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Prosecuting Members of ISIS for Destruction of Cultural Property

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PROSECUTING MEMBERS OF ISIS FOR THE DESTRUCTION OF CULTURAL PROPERTY

CODY CORLISS*

ABSTRACT

This Article examines the potential for war-crime charges against members of ISIS for “culture crimes” in Syria and Iraq, specifically for group members’ participation in the intentional destruction of cultural and historic sites in the Middle East. This Article begins by tracing the history of legal efforts to protect cultural property and the recent developments in international law that have transformed “culture crimes” into chargeable war crimes. After examining the history of legal efforts to protect property, this Article turns its focus to ISIS and the group’s role in destroying cultural property that it deems antithetical to its brand of Islam and its use of looting historic monuments and the sale of antiquities to further itself financially. Following this primer, this Article examines the available avenues of accountability, the potential forums for prosecution (whether via domestic prosecution, an ad hoc international tribunal, or the International Criminal Court), and how each of those forums may be used to prosecute ISIS members for their destruction of culture.

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I. INTRODUCTION

On May 21, 2015, the Islamic State of Iraq and Syria (ISIS)¹ captured the historic city of Palmyra, Syria, one of the best-preserved sites from antiquity.² Although ISIS initially declared it would not destroy Palmyra's historic ruins,³ its promise soon proved false.⁴ ISIS used explosives to demolish the ancient Temple of Baalshamin, a monument built over 2,000 years ago and originally dedicated to the Phoenician god Baalshamin.⁵ A week later, ISIS leveled the Temple of Bel, a temple dedicated to the Semitic god Baal dating from 32 A.D., and a site considered to be one of the most important religious monuments in the Middle East.⁶ Archaeologists, political leaders, and lovers of history mourned the losses of these monuments, other historic structures in Palmyra, and other places in the Middle East, call-

1. The author will use "ISIS" to describe the militant group occupying portions of Iraq and Syria. ISIS, also known as the Islamic State, the Islamic State of Iraq and the Levant (ISIL), or *Daesh* has its roots as an al-Qaeda splinter group formed in Iraq in 2004. For a more thorough discussion of the rise of ISIS and its expansion in Iraq and Syria, see CHRISTOPHER M. BLANCHARD & CARLA E. HUMUD, CONG. RESEARCH SERV., R43612, THE ISLAMIC STATE AND U.S. POLICY 23 (2017) (describing ISIS leaders' vision of creating a caliphate in the Middle East); Milena Sterio, *The Applicability of the Humanitarian Intervention "Exception" to the Middle Eastern Refugee Crisis: Why the International Community Should Intervene Against ISIS*, 38 SUFFOLK TRANSNAT'L L. REV. 325, 326-28 (2015); *ISIS Fast Facts*, CNN LIBRARY, <http://edition.cnn.com/2014/08/08/world/isis-fast-facts/> [<https://perma.cc/S2GP-6K4A>] (last updated Dec. 12, 2017).

2. *ISIS Fast Facts*, *supra* note 1.

3. In a radio interview, ISIS's military commander in Palmyra, Abu Laith al-Saody, suggested that ISIS would only destroy the historic artifacts that constituted "idols" and that historic buildings would be preserved. Kareem Shaheen, *Syria: ISIS Releases Footage of Palmyra Ruins Intact and 'Will Not Destroy Them'*, GUARDIAN (May 27, 2015), <https://www.theguardian.com/world/2015/may/27/isis-releases-footage-of-palmyra-ruins-intact> [<https://perma.cc/DM2Q-G5RY>].

4. *Director-General of UNESCO Irina Bokova Firmly Condemns the Destruction of Palmyra's Ancient Temple of Baalshamin, Syria*, UNESCO (Aug. 24, 2015) [hereinafter UNESCO I], <http://whc.unesco.org/en/news/1339/> [<https://perma.cc/28HA-3T2D>] (condemning the destruction of the Baalshamin temple dating to the Roman era and calling its destruction "a new war crime and an immense loss for the Syrian people and for humanity" (quoting Director-General, UNESCO)); *Director-General Irina Bokova Expresses Consternation at the Destruction of the Temple of Bel in Palmyra*, UNESCO (Sept. 1, 2015), <https://en.unesco.org/news/director-general-irina-bokova-expresses-consternation-destruction-temple-bel-palmyra> [<https://perma.cc/Z47P-Q9EF>] ("Bokova . . . condemned the destruction of the Temple of Bel in Palmyra, one of the most important 1st century CE religious monuments in the Middle East . . .").

5. Liam Stack, *ISIS Blows Up Ancient Temple at Syria's Palmyra Ruins*, N.Y. TIMES (Aug. 23, 2015), <http://www.nytimes.com/2015/08/24/world/middleeast/islamic-state-blows-up-ancient-temple-at-syrias-palmyra-ruins.html>.

6. Anne Barnard & Hwaida Saad, *Palmyra Temple Was Destroyed by ISIS, U.N. Confirms*, N.Y. TIMES (Aug. 31, 2015), <http://www.nytimes.com/2015/09/01/world/middleeast/isis-militants-severely-damage-temple-of-baal-in-palmyra.html>.

ing their destruction “a catastrophe,”⁷ “cultural carnage,”⁸ and “cultural barbarism at its worst.”⁹ Irina Bokova, the Secretary-General of the United Nations Educational, Scientific and Cultural Organization (UNESCO) at the time, used another term to describe ISIS’s destruction: a “war crime.”¹⁰

The phenomenon of the destruction of cultural property in both wartime and peacetime is a common story that stretches to the earliest days of civilization. In wartime, cultural destruction was used as a means to further a repressor’s ideology, destroy the social fabric of those who were invaded, and obliterate the hallmarks of a previous regime.¹¹ The notion that such destruction could lead to criminal prosecution is a recent development in international law, although the first international documents on the preservation of cultural property in times of war were drafted in the late nineteenth century.¹² Since that time, there have been efforts—and pushbacks—on the international normative level to punish perpetrators who have intentionally destroyed cultural property in times of war.

This Article examines the potential for war-crime charges against members of ISIS for “culture crimes,” namely the group’s intentional destruction of cultural property. This Article begins by tracing the history of legal efforts to protect cultural property and the evolutions

7. *Palmyra’s Temple of Bel destroyed, Says UN*, BBC NEWS (Sept. 1, 2015) (quoting Maamoun Abdul Karim, Head of Syrian Dep’t of Antiquities & Museums), <http://www.bbc.com/news/world-middle-east-34111092> [<https://perma.cc/BFU6-EVKN>].

8. Jethro Mullen & Schams Elwazer, *ISIS Destroys Arch of Triumph in Syria’s Palmyra Ruins*, CNN (quoting Markus Hilgert), <http://www.cnn.com/2015/10/05/middleeast/syria-isis-palmyra-arch-of-triumph/index.html> [<https://perma.cc/R5FV-9KSK>] (last updated Oct. 6, 2015, 10:11 AM). In addition to destroying these beloved structures, ISIS beheaded Khaled al-Asaad, the beloved eighty-two-year-old Syrian archaeologist who had looked after Palmyra’s ruins for four decades, and hung his body in public. Hassan Hassan, *Beheading of Khaled al-Asaad, Keeper of Palmyra, Unites Syria in Condemnation*, GUARDIAN (Aug. 22, 2015), <https://www.theguardian.com/world/2015/aug/22/beheading-of-khaled-al-asaad-keeper-of-palmyra-unites-syria-in-condemnation> [<https://perma.cc/33M4-UGAS>].

9. John Kerry, U.S. Sec’y of State, Remarks at Threats to Cultural Heritage in Iraq and Syria Event (Sept. 22, 2014), <https://2009-2017.state.gov/secretary/remarks/2014/09/231992.htm> [<https://perma.cc/6DZS-XSSZ>].

10. UNESCO I, *supra* note 4.

11. See, e.g., CAROLINE EHLERT, PROSECUTING THE DESTRUCTION OF CULTURAL PROPERTY IN INTERNATIONAL CRIMINAL LAW 1-2 (2013).

12. Although never ratified, the first international document on the protection of cultural property in wartime was the 1874 Declaration of Brussels. The Tsar of Russia convened a Diplomatic Conference in Brussels in July 1874 with the objection of deliberating on an international agreement respecting the laws and customs of war. Article 17 instructed, in part, that “[i]n such cases all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes.” Project of an International Declaration Concerning the Laws and Customs of War, art. 17, Aug. 27, 1874 [hereinafter Declaration of Brussels].

in international law leading to the criminalization and the potential prosecution of those who destroy cultural and historic sites. After examining the legal grounds for the prosecution of ISIS members for the destruction of cultural property in the Middle East, this Article examines ISIS and its aims, including its destruction of cultural property that it deems antithetical to its brand of Islam. Following this primer, this Article examines the appropriate forum for that prosecution. First, this Article examines the possibility of domestic prosecution in Syria and Iraq or in the home jurisdictions of ISIS members who are not from those two nations. Next, it examines the use of an ad hoc international tribunal where the destruction of cultural property could be charged as a war crime. Finally, this Article examines the International Criminal Court (ICC) as the jurisdiction to try ISIS members, focusing on Article 8 of the Rome Statute of the ICC¹³ and the recent precedent-setting case that offers ICC prosecutors a clear path to prosecute perpetrators of cultural destruction. Although the Rome Statute and case law suggest a path to prosecute ISIS members for cultural destruction, ICC jurisdiction remains a hurdle. The final Section examines the various ways to bring ISIS members to justice before the ICC.

II. THE PRE-WORLD WAR II HISTORY OF THE PROTECTION OF CULTURAL PROPERTY

The protection of cultural property has long been intertwined with the laws of war.¹⁴ Polybius of Athens, a third to second century B.C.E. historian, is often considered the earliest advocate for cultural pro-

13. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute].

14. A number of scholars have addressed the historical evolution of the protection of cultural property within greater scholarly works. See, e.g., M. Cherif Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYRACUSE J. INT'L L. & COM. 281, 287-305 (1983) (examining the evolution of the protection of cultural property in times of war and peace); Joseph F. Edwards, *Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects*, 22 U. TOL. L. REV. 919, 923-25 (1991) (examining major cultural protection treaties); Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes Under the Rome Statute of the ICC*, 23 PENN ST. INT'L L. REV. 857, 859-62, 880-95 (2005) (tracing the evolution of the law of protection of cultural property and advocating additional laws within the ICC); James A. R. Nafziger, *UNESCO-Centered Management of International Conflict Over Cultural Property*, 27 HASTINGS L.J. 1051, 1051-55 (1976) (examining the history of protection of cultural property in relation to the role of UNESCO); Stanislaw E. Nahlik, *International Law and the Protection of Cultural Property in Armed Conflicts*, 27 HASTINGS L.J. 1069, 1070-76 (1976) (examining early attempts to protect cultural property during armed conflict); Hannah G. He, Comment, *Protecting Ancient Heritage in Armed Conflict: New Rules for Targeting Cultural Property During Conflict with ISIS*, 30 MD. J. INT'L L. 168, 176-78 (2015) (tracing the evolution of the protection of cultural property and advocating a balancing between the preservation of cultural sites with military necessity).

tection during times of war.¹⁵ Later, such prohibitions against cultural destruction gained additional currency during the Renaissance.¹⁶ The first formal codification of the laws of war was drafted during the American Civil War.¹⁷ In 1863, Francis Lieber drafted his Instructions for the Government of Armies of the United States in the Field.¹⁸ Known as the Lieber Code, the document included the codification of the doctrine of military necessity.¹⁹ The doctrine of military necessity recognized a limitation on a previous notion that all private or public property of the enemy could be confiscated for military use.²⁰ The Lieber Code instead recognized “the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms,” and noted “[t]he principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.”²¹ Consequently, the newly enacted doctrine recognized a general protection of property, including an explicit protection for churches, hospitals, and “museums of the fine arts, or of a scientific character.”²²

The influence of the Lieber Code’s protection of property extended beyond the American border, with the Code forming a basis for the 1874 Brussels Declaration, the first intergovernmental codification of the laws of war.²³ Although the Brussels Declaration was never ratified, the Declaration influenced subsequent efforts to codify the laws of war. For example, international legal scholars at Oxford, England approved a manual on the law of land warfare, commonly known as the Oxford Manual, with roots in the Brussels Declaration.²⁴ Alt-

15. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 833 n.7 (1986).

16. See JIŘÍ TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 4-10 (1996).

17. ROGER O’KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 18 (2006).

18. Francis Lieber, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, art. 31 (promulgated Apr. 24, 1863) (Washington, Government Printing Office 1898) [hereinafter The Lieber Code].

19. Burrus M. Carnahan, *Lincoln, Lieber, and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT’L L. 213, 215 (1998).

20. *Id.* at 226.

21. The Lieber Code, *supra* note 18, art. 22.

22. *Id.* arts. 31, 34; see also JOHN FABIAN WITT, LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (Simon & Schuster eds., 2012).

23. See *supra* text accompanying note 12; see also Declaration of Brussels, *supra* note 12; Carnahan, *supra* note 19, at 215 (noting that the Lieber Code formed the basis for the 1874 Declaration of Brussels).

24. THEODOR MERON, WAR CRIMES LAW COMES OF AGE 139 (1998); INSTITUTE OF INTERNATIONAL LAW, OXFORD MANUAL ON THE LAWS OF WAR ON LAND (1880), in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCU-

hough the Lieber Code and the Oxford Manual urged restraint concerning civilian property, the strict legal position remained that the bombardment of civilian areas was permissible if the requirements of war necessitated such action.²⁵

Endorsing the positions staked out in the never-ratified Brussels Declaration, the Hague Convention of 1907 on the Laws and Customs of Wars on Land became the first international agreement on protecting culturally-significant property to come into force.²⁶ The 1907 Hague Convention provided for the protection of, among other things, “buildings dedicated to religion, art, science, or charitable purposes, [and] historic monuments.”²⁷ This early protection against the destruction of cultural property was one of many topics in a greater document concerning the laws of belligerents. As would be the case with many international agreements concerning cultural property protection, punishment was carried out by the authorities of an offender’s home nation.²⁸ The result was often an uneven enforcement.

Most significantly, the 1907 Hague Convention yielded an important article that later developed into a broader duty to safeguard cultural property. Article 43, which established the general mandates for occupying forces, stated that an occupying authority had an obligation to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety.”²⁹ Although the drafters of such an article likely never envisioned its applicability to cultural property, the mandate would eventually come to stand for the obliga-

MENTS 35 (Dietrich Schindler & Jiri Toman eds., Sijthoff & Noordhoff 1981); 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 25, 27 (Leon Friedman ed., 1972).

25. See O’KEEFE, *supra* note 17, at 19.

26. *Id.* at 22-23.

27. Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 27, Oct. 18, 1907, 36 Stat. 2277, U.T.S. No. 539 [hereinafter 1907 Hague Convention]. Article 27 to the 1907 Hague Convention states:

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

Id.

28. Merryman, *supra* note 15, at 835.

29. 1907 Hague Convention, *supra* note 27, art. 43. As Anne-Marie Carstens notes, the term for “public order and safety” in the English text is “l’ordre et la vie publics” in the authoritative French version. Anne-Marie Carstens, *The Hostilities-Occupation Dichotomy and Cultural Property in Non-International Armed Conflicts*, 52 STAN. J. INT’L L. 1, 11 n.44 (2016). She suggests that “public order and safety” would be more aptly translated as “public order and civil life.” *Id.*

tion to preserve public order, including the protection of important cultural sites.³⁰

During World War I and World War II, the warring parties made some effort to incorporate the 1907 Hague Convention rules, thereby resulting in some limited efforts to protect cultural property. As Anne-Marie Carstens notes, such duties of protection were typically rooted in occupied territories, such as during World War I when Germany dispatched museum specialists, archivists, and other experts to German-occupied territories on the Western and Eastern fronts as part of its *Kunstschutz* program.³¹ Germany's *Kunstschutz* efforts, however, were not entirely altruistic. Instead, the *Kunstschutz* was largely conducted in response to public outcry stemming from Germany's earlier destruction of cultural sites, such as its destruction of the city center in Kalisz, Poland; the university library in Leuven, Belgium; and the shelling of the Cathedral of Notre Dame in Reims, France—all of which occurred in the summer and fall of 1914.³² As in the case of such destruction, the advent of aerial bombing and the realization of the military strategy of total war eclipsed the 1907 Hague Convention rules during World War I.³³

Limited efforts to protect cultural property continued during World War II. The Axis Power instituted an initiative similar to the World War I German *Kunstschutz* program, but the initiative itself was generally ineffective and principally focused only on cultural protection of sites in southern and western Europe.³⁴ Allied forces also established protections for cultural property, such as issuing orders for troops to protect cultural monuments and establishing a team of Monuments, Fine Arts, and Archives specialist officers to facilitate the protection of historic property.³⁵ Still, the Allied forces were cognizant that their aerial bombardment campaigns would devastate Germany's historically-significant cities and towns. As the United Kingdom's Secretary of State for Air at the time noted:

30. Carstens, *supra* note 29, at 11.

31. *Id.* at 12.

32. REBECCA KNUTH, BURNING BOOKS AND LEVELING LIBRARIES: EXTREMIST VIOLENCE AND CULTURAL DESTRUCTION 164 (2006); REBECCA KNUTH, LIBRICIDE: THE REGIME-SPONSORED DESTRUCTION OF BOOKS AND LIBRARIES IN THE TWENTIETH CENTURY 52 (2003); MIECZYSLAW-ARKADIUSZ WOZNIAK, KALISZ—1914: POGROM MIASTA (2001), <http://www.info.kalisz.pl/kal1914>; Carstens, *supra* note 29, at 12-13.

33. O'KEEFE, *supra* note 17, at 35.

34. *Id.* at 79; see also Carstens, *supra* note 29, at 14 (describing the failures of Nazi Germany to protect historic sites and prevent art looting, though the German *Kunstschutz* operation extended to France, Belgium, Serbia, Greece, and Italy).

35. See Carstens, *supra* note 29, at 15-16 (describing the Allied forces' directives to protect cultural property).

Monuments of art and antiquity are the common heritage of all mankind. We do not deliberately destroy them, but it is our policy to restore that greater heritage of mankind—freedom—and to do that we must and will destroy the enemy's means of making war—his defences, his factories, his stores and his means of transportation, wherever they may be found.³⁶

Owing sensitivity to cultural heritage, the Allied forces required explicit authority from the Supreme Headquarters to bomb certain culturally significant cities in Italy.³⁷ Moreover, the Allied forces spared Kyoto and Nara, Japan from the atomic bomb in part because of their architectural and artistic heritage.³⁸

III. THE POST-WORLD WAR II HISTORY OF THE PROTECTION OF CULTURAL PROPERTY

The widespread destruction of cultural property during World War I and World War II demonstrated the limited utility of the laws of war protecting cultural sites.³⁹ The post-World War II Nuremberg Charter did not specifically address the destruction of cultural monuments, but it did address the destruction of private property not out of military necessity.⁴⁰ As a result, the Nuremberg Charter and the ensuing trials where Nazi officials were convicted of plunder represented the first international enforcement of the protection of cultural property.⁴¹ Moreover, unlike previous situations, other nations imposed responsibility on an individual official of the offending belligerent power for acts against cultural property committed in its name.⁴²

36. O'KEEFE, *supra* note 17, at 68 (quoting U.K. Secretary of State for Air, *quoted in* J.M. SPAIGHT, AIR POWER AND WAR RIGHTS 291 (3d ed. 1947)).

37. *Id.* at 69-72.

38. *Id.* at 69.

39. Merryman, *supra* note 15, at 835 (noting that the new military tactic of "total war" required new protections for cultural property); *see also* Gottlieb, *supra* note 14, at 860 (noting that World War I proved that states often ignore the laws of war, and that endeavors to adjudicate the perpetrators ex-post-facto failed); He, *supra* note 14, at 170-71 (noting the destruction of the Reims Cathedral and other cultural sites during World War I and Hitler's deliberate destruction of historic sites in World War II were used as a means of "breaking down the targeted country's morale").

40. Article 6(b) of the Nuremberg Charter included among its list of war crimes "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(b), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

41. Gottlieb, *supra* note 14, at 860.

42. Merryman, *supra* note 15, at 836.

A. *The Genocide Convention*

In the aftermath of the devastation wrought by World War II, governments began the push for a new crime to encompass the totality of human destruction caused by the Nazis: genocide. The term “genocide,” first coined by Rafael Lemkin (a Jewish, Polish expatriate scholar) in 1944 to describe the widespread massacring of the Armenians at the hands of the Turks during World War I,⁴³ gained almost immediate traction in the aftermath of World War II.⁴⁴ Lemkin’s definition of genocide was largely holistic,⁴⁵ but a key component of the offense was that it was committed against individuals because of their membership in a particular group and, thereby, constituted a crime against the group itself.⁴⁶ Notably, Lemkin originally considered genocide to encompass the physical, biological, and cultural destruction of the group,⁴⁷ writing that a prohibition on cultural genocide was necessary to protect groups that could not continue to exist without the spirit and moral unity provided by their culture.⁴⁸ The proponents of cultural genocide within the United Nations (U.N.) Ad Hoc Genocide Committee recognized that “physical destruction of individuals was not the only possible form of genocide; it was not the indispensable condition of that crime.”⁴⁹ As a result, the drafters of the Genocide Convention initially included the cultural genocide pro-

43. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (1944) (“This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing) . . .”).

44. See Perry S. Bechky, *Lemkin’s Situation: Toward a Rhetorical Understanding of Genocide*, 77 *BROOK. L. REV.* 551, 552 (2012) (“Nuremberg prosecutors mentioned *genocide* in [both] the indictment and trial.”).

45. Lemkin defined genocide as the “disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.” LEMKIN, *supra* note 43, at 79.

46. *Id.* (“Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.”).

47. Physical genocide is generally defined as the extermination of the group by killing its individual members, while biological genocide includes measures to prevent births within a group, including forced sterilizations and separation of the sexes. U.N. Secretary-General, *Draft Convention on the Crime of Genocide*, 25-26, delivered to U.N. Econ. & Soc. Council, U.N. Doc. E/447 (June 26, 1947) [hereinafter *Draft Convention on the Crime of Genocide*]. Cultural genocide includes attacks beyond the physical and/or biological elements of a group done in order to eliminate its wider institutions. Examples including the prohibition of local languages and schools, the restriction or ban of artistic, literary, and cultural activities, and the destruction or confiscation of libraries, museums, artifacts, and art. See LEMKIN, *supra* note 43, at xii, 84.

48. See LEMKIN, *supra* note 43, at 90-95.

49. Summary Record of the Fifth Meeting, U.N. ESCOR, Ad Hoc Comm. on Genocide, 6th Sess., 5th mtg., at 2-3, U.N. Doc. E/AC.25/SR.5 (Apr. 16, 1948).

hibition.⁵⁰ However, the question of whether to incorporate the prohibitions on cultural genocide became a contentious issue dividing the Genocide Convention.⁵¹ Ultimately, the Sixth Committee rejected Article 3, which prohibited cultural genocide, after arguments prevailed that physical genocide was a more serious crime than cultural genocide and that the two forms of genocide should not be placed on the same level.⁵² In rejecting “cultural genocide,” the Genocide Convention limited genocide to “essentially physical acts.”⁵³

50. The crime of cultural genocide was defined as:

Destroying the specific characteristics of the group by: (a) forced transfer of children to another human group; or (b) forced and systematic exile of individuals representing the culture of a group; or (c) prohibition of the use of the national language even in private intercourse; or (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.

Draft Convention on the Crime of Genocide, *supra* note 47, at 6-7. In addition, a U.N. Ad Hoc Genocide Committee produced an initial draft convention (Article III), which proposed to prohibit:

[A]ny deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members; such as: 1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group; 2. Destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

U.N. ESCOR, 3rd Year, 7th Sess., Supp. No. 6, at 712-13, U.N. Doc. E/3/SR.175-225 (July 19-Aug. 28, 1948).

51. See 1947-48 U.N.Y.B. 598, U.N. Sales No. 1949.I.13 (“The Canadian, French, United States and United Kingdom representatives opposed the inclusion in the Convention of provisions relating to “cultural” genocide, holding that this crime was not on a par with physical genocide and should be dealt with separately, and that too wide a definition of genocide would render the Convention meaningless.”).

52. Barry Sautman, “*Cultural Genocide*” and *Tibet*, 38 TEX. INT’L L.J. 173, 183 (2003) (documenting the debate to include cultural genocide within the bounds of the Genocide Convention).

53. Thomas W. Simon, *Defining Genocide*, 15 WIS. INT’L L.J. 243, 252 (1996); see also WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 216 (Cambridge University Press, 2d ed. 2009) (“[I]n light of the *travaux préparatoires* of the Genocide Convention, it seems impossible to consider acts of cultural genocide as punishable crimes if they are unrelated to physical or biological genocide.”). Although cultural genocide was excluded from the Convention on Genocide, the concept has remained in international law contexts. For example, the International Criminal Tribunal for the former Yugoslavia used the destruction of cultural heritage in the Balkan conflict as a method to establish genocidal intent. David Nersessian, *Rethinking Cultural Genocide Under International Law*, CARNEGIE COUNCIL FOR ETHICS INT’L AFF. (Apr. 22, 2005), https://www.carnegiecouncil.org/publications/archive/dialogue/2_12/section_1/5139 [<https://perma.cc/4WC8-WEHK>].

B. *The 1949 Geneva Conventions*

In addition to the Genocide Convention, the premier, post-war international humanitarian law conventions were the four instruments that comprised the Geneva Conventions of 1949.⁵⁴ Cultural property was not specifically protected in the Geneva Conventions,⁵⁵ thereby establishing a divide between the treatment and protection of cultural heritage and other aspects of international humanitarian law.⁵⁶ The protection of cultural property was instead “placed within the parameters of the law of armed conflict,⁵⁷ rather than . . . international humanitarian law.”⁵⁸

Still, the Geneva Conventions themselves play an important role in the evolution of the law protecting cultural property. First, the Geneva Conventions served as the foundation for the subsequent 1954 Hague Convention protecting cultural property.⁵⁹ More importantly, the Geneva Conventions segregate the wartime obligations that attach to parties depending upon whether the armed conflict is of an international or non-international character. The Geneva Conventions place fewer obligations and restrictions on armed conflicts of a non-international character because the international community generally considered non-international conflicts to fall within the domestic affairs of individual states.⁶⁰ As a result, the Geneva Con-

54. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention No. I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention No. III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention No. IV].

55. Though the Geneva Conventions do not explicitly protect cultural property, Anne-Marie Carstens suggests that the 1949 Fourth Geneva Convention, which includes the protection of “personal objects,” contains an implicit protection for some cultural property. See Carstens, *supra* note 29, at 17 n.76 (citing Geneva Convention No. IV, arts. 33, 53).

56. Patty Gerstenblith notes that the lack of protection of cultural property in the Geneva Conventions may be the result of the characterization of the Geneva Conventions being a part of international humanitarian law rather than part of the law of armed conflicts. Where the law of armed conflict is a blueprint for restrictions on the methods of conducting armed conflict, international humanitarian law gives greater emphasis to the protection of human life. Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 344-45 (2016).

57. Jiří Toman characterizes the law of armed conflict as “situated halfway between military necessity and the principles of humanity and chivalry which both determine the formation and application of the law.” TOMAN, *supra* note 16, at 73.

58. Gerstenblith, *supra* note 56, at 345.

59. Carstens, *supra* note 29, at 17.

60. LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 66 (3d ed. 2008); see also Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva*

ventions only applied the provisions to non-international conflicts that, at the time, were firmly entrenched.⁶¹ The segregation of protections for armed conflicts of an international and non-international character was similarly preserved in later conventions and, most significantly for purposes of this Article, in the Rome Statute establishing the ICC.⁶²

C. *The 1954 Hague Convention*

Entering into force on August 7, 1956, the Hague Convention of 1954 was the first universal convention to deal solely with the protection of cultural property.⁶³ For the purposes of the 1954 Hague Convention, the protection of cultural property encompasses both the safeguarding of and respect for cultural property.⁶⁴ The 1954 Hague Convention established a specific definition of “cultural property” in Article 1, defining it as “movable or immovable property of great importance to the cultural heritage of every people” and buildings that contain cultural property.⁶⁵ This broad definition has been both

Conventions and Protocols, in 2 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1979, at 154 (Académie de Droit Int'l ed., 1980) (“International law has to take into account that the world is divided into sovereign States, and that these States keep to their sovereignty. They are not willing to put insurgents within their territory on equal terms with the armed forces of enemy States, or members thereof.”).

61. Carstens, *supra* note 29, at 19 (“To the extent that the international community readied itself to accept the extension of obligations to non-international armed conflicts, it proved willing to do so only in limited circumstances.”).

62. See *infra* Section V.C.

63. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention]. For a general history on the background and creation of the 1954 Hague Convention, see O'KEEFE, *supra* note 17, at 93-94.

64. 1954 Hague Convention, *supra* note 63, art. 2; see also Carstens, *supra* note 29, at 21 (noting that “safeguarding” property requires positive obligations while “respect” denotes negative obligations).

65. 1954 Hague Convention, *supra* note 63, art. 1. Specifically, Article 1 defines “cultural property” as:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

praised and criticized by scholars.⁶⁶ Significantly, the 1954 Hague Convention not only defined and protected cultural property, it also offered the rationale for such protection:

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection⁶⁷

The 1954 Hague Convention requires “High Contracting Parties” (Contracting Parties) to safeguard cultural property situated in their own territory against “foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.”⁶⁸ Under the 1954 Hague Convention, each Contracting Party must take affirmative steps to protect its own cultural property from foreseeable wartime damage.⁶⁹ Article 3 itself leaves the choice of measures to be adopted to the discretion of the Contracting Party in which territory the cultural property is situated.⁷⁰ Many Contracting Parties have responded to that affirmative obligation by creating a list of key property to

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

Id.

66. Lyndel V. Prott & Patrick J. O’Keefe, ‘Cultural Heritage’ or ‘Cultural Property’?, 1 INT’L J. CULTURAL PROP. 307, 312-19 (1992) (discussing the origins of “cultural property” and the effectiveness and issues surrounding the use of the term); Harvey E. Oyer III, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict – Is it Working? A Case Study: The Persian Gulf War Experience*, 23 COLUM.-VLA J.L. & ARTS 49, 52 (1999) (“[C]ultural property’ . . . [was] defined . . . broadly enough to encompass a very wide range of at-risk property.”); Elizabeth Varner, *The Art of Armed Conflicts: An Analysis of the United States’ Legal Requirements Towards Cultural Property Under the 1954 Hague Convention*, 44 CREIGHTON L. REV. 1185, 1193 (2011) (calling the definition “vague” after noting that “[t]he legal definition in Article 1 departs from a layperson’s use of the term cultural property, which causes confusion in understanding what is protected under the 1954 Hague Convention. A layperson’s term for cultural property is far broader and more encompassing than Article 1’s definition of cultural property”).

67. 1954 Hague Convention, *supra* note 63, pmbl.

68. *Id.* art. 3.

69. *Id.* Article 3 requires Contracting Parties to “prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.”

70. *Id.*

be protected, but other nations have examined additional, more creative means to protect their cultural property.⁷¹

Contracting Parties must refrain from hostile acts directed against cultural property, a prohibition that applies to cultural property in their own territory or within the territory of another Contracting Party.⁷² In addition, the 1954 Hague Convention applies to occupying forces: the Convention imposes an affirmative duty on all Contracting Parties that act as an "Occupying Power" in another country to take the necessary measures to preserve the cultural property of the occupied country.⁷³

The 1954 Hague Convention also incorporates a number of affirmative mechanisms. For example, the 1954 Hague Convention requires Contracting Parties to foster in its armed forces "a spirit of respect for the culture and cultural property of all peoples,"⁷⁴ a provision that provides for enforcement through education about the importance of cultural property.⁷⁵ Much like earlier documents on the protection of cultural property, the 1954 Hague Convention waives the protection of cultural property in situations of "military necessity."⁷⁶ However, the duty to protect cultural property applies before an armed conflict begins, during an armed conflict, and during partial or total occupation.⁷⁷

71. "For example, Bulgaria once studied the possibility of totally or partially dismantling some of its monuments in the event of [an] armed conflict." O'KEEFE, *supra* note 17, at 112. A more common response is for nations to make lists of the locations of prized cultural property. Switzerland sent a map showing the location of cultural property in its territory and neighboring Liechtenstein to the Director-General of UNESCO. "Croatian authorities sent lists of cultural monuments . . . to the Yugoslav Federal Defence Secretariat and to all headquarters of the Yugoslav National Army" after a July 1991 attack on Erdut damaged that city's medieval fortress. *Id.* at 114.

72. 1954 Hague Convention, *supra* note 63, art. 4.

73. *Id.* art. 6.

74. *Id.* art. 7.

75. Oyer, *supra* note 66, at 54.

76. Merryman, *supra* note 15, at 837; Oyer, *supra* note 66, at 55 ("From a practical standpoint . . . it is extremely difficult to compel Contracting Parties to comply with the provisions of the Hague Convention in times of actual armed conflict.").

77. See 1954 Hague Convention *supra* note 63, art. 18. Specifically, Article 18 provides:

1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.

2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

3. If one of the Powers in conflict is not a Party to the present Convention, the Powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations. They shall furthermore be bound by the Convention, in

The substantive enforcement mechanisms within the 1954 Hague Convention are largely designed to be self-enforcing. For example, Article 28 incorporated the Principle of International Responsibility, a principle affirmed at Nuremberg: “The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, *of whatever nationality*, who commit or order to be committed a breach of the present Convention.”⁷⁸ The language seems to authorize nations that acquire personal jurisdiction over individuals charged with 1954 Hague Convention violations to try them.⁷⁹ Enforcement rights under Article 28 are generally weak, however, allowing each nation to enforce the provision as it sees fit. The result is varying penal sanctions and inconsistent enforcement results.⁸⁰

The 1954 Hague Convention preserved the distinctions between armed conflicts of international and non-international characters that were established in the Geneva Conventions. Article 19 lays out the requirements for conflicts of a non-international character, noting that under those circumstances, “each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.”⁸¹ The “respect” provision outlined in Article 4 of the 1954 Hague Convention mandates that parties refrain from military use of cultural property and refrain from acts of hostility directed against cultural property.⁸² Although the other prohibitions and obligations of the 1954 Hague Convention are not mandated in a non-international conflict,⁸³ Article 19

relation to the said Power, if the latter has declared that it accepts the provisions thereof and so long as it applies them.

Id.

78. 1954 Hague Convention, *supra* note 63, art. 28 (emphasis added).

79. Merryman, *supra* note 15, at 836.

80. Oyer, *supra* note 66, at 55. Others argue that the failure to enumerate specific offenses that give rise to criminal prosecution limits the Convention’s effectiveness. See David Keane, *The Failure to Protect Cultural Property in Wartime*, 14 DEPAUL-LCA J. ART & ENT. L. & POL’Y 1, 15 (2004).

81. 1954 Hague Convention, *supra* note 63, art. 19(1).

82. *Id.* art. 4.

83. Some scholars maintain that the language of Article 4 on “respect for cultural property” that requires state parties to “undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property,” *id.*, creates a positive duty to prevent destruction by any actor, see, e.g., YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 214 (2004); O’KEEFE, *supra* note 17, at 133; Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 677, 693 (2009); Wayne Sandholtz, *The Iraqi National Museum and International Law: A Duty to Protect*, 44 COLUM. J. TRANSNAT’L L. 185, 215

notes that parties should “endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.”⁸⁴

*D. The 1977 Additional Protocols I and II
to the Geneva Conventions*

The inclusion of cultural property protection within the 1977 Protocols I and II additional to the 1949 Geneva Conventions⁸⁵ heals some of the rifts that developed between the scope of protection available depending upon whether the conflict was of an international or non-international character.⁸⁶ Collectively, the 1977 Protocols widened the definition of an international armed conflict while also narrowing the qualifications for armed conflicts of a non-international nature. For example, Protocol I expanded the definition of “international armed conflicts” to include conflicts “in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination.”⁸⁷

Most significantly for this Article, the 1977 Protocols work in conjunction with the provisions of the 1954 Hague Convention to protect property.⁸⁸ For example, Article 53 of Protocol I, which applies in in-

(2005). *But see* Carstens, *supra* note 29, at 22 (“The 1954 Hague Convention’s express provisions on positive protection and occupation appear elsewhere in the treaty, and thus are not made applicable in non-international armed conflicts.”).

84. 1954 Hague Convention, *supra* note 63, art. 19(2).

85. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter 1977 Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter 1977 Additional Protocol II] (collectively “1977 Protocols”).

86. O’KEEFE, *supra* note 17, at 203 (“Protocol I backs up the rules . . . relevant to the protection of cultural property in international armed conflict with penal sanctions.”); Gerstenblith, *supra* note 56, at 345; *see also* Craig J.S. Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts*, 37 CAL. W. INT’L L.J. 177, 191 (2007) (envisioning the development of the military necessity doctrine moving away from a limitation on the conduct of warfare, expressed in the earlier conventions, and towards a justification for evading principles in the later conventions, an approach found in 1977 Additional Protocol I).

87. 1977 Additional Protocol I, *supra* note 85, art. 1(4).

88. INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, art. 53, at 639 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) (noting that the ICRC did not include a provision for the protection of cultural objects since this has been provided for by the 1954 Hague Convention); O’KEEFE, *supra* note 17, at 208 (“[T]he motivation behind article 53 of [Additional] Protocol I was to affirm in a single provision the essential obligations of respect in international armed conflict embodied more exhaustively in the 1954 Hague Convention.”).

ternational armed conflicts, and Article 16 of Protocol II, which applies in non-international armed conflicts, provide protections for “historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.”⁸⁹ The 1977 Protocols also prohibit acts of hostility and the use of cultural monuments for military purposes.⁹⁰ In addition, Protocol I creates new obligations regarding cultural property during international armed conflicts, such as requiring that parties to a conflict provide “precautions in attack” and “precautions against the effects of attacks” for civilians and civilian objects.⁹¹ There is no corollary obligation in Protocol II applying to non-international armed conflicts.⁹²

Protocol I, applying to international armed conflicts, adds important concepts that apply to civilian life and civilian objects generally, with restrictions that are not strictly limited to the protection of cultural property. For example, Protocol I includes the principle of distinction where the parties to a conflict must distinguish between civilian objects and military objects.⁹³ In addition, Protocol I requires proportionality when planning attacks to minimize the loss of civilian life, injury to civilians, or damage to civilian objects.⁹⁴ Significantly, both Protocols have been widely accepted: the 1977 Protocols I and II have been adopted by 174 and 167 state parties, respectively.⁹⁵

E. The 1999 Second Hague Protocol to the 1954 Hague Convention

The Second Protocol to the 1954 Hague Convention in 1999 (1999 Protocol) marked the advancement of individual criminal liability for serious violations of international norms on the protection of cultural

89. 1977 Additional Protocol I, *supra* note 85, art. 53; 1977 Additional Protocol II, *supra* note 85, art. 16.

90. 1977 Additional Protocol I, *supra* note 85, art. 53; 1977 Additional Protocol II, *supra* note 85, art. 16.

91. 1977 Additional Protocol I, *supra* note 85, arts. 57, 58.

92. Carstens, *supra* note 29, at 25.

93. 1977 Additional Protocol I, *supra* note 85, art. 48 (principle of distinction).

94. *Id.* art. 57 (principle of proportionality in planning attacks).

95. For a list of the state parties to Additional Protocol I, see *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, INT'L COMMITTEE RED CROSS, <https://ihl-databases.icrc.org/ihl/INTRO/470> [<https://perma.cc/UZ53-4SZU>]. For a list of the state parties to Additional Protocol II, see *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, INT'L COMMITTEE RED CROSS, <https://ihl-databases.icrc.org/ihl/INTRO/475?OpenDocument> [<https://perma.cc/QSB4-SP43>].

heritage.⁹⁶ Negotiated and adopted to reinforce the weak enforcement system of the 1954 Hague Convention in the wake of the destruction of cultural property in the late twentieth century, such as the Iran-Iraq war and the Balkan conflict, the 1999 Protocol applies in its entirety to international and non-international armed conflicts.⁹⁷

The new protocol sought to “bring together all aspects of the law protecting cultural property into one document.”⁹⁸ And to do so, the 1999 Protocol introduces the principle of universal jurisdiction over the most “serious violations” of the norms protecting cultural heritage.⁹⁹ Article 17 obliges the party in whose territory the offender is present to prosecute or extradite that person regardless of his or her nationality or the place where the offense was committed.¹⁰⁰ In addition, the 1999 Protocol provides that the entire Protocol applies in “the event of an armed conflict not of an international character.”¹⁰¹

The 1999 Protocol provides widespread obligations for the protection of cultural monuments and closes the remaining gaps between a party’s obligations in international and non-international armed conflicts. Regardless of all of the positives of the 1999 Protocol, the document has had little effect. Many key parties have not joined it, including major military powers such as the United States and, key to this Article, Syria and Iraq. Currently, only sixty-eight state parties have joined the 1999 Protocol, although two of the signers, Mali and Libya, have seen their cultural and historic monuments badly damaged.¹⁰²

F. *The Limits of International Conventions to Protect Cultural Property*

Despite the existence of international conventions and protocols, prohibitions have largely proved ineffective at enforcing cultural

96. 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. 212 [hereinafter 1999 Hague Second Protocol].

97. Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT’L L. 1209, 1216-17 (2004); see also Carstens, *supra* note 29, at 26-27 (noting the international outcry to the shelling of Dubrovnik in a non-international armed conflict as an impetus for the 1999 Hague Second Protocol).

98. UNESCO, Preface to the Inserts on The Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict—1999, UNESCO Doc. CLT/CIH/MCO/2008/PI/H/1, at 3 (Mar. 29, 2003).

99. 1999 Hague Second Protocol, *supra* note 96, art. 15.

100. *Id.* art. 17.

101. *Id.* art. 22(1).

102. For a list of the parties to the 1999 Protocol, see *Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=15207&language=E&order=alpha> [<https://perma.cc/M2QL-KY7Z>].

property protection during conflict.¹⁰³ Gulf War I, however, is one example where the United States put into practice the requirements of the 1954 Hague Convention. The United States, although not a party to the 1954 Hague Convention at the time,¹⁰⁴ attempted to avoid the destruction of cultural property in the Middle East through the creation of a “no target list” that named between 2,000 and 3,000 cultural sites to be protected.¹⁰⁵ Still, as the widespread destruction of cultural property from recent conflicts in Syria, Iraq, and the former Yugoslavia demonstrate, the avoidance of the destruction of cultural property remains more the exception than the rule.

IV. A BRIEF PRIMER ON ISIS

ISIS has its roots in the Sunni/Baathist-dominated Iraqi army of the Saddam Hussein regime. After the defeat of the Baathist regime, members of the Baathist party were banned from serving in the Iraqi army and government positions under the United States-backed Iraqi government of Shi’ite Prime Minister Nouri al-Maliki.¹⁰⁶ Following their exclusion, former Sunni members of the Iraqi military launched a rebellion against the new Iraqi government, naming their group “al-Qaeda in Iraq,” and later, the “Islamic State of Iraq.”¹⁰⁷

At the same time, protests that began in 2011 against the Bashar al-Assad regime in neighboring Syria gained strength after Syrian

103. See, e.g., Andreria Cunning, *The Safeguarding of Cultural Property in Times of War & Peace*, 11 TULSA J. COMP. & INT’L L. 211, 232 (2003) (“[T]he 1954 Hague Convention reflects the fact that nations are becoming increasingly concerned with the protection of cultural property both in armed conflict and peacetime,” acknowledging that “enforcement of the 1954 Hague Convention . . . is inconsistent,” and further noting that “[i]n some ways, the 1954 Hague Convention has not been any more effective than its predecessor, the 1907 Hague Convention, in preventing the destruction of cultural property.”); 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, 206 (2011) (“The results . . . were very modest in terms of penal provisions inserted in the Convention, and even more deceiving as far as their practical implementation is concerned.”); David A. Meyer, *The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law*, 11 B.U. INT’L L.J. 349, 357 (1993) (“[M]uch of the pressure for cultural property protection stems from the moral realm, international indignation, and diplomatic missives, not the concrete realm of sanctions.”).

104. The United States Senate ratified the 1954 Hague Convention on March 13, 2009. See *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention. The Hague, 14 May 1954.*, UNESCO, [http://www.unesco.org/eri/la/convention.asp?KO=13637& \[https://perma.cc/YLW7-FF6E\]](http://www.unesco.org/eri/la/convention.asp?KO=13637&[https://perma.cc/YLW7-FF6E]).

105. Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT’L L. 245, 280 (2006) (noting that even with such a list of cultural sites, a number of sites were still damaged).

106. See BEN SMITH, ISIS AND THE SECTARIAN CONFLICT IN THE MIDDLE EAST 1-9 (Mar. 19, 2015), <http://researchbriefings.files.parliament.uk/documents/RP15-16/RP15-16.pdf> [<https://perma.cc/HJ9K-CNVV>].

107. See *id.* at 7.

government authorities attempted to suppress the protests.¹⁰⁸ By 2014, Syria had blossomed into a full-fledged civil war.¹⁰⁹ The instability in Syria allowed the Iraqi group to cross the border, claim Syrian territory, and establish its “capital” in the Syrian city of al-Raqqah.¹¹⁰ With its foothold in two countries, the Islamic State of Iraq and Syria changed its name to ISIS.¹¹¹ Soon thereafter, ISIS seized Syrian oil wells and refineries, thereby providing the insurgent group with additional financial resources.¹¹² ISIS’s capture of the city of Mosul in Iraq provided an additional windfall, giving the group access to financial capital in addition to a stash of tanks and weapons that ISIS seized from the departing Iraqi army.¹¹³

Over time, the aims of ISIS have come to differ from the al-Qaeda terrorist network with which the group initially affiliated. The al-Qaeda group has predominately sought to attack Western interests through the use of terror.¹¹⁴ ISIS similarly advocates and employs the use of terror throughout the world, most notably in the bombing of a Russian jetliner over Egypt on October 31, 2015, and the Paris attacks on November 13, 2015. But, unlike al-Qaeda, ISIS has also seized and controlled territory in Iraq and Syria with the proclaimed purpose of creating an Islamic caliphate in the region.¹¹⁵ To achieve such goals, in addition to destroying archaeological sites, historic monuments, and religious structures that run contra to ISIS’s religious beliefs, the regime has killed thousands of Shi’ites, Christians, and Kurds. Additionally, much like Afghanistan’s former Taliban regime, it has implemented repressive edicts and conditions on the population of its captured territory.¹¹⁶ Moreover, because of ISIS’s divergent aims and an ongoing conflict with al-Nusra, al-Qaeda’s Syrian entity, al-Qaeda disavowed ISIS’s operations in Syria in 2014.¹¹⁷ Although experts suggest that the majority of the top ISIS decisionmakers are former members of Saddam Hussein’s army and

108. Michael Slackman, *Syrian Troops Open Fire on Protesters in Several Cities*, N.Y. TIMES (Mar. 25, 2011), <http://www.nytimes.com/2011/03/26/world/middleeast/26syria.html>.

109. See SMITH, *supra* note 106, at 8.

110. See *id.* at 1.

111. See *id.* at 8.

112. See *id.* at 17.

113. See *id.* at 16-17.

114. Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 CASE W. RES. J. INT’L L. 15, 21 (2016).

115. *Id.*

116. *Id.*

117. *Al-Qaeda Disavows ISIS Militants in Syria*, BBC (Feb. 3, 2014), <http://www.bbc.com/news/world-middle-east-26016318> [<https://perma.cc/8CK4-JB4D>].

security forces,¹¹⁸ ISIS's ranks have also been bolstered by up to 27,000 foreign fighters who have traveled to the region from other parts of the Middle East, Western Europe, and North America after being drawn to ISIS's extremist ideology.¹¹⁹

V. THE PROSECUTION OF ISIS MEMBERS FOR THE DESTRUCTION OF CULTURAL HERITAGE

In late December 2016, the U.N. General Assembly established an independent panel to assist in the investigation and prosecution of those most responsible for war crimes in Syria.¹²⁰ Formally known since March 2011 as the “International, Impartial and Independent Mechanism to assist in the Investigation and Prosecution of those Responsible for the Most Serious Crimes under International Law committed in [Syria]” (Mechanism), the panel will be led by a senior judge or prosecutor with extensive international criminal investigation and prosecution experience.¹²¹ The Mechanism will have two primary functions. First, the Mechanism is meant to collect, consolidate, preserve, and analyze evidence pertaining to violations and abuses of human rights and humanitarian law.¹²² Second, it will also prepare files in order to facilitate and expedite fair and independent criminal proceedings.¹²³

Three plausible avenues exist for the prosecution¹²⁴ of ISIS members: (1) in the domestic courts of Syria, Iraq, or the home jurisdic-

118. SMITH, *supra* note 106, at 9; CHARLES LISTER, ISLAMIC STATE SENIOR LEADERSHIP: WHO'S WHO (2014), https://www.brookings.edu/wp-content/uploads/2014/12/en_whos_who.pdf [<https://perma.cc/LCC7-677S>]; Sarah Childress et al., *Who Runs the Islamic State?*, PBS (Oct. 28, 2014), <http://www.pbs.org/wgbh/frontline/article/who-runs-the-islamic-state/> [<https://perma.cc/4PMD-Z4QD>].

119. Ashley Kirk, *Iraq and Syria: How Many Foreign Fighters Are Fighting for Isil?*, TELEGRAPH (Mar. 24, 2016, 3:45 PM), <http://www.telegraph.co.uk/news/2016/03/29/iraq-and-syria-how-many-foreign-fighters-are-fighting-for-isil/> [<https://perma.cc/UM5J-ECJ6>].

120. G.A. Res. 71/248, ¶ 4 (Dec. 21, 2016); *see also* Mark Kersten, *How a New U.N. Resolution Could—Someday—Bring Justice to Syria*, WASH. POST (Dec. 30, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/30/how-a-new-u-n-resolution-could-someday-bring-justice-to-syria/?utm_term=.a0f6e46ad433 [<https://perma.cc/8UYZ-84HP>].

121. Press Release, U.N. Secretary-General, Note to Correspondents (Jan. 26, 2017), <https://www.un.org/sg/en/content/sg/note-correspondents/2017-01-26/note-correspondents-international-impartial-and> [<https://perma.cc/6ZCR-V7EE>].

122. *Syria: UN Approves Mechanism to Lay Groundwork for Investigations into Possible War Crimes*, UN NEWS (Dec. 22, 2016), <http://www.un.org/apps/news/story.asp?NewsID=55862> [<https://perma.cc/TX5R-PDCS>].

123. *Id.*

124. Prosecution is not the only option when dealing with ISIS's destruction of cultural monuments in violation of international law. For example, another potential response could be financial, rather than criminal, penalties. Moreover, as history has often shown, a common collective response to violations of international law has been inaction. Still, there was widespread outrage about ISIS's many crimes, including its destruction of cultural

tions of third-party nationals, (2) before an ad hoc criminal tribunal established by the U.N. Security Council, or (3) before the ICC. Each offers potential complications to achieving justice.

A. *Domestic Prosecution in
Syria, Iraq, or Home Jurisdictions*

Because the destruction of a nation's cultural monuments is inherently jurisdiction-specific, one option is to prosecute in the domestic courts of Syria or Iraq, with each domestic system handling the prosecution of the monuments destroyed within its own country. Although such prosecution might be facially attractive, a number of complications suggest that domestic prosecution is unworkable. For example, both Syria and Iraq have proven incapable of arresting ISIS members. Given the general instabilities of both countries, significant misgivings exist regarding the capabilities of the Iraqi and Syrian justice systems. Moreover, countries immersed in or emerging from conflict rarely have the immediate domestic capacity or resources to embark upon complicated factual investigations or to initiate the complex judicial proceedings required for such wide-reaching crimes.¹²⁵ To remedy these issues, the international community could provide resource transfers or personnel support to the Syrian and Iraqi courts, thereby allowing prosecutions to proceed within home jurisdictions.¹²⁶ Still, the post-conflict judiciaries of both nations are largely untested.

A second option is that each country handles the prosecution of its nationals within its own domestic jurisdiction. In investigations that encompassed all war crimes committed in Syria by various actors, national authorities have begun criminal investigations of residents for their roles in crimes committed in the Middle East, including in-

monuments. That outrage, coupled with the recent ICC case where monument destruction was charged as a stand-alone war crime, and the creation of the Syria Mechanism to gather and preserve evidence for use in criminal proceedings suggests that the international response to ISIS's crimes, including the destruction of cultural property, will be prosecution.

125. See, e.g., Cody Corliss, *Truth Commissions and the Limits of Restorative Justice: Lessons Learned in South Africa's Cradock Four Case*, 21 MICH. ST. INT'L L. REV. 273, 282-83 (2013) (describing the limits of South Africa's criminal justice system after the end of apartheid).

126. For example, the international community is supporting the creation of a Kosovo Tribunal that operates under the laws of Kosovo to examine human rights violations that occurred in the jurisdiction. Although the Tribunal operates based on Kosovan law, the Tribunal is situated in The Hague, Netherlands. See *Special Kosovo War Crimes Court to be Set Up in The Hague*, REUTERS (Jan. 15, 2016, 11:35 AM), <https://www.reuters.com/article/us-kosovo-court-thehague/special-kosovo-war-crimes-court-to-be-set-up-in-the-hague-idUSKCN0UT1Z9> [<https://perma.cc/7CJG-FFYW?type=image>].

vestigations or prosecutions in France,¹²⁷ Sweden,¹²⁸ Norway,¹²⁹ the Netherlands,¹³⁰ and Germany.¹³¹ While these measures will achieve some measure of justice, the punishment will differ depending upon the jurisdiction where the national resides. In addition, not all states exercise jurisdiction over war crimes committed in non-international armed conflicts such as the one in Syria.¹³² Moreover, nationals responsible for crimes could avoid punishment by remaining residents in nations that have less incentive to prosecute crimes committed in Syria or Iraq.

B. *An Ad Hoc International Tribunal*

The second method of prosecution is through an ad hoc international tribunal established by the U.N. Security Council or by an international agreement. For example, Carla del Ponte, a member of the U.N. Commission of Inquiry in Syria at the time and the former Prosecutor at the International Criminal Tribunal for former Yugoslavia (ICTY), suggested that an ad hoc criminal tribunal located in the region would offer the best means for widespread prosecution to punish the numerous offenders in the Syrian conflict.¹³³ The United

127. Adam Nossiter, *France Opens Criminal Investigation of Torture in Syria Under Assad*, N.Y. TIMES (Sept. 30, 2015), <https://www.nytimes.com/2015/10/01/world/europe/france-investigates-syria-torture-bashar-assad.html>.

128. Dennis Lynch, *Syrian Rebel Mouhannad Droubi Sentenced to 5 Years in Swedish Prison for War Crimes*, INT'L BUS. TIMES (Feb. 26, 2015, 10:42 AM), <http://www.ibtimes.com/syrian-rebel-mouhannad-droubi-sentenced-5-years-swedish-prison-war-crimes-1829388> [<https://perma.cc/P4VK-SYCA>].

129. Stine Jacobsen, *Norway Police Search for Syrian War Criminals Among Asylum Seekers*, REUTERS (Jan. 15, 2016, 8:02 AM), <http://uk.reuters.com/article/uk-europe-migrants-warcrimes-norway-idUKKCN0UT1FG> [<https://perma.cc/9ZHN-XYZT?type=image>].

130. *Dutch Find 30 Suspected War Criminals Among Last Year's Refugee Wave*, GUARDIAN (Feb. 29, 2016), <https://www.theguardian.com/world/2016/feb/29/refugees-europe-dutch-war-criminals-migration> [<https://perma.cc/E2T5-BL7P>].

131. *Germany's First Isis War Crimes Trial Starts in Frankfurt*, LOCAL (May 3, 2016), <https://www.thelocal.de/20160503/germanys-first-isis-war-crimes-trial-starts-in-frankfurt> [<https://perma.cc/WM2L-K5QG>].

132. As Beth Van Schaack notes, international treaties do not mandate jurisdiction over non-international armed conflicts, thereby relying on the laws of each state's handling of jurisdiction for non-international armed conflicts. Beth Van Schaack, *Mapping War Crimes in Syria*, 92 INT'L L. STUD. 281, 330 (2016). The United States, for example, can assert jurisdiction where the perpetrator or victim is a U.S. national or member of the American armed forces. See War Crimes Act of 1996, 18 U.S.C. § 2441 (2012).

133. Julian Borger, *Call for Special Tribunal to Investigate War Crimes and Mass Atrocities in Syria*, GUARDIAN (Mar. 17, 2015), <https://www.theguardian.com/world/2015/mar/17/call-for-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria> [<https://perma.cc/LQ9Q-XMKU>]; see also Aryeh Neier, *An Arab War-Crimes Court for Syria*, N.Y. TIMES (Apr. 4, 2012), www.nytimes.com/2012/04/05/opinion/an-arab-war-crimes-court-for-syria.html; Beth Van Schaack, *A Mixed Chamber for Syria: An Idea Whose Time Has Come?*, JUST SECURITY (May 28, 2014), <https://www.justsecurity.org/10928/mixed-chamber-syria-idea-time-come/> [<https://perma.cc/RA3N-FQ9R>].

States House of Representatives has similarly backed an ad hoc tribunal.¹³⁴ Additionally, ICC Prosecutor Fatou Bensouda has noted that she would support an ad hoc tribunal if the path to justice is blocked in the ICC.¹³⁵

An ad hoc tribunal would be able to charge property-related crimes, such as the destruction of cultural and historic sites, as the ICTY has done.¹³⁶ Moreover, the establishment of an ad hoc tribunal in the Middle East would allow investigations and prosecutions to occur closer to the site of the conflict. A closer proximity would allow Iraqi and Syrian judges, jurists, and investigators to more easily participate in the work of the tribunal, thereby bringing local ownership and greater legitimacy to the tribunal while also helping build domestic legal capacity.¹³⁷ An ad hoc tribunal would have drawbacks, however; most notably, in its expense and, in some instances, in the speed of prosecutions.¹³⁸ In addition, the establishment of an ad hoc tribunal would delegitimize the ICC, since the ICC was partly established to avoid the creation of ad hoc international tribunals.¹³⁹

Past international criminal tribunals have taken varying views regarding the criminalization of the destruction of cultural and historic property. Tribunals such as those for the former Yugoslavia and Cambodia have included property-related crimes within their criminal statutes while others, such as Rwanda, have not. By criminalizing the destruction of historic monuments, the ICTY took a major step toward a direct, explicit codification of cultural property crimes.¹⁴⁰ For example, Article 3(d) of the ICTY statute specifically

134. H.R. Con. Res. 121, 113th Cong. (2014) (urging the President of the United States to direct the U.N. ambassador to promote the establishment of a Syrian war crimes tribunal).

135. *ICC's Bensouda Would Support Syria Special Tribunal If ICC Path Is Blocked*, AL ARABIYA ENG., (May 18, 2014) <http://english.alarabiya.net/en/News/middle-east/2014/05/18/Interview-ICC-prosecutor-to-examine-alleged-British-crimes-in-Iraq-war.html> [<https://perma.cc/5FD6-4PH6>].

136. Serge Brammertz et al., *Attacks Against Cultural Heritage As a Weapon of War: Prosecutions At the ICTY*, 14 J. INT'L CRIM. JUST. 1143, 1151-74 (2016) (detailing prosecution of attacks against cultural property as a war crime in the ICTY).

137. Van Schaack, *supra* note 132, at 334.

138. Michael P. Scharf, Comment, *The Politics of Establishing an International Criminal Court*, 6 DUKE J. COMP. & INT'L L. 167, 169-70 (1995).

139. See Robert Cryer, *Sudan, Resolution 1593, and International Criminal Justice*, 19 LEIDEN J. INT'L L. 195, 215 (2006) ("The idea underlying Article 13(b) [of the Rome Statute] was to render the creation of further ad hoc tribunals like the ICTY and the ICTR unnecessary, since the ICC could be used instead."); see also Scharf, *supra* note 138, at 170.

140. Hiram Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 27, 30 (2001) ("The insertion in the ICTY Statute of crimes pertaining to cultural property, whether directly or indirectly, was a major step toward strengthening previous international instruments' protection of cultural property in times of armed conflict. The

refers to the destruction of cultural property by criminalizing the “seizure of, 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.”¹⁴¹ Similarly, criminal culpability for the destruction of cultural property is indirectly provided under Article 3(c), which criminalizes attacks on enemy property, and Articles 2(d), 3(b), and 3(e), which criminalize the destruction and plunder of enemy property.¹⁴² Within the ICTY, two alternative approaches have developed for the prosecution of the destruction of cultural property. Such destruction has been charged as either a war crime or a crime against humanity—both approaches leading to successful prosecutions but with distinction in terms of evidence and legal argument.¹⁴³

The Extraordinary Chambers in the Court of Cambodia (ECCC) has also incorporated property-related crimes into its statute.¹⁴⁴ For example, Article 7 of the Cambodian law, which established the ECCC for the prosecution of crimes committed by the Khmer Rouge regime, provides the ECCC with “the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979.”¹⁴⁵

Although the ECCC and the ICTY explicitly listed the destruction of cultural property as chargeable crimes under their respective statutes, such treatment is not universal. For example, the Rwanda and Sierra Leone tribunals do not explicitly list the destruction of cultural property as chargeable offenses. Although the Rwanda tribunal is not limited by a set list of enumerated violations, Article 4 of the statute establishing the Rwanda tribunal mentions only pillage as a war crime related to property.¹⁴⁶ The statute establishing the Special

inclusion in ICTY indictments of criminal charges addressing damages to cultural property concretized this step.”)

141. S.C. Res. 827, art. 3(d) (May 25, 1993) [hereinafter ICTY Statute].

142. *Id.* arts. 2(d), 3(b), 3(c), 3(e).

143. Brammertz, *supra* note 136, at 1151-57, 1160-61.

144. See EHLERT, *supra* note 11, at 198-200.

145. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 7, NS/RKM/0801/12 (Oct. 27, 2004). For a general description of prosecution of cultural destruction under the Khmer Rouge, see also Marina Lostal, *Prosecuting the Destruction of Cultural Property in International Criminal Law: With a Case Study on the Khmer Rouge's Destruction of Cambodia's Heritage*, 15 INT'L CRIM. L. REV. 587 (2015) (book review).

146. S.C. Res. 955, art. 4 (Nov. 8, 1994).

Court for Sierra Leone takes a similar approach, prohibiting pillage and the general destruction of property.¹⁴⁷

Scholars have explained the differing treatment of criminality for property crimes as reflecting the varying degrees of damage to cultural and historic property that occurred as a result of each conflict.¹⁴⁸ For example, the widespread scale of cultural destruction in the former Yugoslavia was the impetus for an explicit recognition of crimes for cultural destruction at the ICTY.¹⁴⁹ Certainly, damage to cultural sites in Mostar, Dubrovnik, and Sarajevo in the former Yugoslavia were well documented in the media at the time.¹⁵⁰ Prosecutors at the ICTY indicted leaders responsible for the destruction of cultural property as part of a litany of available charges. Moreover, convictions were entered against military leaders responsible for the destruction of such property,¹⁵¹ including the Serb general who ordered the bombing of the Old Town in Dubrovnik¹⁵² and the Croatian

147. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 38342.

148. See, e.g., Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT'L L. 619, 645 (2003) (explaining, for example, that the absence in the Statute of the International Criminal Tribunal for Rwanda of specific crimes for the destruction of cultural property can be "explained by the negligible impact that the atrocities committed in Rwanda had on cultural heritage of international importance").

149. See Cuning, *supra* note 103, at 230 ("The destruction of cultural property in the former Yugoslavia in the early 1990s was a form of cultural aggression that was akin to the Nazi's plan for the creation of a pure Germanic empire in that the Serbian expulsion of non-Serbs was a form of ethnic cleansing supported by the destruction of cultural property."); Francioni & Lenzerini, *supra* note 148, at 644-45 (arguing that the disparities between the Statute of the International Criminal Tribunal for the Former Yugoslavia, which placed the destruction of buildings dedicated to religion, or of historical and artistic monuments among the list of enumerated war crimes, and the Statute of the International Criminal Tribunal for Rwanda, which did not, was due to "the negligible impact that the atrocities committed in Rwanda had on cultural heritage of international importance").

150. See, e.g., Stephen Kinzer, *Dubrovnik is Prostrate but Finally Free of Shelling*, N.Y. TIMES (Aug. 17, 1992), <http://www.nytimes.com/1992/08/17/world/dubrovnik-is-prostrate-but-finally-free-of-shelling.html>; Jane Perlez, *A Lovely Library in Ruins, but With a Will to Live*, N.Y. TIMES (Aug. 12, 1996), <http://www.nytimes.com/1996/08/12/world/a-lovely-library-in-ruins-but-with-a-will-to-live.html>; Chuck Sudetic, *Mostar's Old Bridge Battered to Death*, N.Y. TIMES (Nov. 10, 1993), <http://www.nytimes.com/1993/11/10/world/mostar-s-old-bridge-battered-to-death.html>.

151. See Abtahi, *supra* note 140, at 2 (noting that many of the charges for the destruction of cultural property in the ICTY stemmed from the destruction of religious or educational institutions).

152. Prosecutor v. Strugar, Case No. IT-01-42-T, Judgement, ¶¶ 318-20 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005); see also Press Release, Int'l Criminal Tribunal for the Former Yugoslavia, Vladimir Kovacevic Transferred to the ICTY, CT/P.I.S./793e (Oct. 23, 2003). Pavle Strugar and two other Serbian commanders were indicted and found guilty or pled to the charge. See COMMC'NS SERV. OF THE INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, CASE INFORMATION SHEET: PAVLE STRUGAR, http://www.icty.org/x/cases/strugar/cis/en/cis_strugar_en.pdf [<https://perma.cc/823J-R4RK>]. The defendants attempted to justify the shelling as military necessity, but the court found

general responsible for the destruction of the historic Old Bridge (Stari Most) at Mostar in Bosnia-Herzegovina.¹⁵³ As ICTY Prosecutor Serge Brammertz noted, “Through the ICTY’s cases, the law criminalizing attacks against cultural property has been progressively developed and refined. It is now clear that customary international law recognizes attacks against cultural property as criminal.”¹⁵⁴ Moreover, criminal accountability for such cultural crimes can extend to those who were far removed from the scene and who did not directly participate in the destruction.¹⁵⁵

C. *The International Criminal Court*

The ICC, established by the Rome Statute of the ICC, created a permanent court to prosecute the most serious violations of international law.¹⁵⁶ The Rome Statute extends the court’s subject matter to only four crimes: genocide, crimes against humanity, war crimes,¹⁵⁷ and aggression.¹⁵⁸ Although trying acts of terrorism does not specifically fall within the ICC’s mandate, such acts may fall within the def-

that the damage to the Old Bridge was the result of “extensive, deliberate and indiscriminate shelling.” *Id.* at 5.

153. Prosecutor v. Prlić, Case No. IT-04-74-T, Judgement, 1581, 1584-85 (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013). The destruction of Stari Most raised questions of military necessity because the bridge provided a key crossing point for the transport of supplies and troops across the Neretva River for the Bosnian Muslim forces. Though the ICTY Trial Chamber recognized that the bridge was a military target, the Chamber also determined that the destruction of the bridge worsened the humanitarian situation in the region and had a serious psychological impact on the Muslim population in Mostar. *Id.* ¶ 1357 Thus, the damage to the civilian population was “disproportionate to the concrete and direct military advantage expected by the destruction of the Old Bridge.” *Id.* at ¶ 1584. For a description of the Prlić Trial Chamber’s analysis regarding the Old Bridge at Mostar, see Gerstenblith, *supra* note 156, at 370-72.

154. Brammertz, *supra* note 136, at 1171.

155. *Id.*

156. Rome Statute, *supra* note 13; see also C. Cora True-Frost, *Weapons of the Weak: The Prosecutor of the ICC’s Power to Engage the UN Security Council*, 44 FLA. ST. U. L. REV. 261, 274 (2017).

157. A state may opt out of the war crimes jurisdiction of the ICC regarding its nationals or crimes committed on its territory for seven years after the statute enters into force for each state. See Rome Statute, *supra* note 13, art. 124.

158. Notably, the Rome Statute does not define aggression. Article 5(2) provides that the ICC shall exercise jurisdiction over that crime once “aggression” has been defined. The roots of a prohibition of “aggression” come from the Nuremberg judgment which declared aggression to be “the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT’L L. 172, 186 (1947). The prohibition against aggression was similarly embodied in the United Nations Charter. See U.N. Charter art. 2, ¶ 4. For a detailed examination of the creation and implementation of the crime of aggression within the ICC, see Leila Sadat & Richard S. Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 436-44 (2000).

initiation of the crimes already under the court's jurisdiction,¹⁵⁹ such as war crimes "when committed as part of a plan or policy or as part of a large-scale commission of such crimes."¹⁶⁰

1. *Armed Conflict of an International or Non-International Character*

The Rome Statute distinguishes between armed conflicts of an international and non-international character,¹⁶¹ a distinction with roots in the Geneva Conventions of 1949 and their 1977 Protocols.¹⁶² Two conditions precedent exist in order for the existence of an armed international conflict: the parties to the conflict must be states and the conflict must be "armed."¹⁶³ Though "armed conflict" was first introduced in the Geneva Conventions, the term was not defined in the Convention and its subsequent 1977 Protocols. The Appeals Chamber of the ICTY later defined the term "armed conflict" in its *Tadić* decision:

On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.¹⁶⁴

159. Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 15 (2003).

160. Rome Statute, *supra* note 13, art. 8(1).

161. Compare *id.* art. 8(2)(b), with *id.* art. 8(2)(e).

162. See *supra* Sections III.B-D.

163. Geneva Convention No. I, *supra* note 54, art. 2 provides that the Conventions "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." The 1977 Additional Protocol to the Geneva Conventions adopts the same formulation by reference. See 1977 Additional Protocol I, *supra* note 85, art. 1(3). "[T]he State-on-State construct for international armed conflict is universally seen as reflecting customary international law." Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 INT'L L. STUD. 1, 4 (2014). The United States Supreme Court similarly adopted this approach to distinguish conflicts between nations and those "not of an international character." *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006).

164. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

The *Tadić* decision on “armed conflict” has become the most frequently cited definition of the term.¹⁶⁵

Since the end of World War II, there have been few strictly “international armed conflicts” as defined by the jurisprudence around the term first used in the Geneva Conventions.¹⁶⁶ In recent years, however, many conflicts no longer fit neatly within the “international/internal” rubric.¹⁶⁷ Specifically, terror networks provide an even greater challenge to the international or non-international armed conflict dichotomy.¹⁶⁸ ISIS, for example, is not a party to international conventions, much less even a recognized state, as much as it seeks to legitimize itself as one.¹⁶⁹

Scholars are in general agreement that the situation in Syria is an armed conflict of a non-international character.¹⁷⁰ Certainly, under the standard definitions springing from the Geneva Conventions, the

165. Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2475 (2008).

166. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 713 (2004); Carstens, *supra* note 29, at 4-5 (noting that the conflicts of a non-international nature account for the vast majority of armed conflicts).

167. Brooks, *supra* note 166, at 714. For example, Brooks notes, as examples, armed conflicts where insurgent groups train and attack from across international borders where a neighboring state is too weak to prevent its territory from being used as a base or conflicts in which one or more “outside” state provides material support to insurgents fighting within another state. *Id.* Moreover, Hans-Peter Gasser defines an “internationalized non-international armed conflict” as “a civil war characterized by the intervention of the armed forces of a foreign power.” Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U. L. REV. 145 (1983); see also Amal Alamuddin & Philippa Webb, *Expanding Jurisdiction Over War Crimes Under Article 8 of the ICC Statute*, 8 J. INT’L CRIM. JUST. 1219, 1221 (2010) (noting recent signs that customary international law is moving toward a common approach to different types of armed conflicts, particularly because “[c]ontemporary conflicts are often a mixture of international and non-international elements, with internal hostilities being rendered international through state intervention, and international conflicts being conducted covertly as internal conflicts”).

168. For an examination of “armed conflict” as it applies to al-Qaeda, see Balendra, *supra* note 165, at 2461.

169. See Scharf, *supra* note 114, at 66 (“ISIS [is] . . . a non-state actor [that] possesses many of the attributes of a State[, including] massive wealth, sophisticated training and organization, and access to destructive weaponry.”); Adam Withnall, *Iraq Crisis: Isis Declares its Territories a New Islamic State With ‘Restoration of Caliphate’ in Middle East*, INDEPENDENT (June 30, 2014), <http://www.independent.co.uk/news/world/middle-east/isis-declares-new-islamic-state-in-middle-east-with-abu-bakr-al-baghdadi-as-emir-removing-iraq-and-9571374.html> [<https://perma.cc/YN9B-WYUZJ>].

170. See, e.g., YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW 18 (2015) (noting that the situation in Syria since 2011 is a non-international armed conflict); Carstens, *supra* note 29, at 4 (“The conflicts in Syria and Iraq between government forces and organized rebel groups (including Islamic State militants) qualify as non-international armed conflicts under international law.”); Daniel E. Stigall & Christopher L. Blakesley, *Non-State Armed Groups and the Role of Transnational Criminal Law During Armed Conflicts*, 48 GEO. WASH. INT’L L. REV. 1, 30 (2015) (classifying the conflict in Syria as a non-international armed conflict)..

conflict between states and ISIS does not qualify as an “international armed conflict.”¹⁷¹ Still, to classify Syria’s fight with ISIS, for example, as purely “internal” fails to account for the global nature of ISIS’s presence beyond the Syrian border.

2. Article 8 of the Rome Statute

Article 8 gives the ICC jurisdiction to prosecute war crimes “committed as part of a plan or policy or as part of a large-scale commission of such crimes.”¹⁷² The Article incorporates the grave breaches of the Geneva Conventions, breaches which encompass both acts against persons and property.¹⁷³ In addition, Article 8 divides serious violations of the laws and customs of war along the lines of international and non-international armed conflicts.¹⁷⁴ Article 8 lists greater prohibitions of crimes related to the destruction of property that occur in an international armed conflict. Such prohibitions include “directing attacks against civilian objects,”¹⁷⁵ “[a]ttacking or bombarding . . . buildings which are undefended and which are not military objectives,”¹⁷⁶ and “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes,

171. See Geneva Convention No. III, *supra* note 54, at 136 (declaring that the Conventions apply to “all cases of declared war or of any other armed conflict” between signatory states).

172. Rome Statute, *supra* note 13, art. 8(1).

173. The ICC Statute specifically defines the following grave breaches of the Geneva Conventions as “war crimes”:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.

Rome Statute, *supra* note 13, art. 8(2)(a).

174. See, e.g., *id.* art. 8(2)(b)-(c).

175. *Id.* art. 8(2)(b)(ii).

176. *Id.* art. 8(2)(b)(iv).

historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.”¹⁷⁷

Reflective of a trend that has emerged in international law, the Rome Statute provides fewer prohibitions to actions that occur in the course of non-international armed conflicts. Though there are only twelve named prohibitions to actions in an non-international armed conflict, one of those addresses the intentional targeting of cultural property; namely, Article 8(2)(e)(iv) which—like its international armed conflict counterpart—prohibits “[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.”¹⁷⁸

The replication of the prohibition against attacks against historic property in Articles 8(2)(b)(ix) and 8(2)(e)(iv) means that unlawfully directing such attacks constitutes a war crime regardless of the character of the armed conflict. As worded, the sections suggest that any damage resulting to the structures in question is immaterial to the crime, since liability accrues for the “intentionally directing” of an attack with no mention of the outcome of such a direction.¹⁷⁹ In terms of mens rea of the offense, the attack in question must be committed with intent and knowledge,¹⁸⁰ meaning the “awareness that a circumstance exists.”¹⁸¹ As such, the accused must have directed an attack with the knowledge that the objects in question were cultural property.¹⁸²

3. *Article 8(2)(e)(iv) in Practice: The Trial of Ahmad Al Faqi Al Mahdi in the ICC*

The recent conviction of Ahmad Al Faqi Al Mahdi for the destruction of cultural and religious sites in Mali represents the first instance of an international prosecution for war crimes for cultural heritage destruction where the alleged perpetrator was not charged with other war crimes or crimes against humanity.¹⁸³ Al Mahdi was a

177. *Id.* art. 8(2)(b)(ix).

178. *Id.* art. 8(2)(e)(iv).

179. *Id.* art. 8(2)(b)(ix), (e)(iv).

180. *Id.* art. 30(1) (“Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”).

181. *Id.* art. 30(3) (“[K]nowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”).

182. O’KEEFE, *supra* note 17, at 345.

183. Bill Chappell, *Demolition of Timbuktu’s Cultural Sites Spurs War-Crimes Trial at The Hague*, NPR (Mar. 1, 2016, 8:06 AM), <http://www.npr.org/sections/thetwo-way/2016/03/01/468683861/demolition-of-timbuktus-cultural-sites-spurs-war-crimes-trial-at-the-hague>;

leader of Ansar Eddine, a Tuareg group that controlled areas of Mali's northern desert together with al-Qaeda in the Arab Maghreb, in September 1995.¹⁸⁴ As the head of Hisbah, the body established to uphold public morals and prevent vice,¹⁸⁵ Al Mahdi directed his supporters to destroy ten of the most important and well-known cultural sites in Timbuktu.¹⁸⁶ The attacks served no military objective.¹⁸⁷

The ICC classified the conflict in Mali as a non-international armed conflict.¹⁸⁸ As such, Al Mahdi was charged under Article 8(2)(e)(iv) of the Rome Statute.¹⁸⁹ Criminal responsibility fell under Article 25(3)(a) (as a direct co-perpetrator), Article 25(3)(b) (for soliciting and inducing the commission of the crime), Article 25(3)(c) (for facilitating the commission of such a crime by aiding, abetting, or otherwise assisting), and Article 25(3)(d) (for contributing in any other way to the commission of such a crime by a group of persons acting with a common purpose).¹⁹⁰ The trial chamber confirmed the charges on March 24, 2016.¹⁹¹

Al Mahdi avoided a protracted trial through a guilty plea.¹⁹² In a forceful opening statement at the shortened trial, ICC Prosecutor

see also Gerstenblith, *supra* note 56, at 386-87 (describing the early stages of the proceedings against Ahmad Al Faqi Al Mahdi).

184. For a general description of the history of the case against Ahmad Al Faqi Al Mahdi, see COMMC'NS SERV. OF THE INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, CASE INFORMATION SHEET: THE PROSECUTOR V. AHMAD AL FAQI AL MAHDI (2017) [hereinafter AL MAHDI CASE INFORMATION SHEET], <https://www.icc-cpi.int/mali/al-mahdi/Documents/al-mahdiEng.pdf> [<https://perma.cc/R9BV-ALH9>]. The government of Mali referred the situation to the ICC on July 13, 2012. *See* Referral Letter from Garde des Sceaux, Le Ministre de la Justice, The Republic of Mali, to the ICC (July 13, 2012), <https://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf> [<https://perma.cc/V3PW-2LW3>]. After conducting a preliminary examination of the situation, the Office of the Prosecutor opened an investigation on January 16, 2013, into alleged crimes committed in the territory of Mali since January 2012. *See* Press Release, Int'l Criminal Court, 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/YRY7-9N23>].

185. Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Charge Brought by the Prosecution Against Ahmad AL Faqi Al Mahdi, ¶¶ 6-7 (Dec. 17, 2015).

186. *Id.* ¶¶ 12-16.

187. *Id.* ¶¶ 4, 11, 16.

188. *Id.* ¶ 4.

189. *Id.* ¶ 23.

190. *Id.*; *see also* Rome Statute, *supra* note 13, art. 25(3)(a)-(d).

191. *Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Decision on the Confirmation of Charges Against Ahmad Al Faqi Al Mahdi, ¶ 58 (Mar. 24, 2016).

192. AL MAHDI CASE INFORMATION SHEET, *supra* note 184, ¶ 2.

Fatou Bensouda acknowledged the significance of the charges for the destruction of religious and cultural sites.¹⁹³ She stated:

Today's trial is indeed historic.

And it is all the more historic in view of the destructive rage that marks our times, in which humanity's common heritage is subject to repeated and planned ravages by individuals and groups whose goal is to eradicate any representation of a world that differs from theirs by eliminating the physical manifestations that are at the heart of communities. The differences and values of these communities are thus simply denied and annihilated.

. . . .

This is the essence, the very heart of this case. What makes this crime so serious is the fact that it is a profound attack on the identity, the memory and, therefore, the future of entire populations.

This is a crime against that which constitutes the richness of whole communities. And it is thus a crime that impoverishes us all and damages universal values we are bound to protect.¹⁹⁴

As Bensouda explained, such types of crimes present the international community with considerable challenges. First, "deliberate attacks on cultural property are often the precursor to the worst outrages against a population."¹⁹⁵ Second, deliberate attacks on cultural property have become weapons of war

[U]sed to eliminate entire communities and wipe out any traces left of them, their history and identity, as though they never existed. . . . To be sure, attacks on historic monuments and buildings dedicated to religion are de facto attacks on the very people that hold such tangible possessions near and dear to their cultural identity.¹⁹⁶

Most significantly, Bensouda suggested that the protection of cultural heritage is an essential part of the post-conflict social recon-

193. Statement of Fatou Bensouda, Prosecutor of the International Criminal Court (Aug. 22, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-al-mahdi-160822> [<https://perma.cc/45LK-XRAN>].

194. *Id.*

195. *Id.*

196. *Id.* Specifically, Bensouda gave an example of how the destruction of cultural and religious monuments allows for a revision of history. In a case before the ICTY, the trier of fact established that Serbs destroyed five mosques in the Bosnian city of Zvornik. *Id.* Bensouda contrasted these facts with the statements of the Serb-installed mayor of Zvornik who asserted in 1993 that "[t]here were never . . . any mosques in Zvornik." *Id.*; Carol J. Williams, *Serbs Stay Their Ground on Muslim Land: Bosnia: Conquering Warlords Bend History and Reality in an Attempt to Justify Their Spoils*, L.A. TIMES (Mar. 28, 1993), http://articles.latimes.com/1993-03-28/news/mn-16253_1_bosnian-serb [<https://perma.cc/Y48R-47G5>].

struction and reconciliation process where cultural heritage serves as a common reference point and provides a sense of community continuity.¹⁹⁷ She continued:

My message today is this: our cultural heritage is not a luxury good. Our cultural heritage is a vital instrument of human development.

To protect cultural property is to protect our culture, our history, our identity, and our ways of expressing faith and practicing religion for current and future generations. We must protect our common heritage from desecration, ravages and the long-term effects of such destructive acts.¹⁹⁸

Interestingly, Bensouda emphasized the cultural virtue rather than the religious aspects of the historic structures.¹⁹⁹

The defendant's guilty plea may have avoided a full-fledged criminal trial on the charges, but the successful prosecution for the destruction of religious or cultural sites elevates the status of the crime of cultural heritage destruction, nonetheless. Al Mahdi was sentenced to a prison term of nine years, a sentence on the low end of the range suggested by the prosecution.²⁰⁰ Moreover, the conviction of Al Mahdi sets a precedent for the prosecution of members of ISIS for their roles in the destruction of historic and religious sites throughout the Middle East, including the Temple of Baalshamin and the Temple of Bel in Syria.

4. *Jurisdiction*

The ICC is designed to be a court of last resort.²⁰¹ The Rome Statute provides for jurisdiction *ratione personae* over natural persons who are over the age of eighteen,²⁰² thereby excluding jurisdiction against organizations such as states or ISIS in general.²⁰³ Three avenues exist for the ICC to prosecute a matter: (1) referral by a state party,²⁰⁴ (2) an investigation initiated by the ICC prosecutor,²⁰⁵ or (3)

197. See Statement of Fatou Bensouda, *supra* note 193.

198. *Id.*

199. See *id.*; see also Gerstenblith, *supra* note 56, at 387 (analyzing the Prosecutor's statements when the Trial Chamber confirmed criminal charges against Al Mahdi).

200. *Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶ 106 (Sept. 27, 2016). The Prosecution sought a sentence of between nine and eleven years. *Id.*

201. Brammertz, *supra* note 136, at 1172.

202. Rome Statute, *supra* note 13, art. 26.

203. *Id.* arts. 1, 25(1). In addition, the Rome Statute does not permit trials in absentia. *Id.* art. 63(1).

204. *Id.* arts. 13(a), 14.

205. *Id.* arts. 13(c), 15.

U.N. Security Council referral.²⁰⁶ The geographic scope of the ICC's jurisdiction, *rationale loci*, varies depending on the mechanism by which the case comes to the court.²⁰⁷ In the event that the U.N. Security Council refers the matter, jurisdiction covers the territory of every state in the world, whether or not the state in question is a party to the Rome Statute.²⁰⁸ If the matter is referred by a state party or initiated proprio motu by the prosecutor, the court's jurisdiction is more restricted. Under those circumstances, jurisdiction extends to the territory of a nonparty state only if that state consents to the jurisdiction of the court, and either the acts were committed in the territory of the consenting state or the accused is a national of the consenting state.²⁰⁹

a. Referral: State Parties and the ICC

Because the Rome Statute does not envisage the ICC as the primary tribunal for perpetrators of certain crimes under international criminal law,²¹⁰ the responsibility for investigating and prosecuting perpetrators of crimes within the ICC's jurisdiction remains first with domestic courts.²¹¹ Under the principle of complementarity, jurisdiction is only granted to the ICC when a country with primary competency is unwilling or unable to investigate or prosecute the crime at issue.²¹² The principle of complementarity has a number of benefits. First, it allays fears that the ICC will encroach upon the sovereignty of nations; and second, the existence of potential jurisdic-

206. *Id.* art. 13(b). Although the ICC is designed to be independent of the United Nations, the ICC retains ties to the United Nations through the Security Council's referral power. See Sadat & Carden, *supra* note 158, at 400.

207. Sadat & Carden, *supra* note 158, at 404.

208. Rome Statute, *supra* note 13, art. 13(b). Because the Security Council will refer cases only under its Chapter VII powers, referral to the ICC, like the establishment of ad hoc tribunals, is presumably a measure "not involving the use of force" that the Security Council may adopt to maintain international peace and security. See Sadat & Carden, *supra* note 158, at 404; Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 34-36 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

209. Rome Statute, *supra* note 13, arts. 4(2), 12(2).

210. Brammertz, *supra* note 136, at 1172 (noting that the ICC is the court of last resort); Goldstone, *supra* note 159, at 21; Michael J. Kelly, *Can Sovereigns Be Brought to Justice? The Crime of Genocide's Evolution and the Meaning of the Milosevic Trial*, 76 ST. JOHN'S L. REV. 257, 322 (2002) (noting that the ICC's jurisdiction is specifically complementary); Sadat & Carden, *supra* note 158, at 396 (noting that the ICC does not operate on the basis of primary jurisdiction).

211. Goldstone, *supra* note 159, at 21.

212. Rome Statute, *supra* note 13, art. 17.

tion acts as an incentive for sovereign nations to investigate and punish the crimes under the ICC's jurisdiction.²¹³

Currently, jurisdiction presents a stumbling block to the international prosecution of ISIS. Syria and Iraq are not parties to the Rome Statute, and therefore, the ICC does not have jurisdiction over the crimes committed in those countries unless the U.N. Security Council has referred the situation to the court.²¹⁴ Still, a nonparty may avail itself to ICC jurisdiction, as Cote d'Ivoire, Uganda, and Palestine have previously done.²¹⁵ Under Article 12(3) of the Rome Statute, a nonparty state may declare that it accepts the jurisdiction of the ICC, "with respect to the crime in question" without ratifying or acceding to the full Rome Statute.²¹⁶ Although the use of Article 12(3) is somewhat controversial,²¹⁷ there have been repeated calls for Syria and Iraq to accept the jurisdiction of the ICC.²¹⁸ Such calls have so far

213. Goldstone, *supra* note 159, at 21.

214. Rome Statute, *supra* note 13, art. 13(b).

215. William Schabas, *The International Criminal Court and Non-Party States*, 28 WINDSOR Y.B. ACCESS JUST. 1, 8 (2010).

216. Rome Statute, *supra* note 13, art. 12(3).

217. Article 12 has been criticized in the past as allowing a means for a nation to shield itself from ICC jurisdiction, but then to use ICC jurisdiction offensively. For example, the United States argued that Article 12(3) would allow Saddam Hussein to selectively invoke ICC jurisdiction against the United States for alleged crimes committed by the United States in Iraq while at the same time shielding his regime from jurisdiction for the alleged atrocities committed by the Hussein regime against Iraqis. See David J. Scheffer, *A Negotiator's Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 8 (2001); Schabas, *supra* note 215, at 9. In response to such concerns, a provision of the ICC Rules of Procedure and Evidence established:

Rule 44. Declaration provided for in article 12, paragraph 3

1. The Registrar, at the request of the Prosecutor, may inquire of a State that is not a Party to the Statute or that has become a Party to the Statute after its entry into force, on a confidential basis, whether it intends to make the declaration provided for in article 12, paragraph 3.

2. When a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12, paragraph 3, or when the Registrar acts pursuant to sub-rule 1, the Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning State Parties, shall apply.

Report of the Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/2000/1/A/Add.1, at 17 (2000). The Rule's intent is to make one-sided manipulation of jurisdiction impossible. Schabas, *supra* note 215, at 10 (2010).

218. For example, a February 2, 2016 Resolution of the European Parliament regarding the systematic mass murders of religious minorities urged Iraq and Syria to "accept the jurisdiction of the International Criminal Court." Resolution on the Systematic Mass Murder of Religious Minorities by the So-Called 'ISIS/Daesh', EUR. PARL. DOC. 2016/2529 (2016).

gone unanswered. Neither Syria nor Iraq has indicated that it will accept ICC jurisdiction.

b. An Investigation Initiated by the ICC Prosecutor

The ICC Prosecutor may initiate investigations proprio motu on the basis of information regarding crimes within the jurisdiction of the court.²¹⁹ Again, however, the ICC Prosecutor is hamstrung by jurisdiction. Since neither Syria nor Iraq is a party to the Rome Statute, the ICC Prosecutor lacks territorial jurisdiction to open an investigation under Article 12.²²⁰ The ICC Prosecutor could still open an investigation against ISIS members who are nationals of state parties under Article 12(2)(b).²²¹ Because the majority of ISIS's leadership hails from Iraq and Syria,²²² the prosecution would have the unintended consequence of only reaching a limited number of responsible members, a particularly troublesome result given the Rome Statute's goal of placing "State and non-State actors side-by-side in the international arena."²²³

In a statement on April 8, 2015, ICC Prosecutor Fatou Bensouda addressed these issues.²²⁴ While recognizing the numerous reports of ISIS's crimes, including genocide, mass executions, rape, and "the wanton destruction of cultural property," the ICC Prosecutor stressed that the ICC had no territorial jurisdiction over crimes committed on the soil of non-state parties.²²⁵ While the ICC could exercise personal jurisdiction over alleged perpetrators who are nationals of state parties, ICC Prosecutor Bensouda reiterated the ICC's policy to "focus on those most responsible for mass crimes."²²⁶ Although a significant number of state party nationals have joined the ranks of ISIS,²²⁷ the ICC Prosecutor stressed that ISIS is "primarily led by nationals of

219. Rome Statute, *supra* note 13, art. 15(1).

220. *Id.* art. 12 ("[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court.").

221. *Id.* art. 12(2)(b) (recognizing jurisdiction over nationals of party states).

222. See SMITH, *supra* note 106, at 9; Childress, *supra* note 118; Lister, *supra* note 118.

223. LEILA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW 8 (2002).

224. Statement of Fatou Bensouda, Prosecutor of the Int'l Criminal Court (Apr. 8, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1> [<https://perma.cc/QP2G-US4B>].

225. *Id.*

226. *Id.*

227. The Prosecutor named Tunisia, Jordan, France, the United Kingdom, Germany, Belgium, the Netherlands and Australia as examples where "significant numbers of State Party nationals" have joined ISIS. *Id.*

Iraq and Syria,” thereby rendering the prospects of a prosecutor-initiated prosecution of ISIS leaders “limited.”²²⁸

c. United Nations Security Council Referral

Finally, the ICC may exercise jurisdiction if “[a] situation . . . is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”²²⁹ With its basis in Chapter VII, the Security Council’s referral is conditioned upon the determination that the referred situation constitutes an imminent threat to international peace and security.²³⁰ The Security Council has twice referred situations to the ICC. It referred the situation in Darfur, Sudan to the ICC in March 2005,²³¹ and referred the situation in Libya in February 2011.²³²

The Security Council has previously rejected referral of the situation in Syria to the ICC.²³³ The most significant roadblock for Security Council referral is the current positioning of permanent members of the Security Council in Syria. For example, France’s allegation that Russia committed war crimes in Syria complicates any potential Security Council referral.²³⁴ Even after that confrontation, however,

228. *Id.*

229. Rome Statute, *supra* note 13, art. 13(b); *see also* Statement of the Fatou Bensouda, *supra* note 224 noting that the Security Council’s decision to confer jurisdiction on the ICC is independent of the Court).

230. U.N. Charter art. 39; *see also* Stuart Ford, *The ICC and the Security Council: How Much Support is There for Ending Impunity?*, 26 *IND. INT’L & COMP. L. REV.* 33, 41 (2016).

231. S.C. Res. 1593 (Mar. 31, 2005). The U.N. Security Council passed the referral of the Darfur situation to the ICC with eleven votes and four abstentions, including the abstention of two of the five members of the Permanent Security Council (China and the United States). For a more detailed analysis of the U.N. Security Council’s referral to the ICC, *see generally* Corrina Heyder, *The U.N. Security Council’s Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court’s Functions and Status*, 24 *BERKELEY J. INT’L L.* 650 (2006).

232. S.C. Res. 1970 (Feb. 26, 2011) (referring the situation dating onward from February 15, 2011, to the ICC).

233. Press Release, U.N. Sec. Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, SC/11407 (May 22, 2014), <https://www.un.org/press/en/2014/sc11407.doc.htm> [<https://perma.cc/TZV6-VMGA>] (noting that Russia and China voted against the referral of the situation in Syria to the ICC).

234. Russia, as one of five Permanent Members of the U.N. Security Council, has veto power of any U.N. resolution. *See* U.N. Charter art. 27, ¶ 3. Given that France, another Permanent Member of the U.N. Security Council, has recently alleged that Russia committed war crimes in Syria, the Russian Federation is unlikely to approve any permanent tribunal where Russia may find itself charged by an independent prosecutor with war crimes for its role in the Syria conflict. *See* Julian Borger & Kareem Shaheen, *Russia Accused of War Crimes in Syria at UN Security Council Session*, *GUARDIAN* (Sept. 26, 2016), <https://www.theguardian.com/world/2016/sep/25/russia-accused-war-crimes-syria-un-security-council-aleppo> [<https://perma.cc/4KRA-HEWH>].

the Security Council has continued to express concern regarding the events in Syria and Iraq, including the continued destruction of cultural heritage in the region. For example, in January 2017, the Security Council members issued a statement where it “reiterated their condemnation of the destruction of cultural heritage in Syria by ISIL/Da’esh” and “underlined the need to bring perpetrators of these acts to justice.”²³⁵ In addition, the Security Council statement reiterated its continued support for Security Council Resolution 2199, which, among other things, takes a stand against allowing terrorist groups, including ISIS, to raise funds through the antiquities trade.²³⁶

One question regarding Security Council referral is whether the Security Council can make a “limited referral” when it refers a “situation” to the ICC. For example, whether the Security Council may limit its referral to only the situation concerning ISIS in Iraq and Syria to the ICC. Given the few matters that the Security Council has referred to the ICC, the issue has not been fully developed. However, the Security Council’s referrals in Darfur and Libya suggest that possibility. In its referral involving Libya, the Security Council Resolution specifically asserted:

4. *Decides* to refer to the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;

. . . .

6. *Decides* that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State²³⁷

The provision notably excludes nationals from states that are not a party to the Rome Statute if they are engaged in peacekeeping opera-

235. Press Release, U.N. Sec. Council, Security Council Press Statement on Destruction of Cultural Heritage, Executions in Palmyra, SC/12690 (Jan. 20, 2017), <https://www.un.org/press/en/2017/sc12690.doc.htm> [<https://perma.cc/S56X-ZVYP>].

236. S.C. Res. 2199 (Feb. 12, 2015) (emphasizing that Members States are required to ensure that their nations and others in their territories do not make economic resources available to terrorist groups through trade, including through oil, other natural resources, and the antiquities trade).

237. S.C. Res. 1970, ¶¶ 4, 6 (Feb. 26, 2011) (referring the situation dating onward from February 15, 2011, to the ICC).

tions in Libya from ICC jurisdiction.²³⁸ The Security Council made a similar statement in its referral of the situation in Darfur.²³⁹

The Security Council's referral of a situation to the ICC may include limitations *ratione personae* according to David Scheffer, former American Ambassador-at-Large for War Crimes Issues.²⁴⁰ As Scheffer notes:

The power of the Security Council to refer situations enables the Council to shape the ICC's jurisdiction This means that if the Council seizes the opportunity, particularly in a situation that has already engaged the Council as a threat to international peace and security, to refer a situation to the ICC, then such referral can be tailored to minimize the exposure to ICC jurisdiction of military forces deployed to confront the threat.²⁴¹

Other scholars have called Scheffer's view regarding the Security Council's power to make a limited referral of a situation to the ICC "unpersuasive."²⁴² As Robert Cryer writes, "The text of Article 13(b), in particular when read alongside Article 16, makes it clear that a situation may not be limited *ratione personae*."²⁴³ Moreover, Cryer argues that precedent suggests that situations may not be limited. Specifically, Uganda referred the situation "concerning the Lord's Resistance Army" in northern Uganda, but the ICC Prosecutor ultimately opened an investigation into events in northern Uganda more generally.²⁴⁴

238. RES SCHUERCH, *THE INTERNATIONAL CRIMINAL COURT AT THE MERCY OF POWERFUL STATES: AN ASSESSMENT OF THE NEO-COLONIALISM CLAIM MADE BY AFRICAN STAKEHOLDERS 202-203* (2017) (noting that the Security Council referral in Libya "limited the personal scope of the jurisdiction of the ICC because a well-defined group of persons is permanently exempted").

239. See S.C. Res. 1593, ¶ 6 (Mar. 31, 2005). Specifically:

6. *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.

Id.

240. David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 90-91 (2001).

241. *Id.* (footnotes omitted).

242. Cryer, *supra* note 139, at 212.

243. *Id.*

244. *Id.*; see also Press Release, President of Uganda Refers Situation Concerning Lord's Resistance Army (LRA) to International Criminal Court (Jan. 29, 2004); Press Release, Prosecutor of the International Criminal Court Opens an Investigation into North Uganda (July 29, 2004).

VI. CONCLUSION

The phenomenon of the destruction of cultural property may be a common theme in history, but the prosecution of perpetrators of such destruction is a recent development in international law. Unquestionably, ISIS's destruction of historic monuments in the Middle East pales in comparison to some of its other crimes, including the genocide of religious minorities, its televised executions, and its widespread use of rape as a means of war. Still, the failure to prosecute members of ISIS for the destruction of cultural and historic sites in the Middle East would be a grave omission of international law, and such an omission would be particularly insulting given ISIS members' wanton destruction of cultural heritage. By prosecuting ISIS members for crimes against culture, the international community can reiterate the importance of cultural heritage and, particularly, the cultural heritage of the Middle East. As this Article has shown, the legal framework is in place for such prosecutions. The only thing left is for members of the international community to act so that these perpetrators may be brought to justice.

