collectives we are doomed to reenact the wretched past, over and again. *But it is doing so under the radar, so to speak, for there are no laws against it.* And, as yet, it is not perceived to have reached the level of international scandal that makes for new laws and regulations. It would seem that such a scandal is what it would take for an event to break through the thought collectives of myriad cultures and peoples and get them to act collectively in their own interest. And even then, historical memory is all too brief.⁴³

Because of these connections, some believe that the destruction of cultural heritage may best be viewed through the lens of cultural genocide.⁴⁴ The international community, however, has hesitated to use cultural genocide as its own vehicle for prosecuting cultural heritage destruction.⁴⁵ This hesitancy stems from a perceived “hierarchy of importance”—the idea that the goal of protecting people is entirely separate from the goal of protecting objects or buildings.⁴⁶ To some, it seems incongruous to prosecute a perpetrator for crimes of cultural heritage destruction when that same perpetrator has also committed atrocious crimes against people, but this observation begs the question: Are these two priorities mutually exclusive?

II

THE EVOLUTION OF INTERNATIONAL CULTURAL HERITAGE LAW

A. Early Efforts to Protect Cultural Heritage

The framework for international cultural heritage law dates back to the nineteenth century,⁴⁷ originating with efforts to protect cultural property during armed conflicts.⁴⁸ During the nineteenth century, the destructive and annihilative effects of war made important cultural and religious sites even more vulnerable.⁴⁹ Intending to protect such sites and prevent further destruction, the international community drafted a code to regulate the conduct of warfare, resulting in the Hague Conventions of 1899 and 1907 on the Laws and Customs of War on Land, as well as the Regulations annexed to the Conventions,

43 LAWRENCE DAVIDSON, CULTURAL GENOCIDE 131 (2012) (emphasis added).

44 Luck, *supra* note 2, at 5.

45 *Id.* at 5–6.

46 Gibbon, *supra* note 32.

47 Gerstenblith, *supra* note 9, at 338.

48 *See id.* at 338 n.3.

49 *See id.*

which prohibited the destruction of real and personal property of an occupied state or person(s), except when it was a military necessity.⁵⁰

However, despite their widespread acceptance, the Hague Conventions failed to protect cultural heritage during later conflicts, namely World War I and World War II.⁵¹ The unprecedented level of destruction during the two world wars triggered the passing of another round of protective measures. After World War II, the international community established several intergovernmental organizations and international conventions dedicated to preserving and protecting cultural heritage, including the United Nations and the United Nations Economic, Scientific and Cultural Organization (UNESCO),⁵² the 1949 Geneva Conventions and its two Additional Protocols,⁵³ the 1950 Nuremberg Principles,⁵⁴ the Universal Declaration of Human Rights,⁵⁵ and the Convention on the Prevention and Punishment of the Crime of Genocide.⁵⁶

However, cultural property was excluded from the premier post-war international humanitarian law conventions—the four instruments that comprise the Geneva Conventions of 1949—likely because cultural heritage destruction was not

⁵⁰ Convention Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, U.N.T.S. 539. Articles 23, 28, and 47 of the 1899 Convention Annex prohibit pillage and seizure, and Article 56 requires armies to take all necessary steps to avoid seizure, destruction, and intentional damage to cultural property. *Id.*

⁵¹ Gerstenblith, *supra* note 9, at 341. The exact reasons for the failure of the earlier Hague Conventions to protect cultural heritage are a subject of their own debate, which will not be discussed in this Note.

⁵² Jasmina Šopova, *UNESCO Past and Present*, UNESCO COURIER, 1996, at 40 http://www.unesco.org/archives/new2010/en/history_of_unesco.html [<https://perma.cc/XNJ9-BXFH>].

⁵³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

⁵⁴ Int'l Law Comm'n, Rep. of the Int'l Law Comm'n Covering its Second Session, U.N. Doc. A/1316, at 374 (1950).

⁵⁵ G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 27 (Dec. 10, 1948).

⁵⁶ G.A. Res. 260 A (III), *supra* note 33. Examples of the destruction to cultural heritage that occurred during World War I include the destruction of the library at the University of Louvain in Belgium and the severe damage to the Cathedral at Reims. World War II, however, contained “the most extensive destruction, theft, and movement of cultural objects at any time in world history.” See Gerstenblith, *supra* note 8, at 341.

considered to be as “serious” as other war crimes.⁵⁷ The inattention and exclusion of cultural heritage protection at this point in history effectively initiated a divide between cultural heritage protection and other aspects of international humanitarian law. The preservation of cultural heritage was thus placed within the parameters of the law of armed conflict, rather than within international humanitarian law.⁵⁸

A new era of international cultural heritage law began with the passing of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention),⁵⁹ the first international convention to “exclusively deal[] with the protection of cultural property.”⁶⁰ The 1954 Hague Convention, now regarded as customary international law and ratified by 133 states, embodies the ideals of cultural internationalism and extols a unified international interest in protecting cultural property.⁶¹ Indeed, in its Preamble, it states:

[C]ultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction [D]amage to cultural property belonging to any people whatsoever means damage to the *cultural heritage of mankind, since each people makes its contribution to the culture of the world.*]⁶²

For the first time in history, a multilateral instrument referred to “cultural heritage,” rather than “cultural property,”⁶³ signify-

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 1954 Convention, *supra* note 13; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172, available at <http://unesdoc.unesco.org/images/0013/001306/130696eo.pdf> [<https://perma.cc/LL9N-GBJB>] [hereinafter Second Protocol].

⁶⁰ Andrew Miles, *Conserving Culture: The Shift Towards International Criminal Liability for the Destruction of Cultural Property*, 27 MINN. J. INT'L L. 581, 585 (2018).

⁶¹ See *Treatises, States Parties and Commentaries*, INT'L COMMITTEE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=Xpages_NORMStatesParties&xp_treatySelected=400 [<https://perma.cc/RX6P-UEJQ>] (last visited Apr. 26, 2020) (listing the ratifying states).

⁶² Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 (emphasis added).

⁶³ See Ana Filipa Vrdoljak, *Cultural Heritage in Human Rights and Humanitarian Law*, in Ben-Naftali, *supra* note 17, at 280–81; see UNESCO General Conference Seventh Session, *Draft International Convention for the Protection, in the Event of Armed Conflict, of Monuments, Collections and Other Cultural Property*, 20, U.N. Doc. 7C/PRG/7, annex II (Sept. 30, 1952).

ing to the world an acceptance of the idea that cultural property is not just property to be bought and sold, but rather is a part of a larger body of cultural heritage belonging to the international community as a whole. This principle was reaffirmed by a resolution, adopted at the first meeting of the High Contracting Parties to the Convention, that provided: “the purpose of the Convention . . . is to protect the cultural heritage of all peoples for future generations.”⁶⁴ Thus, the legacy of the 1954 Hague Convention is that the “importance” of a protected cultural site or object is not determined by its monetary value or by the state where it is located; rather, it’s importance is determined by “every people,”⁶⁵ and it will be protected “for itself, because of its intrinsic value and importance to humanity, above and beyond its everyday use by civilians, the civilian casualties that could be caused by acts against such property, and the consequences that its destruction could bring on civilians living nearby.”⁶⁶

Despite its lofty ideals, the 1954 Hague Convention was not entirely effective in protecting cultural heritage. The Convention applies to the protection of cultural heritage during both international and non-international armed conflicts,⁶⁷ and it seeks to ensure the “safeguarding and respect for such property” during both peacetime and war.⁶⁸ However, as of

⁶⁴ UNESCO First Meeting of the High Contracting Parties to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, *Report*, ¶ 22, U.N. Doc. CUA/120 (Sept. 3, 1962).

⁶⁵ Article 1 of the 1954 Convention defines cultural property broadly as “movable or immovable property of great importance to the cultural heritage of every people,” requiring that such property be of great importance to every people and not just to the people of the particular State. See Gerstenblith, *supra* note 9, at 348 (emphasis added) (quoting 1954 Convention, *supra* note 13, at art. 1). The 1954 Convention lists examples of cultural property, 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. In addition to movable and immovable property, cultural property also includes repositories of cultural objects, such as museums, libraries and archives, as well as refuges created specifically to shelter cultural property during hostilities.” *Id.*

⁶⁶ Micaela Frulli, *The Criminalization of Offences Against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 EUR. J. INT’L L. 203, 205 (2011) (footnote omitted).

⁶⁷ See 1954 Hague Convention, *supra* note 13, at art. 19; Second Protocol, *supra* note 59.

⁶⁸ Gerstenblith, *supra* note 9, at 348. “Safeguarding” is meant to refer to the actions a nation is expected to take to protect its cultural property during *peacetime*. *Id.* Article 3 establishes that nations are obligated to safeguard cultural property located within their territory during peacetime from “the foreseeable effects of an armed conflict.” *Id.* Similarly, “respect” refers to the actions that a

today, the Convention has not been applied during peacetime; its main application has been during armed conflicts.⁶⁹

Further, the Convention creates a substantial loophole in the protection of cultural heritage—the military necessity exception. Under Article 4(1), states are to avoid jeopardizing or targeting cultural property located in their own territory or in the territory of another State by “refraining from using such property in a way that might expose it to harm during hostilities.”⁷⁰ Under this provision, nations are required to refrain from “locat[ing] strategic or military equipment near cultural property.”⁷¹ But in the most controversial provision of the Convention, Article 4(2) provides that the aforementioned obligations “may be waived only in cases where military necessity imperatively requires such a waiver.”⁷² This so-called military necessity exception is perhaps one of the greatest drawbacks of the Convention, providing a loophole that enables nations to use, damage, and destroy cultural heritage during armed conflicts. Therein lies the gigantic bullet hole marring the façade of the 1954 Hague Convention.

This bullet hole was fully exposed in the early 1990s during the Gulf Wars, where cultural heritage sites were commonly used as “shields” by armed forces.⁷³ Many sites were used as a tactical strategy in the hopes of avoiding an enemy attack, but this hope was often violently dashed. The tactic merely invoked the military necessity exception, recategorized the sites as targets, and what were once protected religious or cultural sites became cannon fodder for enemy forces. This was the fate of the Ziggurat at Ur, the tenth-century church in Mosul, and the Arch of Ctesiphon.⁷⁴ Other cultural heritage sites in Iran, Iraq, Kuwait, and Jordan also suffered the “destructive conse-

nation must take to protect both its cultural property and the cultural property of another State during *hostilities*. *Id.*

⁶⁹ See Patty Gerstenblith, *Beyond the 1954 Hague Convention*, in CULTURAL AWARENESS IN THE MILITARY 83, 85 (Robert Albro & Bill Ivey eds., 2014).

⁷⁰ Gerstenblith, *supra* note 9, at 348.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 355–56, 355 n.64.

⁷⁴ See *The Impact of War on Iraq's Cultural Heritage: Operation Desert Storm*, U.S. CENT. COMMANDHIST. CULTURAL ADVISORY GROUP, <https://www.cemml.colorado.edu/cultural/09476/iraq08-01enl.html> [<https://perma.cc/KW49-8ZR8>]. In the case of the Temple of Ur, two Iraqi fighter aircraft were stationed adjacent to the temple in the hopes that the risk of damaging the temple would dissuade any attempt to destroy the aircraft. Of course, this did not prevent Coalition forces from attacking the aircraft. *Id.*

quences of armed conflict,”⁷⁵ even though Iranian authorities complained about the 1954 Convention’s inadequacies in the international arena.⁷⁶ Similar problems with the 1954 Convention were seen in other conflicts, such as the Balkan conflict.⁷⁷ Thus, it is clear that the 1954 Hague Convention has not been sufficiently effective in protecting cultural heritage because it is a double-edged sword—it seeks to protect cultural heritage, but in doing so, it turns already-protected cultural heritage sites into military targets.⁷⁸ However, is this a problem caused by the 1954 Hague Convention or is it the result of a wider societal problem—one that sees cultural heritage as second to the whims of the military and the pursuit of victory on the battlefield? Further, despite the 1954 Hague Convention’s customary law status, crimes falling under the Convention and its Additional Protocols have largely been ignored,⁷⁹ and the 1954 Convention has yet to serve as a “basis for prosecution in national or international proceedings.”⁸⁰ While some claim this to be the result of the Convention’s “lack of effective and consistent enforcement,”⁸¹ it seems the larger obstacle to protecting cultural heritage is actually international public opinion and the lack of public outrage in response to cultural heritage destruction.

⁷⁵ FORREST, *supra* note 7, at 59. “Iran, in particular, suffered considerable damage to its cultural heritage including, for example, the eleventh-century Jomeh Mosque, located in the Iranian city of Isfahan, which was damaged by Iraqi missiles.” *Id.*

⁷⁶ *Id.*

⁷⁷ See *infra* subpart II.B. See also FORREST, *supra* note 7, at 58 (discussing the shelling of the cultural site of the Old Town of Dubrovnik in Croatia despite clear protection under the 1954 Hague Convention). During the Balkan conflict, Croatian troops “vandalised Serb churches in Kinin and other Krajina towns while Serbs of Bosnia smashed gravestones in Muslim cemeteries. Many of these religious institutions were of historic importance, such as the Ferhat Pasha and Arnaudija mosques in Bosnia, destroyed in 1993.” *Id.* at 57.

⁷⁸ FORREST, *supra* note 7, at 56.

⁷⁹ Amy Albanese, *The ICC Accepts First Cultural Heritage Destruction Case*, MICH. J. INT’L L. (2015), <http://www.mjlonline.org/the-icc-accepts-first-cultural-heritage-destruction-case/> [<https://perma.cc/UC3Z-DEGX>].

⁸⁰ Roger O’Keefe, *Protection of Cultural Property Under International Criminal Law*, 11 MELB. J. INT’L L. 339, 358 (2010).

⁸¹ Sam Sasan Shoamanesh & Gilles Dutertre, *The ICC and Cultural Property: Reinforced Legal Enforcement of the Protection of Cultural Property in Armed Conflict*, INT’L CRIM. JUST. TODAY (June 22, 2016), <https://www.international-criminal-justice-today.org/arguendo/the-icc-and-cultural-property/> [<https://perma.cc/A9E5-UGBN>].

B. International Criminal Tribunal for the Former Yugoslavia

Almost in response to the apathetic attitude toward prosecution under the 1954 Hague Convention,⁸² the international community adopted a more proactive approach to cultural heritage protection. One of the most notable examples of this change in tactics was seen during the Balkan conflict and the resulting ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY),⁸³ which helped set the groundwork for prosecuting crimes of cultural heritage destruction in an international setting.

The Balkan conflict of the early 1990s was centered on ethnic and religious grounds, and therefore the destruction of important cultural and religious buildings was extensive.⁸⁴ The ICTY was established by the UN Security Council in 1993,⁸⁵ and the ICTY Statute categorized the destruction of cultural property as a war crime in Article 3(d),⁸⁶ defining it as the “[s]eizure, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.”⁸⁷ In the aftermath of the Balkan conflict, ICTY prosecutions achieved a number of indictments against military leaders for a variety of war crimes and crimes against humanity, including that of damage or destruction of cultural heritage.⁸⁸ Further, these prosecutions contributed much to “clarify the customary international law applicable to the protection of cultural heritage during armed conflicts.”⁸⁹

The ICTY confirmed cultural heritage destruction—as described in the 1954 Hague Convention—as a tenant of customary international law in its leading case, *Prosecutor v. Tadic*, as well as in the later cases of *Kordic and Cerkez*, *Brdanin*, and *Strugar*.⁹⁰ Because the Balkan conflict was an internal rather than international conflict, the ICTY needed to establish jurisdiction by extending the customary status of cultural heritage

⁸² See *supra* subpart II.A.

⁸³ See S.C. Res. 827, ¶ 2 (May 25, 1993) (acting under Chapter VII of the Charter of the United Nations); FORREST, *supra* note 7, at 58.

⁸⁴ FORREST, *supra* note 7, at 57.

⁸⁵ See S.C. Res. 827, *supra* note 83, ¶ 2; Vrdoljak, *supra* note 17, at 282–83.

⁸⁶ S.C. Res. 827, art. 3(d) (May 25, 1993) http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [<https://perma.cc/TXM2-E8XC>] (as most recently amended July 7, 2009 by Res. 1877).

⁸⁷ Vrdoljak, *supra* note 17, at 283.

⁸⁸ Gerstenblith, *supra* note 9, at 370.

⁸⁹ FORREST, *supra* note 7, at 58.

⁹⁰ Lenzerini, *supra* note 1, at 47.

destruction to non-international armed conflicts.⁹¹ As such, in *Tadic*, the Appeals Chamber stated:

The emergence of international rules governing internal strife has occurred . . . at the level of customary law [S]ome treaty rules have gradually become part of customary law. This holds true for . . . Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954.⁹²

The ICTY categorized cultural heritage destruction as a war crime in the well-known prosecution of Admiral Miodrag Jokic,⁹³ as well as the prosecution of his immediate superior, Strugar.⁹⁴ Both Jokic and Strugar were found guilty of war crimes for the shelling of the Old Town of Dubrovnik, which had been declared a World Heritage site in 1979.⁹⁵ In *Jokic*, the Trial Chamber found that the shelling was a “violation of values especially protected by the international community” because the Old Town of Dubrovnik was considered “an especially important part of the world cultural heritage [A]nd the existence of its population was intimately intertwined with its ancient heritage.”⁹⁶ As such, the shelling was seen as “an attack not only against the history and heritage of the region, but *also against the cultural heritage of humankind.*”⁹⁷

Further, the ICTY suggested that an act of cultural heritage destruction could also be “regarded as persecution and thus amount to a crime against humanity, and . . . sometimes it can even be proof of the mens rea, or intention, to commit the crime

⁹¹ *Id.*

⁹² Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 98 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <https://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [<https://perma.cc/SS7S-E3L7>].

⁹³ Prosecutor v. Jokic, Case No. IT-01-42/1-S, Sentencing Judgment, ¶¶ 23, 51, 55 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004), https://www.icty.org/x/cases/miodrag_jokic/tjug/en/jok-sj040318e.pdf [<https://perma.cc/NKY9-PYVK>].

⁹⁴ Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶¶ 229-33 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005), <https://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf> [<https://perma.cc/3SY9-RH3J>].

⁹⁵ FORREST, *supra* note 7, at 58. The shelling of the Old Town of Dubrovnik in Croatia has been described as “one of the most pertinent breaches of the Law of War in recent times: not even during the Second World War was there displayed such arrogance with regard to cultural monuments.” (quoting INGRID DETTER, *THE LAW OF WAR* 177 (2d ed., 2000)).

⁹⁶ *Jokic*, Case No. IT-01-42/1-S, ¶¶ 46, 51.

⁹⁷ *Id.* at ¶ 51 (emphasis added).

of genocide.”⁹⁸ Indeed, in *Kordic & Cerkez*, the Trial Chamber found that the specific act of destruction of cultural property,

when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of “crimes against humanity”, [sic] for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects. The Trial Chamber therefore finds that the destruction and wilful damage of institutions dedicated to Muslim religion or education, coupled with the requisite discriminatory intent, may amount to an act of persecution.⁹⁹

The Trial Chamber’s affirmation of cultural heritage destruction as an act of persecution, and thus a crime against humanity, may extend the international legal regime’s wartime protection of cultural heritage to include peacetime protection as well, since crimes against humanity can be prosecuted when carried out during either wartime or peacetime. However, there are drawbacks to this extension. Marina Lostal notes that “a complete recalibration of [the cultural heritage destruction] rationale would limit the scope of the laws protecting cultural heritage” because “the crime of persecution requires that the cultural or religious property under threat [be] symbolic of the identity of a certain human group.”¹⁰⁰ Put another way, this recalibration would abandon significant examples of cultural heritage that are not significant to a particular group, but are significant to humanity as a whole.¹⁰¹

The *Kordic & Cerkez* Trial Chamber went further by differentiating the crime of the destruction or willful damage to institutions dedicated to religion or education from the crime of unlawful attacks on civilian objects. The Chamber stated that the *object* of the former crime is *more specific* because these institutions are “the *cultural heritage* of a certain population.”¹⁰² As such, when the target of an act of destruction is the cultural heritage of a community, that act acquires an “es-

⁹⁸ LOSTAL, *supra* note 7, at 43 (footnote omitted); see *Prosecutor v. Kordic*, Case No. IT-95-14/2-T, Judgement, ¶¶ 206-07 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), https://icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf [https://perma.cc/DDE5-AAFY]; *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgement, ¶ 580 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), <https://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf> [https://perma.cc/9UQF-UZ22].

⁹⁹ See *Kordic*, Case No. IT-95-14/2-T, ¶ 207.

¹⁰⁰ LOSTAL, *supra* note 7, at 44.

¹⁰¹ *Id.*

¹⁰² See *Kordic*, Case No. IT-95-14/2-T, at ¶ 361 (emphasis added).

pecially qualified degree of gravity” that “amounts to a mutilation of the very cultural and spiritual identity of the group that finds expression in that property.”¹⁰³ In specifying the particular gravity of the crime of destruction of cultural heritage, the ICTY signified a trend that would continue to grow in later prosecutions regarding cultural heritage destruction.

By establishing that cultural heritage destruction could be considered proof of the mens rea to commit the crime of genocide, the ICTY opened the door to a conversation about cultural genocide in the context of the Balkan conflict. For instance, the *Krstic* Trial Chamber provided:

[W]here 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*. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.¹⁰⁴

The *Krstic* Tribunal later stated that “the razing of the principal mosque confirm[ed] an intent to destroy the Srebrenica part of the Bosnian Muslim group,”¹⁰⁵ effectively using cultural heritage destruction to establish the genocidal intent of the Serbs against the Bosnian Muslims. However, despite this extension, the Trial Chamber in *Krstic* foreclosed any further consideration of cultural genocide, concluding that:

[C]ustomary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.¹⁰⁶

¹⁰³ Lenzerini, *supra* note 1, at 52; see also *Kordic*, Case No. IT-95-14/2-T, ¶ 361 (stating that the prohibition of the destruction of cultural property is “the *lex specialis* as far as acts against cultural heritage are concerned.”).

¹⁰⁴ Prosecutor v. *Krstic*, Case No. IT-98-33-T, Judgement, ¶ 580 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), <https://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf> [<https://perma.cc/9UQF-UZ22>] (emphasis added).

¹⁰⁵ Prosecutor v. *Krstic*, Case No. IT-98-33-A, Judgement, Partial Dissenting Opinion of Judge Shahabuddeen ¶ 53 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), <https://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf> [<https://perma.cc/NVC8-JJRY>].

¹⁰⁶ *Krstic*, Case No. IT-98-33-T, ¶ 580.

Thus, just as cultural genocide was excluded from the Genocide Convention,¹⁰⁷ the ICTY ultimately rejected cultural genocide as an independent criminal offense.¹⁰⁸ Yet, merely by touching on cultural genocide in its decision, the *Krstic* Trial Chamber started a more nuanced discussion of cultural heritage destruction in relation to genocide. In this way, the ICTY prosecutions were a groundbreaking step for international cultural heritage law. The prosecutions not only brought the crime of cultural heritage destruction to the forefront of international consciousness, highlighting the intrinsic importance of cultural heritage, but they also showed that the destruction of cultural heritage, rather than remaining a strictly-confined crime unto its own, could also be used to establish the requisite *mens rea* for other grave international crimes.

C. Fostering Cultural Internationalism

1. UNESCO and the Human Rights Approach

Since its establishment in 1945,¹⁰⁹ UNESCO played, and continues to play, a significant role in international cultural heritage law and its evolution. Founded before the 1954 Hague Convention—and the wave of cultural internationalism that influenced it—UNESCO was directly impacted by the destruction of World War II and sought to protect cultural heritage by using a different tactic—cultural nationalism. Hence, the purpose of UNESCO was to:

[C]ontribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.¹¹⁰

UNESCO sought to protect cultural heritage by promoting the cooperation of individual nations. To realize its purpose, UNESCO was tasked with maintaining, increasing, and diffusing knowledge by “assuring the conservation and protection of the world’s inheritance of books, works of arts and monuments of history and science, and recommending to the nations

¹⁰⁷ G.A. Res. 260 A (III), *supra* note 33.

¹⁰⁸ See O’Keefe, *supra* note 80, at 388–89.

¹⁰⁹ Šopova, *supra* note 52.

¹¹⁰ Constitution of the United Nations Educational, Scientific and Cultural Organization, art I(1), Nov. 16, 1945, 4 U.N.T.S. 275 (emphasis added).

concerned the necessary international conventions.”¹¹¹ It is clear, in its mission to “promot[e] collaboration *among the nations*,”¹¹² that UNESCO was founded on a premise of cultural nationalism.

Further, the Preamble to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (1970 UNESCO Convention) includes propositions for international action for the sake of protecting cultural property of national importance, stating that “cultural property constitutes one of the basic elements of civilization and *national culture*, and . . . its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.”¹¹³ The 1970 UNESCO Convention emphasizes the interests of states in their “national cultural heritage.”¹¹⁴ Even though, at this point, the 1954 Hague Convention had already injected cultural internationalism into the body of cultural heritage law, the 1970 UNESCO Convention “supports retention of cultural property by source nations.”¹¹⁵ As such, the 1954 Hague Convention and the 1970 UNESCO Convention have markedly conflicting emphases—“one cosmopolitan, the other nationalist; one protective, the other retentive”—that perfectly characterize the difference in the nationalist and internationalist views of cultural property.¹¹⁶

In more recent years, however, UNESCO’s approach to cultural heritage law has shifted into the realm of human rights, attempting to reconcile UNESCO’s previous cultural-nationalist approach with the cultural-internationalist views of the wider international community. UNESCO adopts a human-rights approach to cultural heritage protection by focusing on “the role of cultural heritage as an integral component of humanity.”¹¹⁷ This approach, leaning in the cultural-internationalist direction, seeks to protect cultural heritage by creating a closer connection between cultural heritage and people, and by fostering a more integrated understanding of “the role that cultural heritage plays in the lives of present and future generations.”¹¹⁸ Instead of considering cultural heritage in a vacuum,

¹¹¹ *Id.* art. I(2)(c).

¹¹² *Id.* art. I(1) (emphasis added).

¹¹³ Merryman, *supra* note 19, at 843 (emphasis added and omitted).

¹¹⁴ *Id.* at 845–46.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Gerstenblith, *supra* note 9, at 381.

¹¹⁸ *Id.* at 381–82.

a human-rights lens considers cultural heritage in a sociological and anthropological context that includes “the local community that lives among the heritage, the regional and national communities, and the world community.”¹¹⁹ Because human-rights instruments often lack enforcement mechanisms, framing cultural heritage destruction in a human-rights lens offers “a more flexible and nuanced approach” for preserving and safeguarding cultural heritage, rather than providing a set of draconian rules for prosecuting cultural heritage destroyers.¹²⁰

a. *The Bamiyan Buddhas*

An example of UNESCO’s human-rights approach can be seen in the 2001 case of the Bamiyan Buddhas. The Bamiyan Buddhas were two monumental, sixth-century statues of Buddha carved into the cliffs of the Bamiyan Valley in Afghanistan.¹²¹ In March of 2001, after issuing an edict requiring the destruction of all non-Islamic shrines in Afghanistan, the Taliban deliberately destroyed the Bamiyan Buddhas.¹²² The international community responded immediately,¹²³ and the UN General Assembly denounced the “deliberate ongoing destruction of these relics and monuments which belong to the *common heritage of humankind*.”¹²⁴

Considering the case of the Bamiyan Buddhas solely in the context of international criminal law, some scholars suggest that even though the destruction of the Buddhas did not occur during the context of an armed conflict, the act was still violative of international legal instruments because it violated customary international law.¹²⁵ However, UNESCO provided a

¹¹⁹ *Id.* at 389 & fn.214 (citing Kanishk Tharoor, *Life Among the Ruins*, N.Y. TIMES, Mar. 20, 2016, at SR5 (“recounting the human element behind the ancient ruins of Palmyra”).

¹²⁰ Gerstenblith, *supra* note 9, at 381.

¹²¹ *Id.* at 382.

¹²² Barry Bearak, *Over World Protests, Taliban Are Destroying Ancient Buddhas*, N.Y. TIMES (Mar. 4, 2001), <https://www.nytimes.com/2001/03/04/world/over-world-protests-taliban-are-destroying-ancient-buddhas.html> [<https://perma.cc/EB2A-T9MS>].

¹²³ *Id.*

¹²⁴ G.A. Res. 55/243, *The Destruction of Relics and Monuments in Afghanistan* (Mar. 9, 2001) (emphasis added). The UN General Assembly had previously adopted resolutions 54/189, as of December 17, 1999, and 55/174, as of December 19, 2000. G.A. Res. 54/189 (Dec. 17, 1999); G.A. Res. 55/174 (Dec. 19, 2000).

¹²⁵ See Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT’L L. 619, 630–38 (2003). Francioni and Lenzerini reach their conclusion by relying on the 1954 Hague Convention, the ICTY statute, several UNESCO recommendations, the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural

more complex response to the Bamiyan Buddhas—it adopted the Declaration Concerning the Intentional Destruction of Cultural Heritage on October 17, 2003 (2003 UNESCO Declaration).¹²⁶ This Declaration adds three elements to customary international law regarding the destruction of cultural heritage.¹²⁷ First, similar to the 1954 Hague Convention and the prosecutions in the ICTY, it extends the protection of cultural heritage beyond the limits of an armed conflict and into peacetime by shifting cultural heritage destruction beyond the status of a war crime and into the level of a crime against humanity.¹²⁸

Second, the 2003 UNESCO Declaration further extends cultural heritage protection by prohibiting destruction committed by a state within its own territory, as was the case with the Taliban’s destruction of the Buddhas in Afghanistan.¹²⁹ Therefore, cultural heritage protection now covers acts that constitute “an unjustifiable offence to the principles of humanity and dictates of public conscience” beyond the context of an international armed conflict.¹³⁰ Lastly, the 2003 UNESCO Declaration changes the definition of state responsibility so that “[a] State that intentionally destroys or intentionally 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.”¹³¹

While these changes in international cultural heritage law may help protect other cultural heritage sites, it is already too late for the Bamiyan Buddhas—almost two decades after their destruction, no final decision has been made on whether to protect or restore the site of the Buddhas.¹³² The empty niches

Heritage, the principle of intentional destruction of religious sites as a form of discriminatory persecution evinced by the ICTY, and the Nuremberg International Military Tribunal. *Id.*

¹²⁶ UNESCO General Conference Thirty-Second Session, *Declaration Concerning the International Destruction of Cultural Heritage*, (Oct. 17, 2003), http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html [<https://perma.cc/69EW-X3ND>] [hereinafter *UNESCO Declaration*].

¹²⁷ Gerstenblith, *supra* note 9, at 383–84.

¹²⁸ See *UNESCO Declaration*, *supra* note 126, at art. II(2).

¹²⁹ *Id.* at art. VI.

¹³⁰ *Id.* at art. II(2).

¹³¹ *Id.* at art. VI.

¹³² Rod Nordland, *2 Giant Buddhas Survived 1,500 Years. Fragments, Graffiti and a Hologram Remain*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/world/asia/afghanistan-bamiyan-buddhas.html> [<https://perma.cc/SJ6W-LNWL>]. Today, instead of restoring the Bamiyan Buddhas, a

where the Bamiyan Buddhas once stood serve as a reminder of “Taliban iconoclasm” and the failure of the international legal community to do anything about it.¹³³ However, UNESCO’s response to the destruction of the Bamiyan Buddhas signaled a new era for cultural heritage law. Not only had UNESCO changed its tune by adopting a human rights approach to cultural heritage, but it had also made a concerted effort to expand customary international law, thereby bolstering the ability to prosecute crimes of cultural heritage destruction.¹³⁴

b. “Cultural Cleansing”

In 2014, UNESCO’s approach to cultural heritage evolved once again—this time, it seemed to adopt the concept of “cultural cleansing.”¹³⁵ In 2014 and 2015, the Director-General at the time, Irina Bokova, began using the term “cultural cleansing” to describe the destruction of cultural heritage.¹³⁶ Referring to events in Iraq and Syria, Bokova wrote, “cultural cleansing is an attack on cultural diversity that combines the destruction of monuments and the persecution of people. In today’s new conflicts, those two dimensions cannot be separated.”¹³⁷

Bokova described the destruction of cultural heritage as both “a tactic of war, used to destabilize populations and weaken social defenses,” and an assault on human security, given that “there is no need to choose between saving human lives and preserving cultural heritage: the two are inseparable.”¹³⁸ Bokova framed cultural heritage destruction as an act of persecution in the same vein as the ICTY cases.¹³⁹ However,

wealthy Chinese couple has financed the creation of a Statue of Liberty-sized, 3D-light projection of the larger Buddha, known as “Solsol” to locals, which reflects what the statue likely looked like before its destruction. *Id.*

¹³³ *See id.*

¹³⁴ *See, e.g.,* Eleanor Boggs, *UNESCO Takes on the Taliban: The Fight to Save the Buddhas at Bamiyan*, 5 VA. TECH. UNDERGRADUATE HIST. REV. 23, 25–28 (2017) (describing the UNESCO response to the destruction of the Bamiyan Buddhas). “Even though UNESCO did not prevent the demolition of the Buddha statues at Bamiyan, the event acts as a case study of how UNESCO defines world heritage sites and the extent of its authority over these sites.” *Id.* at 26.

¹³⁵ Luck, *supra* note 2, at 13. Although the term “cultural cleansing” is “evocative and compelling”—it has been used by those defending Confederate monuments in the United States—its use has faded since Bokova completed her tenure at UNESCO. *Id.*

¹³⁶ *Id.*

¹³⁷ Irina Bokova, *Culture on the Front Line of New Wars*, 22 BROWN J. WORLD AFF. 289, 289 (2015).

¹³⁸ *Id.* at 291, 294.

¹³⁹ *See* LOSTAL, *supra* note 7, at 43–44.

in response to the “hierarchy of importance” issue of whether the law should prioritize saving people or saving buildings—a question that seemed to stump the ICTY Chambers and the public in general—she gave a simple answer: “[T]he two are inseparable.”¹⁴⁰ “[D]efending cultural heritage is more than a cultural issue,” Bokova told the U.N. Security Council in 2017, “it is a security imperative that cannot be separated from the protection of human lives.”¹⁴¹

2. Cooperation and Counterterrorism

Another strategy to foster cultural-internationalist sentiments has been the promotion of international cooperation in the fight against terrorism. In the summer of 2015, the Islamic State of Iraq and the Levant (ISIL or ISIS) perpetrated multiple attacks on cultural heritage sites, such as the ancient city of Palmyra, on which it directed large-scale attacks, including exploding the 2,000-year-old Temple of Baalshamin.¹⁴² In March 2017, as a response to these acts of destruction, the U.N. Security Council used the goals of international security and counterterrorism to promote the protection of cultural heritages.¹⁴³ For instance, U.N. Security Council Resolution 2199 recognized the illicit trafficking of cultural objects to be a key source of terrorist financing, and therefore the Resolution prohibited trade in cultural property from Iraq and Syria.¹⁴⁴

Further, U.N. Security Council Resolution 2347 became the first resolution adopted by the Security Council to focus solely on cultural heritage.¹⁴⁵ Specifically, Resolution 2347 “[d]eplores and condemns the unlawful destruction of cultural heritage, inter alia destruction of religious sites and artefacts, as well as the looting and smuggling of cultural property from archaeological sites, museums, libraries, archives, and other sites, in the context of armed conflicts, notably by terrorist groups.”¹⁴⁶ However, because the Resolution was not taken under Chapter VII of the Charter, it lacks its enforcement measures.¹⁴⁷ Despite this, the Council set an important precedent

¹⁴⁰ Luck, *supra* note 2, at 13.

¹⁴¹ *Id.*

¹⁴² Weiss & Connelly, *supra* note 11, at 8.

¹⁴³ Luck, *supra* note 2, at 13.

¹⁴⁴ *Cultural Property at Risk*, UNESCO, http://www.unesco.org/culture/culture-sector-knowledge-management-tools/05_Info%20Sheet_Cultural%20Property%20at%20Risk.pdf [<https://perma.cc/L52H-CZE7>] (last visited Apr. 25, 2020).

¹⁴⁵ *Id.*

¹⁴⁶ S.C. RES. 2347, at 3 (Mar. 24, 2017) (emphasis removed).

¹⁴⁷ Luck, *supra* note 2, at 13.

by considering the security ramifications of assaults on cultural heritage.¹⁴⁸

However, the Council's vote on the Resolutions "reveals . . . fissures" in how Member States view the protection of cultural heritage, and instead of fostering international cooperation, the vote reveals the rising trend of cultural nationalism.¹⁴⁹ For instance, in a Resolution vote, Bolivia blamed "the interventionist policies and invasions of recent years that led to the emergence and rise of terrorist groups that the international community is now facing," and claimed that "many of the museums that now exhibit historic cultural property from other countries in their galleries, were also acquired through invasion, looting and other illegal means. Consequently," Bolivia stated, "we are calling for enhanced policies for the restoration and return of that property"¹⁵⁰ Similarly, Egypt enumerated a series of principles and conditions for its vote, which included noninterference in internal affairs, state consent, restoring heritage to their original countries, "[protection of] cultural goods and heritage in areas under foreign occupation," and limiting Council consideration of cultural heritage to "situations where there is a threat to international peace and security, international counter-terrorism activities or an international conflict that figures on the agenda of the Council."¹⁵¹ Uruguay, China, and Senegal all took similar stances in underscoring the importance of respecting *national* ownership.¹⁵² It is clear that while counterterrorism framing may get the attention of the international community, it cannot guarantee a convergence of views among UN Security Council members, nor can it stem the tide of growing cultural nationalism in its ranks.¹⁵³

III

CHANGING TIDES: THE ICC AND THE FUTURE OF INTERNATIONAL CULTURAL HERITAGE LAW

A. The International Criminal Court

The International Criminal Court (ICC) is a court of last resort, seeking to "end impunity" by prosecuting the "gravest

¹⁴⁸ *Id.* at 14.

¹⁴⁹ *Id.*

¹⁵⁰ U.N. SCOR, 72nd Sess., 7907th mtg. at 10, U.N. Doc. S/PV.7907 (Mar. 24, 2017).

¹⁵¹ *Id.* at 15.

¹⁵² *Id.* at 14, 17, 20.

¹⁵³ Luck, *supra* note 2, at 14.

crimes of concern to the international community: genocide, war crimes, crimes against humanity, and the crime of aggression.”¹⁵⁴ The Rome Statute of 1998,¹⁵⁵ establishing the ICC, is the final significant block in the body of international cultural heritage law.¹⁵⁶ The Statute states: “[A]ll peoples are united by common bonds, their cultures pieced together in a shared heritage”¹⁵⁷ The preamble of the Statute goes on to say that “the most serious crimes of concern to the international community as a whole must not go unpunished and . . . their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”¹⁵⁸ Thus, the ICC has been unequivocal in declaring its intention to prosecute cultural heritage crimes under the mantle of cultural internationalism.¹⁵⁹

The ICC’s standing in the international community is inextricably linked to the strategy and success of the ICC’s Office of the Prosecutor (OTP) and the effectiveness of the OTP’s prosecutions.¹⁶⁰ As such, the ICC plays a significant deterrent role—especially in the protection of cultural heritage—as discussed by Sam Sasan Shoamanesh, the Senior Special Assistant to the Prosecutor of the ICC:

The Court is a crucially important judicial mechanism that, through its work, can highlight the severity of these crimes, and by holding perpetrators accountable, deter the commission of similar crimes in the future. In other words, *the ICC is critical to the fight against impunity for the destruction of cultural heritage in this new century*. In order for the Court to have more of an impact, universal jurisdiction is of course

¹⁵⁴ See *About the ICC*, INT’L CRIM. CT., <https://www.icc-cpi.int/about> [<https://perma.cc/X5UF-TTM7>] (last visited Oct. 15, 2019).

¹⁵⁵ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

¹⁵⁶ Gerstenblith, *supra* note 9, at 345. Currently, 124 States have ratified the Rome Statute and several others are signatories. *Id.*

¹⁵⁷ Rome Statute, *supra* note 155, at Preamble.

¹⁵⁸ *Id.*

¹⁵⁹ See U.N. Human Rights Council, Report of the Special Rapporteur in the Field of Cultural Rights, ¶ 60, U.N. Doc. A/HRC/31/59 (Feb. 3, 2016) (“In the UNESCO Declaration concerning the International Destruction of Cultural Heritage adopted in 2003, the international community reaffirms its commitment to fight against the intentional destruction of cultural heritage in any form States are unequivocally instructed to prevent, avoid, stop and suppress international destruction, whatever such heritage is located.”).

¹⁶⁰ See generally *International Criminal Court Strategic Plan*, TRICOMM (July 24, 2015) (emphasis added), https://www.icc-cpi.int/iccdocs/registry/Strategic_Plan_2013-2017__update_Jul_2015.pdf [<https://perma.cc/DS4V-KV92>] (demonstrating how many of the ICC’s strategic goals depend on the success of the OTP).

crucial. More states are encouraged to ratify the Rome Statute to join the ICC family, and by so doing, benefit from the legal protections it provides.¹⁶¹

The Rome Statute specifically addresses cultural heritage destruction in Article 8(2), which states that “[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” are serious violations, “provided they are not military objectives.”¹⁶² In other provisions, the Statute favors different penalties for crimes committed in international versus non-international armed conflicts,¹⁶³ but the penalties in the cultural heritage provisions of Articles 8(2)(b)(ix) and 8(2)(e)(iv) “are identical for both international and non-international armed conflicts,” following the groundwork laid by the 1954 Hague Convention.¹⁶⁴

There are, however, a few important limitations to the Rome Statute. First, the ICC itself is an organization that faces a host of political challenges within the international community. As of October 2019, the Rome Statute had 122 state parties and 137 signatory states,¹⁶⁵ but several political and economic powerhouses—the United States, China, Russia, and

¹⁶¹ Daniel M. Cole, Note, *From the Hague to Timbuktu: The Prosecutor v. Ahmad Al Faqi Al Mahdi; A Consequential Case of Firsts for Cultural Heritage and for the International Criminal Court*, 31 *TEMPLE INT'L & COMP. L.J.* 397, 457 (2017) (emphasis added) (citing Shoamanesh & Dutertre, *supra* note 80).

¹⁶² Rome Statute, *supra* note 155, at art. 8(2)(e)(iv) (stating that violations against cultural property of a non-international character and of an international character fall into the ambit of the ICC's jurisdiction); *but see id.* at art. 8(2)(b)(ix) (applying to international armed conflict) and art. 8(2)(e)(iv) (applying to non-international armed conflict).

¹⁶³ *See, e.g.*, Frulli, *supra* note 66, at 210 (stating “[a]s is well known, the ICC Statute adopts a two-fold approach to war crimes, and it penalizes separately offences committed in international and non-international armed conflicts. This dual system implies an imperfect correspondence between the two spheres.”); *see also* Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 *EUR. J. INT'L L.* 144, 150 (1999) (“Insofar as Article 8 separates the law applicable to international armed conflict from that applicable to internal armed conflict, it is somewhat *retrograde*, as the current trend has been to abolish this distinction and to have simply one *corpus* of law applicable to *all* conflicts. It can be confusing—and unjust—to have one law for international armed conflict and another for internal armed conflict.”).

¹⁶⁴ Frulli, *supra* note 66, at 210.

¹⁶⁵ UN General Assembly, *Rome Statute of the International Criminal Court (Signatory Parties)*, UNITED NATIONS TREATY COLLECTION https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en [<https://perma.cc/Y9D5-KHXQ>] (last visited Oct. 15, 2019).

India—are not yet parties to the Rome Statute.¹⁶⁶ Further, some countries have recently chosen to withdraw from the ICC.¹⁶⁷ In late 2016, the ICC saw the withdrawal of Russia's signatory status¹⁶⁸ and the memberships of South Africa and Burundi,¹⁶⁹ and in early 2017, the African Union called for en masse African exodus from the ICC,¹⁷⁰ naming the ICC the “international [C]aucasian court.”¹⁷¹ Further, permanent ICC members wield substantial veto power over case referrals, and it is difficult for the ICC to prosecute without state cooperation given its wariness of infringing on state sovereignty.¹⁷²

Second, and more specifically, similar to the 1954 Hague Convention, the Statute's cultural heritage provision creates an exception for attacks on “military objectives.”¹⁷³ For the same reasons this loophole was counterproductive to the goals of the 1954 Hague Convention, this exception could prove just as deadly to the aims of the ICC's provision. Lastly, according to the language of Statute, the ICC's jurisdiction only extends to crimes committed in the context of international or non-international armed conflicts.¹⁷⁴ This leaves a gap in the Statute's ability to prosecute crimes of cultural heritage destruction that are committed during peacetime. Indeed, Article 8(2) classifies

¹⁶⁶ Luck, *supra* note 2, at 12. Further, neither Iraq nor Syria are parties to the Rome Statute. *Id.*

¹⁶⁷ Countries that have withdrawn from the ICC, or that have attempted to do so, have in reality chosen to do so to either use the ICC as a scapegoat for domestic political trouble, or to avoid investigation and persecution for crimes under the Rome Statute. See Cole, *supra* note 161, at 440.

¹⁶⁸ See *Statement by the Russian Foreign Ministry*, MINISTRY FOREIGN AFF. RUSSIAN FED'N (Nov. 16, 2016, 2:15 PM), http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566 [<https://perma.cc/7D37-KFPC>] (“The work of the Court is characterized in a principled way as ineffective and one-sided in different fora, including the United Nations General Assembly and the Security Council. It is worth noting that during the 14 years of the Court's work it passed only four sentences having spent over a billion dollars.”).

¹⁶⁹ *African Union Backs Mass Withdrawal from ICC*, BBC (Feb. 1, 2017), <http://www.bbc.com/news/world-africa-38826073> [<https://perma.cc/3BBK-4ZA6>].

¹⁷⁰ *African Leaders Plan Mass Withdrawal from International Criminal Court*, GUARDIAN, (Jan. 31, 2017, 6:18 PM), <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court> [<https://perma.cc/33ZS-TX6R>].

¹⁷¹ Cole, *supra* note 161, at 438.

¹⁷² *Id.*

¹⁷³ Gerstenblith, *supra* note 9, at 346.

¹⁷⁴ See Rome Statute, *supra* note 155, at art. 5, art. 8(2)(b)(xi) (explaining that the ICC has jurisdiction over “War Crimes” and defining war crimes as “[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.”).

cultural heritage destruction as a war crime rather than as a crime against humanity.¹⁷⁵ This designation, by its very definition, prevents the ICC from prosecuting any acts of destruction that occurred during times of peace or during events that do not constitute “armed conflicts” under the Statute.¹⁷⁶ A strict reading of this classification puts many destroyers of cultural heritage out of the ICC’s reach—for instance, the ICC would not be able to hold members of the Taliban accountable for the destruction of the Bamiyan Buddhas under the Statute. As such, because many assaults on cultural heritage occur outside of the context of armed conflict, it is clear that the international community could respond to this gap in the Statute in one of two ways—it could resort to different methods of cultural heritage protection altogether, possibly by turning to policy measures similar to U.N. Security Council Resolutions rather than prosecution, or it could create a more flexible, inclusive interpretation of the ICC’s cultural heritage provision.¹⁷⁷ The ICC, anticipating this dilemma, chose the latter option in its landmark case *The Prosecutor v. Ahmad Al Faqi Al Mahdi*.¹⁷⁸

B. *The Prosecutor v. Ahmad Al Faqi Al Mahdi*

Despite its limitations, the ICC has been the first international body to successfully prosecute a crime on the basis of cultural heritage destruction alone. In the 2016 case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*,¹⁷⁹ the ICC interpreted the crime of cultural heritage destruction for the first time, creating an invaluable precedent for future prosecutions. Further, in its ruling, the ICC demonstrated a newfound prosecutorial energy that aimed to change public opinion and answer the “hierarchy of importance” argument once and for all.

¹⁷⁵ Ella Weiner, *Can the International Criminal Court Help Protect Cultural Heritage?*, 13 NEW PERSP. FOREIGN POLY 46, 46 (2017) https://csis-prod.s3.amazonaws.com/s3fs-public/publication/171011_NewPerspectives2017_v13.pdf?QYUwU9IFLGPxIAJkax6e6ttvTwUPMOd5 [<https://perma.cc/N25H-HUFV>].

¹⁷⁶ *Id.* The 1954 Hague Convention, ICTY case law, and the 2003 UNESCO Declaration all sought to apply cultural heritage destruction prohibitions to both wartime and peacetime contexts. *Id.*

¹⁷⁷ Luck, *supra* note 2, at 12.

¹⁷⁸ *Prosecutor v. Al Mahdi*, ICC-01/12-01/15-171, Judgment and Sentence (Sept. 27, 2016).

¹⁷⁹ *Id.*

1. *Mali, Timbuktu*

From April 2012 to January 2013, Ansar Dine, an Al-Qaeda-linked paramilitary group in the Islamic Maghreb, controlled northern Mali and Timbuktu.¹⁸⁰ Ansar Dine imposed religious Sharia law through the Hesbah, a morality brigade, which was led by Al Mahdi.¹⁸¹ In June 2012, Ansar Dine consulted Al Mahdi on the destruction of mausoleums and significant sites of Timbuktu,¹⁸² including numerous fifteenth- and sixteenth-century Sufi shrines.¹⁸³ Al Mahdi then decided the manner and order of attacks, arranged logistics, personally supervised and supported each attack, personally participated in at least five of the ten attacks, and promoted the attacks to the media present on the scene.¹⁸⁴

The impact of this destruction was immediate, resulting in a public outcry against the destruction of the sites, which were viewed as “embodiment[s] of Malian history, captured in tangible form, from an era long gone.”¹⁸⁵ On July 13, 2012, the government of Mali brought the case to the ICC,¹⁸⁶ which conducted a preliminary investigation. Finding that the destruction in Mali “deeply shock[ed] the conscience of humanity,”¹⁸⁷ the OTP charged Al-Mahdi with organizing, supervising, and actively participating in the destruction of Malian heritage.¹⁸⁸ Al-Mahdi pleaded guilty at the opening proceedings of his August 2016 trial and was convicted on all counts as a co-perpetrator under Articles 8(2)(e)(iv) and 25(3)(a) of the Rome Statute.¹⁸⁹ Al-Mahdi was sentenced to nine years of imprisonment.¹⁹⁰

180 *Id.* ¶ 31.

181 *Id.*

182 *Id.* ¶ 36.

183 Gerstenblith, *supra* note 9, at 356–57. The sites that were destroyed include Sidi Yahia, one of Timbuktu’s main mosques dating from the 15th to 16th centuries, and eight mausoleums. The mosque and the mausoleums are designated UNESCO World Heritage sites. See Weiner, *supra* note 175, at 46.

184 *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶¶ 37–41.

185 Fatou Bensouda, Prosecutor of the Int’l Criminal Court, Statement at the Opening of Trial in the Case Against Mr. Ahmad Al-Faqi Al Mahdi (Aug. 22, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-al-mahdi-160822> [<https://perma.cc/GN28-JD3R>].

186 Weiner, *supra* note 175, at 46.

187 Press Release, Office of the Int’l Criminal Court Prosecutor, *ICC Prosecutor Opens Investigation into War Crimes in Mali: “The Legal Requirements Have Been Met. We Will Investigate”*, (Jan. 16, 2013), <https://www.icc-cpi.int/Pages/item.aspx?name=pr869&ln=en> [<https://perma.cc/D8R4-USMK>].

188 Weiner, *supra* note 175, at 46.

189 Prosecutor v. Al Mahdi, ICC-01/12-01/15-171, Judgment and Sentence, ¶¶ 30(ii), 63 (Sept. 27, 2016).

190 *Id.* ¶ 109.

2. *The Chamber's Analysis*

Al-Mahdi's case gave the ICC its first chance to interpret the crime of cultural heritage destruction, as provided in Article 8(2)(e)(iv).¹⁹¹ In its unanimous opinion, the Trial Chamber analyzed the elements and gravity of the crime, successfully defining the criminalized act.

The Chamber defined the *actus reus* of the crime as "directing" an attack *towards* protected objects or sites, regardless of the attack's success or the attacker's hierarchical role, given that "directing" an attack does not necessarily require a position of command or responsibility.¹⁹² The ICC's definition shows a divergence in cultural heritage law in that its *actus reus* differs from that of the ICTY statute, which requires actual harm to the target.¹⁹³ Here, the ICC's more inclusive definition allows the possibility of prosecuting a wider range of acts and attackers. Further, in defining the *mens rea*, the ICC Chamber found the requisite intent by affirming that the accused purposely identified, planned, and executed the attacks on the religious cultural targets.¹⁹⁴ The Prosecutor's Submission on Sentencing cited Al Mahdi's public explanation that he "destroyed the cemeteries [. . .] as a preventive measure in order to not allow people to take these cemeteries as idols."¹⁹⁵

The Chamber concluded that Al Mahdi's crime was of "significant gravity,"¹⁹⁶ considering two major factors: (i) the extent of the damage caused to ten mausoleums, and (ii) the impact of the attack on the population, which was heightened by extensive media exposure.¹⁹⁷ The Court stated:

Timbuktu is at the heart of Mali's cultural heritage, in particular thanks to its manuscripts and to the mausoleums of the saints. The mausoleums reflected part of Timbuktu's history and its role in the expansion of Islam. They were of great importance to the people of Timbuktu, who admired them and were attached to them. *They reflected their commitment to Islam and played a psychological role to the extent of being perceived as protecting the people of Timbuktu.* [It was] also described how the people of Timbuktu were collectively en-

¹⁹¹ *Id.* ¶ 13.

¹⁹² *Id.* ¶ 15.

¹⁹³ *Id.* ¶ 16.

¹⁹⁴ *See id.* ¶¶ 34–37.

¹⁹⁵ Prosecutor v. Al Mahdi, ICC-01/12-01/15-139, Prosecution's Submissions on Sentencing, ¶ 31 (July 22, 2016).

¹⁹⁶ Prosecutor v. Al Mahdi, ICC-01/12-01/15-171, Judgment and Sentence, ¶ 82 (Sept. 27, 2016).

¹⁹⁷ *Id.* ¶ 78.

sureing that the mausoleums remained in good condition in the course of symbolic maintenance events involving the entire community—women and elderly and young people. The mausoleums were among the most cherished buildings of the city and they were visited by the inhabitants of the city, who used them as a place for prayer while some used them as pilgrimage locations.¹⁹⁸

The Chamber also considered the fact that the “the targeted buildings were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu” in order to assess the gravity of the crime.¹⁹⁹ By acknowledging the “psychological”²⁰⁰ and “symbolic and emotional”²⁰¹ roles of the cultural heritage sites for the Malian people, the Chamber adopted a spirit of cultural internationalism similar to that conveyed by the 1954 Hague Convention and the ICTY jurisprudence. Even further, the Chamber stated

. . . all the sites but one (the Sheikh Mohamed Mahmoud Al Arawani Mausoleum) were UNESCO World Heritage sites and, as such, their attack appears to be of particular gravity as *their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community*. The Chamber . . . indicated that the people of Timbuktu protested against the destruction and refused to see the mausoleums razed to the ground . . . [and considered testimony that] destroying the mausoleums, to which the people of Timbuktu had an emotional attachment, was a war activity aimed at breaking the soul of the people of Timbuktu. In general, the population of Mali, who considered Timbuktu as a source of pride, were indignant to see these acts take place. *Moreover, [it was] described how the entire international community, in the belief that heritage is part of cultural life, is suffering as a result of the destruction of the protected sites.*²⁰²

The Chamber’s concern for the effects of cultural heritage destruction not only on the Malian people, but also on the international community as a whole, reflect the ICC’s commitment to the spirit of cultural internationalism. In essence, the Chamber’s understanding and sympathy toward the role of cultural heritage in a people’s culture and identity suggest that the ICC was testing the waters for the concept of cultural geno-

¹⁹⁸ *Id.* (emphasis added) (footnotes omitted).

¹⁹⁹ *Id.* ¶ 79.

²⁰⁰ *Id.* ¶ 78.

²⁰¹ *Id.* ¶ 79.

²⁰² *Id.* ¶ 80 (emphasis added) (footnotes omitted).

cide. Insofar as the ICC seeks to revisit cultural genocide, it would almost certainly not be in the hopes of creating a new form of genocide per se; rather, the ICC would likely revisit the concept only to communicate the gravity of the crime of cultural heritage destruction. This would not be an unusual tactic, given that cultural genocide has already begun to return in different contexts in international legal jurisprudence.²⁰³ As such, while cultural genocide is unlikely to ever be accepted as an independent category of genocide, the *Al Mahdi* opinion suggests that the concept's rejection is not set in stone.

C. International Criticism and the Legacy of *Al Mahdi*

The *Al Mahdi* case demonstrates to the world that an international criminal prosecution of an Islamic militant radical leader within a non-state governing power is possible.²⁰⁴ Further, it fully legitimizes the goal of prosecuting destroyers of cultural heritage.²⁰⁵ Through *Al Mahdi*, we have a demonstration that international justice—via the ICC—can reach non-state or quasi-state actors who destroy cultural heritage, even if those actors have rejected national and international associations.²⁰⁶ During a time when so much of the world's cultural heritage is surrounded and targeted by conflict and strife, the *Al Mahdi* case shows that the power of an ICC prosecution holds fast.

Essentially, the ICC's interpretation of Article 8(2)(e)(iv) in *Al Mahdi* broadens its application of this statute in two ways. First, it suggests that these non-international acts are crimes regardless of whether the acts were "carried out in the conduct of hostilities or after the object had fallen under the control of an armed group."²⁰⁷ Second, it implies that Article 8(2)(e)(iv) also extends to quasi-state actors, as well as actors that have established control over an area, if they engaged in armed con-

²⁰³ See *infra* section II.B. For example, in *Krstic*, the ICTY considered cultural genocide to be an act of genocide, as well as evidence of genocidal intent. See *supra* note 105 and accompanying text. In another example, recent decisions of two United States Courts of Appeals show a movement toward associating certain acts with cultural genocide. For instance, in a case about the expropriation of property from Jews during the Holocaust, the D.C. Circuit Court of Appeals stated, "[i]n our view, the alleged takings did more than effectuate genocide or serve as a means of carrying out genocide. Rather, we see the expropriations as *themselves genocide*." *Simon v. Republic of Hungary*, 812 F.3d 127, 142 (D.C. Cir. 2016) (internal citation omitted). See also O'Keefe, *supra* note 80, at 387–89.

²⁰⁴ See Cole, *supra* note 161, at 451–54.

²⁰⁵ See *id.*

²⁰⁶ See *id.*

²⁰⁷ See *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 15.

flict with the state power and if the Rome Statute can establish jurisdiction.²⁰⁸ Thus, using *Al Mahdi's* interpretation of Article 8(2)(e)(iv), if the Rome Statute had been in force when the Taliban destroyed the Bamiyan Buddhas, the Taliban leaders could have been criminally prosecuted.²⁰⁹

However, despite general approbation from the international community, the *Al Mahdi* case has received scathing criticism.²¹⁰ Ultimately, the criticism carries out a two-pronged attack. First, it seeks to portray *Al Mahdi* as a weak prosecution—one that settles on convicting a minor actor for a relatively minor crime in a typical “hierarchy of importance” argument. Second, the criticism characterizes the entire crime of cultural heritage destruction as unnecessary and unworthy of international attention and approval.

Because the Mali situation was rife with sex and gender-based crimes,²¹¹ the OTP was criticized for choosing to prosecute the crime of cultural heritage destruction instead of more extreme crimes against humanity.²¹² Major international and local civil society groups, such as Amnesty International, International Federation for Human Rights, and the Malian NGO Women in Law and Development, have all “expressed dissatisfaction that the OTP did not bring charges against Mr. Al Mahdi for sex- and gender-based crimes . . . for which they feel there is significant evidence.”²¹³ How could the ICC, an organization purporting to “end impunity” by prosecuting the gravest of international crimes,²¹⁴ simply ignore atrocious crimes targeting *people* in favor of prosecuting a crime targeting *buildings*? Similarly, some citizens of Timbuktu took issue with the *Al Mahdi* case, expressing a feeling that it is primarily symbolic and for

²⁰⁸ See Cole, *supra* note 161, at 453–55.

²⁰⁹ *Id.* at 455–56.

²¹⁰ *Id.* at 432; see also Gibbon, *supra* note 32 (noting that one of the barriers to cultural heritage protection lies in public opinion and the concept of the “hierarchy of importance”).

²¹¹ Cole, *supra* note 161, at 433–34; *Mali: ICC Trial over Destruction of Cultural Property in Timbuktu Shows Need for Broader Accountability*, AMNESTY INT’L (Aug. 22, 2016), <https://www.amnesty.org/en/latest/news/2016/08/mali-icc-trial-over-destruction-of-cultural-property-in-timbuktu-shows-need-for-broader-accountability/> [<https://perma.cc/99L5-VP88>].

²¹² *Mali: ICC Trial over Destruction of Cultural Property in Timbuktu Shows Need for Broader Accountability*, AMNESTY INT’L (Aug. 22, 2016), <https://www.amnesty.org/en/latest/news/2016/08/mali-icc-trial-over-destruction-of-cultural-property-in-timbuktu-shows-need-for-broader-accountability/> [<https://perma.cc/99L5-VP88>].

²¹³ See Cole, *supra* note 161, at 433–34; *Mali: ICC Trial Over Destruction of Cultural Property in Timbuktu Shows Need for Broader Accountability*, *supra* note 211.

²¹⁴ See *About the ICC*, INT’L CRIM. CT., *supra* note 154.

the benefit of the international community, given that criminals responsible for other more notorious and damaging crimes walk free among the population.²¹⁵

Critiques based on these “hierarchy of importance” arguments tend to focus on the minutiae instead of the bigger picture, essentially ignoring the OTP’s prosecutorial purposeful discretion and strategy. *Al Mahdi* is just the first prosecution to come out of the ICC’s Mali investigation—it is merely the tip of an iceberg not fully uncovered. The *Al Mahdi* case’s placement at the beginning of the ICC’s inquiry stems, perhaps, from the fact that it was the crime with the most obvious and forthcoming evidence upon which a perpetrator could be convicted. Furthermore, the OTP very likely chose to prosecute *Al Mahdi* first to “flip” him and gain a witness to testify in future prosecutions. Indeed, in September 2019, the ICC confirmed charges against another actor in the Mali situation, *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*.²¹⁶ In the confirmation of charges, *Al Hassan* is charged not only with destruction of cultural heritage, but also with crimes against humanity for torture, rape, sexual slavery, and other inhumane acts, including forced marriages and persecution.²¹⁷ Furthermore, reports state that *Al Mahdi* is likely set to testify as a witness against *Al Hassan* in the upcoming trial,²¹⁸ giving key insight into the true motives and strategy of the OTP in its choice to bring the *Al Mahdi* case first.

Underscoring the “hierarchy of importance” criticism is a more insidious attack—the idea that the destruction of cultural heritage as a crime in itself is illegitimate and unimportant. This attack negates the role that cultural heritage plays in defining the culture and identity of a people.²¹⁹ Indeed, this attack even goes to delegitimize the deterrence power that ICC prosecutions have, and which the *Al Mahdi* case—the first

²¹⁵ *Maliens Dissatisfied with Light Sentence for Islamist who Desecrated Timbuktu*, DEUTSCHE WELLE (Sept. 28, 2016), <http://www.dw.com/en/maliens-dissatisfied-with-light-sentence-for-islamist-who-desecrated-timbuktu/a-35912148> [https://perma.cc/92MC-6GHJ].

²¹⁶ Press Release, Int’l Criminal Court, *Al Hassan Case: ICC Pre-Trial Chamber I Confirms Charges of War Crimes and Crimes Against Humanity and Commits Suspect to Trial*, Sept. 30, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=PR1483> [https://perma.cc/7MX8-LRRN].

²¹⁷ *Id.*

²¹⁸ Jason Burke, *ICC Prosecutes Islamist Militant on Groundbreaking Gender-Based Charges*, GUARDIAN (Apr. 12, 2018, 7:16 PM), <https://www.theguardian.com/law/2018/apr/12/icc-prosecutes-islamist-militant-al-hassan-ag-abdoul-aziz-ag-mohamed-ag-mahmoud-gender-persecution> [https://perma.cc/S5WX-G8JB].

²¹⁹ See Cole, *supra* note 161, at 402–03.

of its kind—will undoubtedly have on future acts of cultural heritage destruction. Chief Prosecutor Bensouda acknowledged this exact goal, stating that the *Al Mahdi* prosecution “will deter the commission of similar crimes in the future”²²⁰ by putting would-be violators on notice and signaling an end to impunity for crimes of cultural heritage destruction.²²¹

From the outset of the “hierarchy of importance” argument, we are faced with the paradox of two seemingly mutually-exclusive priorities—the protection of people or the protection of cultural heritage. However, is this really a choice that must be made? The *Al-Mahdi* Chamber conceded that ICC case law treats crimes against property as generally of lesser gravity than crimes against people,²²² a move that also angered proponents of cultural heritage protection. However, the ICC did not address its reasons for prosecuting *Al Mahdi* for cultural heritage destruction, instead of other crimes against humanity. Instead, the ICC stated: “[T]here is no hierarchy in mass atrocities. These grave [cultural heritage] crimes must be pursued with the same vigour as other atrocity crimes.”²²³

Thus, the *Al Mahdi* case does not signify a binary choice of priorities—there is no chosen hierarchy of importance within the ICC’s prosecutorial scheme—and it does not mean that the ICC is taking the easy way out by prosecuting cultural heritage destruction crimes over other, more serious crimes. Rather, *Al Mahdi* simply demonstrates the OTP’s discretion and strategy—its choice to “highlight[] the gravity of cultural destruction as a war crime”²²⁴ in order make a statement about a crime that was not fully being taken seriously by the international community. The ICC sought to capitalize on the fact that “holding offenders to account stigmatises their behaviour, vindicates victims and their rights, and serves to enforce humanitarian law and combat impunity for international crimes.”²²⁵ *Al Mahdi* is an important step in elevating cultural heritage protection as *jus cogens*, a move that will help protect cultural

²²⁰ Fatou Bensouda, “Prosecutor of the Int’l Criminal Court, Statement at the Opening of Trial in the Case Against Mr. Ahmad Al-Faqi Al Mahdi” (Aug. 22, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-al-mahdi-160822> [<https://perma.cc/GN28-JD3R>].

²²¹ Cole, *supra* note 161, at 454.

²²² *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 77.

²²³ Cole, *supra* note 161, at 457 (second alteration added).

²²⁴ See Mark V. Vlasic & Helga Turku, *Blood Antiquities: Protecting Cultural Heritage Beyond Criminalization*, 14 J. INT’L CRIM. JUST. 1175, 1197 (2016).

²²⁵ Cole, *supra* note 161, at 454.

heritage when domestic justice and international conventions and custom fail.²²⁶

As of 2019, the ICC's only successful prosecution for the crime of cultural heritage destruction has been that of *Al Mahdi*. If no other cases were on the horizon, *Al Mahdi* might go down in ICC history as a stand-alone anomaly. However, enter the *Al Hassan* case—another step forward in defining and prosecuting the crime of cultural heritage destruction. Does this signal a continuation of the ICC's newfound prosecutorial activism? The answer is unequivocally yes.

CONCLUSION

Craig Forrest asserts that the adversarial nature of cultural heritage law “has undermined the development of a principle[d] foundation for an international law of cultural heritage,” and as a result, a distinctive branch of international law is unlikely to materialize as long as this remains unchallenged.²²⁷ However, given the successful prosecution of *Al Mahdi*, the new prosecutorial energy of the OTP, and the upcoming prosecution of *Al Hassan*, the question becomes—is a distinctive branch of international law *necessary* to protect cultural heritage? The answer: probably not. In fact, the ICC's prosecutorial energy and activism is already building a body of legal precedent that will inevitably change the public's attitude about the importance of protecting cultural heritage. With the *Al Mahdi* case, the ICC demonstrated the effectiveness of prosecutorial discretion and its power to capture and mold public perception. With the *Al Hassan* case, the ICC is cementing its newfound path, one that will solidify cultural heritage destruction as a crime in both international law and public opinion.

²²⁶ *Id.*

²²⁷ FORREST, *supra* note 7, at xxi.