

INTENTIONAL DESTRUCTION AND SPOILIATION OF CULTURAL HERITAGE UNDER INTERNATIONAL CRIMINAL LAW

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ABSTRACT

International criminal law targets the most serious crimes against humanity. Its prosecutors seek justice for those who commit the most horrific of acts: mass murder, human trafficking, and the like. It attempts to apply legal standards to the actions of individuals during armed conflict and mass atrocity. Now, cultural heritage destruction will be considered as a part of international criminal law with the decision by the International Criminal Court to bring charges for cultural heritage destruction for the first time. This finds international criminal law exploring an ambitious new arena, premised on the idea that when a people move through conflict and unrest, their cultural heritage will help to rebuild what has been lost. On September 18, 2015, the ICC issued a warrant for the arrest of Ahmad al-Mahdi al-Faqi, charging him with the destruction of 10 buildings of cultural importance in Timbuktu during the summer of 2012. The announcement has the potential to increase the profile of cultural heritage crimes. It will demonstrate that a population's culture is essential.

I. INTRODUCTION	150
A. The Long History of the Offense of Cultural Destruction.....	152
B. Early International Legal Efforts	160
II. THE OFFENSE OF DESTROYING CULTURAL HERITAGE UNDER INTERNATIONAL CRIMINAL LAW	162
A. Intentional Destruction of Cultural Property as a Crime Against Humanity.....	167
B. War Crimes as one basis for prosecution of intentional destruction	171

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III.INTERNATIONAL COURTS WITH JURISDICTION.....	179
A. Post-Conflict Tribunals and the Prosecution.....	180
B. The International Criminal Court	181
C. The Destruction in the Aftermath of the Arab Spring	183
IV.CONCLUSION.....	190

I. INTRODUCTION

The international community has been shocked at the repeated and widespread attacks on cultural heritage. The attacks on the Buddhas in the Bamiyan Valley of Afghanistan seemed extreme,¹ but events in Syria and Iraq have taken this destruction to new levels. States in Africa and the Middle East have become targets for a troubling wave of cultural destruction. Many of these conflicts can be tied to the “Arab spring” uprisings which started in Tunisia in 2010 and gained continued momentum during the Egyptian revolution in 2011.²

Cultural heritage will always be vulnerable during periods of upheaval. It is open, publicly accessible, and the more important it is to a community or people, the more likely some groups may attempt to target it to politicize the destruction of heritage and to manipulate international opinion.³

In remarks delivered at the Metropolitan Museum of Art in 2014, then U.S. Secretary of State John Kerry remarked that the destruction of heritage

¹ In March, 2001 the Taliban authorities in Afghanistan destroyed two giant figures of Buddha which were carved into cliffs in the Bamiyan province. The Taliban also sought the destruction of the many other sculptures which dated from the time when Afghanistan’s place on the Silk Road made it a center of Buddhist culture. The destruction was ordered by Mullah Omar Mohamed Omar, on the grounds that the figures violated the Islamic faith’s rules on graven images. N.Y. TIMES, (Mar. 3, 2001), <http://www.nytimes.com/2001/03/03/world/buddhas-of-bamiyan-keys-to-asian-history.html>.

² Monica Hanna, *What Has Happened to Egyptian Heritage after the 2011 Unfinished Revolution?*, 1 J. EASTERN MEDITERRANEAN ARCHAEOLOGY & HERITAGE STUD. 371 (2013); Sarah Parcak et al., *Satellite Evidence of Archaeological Site Looting in Egypt: 2002–2013*, 90 ANTIQUITY 188 (2016); Rick Gladstone, *Explosion Destroys Ancient Cultural Heritage Site in Yemen Capital*, N.Y. TIMES, (Jun. 12, 2015), <https://www.nytimes.com/2015/06/13/world/middleeast/yemen-sana-explosion-houthis-saudi-arabia.html>; see, e.g., Garry Shaw, *Yemen’s historic sites damaged in airstrikes after ceasefire fails*, THE ART NEWSPAPER (May 19, 2015), <http://theartnewspaper.com/news/conservation/yemen-s-historic-sites-damaged-in-airstrikes-after-ceasefire-fails/>.

³ As Jean-Luc Martinez, director of the Louvre, told the New York Times in 2016 about efforts by his museum to bring attention to the destruction of sites: “all are under threat from pillaging, neglect or destruction and are not accessible to the public,” and the exhibition was an attempt to move the perception of the public at large “in the face of the devastation of unique heritage.” Marlise Simons, *Damaged by War, Syria’s Cultural Sites Rise Anew in France*, N.Y. TIMES, (Dec. 31, 2016), <https://www.nytimes.com/2016/12/31/world/europe/destroyed-by-isis-syrias-cultural-sites-rise-again-in-france.html>.

in Syria is a “purposeful final insult” which robs “the soul of millions.”⁴ He urged action: “How shocking and historically shameful it would be if we did nothing while the forces of chaos rob the very cradle of our civilization.” The actions that can be taken currently under international law are somewhat limited. This article takes up the narrow question of how cultural heritage can be secured from intentional destruction. This work does not discuss the other pressing problems during armed conflict: looting of archaeological sites,⁵ the illicit trafficking in cultural objects,⁶ or the seizure and misappropriation of these objects.⁷ With the important return of political self-determination and a move away from the rigid control of colonial domination, states and peoples are increasingly in need of their culture to remember their own history. The political turmoil in Mali shows the difficulty in preventing the destruction of cultural heritage during armed conflict. Northern Mali has seen increasing conflict since the first months of 2012. The conflict has inflicted the loss of religious objects, centers of religious worship and devotion, and the very public destruction of sites.⁸

The scope of this work will cover the aspects of tangible cultural heritage, which means monuments, buildings, cultural sites, and works of art such as painting, sculpture, or the like.⁹ In the past, the term cultural property has been used to define the works of art and culture that are at risk during armed conflict.¹⁰ Cultural heritage can be defined as “the physical and intangible elements associated with a group of individuals which are created and passed from generation to generation.”¹¹ This piece will use both terms interchangeably, though the preferred term for purposes of considering the

⁴ John Kerry, U.S. Secretary of State, Keynote Address at Heritage in Peril: Iraq and Syria Event, U.S. DEPARTMENT OF STATE, (Sept. 22, 2014).

⁵ Patty Gerstenblith, *Archaeology in the Context of War: Legal Frameworks for Protecting Cultural Heritage during Armed Conflict*, 5 *ARCHAEOLOGIES* 18, 18 (2009).

⁶ Simon Mackenzie & Tess Davis, *Temple Looting in Cambodia: Anatomy of a Statue Trafficking Network*, 54 *BRIT. J. CRIMINOLOGY* 722 (2014).

⁷ Wayne Sandholtz, *Dynamics of International Norm Change: Rules against Wartime Plunder*, 14 *EUR. J. INT’L RELATIONS* 101, 101 (2008).

⁸ According to the International Committee of the Red Cross, destruction means “demolishing manufactured products, installations and materials, or interrupting them or putting them out of order, for offensive or defensive purposes in the course of military operations”. See PIETRO VERRI, *DICTIONARY OF THE INTERNATIONAL LAW OF ARMED CONFLICT* 40–41 (1992).

⁹ See, e.g., Jiri Toman, *PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT* 40 (1996).

¹⁰ See Janet Blake, *On Defining the Cultural Heritage*, 49 *INT’L & COMP. L. Q.* 61, 65 (2000).

¹¹ Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 *PA. ST. L. REV.* 641, 668 (2011).

impact of policy on future generations is cultural heritage.¹²

The destruction of cultural heritage of all mankind has suffered tremendous damage throughout history. But more recently this destruction has increased in intensity. International organizations like UNESCO and the United Nations have condemned destruction even as the destroyers of culture use technology to document and spread evidence of their destruction. The traditional view of international law has been one directed against states, and governing interstate relations. This has shifted though to account for the responsibility of individuals as well, including at the domestic court level, but also before international courts.

This article will discuss the development of international criminal law as it applies to the destruction of art and cultural heritage. It will examine in depth the problems posed by non-international armed conflict, non-state actors, and the exception for military necessity in protecting cultural heritage. It concludes that the law protecting cultural heritage and the responsibility of individuals and states has a long and well-settled place in domestic and international law. It concludes by examining the prospects for prosecution of individuals in the ongoing conflict in Syria and Northern Iraq and highlights the limitations of the International Criminal Court as a continuing forum for these prosecutions.

A. *The Long History of the Offense of Cultural Destruction*

Armed conflict seemingly inevitably causes the theft,¹³ looting,¹⁴ and

¹² As the author has argued before, heritage “is a web of interconnected subjective interests. It is the manifestation of culture, a reminder of past cultures, and a tool by which cultures ebb and flow and change over time.” *Id.* at 669–70.

¹³ The Horses of Saint Mark are perhaps the best example of this. The four bronze horses are attributed to the classical Greek sculptor Lyssippos; and were long displayed at the Hippodrome in Constantinople. They were taken during the Fourth Crusade to Venice. In 1797, Napoleon carried them back to Paris where they were used in the design of the Arc de Triomphe du Carrousel before their return to St. Mark’s Basilica in Venice in 1815. The cathedral was a place of worship, but also a place to house the spoils of the Fourth Crusade:

The Venetians had played a key role in the complex series of events that diverted the Fourth Crusade from its original goal in the Holy Land and that culminated in the conquest of Constantinople. Their reward was commensurate.... The resplendent adornment of the facades of the church of the city’s patron saint was conceived as a triumphant declaration of the Serenissima’s new status as a great power in the Mediterranean world. The link between the new decoration and the conquest of 1204 is direct and concrete, for the facades incorporate numerous spoils carried off from Constantinople. It is widely assumed that this is the manner in which many of the columns, revetment panels, and works of sculpture were acquired.... Of course, the most celebrated of all the prizes brought back from Constantinople is the team of four gilded horses. MICHAEL JACOFF, *THE HORSES OF SAN MARCO AND THE QUADRIGA OF THE LORD* 2–5 (1993).

¹⁴ See, e.g., Katharyn Hanson, *Why Does Archaeological Context Matter?*, *ORIENTAL*

destruction of works of art and monuments.¹⁵ In the classical era, there was little regard paid to monuments and cultural treasures during armed conflict.¹⁶ In fact, one stated aim of conflict was the opposite: to destroy cultural sites, or to take away important cultural treasures. During the Roman campaign against Jerusalem in 70 CE, the son of the Roman Emperor Vespasian, Titus, looted and destroyed the Second Temple in Jerusalem. This conquest can be seen today in the relief on the Arch of Titus in Rome.¹⁷ The destruction of cultural heritage was often viewed as an inevitable outcome of any armed conflict.¹⁸ As Roger O’Keefe summarizes, in the sixteenth and seventeenth centuries, war, and the protection of cultural heritage during conflict was governed by the law of nature, that “as long as the end pursued by the war was just, armed violence necessary to achieve

INSTITUTE MUSEUM PUBLICATIONS NO. 28, 2008; Stefano Manacorda, ORGANISED CRIME IN ART AND ANTIQUITIES (2009); Duncan Chappell & Saskia Hufnagel, CONTEMPORARY PERSPECTIVES ON THE DETECTION, INVESTIGATION AND PROSECUTION OF ART CRIME: AUSTRALASIAN, EUROPEAN AND NORTH AMERICAN PERSPECTIVES (Routledge 2016); C.J. Chivers, *Grave Robbers and War Steal Syria’s History*, N.Y. TIMES, Apr. 7, 2013, at A1; Farah Halime, *Revolution Brings Hard Times for Egypt’s Treasures*, N.Y. TIMES, (Oct. 31, 2012), <http://www.nytimes.com/2012/11/01/world/middleeast/revolution-brings-hard-times-for-egypts-treasures.html>; Erin Thompson, *To Protect Syria’s Antiquities — Don’t Buy Them*, L.A. TIMES, (Sept. 29, 2013), <http://www.latimes.com/opinion/commentary/la-oe-thompson-syria-looting-archeology-20130929,0,4594308.story>.

¹⁵ EMR. DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 571, (Béla Kapossy & Richard Whatmore, eds., Thomas Nugent, trans., Liberty Fund, Inc. 2008) (1797). De Vattel argued:

For whatever cause a country be devastated, these buildings should be spared which are an honour to the human race and which do not add to the strength of the enemy, such as temples, tombs, public buildings and all edifices of remarkable beauty. What is gained by destroying them? It is one’s self an enemy to mankind, thus wantonly to deprive them of these monuments of art and models of taste.

¹⁶ Margaret Miles notes that the 4th Century B.C.E. Greek historian Xenophon:

[U]nderstood the ambivalence about destruction a soldier might feel that would require such reassurance . . . These two linked models of behavior in war, that the winner takes all and that some winners might show humane qualities in the aftermath of victory, are thus firmly rooted in historical memory.

MARGARET M. MILES, ART AS PLUNDER: THE ANCIENT ORIGINS OF DEBATE ABOUT CULTURAL PROPERTY 19 (2009).

¹⁷ See Jeanette Greenfield, *The Spoils of War: World War II and Its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property*, in SPOILS OF WAR 34, 35 (Elizabeth Simpson ed., 1997).

¹⁸ See Toman, *supra* note 9, at 3–4; see also ROGER O’KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 6 (2007).

that end, including destruction of enemy property, was permissible.”¹⁹ The result then was that “[w]orks of art, grand edifices, monuments and ruins were treated no differently from other civilian property of which they were a species, at least according to the bare law of nations”.²⁰

History shows many examples of religion or ideology spurring the destruction of works of art. The Byzantine Empire for instance had periods of iconoclasm.²¹ Icons had been an important aspect of the Christian religion from about the middle of the 6th century B.C.E.²² But iconoclasm became the official practice of the Byzantine Empire.²³ The period of destruction began in about 726 until about 780 C.E., before being revived again the following century from 814 until 842.²⁴

Iconoclasm also took hold in England, Germany, France and the Netherlands during the Reformation.²⁵ Iconoclasm was ordered by many rulers, in Constantinople, in England under Henry VIII, Edward VII, and by the Long Parliament during the Anabaptist uprising.²⁶ The French Revolution also witnessed the destruction of art.²⁷ Destroying art always relates in some way to political decisions. Especially when images are symbols of a previous ruling class or system of belief, iconoclasm strives to

¹⁹ O’KEEFE, *supra* note 18, at 5–6.

²⁰ *Id.* at 6 (citations omitted).

²¹ See generally Charles Barber, *From Transformation to Desire: Art and Worship after Byzantine Iconoclasm*, 75 THE ART BULL. 7 (1993).

²² See Eunice Dauterman Maguire & Henry Maguire, OTHER ICONS: ART AND POWER IN BYZANTINE SECULAR CULTURE 1-3 (2007).

²³ See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.*, 717 F. Supp. 1374, 1377 (S.D. Ind. 1989) (“During the period of Iconoclasm (roughly the 8th century), government edicts mandated the destruction of religious artifacts so that such religious ‘images’ would not be the subject of veneration. These iconoclast edicts were responsible for the destruction of many significant religious artifacts.”), *aff’d*, 917 F.2d 278 (7th Cir. 1990).

²⁴ See, e.g., Cyril Mango, *The Art of the Byzantine Empire, 312-1453: Sources and Documents 149-59* (H. W. Janson ed. 1972), in JOHN HENRY MERRYMAN ET AL., LAW, ETHICS, AND THE VISUAL ARTS 618 (Fifth ed. 2007) (citations omitted). [T]he adoption of iconoclasm by the Emperor Leo III occurred at a time when the fortunes of the Empire were at their lowest ebb, only a few years after the Arab siege of Constantinople in 717. There can be little doubt that the Emperor and his advisers attributed Byzantine reverses to the wrath of the Almighty caused by the growth of idolatry in the Christian Church.

²⁵ David Freedberg, *The Structure of Byzantine and European Iconoclasm, Iconoclasm: Papers Given at the Ninth Spring Symposium of Byzantine Studies (1977)*, in JOHN HENRY MERRYMAN ET AL., LAW, ETHICS, AND THE VISUAL ARTS 619 (Fifth ed. 2007).

²⁶ *Id.*

²⁷ See Stanley J. Idzerda, *Iconoclasm during the French Revolution*, 60 THE AMERICAN HISTORICAL REVIEW 13, 13 (1954) (“[A]ny French government wishing to justify itself in the eyes of contemporaries or of posterity would have to respect the French artistic inheritance . . . [yet the revolutionaries knew art] had been used as instruments of social control...”).

remove the vestiges of what came before.²⁸ The public destruction and removal of art and architecture from public view marks a concrete separation in regimes, and the power of the image makes this political statement possible.

Special care must be taken to distinguish the different motivations of the destruction of art. Many nations prevent the destruction of works of art on the theory that the moral rights of artists continue even when the work of art has passed on to subsequent possessors.²⁹ Courts have noted the damage done to artists individually when a work is destroyed.³⁰ Owners of works of art also have a remedy when their works of art are destroyed under property law. For example in a New York landlord dispute with Donald Trump, tenants used the destruction of works of art during repairs to avoid paying rent.³¹ In some cases, a government may decide that works of public art may not serve a useful purpose or may cause difficulty for the public at large using a public space.³²

Some decisions are made from a governing body or ruler, while others are spontaneous attacks by smaller groups that stem from a spontaneous grassroots uprising. Works of art often represent tremendous expense or even luxury. During times of economic distress, some “polemicists” may repeatedly target the wealth spent on making the art when the expenses could have been spent elsewhere on more tangible daily needs like housing, food, or the like. For example in 1566 in the Netherlands, preachers and nobility organized to destroy art to spark a revolt against Spain.³³

²⁸ See Francesco Rutelli, *The Return of Iconoclasm: Barbarian Ideology and Destruction by ISIS as a Challenge for Modern Culture, Not Only for Islam*, 14 J. ART CRIME 55, 59 (2015) (“Silently witnessing iconoclasm as a power play in the homeland of cutthroats is not a concept for 21st century men, women and institutions.”).

²⁹ Under the Visual Artists Rights Act, creators of visual works of art have the right “to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.” 17 U.S.C. § 106A(a)(3)(b) (2012).

³⁰ *Lubner v. City of Los Angeles*, 45 Cal. App. 4th 525, 533 (1996) (“[A]n artist would experience emotional distress at having his or her body of work destroyed.”).

³¹ *Trump C.P.S. L.L.P. v. Meyer*, 249 A.D.2d 22, 22 (1998) (“The tenants have not paid rent for several years, claiming a constructive eviction arising from construction work directly in front of the apartment and damages arising from the destruction of art, antiques and other personal belongings during repair work within the apartment.”).

³² *Serra v. U. S. Gen. Servs. Admin.*, 667 F. Supp. 1042 (S.D.N.Y. 1987) (dismissing sculptor's bid to stop GSA's removal and eventual destruction of sculpture “Tilted Arc”), *aff'd*, 847 F.2d 1045 (2d Cir. 1988), *superseded by statute*, Visual Artists Rights Act, 17 U.S.C. § 113(d).

³³ Freedberg, *supra* note 25, at 619. As Freedberg notes, “Hired men often took the lead and showed the way to further destruction. The participation of clergymen and monks who had convinced themselves of the wrongfulness of images is well documented from Byzantium to the Reformation and the French Revolution. During the Byzantine Iconoclastic Periods we

Even artists have participated in the destruction of works of art. During Savonarola's *bruciamenti*, otherwise referred to as the "bonfire of the vanities", Fra Bartolommeo and Lorenzo di Credi are said to have sent some of their own works into the fire.³⁴ While in the Netherlands, van Mander states that the artist Joos van Lier gave up painting entirely. As Freedberg argues, simple destruction of art has not always been the motivating factor. Instead, the destroyers hope "to render images powerless, to deprive them of those parts which may be considered to embody their effectiveness. This is why images are very often mutilated rather than wholly destroyed."³⁵ After a wave of iconoclasm, there can be a loss in artistic output. Artists and patrons may be unsure of what will be targeted, and may decide not to create works for fear they may be subject to an attack.

The idea of vandalism also shares many similarities with iconoclasm. Joseph Sax attributed the idea of vandalism to Abbé Grégoire, who "made cultural policy a litmus test of civilized values, and located in the ideological geography of the French Revolution. The nation decides what it will be as it stands before its artistic, historical, and scientific monuments, hammer in hand."³⁶

The concept of spoliation has a long history in the law.³⁷ The word *spolia* in Latin meant arms and armor initially captured from the enemy; later though it came to mean objects looted. Ultimately it came to refer to works of art or architectural elements which were removed and placed in another context.³⁸ The concept of spoliation has been used to draw attention to the problem of removal of indigenous culture and resources.³⁹ Justice Harlan of the Supreme Court reasoned that the Due Process Clause of the Fourteenth Amendment required just compensation for eminent domain

know that there were Iconoclastic monks and monasteries." *Id.*

³⁴ Freedberg, *supra* note 25, at 619.

³⁵ *Id.*

³⁶ Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, MICH. L. REV. 1142, 1161 (1990).

³⁷ See Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, 28 VAND. J. TRANSNAT'L L. 45, 48 n.1 (1995) (defining indigenous spoliation as "an illegal act of depredation committed for private ends by constitutionally responsible rulers, public officials, or private individuals.").

³⁸ MILES, *supra* note 16, at 15 n. 2.

³⁹ As Michael Reisman has argued:

The ritual of condemnation of foreign corporations' spoliations of the resources of developing [states] and their elevation to the level of international concern have obscured the problem of spoliations by national officials of the wealth of the states of which they are temporary custodians. . . . [This causes a great deal] of confusion and paralysis about the status of national funds spoliated by high government officials and cached abroad.

W. Michael Reisman, *Harnessing International Law to Restrain and Recapture Indigenous Spoliations*, 83 AM. J. INT'L L. 56, 56-58 (1989).

takings because mere forced transfer of property without compensation would amount to “not as an exertion of legislative power, but as a sentence—an act of spoliation.”⁴⁰ Under the Federal Rules of Evidence, the destruction of evidence is treated as spoliation.⁴¹

Yet there exists a tension here between ideas of state sovereignty, individual rights in property, and preservation for future generations.⁴² As Joseph Sax argued, “[t]he collector has a very peculiar position in the society. He or she is crucial to the protection of objects that are of great importance to a community of national, or even global, scope.”⁴³ Take the peculiar example posed in 1982 by a Texas millionaire named Cullen Davis and an evangelist named James Robison. These two men—echoing the efforts of Savonarola in Florence during the renaissance bonfire of the vanities—destroyed works of art made of jade, ivory, and lapis lazuli—all worth as much as a million dollars at the time.⁴⁴ Davis reportedly destroyed his valuable art after being overcome by religious fervor.⁴⁵ This destruction can be criticized on many of the same levels as the intentional destruction of monuments and other objects. The difference though is that these objects have not entered the realm of public interest as laid out by domestic law. In the United States, works of movable art can be controlled and preserved for future generations only after they have entered the public trust,⁴⁶ meaning they have been acquired by public institutions such as a museum.⁴⁷

The destruction of art can also take place domestically, as a part of a message to the public at large. This was the case in 1993 when a car bomb was

⁴⁰ *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 227, 235-36 (1897).

⁴¹ *See, e.g., Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 476 (entering a default judgment when the defendant had been found to destroy potentially harmful documents in the suit), *aff'd in part and rev'd in part*, 775 F.2d 1440 (11th Cir. 1985); *but see Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 521 (Cal. 1998) (holding a party has no cause of action for spoliation if he should have known of the spoliation before trial).

⁴² The author has examined this tension at length elsewhere, *see generally* Fincham, *supra* note 11, at 5.

⁴³ JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* 60 (2001).

⁴⁴ Paul Taylor, *Asian Art Remains Sold For Cut Rate at Auction; Collection Destroyed In Religious Fervor*, WASHINGTON POST, Dec. 3, 1984.

⁴⁵ Bill Marvel, *Breaking up the Davis Collection: Cullen Davis Name Attracts Art Buyers, Gawkers*, DALLAS MORNING NEWS, Sept. 8, 1987, at 5C.

⁴⁶ *See generally* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); *see also* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).

⁴⁷ The process of removing works of art from the public trust is known as deaccession, and is sharply criticized in the cultural policy community. *See, e.g.,* Derek Fincham, *Deaccession of Art From the Public Trust*, 16 J. OF ART, ANTIQUITY, & LAW 1 (2011).

detonated outside the Uffizi Gallery in Florence, which damaged dozens of works in the collection.⁴⁸ The destruction was done to retaliate against efforts to increase the scrutiny of the Mafia, and caused the destruction of works by Bartolomeo Manfredi, Gherardo delle Notti, Sebastiano del Piombo, and damaged many other works by renowned artists such as Rubens and Van Dyck.⁴⁹

Certain buildings and their noteworthy architectural features can also be protected,⁵⁰ narrowing some private property interests.⁵¹ Changing or demolishing certain landmarks will often be barred or restricted.⁵² Sax rightly pointed out the importance for imposing some restrictions on owners of historic or noteworthy buildings:

[W]hile the patrons (or owners) of an important work of architecture were not obliged to engage with a masterwork, having done so they have by their own voluntary act potentially made the community worse off than it would have been if they had never acted. It is insufficient to say that the work would not have existed without their patronage. For they have diverted the time and effort of an artist from other work he might have done, and that—in other hands—might have been better protected. . . .⁵³

There are many good reasons for restricting the right to destroy, and even when a building or monument of interest to future generations is damaged or demolished, the waste echoes on. There has been a healthy debate among property scholars about whether property rights include a

⁴⁸ Alan Cowell, *Bomb Outside Uffizi in Florence Kills 6 and Damages Many Works*, N.Y. TIMES (May 28, 1993), <http://www.nytimes.com/1993/05/28/world/bomb-outside-uffizi-in-florence-kills-6-and-damages-many-works.html> (Italy's Culture Minister at the time, Alberto Ronchey said the attack was "an attack on Italy's cultural and artistic patrimony.").

⁴⁹ Patricia Clough, *Uffizi's great treasures survive "Mafia" blast: Six people killed and*, THE INDEPENDENT (May 27, 1993), <http://www.independent.co.uk/news/uffizis-great-treasures-survive-mafia-blast-six-people-killed-and-three-paintings-destroyed-by-car-2325554.html>.

⁵⁰ Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 954 (1985) (noting that New York City landmarks law seldom allows demolition of historic buildings).

⁵¹ See David F. Tipson, *Putting the History Back in Historic Preservation*, 36 THE URB. LAW. 289, 306 (2004) ("Most ordinances require a permit for demolition within the historic district, but many allow demolition after a certain period of time if the landowner has made a good-faith effort to sell the property. Savannah, Charleston, and Alexandria take this approach. Some ordinances do contain an absolute prohibition on demolition without a permit from the review board.").

⁵² See, e.g., *Kalorama Heights Ltd. P'ship v. D.C. Dep't of Consumer & Regulatory Affairs*, 655 A.2d 865, 869 (D.C. 1995).

⁵³ SAX, *supra* note 43, at 58.

right to destroy.⁵⁴ These concerns though interesting exceed the scope of the present paper. They do however point to an important assumption;⁵⁵ in many cases individuals and governmental entities must weigh interests of preservation against economic or other interests.⁵⁶ These are important considerations, and should not be cast aside lightly.⁵⁷ As Professor Levinson has argued, “almost all of us would wish to put limits on the ‘creative destruction’ allowed any new political regime, especially with regard to material artifacts that are constitutive a no-displaced culture.”⁵⁸ Factions of the United States military seemingly wanted to send a symbolic message when a statue of Saddam Hussein was brought down in April of 2003 in Paradise Square in Baghdad.⁵⁹

However the destruction at issue here carries an additional component, the intent to send a message, to destroy a way of life, and to make the practicing of culture and human flourishing more difficult for a limited group.⁶⁰ It is this

⁵⁴ See, e.g., Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005); see also Kellen Zale, *The Government's Right to Destroy*, 47 ARIZ. ST. L.J. 269 (2015).

⁵⁵ As the Louisiana Supreme Court noted with respect to the historic preservation of parts of the City of New Orleans:

The purpose of the ordinance is not only to preserve the old buildings themselves, but to preserve the antiquity of the whole French and Spanish quarter, the tout ensemble, so to speak, by defending this relic against iconoclasm or vandalism. Preventing or prohibiting eyesores in such a locality is within the police power and within the scope of this municipal ordinance. The preservation of the Vieux Carre as it was originally is a benefit to the inhabitants of New Orleans generally, not only for the sentimental value of this show place but for its commercial value as well, because it attracts tourists and conventions to the city, and is in fact a justification for the slogan, America's most interesting city.

City of New Orleans v. Pergament, 198 La. 852, 858 (1941).

⁵⁶ See generally Joseph Alsop, THE RARE ART TRADITIONS: THE HISTORY OF ART COLLECTING AND ITS LINKED PHENOMENA WHEREVER THESE HAVE APPEARED 395 (1st edition ed. 1987) (“No one on earth can define good taste or bad taste in a way that will be valid and durable, even for so short a period as two generations. There is only the good taste of a particular time and place, which may be described as the taste of those men with the best minds and eyes who have cared much about art in that time and place.”).

⁵⁷ For example, Pennsylvania Station in New York City was a Beaux-Arts building which was demolished in 1963 to make way for the construction of Madison Square Garden. See William A. Fischel, *Lead Us Not into Penn Station: Takings, Historic Preservation, and Rent Control*, 6 FORDHAM ENVTL. L.J. 749 (1994).

⁵⁸ Sanford Levinson, *Thomas Ruffin and the Politics of Public Honor: Political Change and the Creative Destruction of Public Space*, N.C. L. REV. 673, 680 (2009).

⁵⁹ ROBERT BEVAN, *THE DESTRUCTION OF MEMORY: ARCHITECTURE AT WAR* 91 (2006).

⁶⁰ The Spanish clergymen who encountered Maya culture on the Yucatan Peninsula in the 1560s often destroyed sacred Maya texts, or codices because they feared the beliefs would make the spread of Christianity more difficult. John F. Chuchiak, *Writing as Resistance: Maya*

intent which distinguishes the ordinary and rightful destruction of certain movable and immovable property from the wrongful destruction of art and cultural heritage. As the next section shows, much of that destruction has taken place during armed conflict.

B. *Early International Legal Efforts*

In response to threats to our collective cultural heritage, a patchwork treaty regime has slowly been created to respond to theft, destruction, and looting. Even the famed Roman lawyer Cicero was critical of those who stole and appropriated works of art for their own uses,⁶¹ in particular the Roman General Gaius Verres.⁶² The first of these were created to mitigate the theft and destruction of works during war. During the enlightenment, forward thinking lawyers and philosophers recognized a need to protect art and important historical areas from increasingly industrialized warfare. The Swiss jurist Emmerich de Vattel began arguing for a change in attitude regarding military tactics during armed conflicts in the eighteenth century. He argued for limits on the methods of conducting war, and carved out some activities that should be shielded from destruction.⁶³ The scholar Quatremère de Quincy also criticized Napoleon's taking because of a "common European cultural heritage", language which has been echoed in one form or another in most multilateral cultural agreements.⁶⁴

These ideas began to gain concrete international support with the advent of the "Lieber Code", formulated by the German-American political scientist Francis Lieber.⁶⁵ Lieber was a Prussian soldier who witnessed the battle of Waterloo, and also fought in the Greek War of Independence.⁶⁶ The Lieber

Graphic Pluralism and Indigenous Elite Strategies for Survival in Colonial Yucatan, 1550-1750, 57 ETHNOHISTORY 87, 91 (2010).

⁶¹ MILES, *supra* note 16, at 88 ("Cicero describes in detail Verres' plundering of art while he was serving as a legate in Asia Minor, before he became governor of Sicily. Some of it was on display during a festival in Rome, where it was seen and recognized by visitors as having come from their own temples and sanctuaries.").

⁶² See Margaret M. Miles, *Cicero's Prosecution of Gaius Verres: A Roman View of the Ethics of Acquisition of Art*, 11 INT'L J. CULTURAL PROP. 28 (2002).

⁶³ See generally VATTEL, *supra* note 15.

⁶⁴ See, e.g., Charles de Visscher, *Protection Internationale des Objets d'Art et des Monuments Historiques*, La, 16 REV. DROIT INT'L & LEGIS. COMP. (3D SER.) 246, 248 (1935).

⁶⁵ Instructions for the Government of Armies of the United States in the Field, promulgated as General Order No. 100 by President Abraham Lincoln, Apr. 24, 1863 [hereinafter Lieber Code]. The full text of the Lieber Code and other historical international instruments cited in this section may be found at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/>.

⁶⁶ MILES, *supra* note 16, at 349–52 (arguing Lieber drew "on a long tradition and theoretical discussion reaching from Cicero to Emmerich de Vattel.").

Code included penal provisions for the destruction of cultural property during armed conflict. Article 44 provided that the destruction or damage of property was “prohibited under penalty of death or other severe penalty adequate for the gravity of the offense” unless authorized by a superior officer. The code is a set of army regulations set out by President Abraham Lincoln for the conduct of the Union army during the American Civil War. This was the first attempt to codify the measures which should be taken to protect cultural property. Article 34 of the Lieber Code states that property should be treated as private property unless used for a military purpose.⁶⁷ Art is specifically mentioned in Article 35, which provides “Classical works of art, libraries, scientific collections, or precious instruments. . . must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.”

Continued concern over protecting private property produced the 1899⁶⁸ and 1907⁶⁹ Hague Conventions. These Conventions prohibit invading forces from pillaging and require them to abide by the civil laws of the conquered territory. Article 27 of the 1907 Convention provides that all religious, scientific, and historic monuments should be protected.⁷⁰ Some authors point to these conventions as of limited use, arguing that they may

⁶⁷ Lieber Code art. 34 states:

As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of fine arts, or of a scientific character—such property is not to be considered public property.

Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, art 34 (Apr. 24, 1963).

⁶⁸ Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803. The Convention was adopted at the First Hague Peace Conference in 1899 and entered into force in 1900.

⁶⁹ Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

⁷⁰ Art. 27 provides:

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 sick and wounded are collected, provided they are not being used at the time for military purposes.

Hague 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. 37, Oct. 18, 1907, 36 Stat. 2277.

have failed to prevent the destruction of cultural heritage and monuments during the First and Second World Wars.⁷¹ O’Keefe argues these rules “provided cultural property with a degree of legal protection in war.”⁷²

II. THE OFFENSE OF DESTROYING CULTURAL HERITAGE UNDER INTERNATIONAL CRIMINAL LAW

International law historically only focused on the relationships between States. Yet as armed conflict has veered away from the paradigm of multiple States in conflict, international law and international criminal law has had to adjust to these changing circumstances.⁷³ International criminal law mirrors much of the typical criminal law in that offenses consist of an *actus reus* (action) and a *mens rea* (mental element).⁷⁴ There are two broad branches of international criminal law which both can be used to prosecute an individual for the intentional destruction of cultural heritage: either crimes against humanity,⁷⁵ or war crimes. Some initial attention has been paid to a third category, known as cultural genocide, but the crime of genocide, as discussed below, does not extend yet to consider actions made to target cultural heritage. As a threshold matter then, a determination must be made about whether there is an armed conflict or some kind of targeting of the civilian population. The targeting of cultural property must also have a

⁷¹ Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 341 (2016) (“Despite the widespread acceptance of these conventions by European nations, the conventions failed to protect cultural property during the two world wars.”).

⁷² O’KEEFE, *supra* note 18, at 34 (Pointing out the limitations of the early Hague Rules with respect to bombardment, “the most destructive and indiscriminate method of warfare”).

⁷³ See, e.g., Anne-Marie Carstens, *The Hostilities-Occupation Dichotomy and Cultural Property in Non-International Armed Conflicts*, 52 STAN. J. INT’L L. 1, 5 (2016) (arguing “well-entrenched prohibitions prove woefully ineffective against the current scourge for several reasons. First and foremost, rules based on good-faith adherence cannot protect the “cultural heritage of mankind“ in conflicts where belligerents flagrantly violate these rules and target cultural property precisely for its cultural connotations.”).

⁷⁴ As the ICTY Appeals Chamber stated:

[T]he principle of individual guilt requires that an accused can only be convicted for a crime if his *mens rea* comprises the *actus reus* of the crime. To convict him without proving that he knew of the facts that were necessary to make his conduct a crime is to deny him his entitlement of the presumption of innocence.

Prosecutor v. Naletilić, Case No. IT-98-34-T, Judgment, ¶ 114 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003), http://www.icty.org/case/naletilic_martinovic/4.

⁷⁵ See, e.g., Diana Kearney, *Food Deprivations as Crimes against Humanity*, 46 N.Y.U. J. INT’L L. & POL. 253, 263 (2013) (discussing the history of the term “crimes against humanity” which had its roots in the Armenian Genocide by Ottoman forces in 1915, and was firmly established with the Nuremberg Tribunal in 1945.).

connection with the conflict.⁷⁶ Then the elements of the actus reus or mens rea may be considered.

International criminal law provides for criminal responsibility for individuals who violate the norms erected by international humanitarian law.⁷⁷ The Statute of the International Court of Justice offers guidance for the sources of international criminal law. Article 38(1) states:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. International custom, as evidence of a general practice accepted as law; c. The general principles of law recognized by civilized nations; d. Subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁷⁸

The Rome Statute of the International Criminal Court, in Article 21 similarly provides for the sources of international criminal law.⁷⁹

A number of treaties offer precedent for the idea that international criminal law prohibits the destruction of cultural heritage. Among these are the 1954 Hague Convention,⁸⁰ and the 2001 UNESCO Convention

⁷⁶ See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶ 444 (June 1, 2001), <http://unictr.unmict.org/en/cases/ict-96-4>; *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Appeals Chamber Judgement, ¶ 569-70 (May 26, 2003), <http://unictr.unmict.org/en/cases/ict-96-3>.

⁷⁷ Antonio Cassese, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 4 (1998).

⁷⁸ Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 933.

⁷⁹ Rome Statute of the International Criminal Court art. 21, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [Rome Statute].

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

⁸⁰ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 (entered into force Aug. 7, 1956) [1954 Hague

prohibiting the intentional destruction of cultural property.⁸¹

Customary international law also plays an important role in determining the scope of international criminal law. The International Court of Justice has held two elements must be met to elevate a norm to customary international law. First the act concerned has to be reflected in consistent State practice. Second, the State practice has to be adhered to out of a sense of legal obligation, otherwise known as *opinio juris*.⁸² To fully analyze State practice and *opinio juris*, legislation, court precedent, and official State acts should all be considered. The decisions of international courts and tribunals also illustrate State practice and show the gradual development of customary international law. General principles of law which have been recognized by civilized nations also offer a potential source for international criminal law. International criminal law has yet to evolve to a consistent workable set of offenses, especially for the intentional destruction of cultural heritage.

A growing number of sources in international law establish individual responsibility for destruction of cultural heritage. This includes Article 28 of the 1954 Hague Convention, the 1977 Protocol I of the Geneva Convention, The ICTY Statute 3(d), the 1998 Rome Statute of the ICC, as well as the 1999 Protocol to the 1954 Hague Convention.⁸³ The Italian law professor Francesco Francioni demonstrated the link between protection of cultural heritage and individual criminal responsibility has not just been seen in international law, but also in “the case law of international courts and tribunals”.⁸⁴

One good argument for prosecuting individuals for the intentional destruction of cultural property may be because it builds public confidence in the rule of law. The rule of law can be difficult for local populations to believe in of course when they are suffering atrocities such as mass executions, systematized rape, or the use of child soldiers. But does the destruction of cultural heritage rise to this level? How can crimes against culture be compared to these other horrific acts? One aspect to consider is that post-conflict, societies will need to move forward. Will there be a need for criminal prosecution, or other forms of accountability such as peace and reconciliation tribunals or compensation? O’Keefe plainly states the position

Convention], <http://treaties.un.org.proxy.stcl.edu/doc/PublicationfUNTS/Volume%20249/volume-249-I-3511-English.pdf>.

⁸¹ UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (Oct. 17, 2003), http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁸² See, e.g. North Sea Continental Shelf (Fed. Republic of Ger. v. Den.; Fed. Republic of Ger. v. Neth), 1969 I.C.J. 3, 44 (Feb. 20).

⁸³ 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 (2003).

⁸⁴ *Id.* at 1217.

of international criminal law: “Unlawful acts of hostility against cultural property other than attacks also give rise to individual criminal responsibility under customary international law, regardless of whether the acts take place in international or non-international armed conflict.”⁸⁵ O’Keefe also notes that many German war criminals tried at Nuremberg were convicted of destroying cultural property during WWII.

There have been four phases of the development of international criminal law, and crimes against cultural property have been an important aspect or component in all these stages. The first phase occurred after the Second World War with the Nuremberg and Tokyo tribunals which prosecuted Nazi and Japanese individuals for committing crimes against humanity and war crimes.⁸⁶ Substantive international law developed to respond to the horrors of World War II, including the 1948 Genocide Convention, the 1949 Geneva Convention, and the 1954 Hague Convention. These instruments erected safeguards which agreed to make genocide a war crime under domestic law, and obligated them to prosecute or extradite those who are alleged to have committed these acts.⁸⁷

The second stage took place in the form of criminal tribunals erected to respond to conflict. With the mass atrocities which took place in the Balkan wars and the atrocities suffered by many in Rwanda, the United Nations Security Council created international criminal tribunals for each conflict.⁸⁸ These tribunals were created because of fears that fair and impartial domestic prosecutions would be possible. As a result, the Security Council placed these international tribunals in a superior position, above the domestic courts in these areas.⁸⁹ Professor Jane Stromseth summarizes the task of these post-conflict tribunals: “to seek justice by holding major perpetrators accountable for their crimes in accordance with international standards of due process; to build a truthful record of the horrific criminal acts; and to deter future atrocities.”⁹⁰

⁸⁵ O’KEEFE, *supra* note 18, at 346.

⁸⁶ DAVID LUBAN ET AL., INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 73–74, 92–93 (2009).

⁸⁷ Steven R. Ratner & Jason S. Abrams, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 163–64 (2 ed. 2001).

⁸⁸ *Id.* at 191, 201-02.

⁸⁹ See Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Art. 9(2), May 25, 1993, U.N. Audiovisual Libr. of Int’l Law, <http://untreaty.un.org/cod/avl/pdf/ha/icty/ictye.pdf> (tribunal has primacy over national courts); Statute of the International Criminal Tribunal for Rwanda (ICTR), Art.8(2), Nov. 8, 1994, U.N. Audiovisual Libr. of Int’l Law, <http://untreaty.un.org/cod/avl/pdf/ha/icttr/icttr-e.pdf>

⁹⁰ Jane E. Stromseth, *The International Criminal Court and Justice on the Ground*, 43 ARIZ. ST. L.J. 427, 430 (2011).

The third stage responded to some drawbacks of earlier stages. In particular, the post-conflict tribunals did tremendous work in seeking justice, but were often physically removed from the populations they were meant to support. This fact managed to undermine their efficacy. As a result, advocates pushed for initiatives that would prevent international crimes from taking place by preemptively strengthening domestic judicial mechanisms by building better capacity for justice. This resulted in hybrid courts that were constructed from international and domestic judges, prosecutors, defense, and others. These hybrid courts were created in East Timor, Sierra Leone, Bosnia-Herzegovina, and Cambodia.⁹¹

The fourth stage begins with the establishment of the International Criminal Court in 2002. The ICC has jurisdiction over crimes against humanity, genocide, and war crimes. The ICC does not have universal jurisdiction though, its jurisdiction is only triggered in those countries which are a party to the treaty or consent to the jurisdiction. There are at present 114 countries which have signed on to the Rome statute. Many of the world's largest economies and important centers of cultural heritage have yet to join on to the Rome statute, including the United States, India, and China. The ICC sits at The Hague in the Netherlands and seeks to "end impunity" for international crimes.⁹²

The ICC rests on the idea of complementarity. It seeks to promote domestic proceedings first, and only has jurisdiction to prosecute genocide, crimes against humanity, or war crimes of those countries which might otherwise have jurisdiction are "unable or unwilling" to investigate or prosecute these crimes.⁹³ This complementarity works to allow States to avoid the jurisdiction of the ICC if domestic courts and authorities investigate and seek to secure prosecutions domestically for crimes which would otherwise fall under the jurisdiction of the ICC.⁹⁴ The ICC will only exercise its jurisdiction for serious crimes such as genocide, crimes against humanity, or war crimes. It can do this only if countries which might otherwise have jurisdiction of the dispute are either unable or unwilling to utilize domestic courts to hear these claims.⁹⁵

⁹¹ See LUBAN ET AL., *supra* note 86, at 108–10, 122–29.

⁹² Rome Statute of the International Criminal Court, preamble, July 17, 1998, 2187 UNTS 90.

⁹³ *Id.* at Art. 17.

⁹⁴ See, e.g., David J. Scheffer, *A Negotiator's Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 10–11 (2001).

⁹⁵ Rome Statute of the International Criminal Court, art. 17, July 17, 1998, 2187 UNTS 90.

A. *Intentional Destruction of Cultural Property as a Crime Against Humanity*

The precedent that individual criminal responsibility lies under international humanitarian law has a long and consistent precedent since the IMT Charter, and the Nuremberg Trial. Some rules of international humanitarian law will be focused more squarely on individual actions than some others which are not focused on the actions of individuals. These violations of international humanitarian law apply in internal armed conflicts.⁹⁶

For an individual to be subject to prosecution for intentional destruction of cultural property under the law preventing crimes against humanity, there are three main requirements. First, at the time of the destruction, there must have been a widespread and systematic attack, which was part of a State or group's policy directed at a Civilian population. Second, the intentional destruction must have been a part of this attack. Finally, the perpetrator of the intentional destruction must have known that the intentional destruction was a part of this systematic attack.

The requirements of the offense include the following. First, the object of the intentional destruction must have been an institution dedicated to religion, charity or education, the arts or science, or a historic monument or a work of art or science. Second, there must have been destruction or damage. Third, the destruction or damage must have been of equal gravity and severity to other related war crimes offenses. Fourth, the target of the offense could not have been a military objective. Fifth, the owner of the target of the destruction must have been a member of the group the overall attack was directed at. Sixth, the destroyer must have intentionally destroyed or damaged the target on political, racial, or religious grounds.

The prosecution of intentional destruction of cultural heritage during armed conflict has occurred with some frequency. The prosecution of intentional destruction in the absence of armed conflict marks a major expansion of the protection of cultural property and sites. Should this new offense of crimes against cultural property be classified as a new offense under the umbrella of crimes against humanity? Perhaps, particularly if groups continue to target cultural heritage and sites as a concerted aspect of their strategy, such as ISIS and other groups.

International humanitarian law overlaps with international criminal law in some respects, but carves out its own scope of protection for the individual and the culture of the individual. It serves to preserve a set of norms for these purposes during armed conflict which aim to impose "obligations on

⁹⁶ Prosecutor v. Dusko Tadić, Case No. IT-94-1, Judgment, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 15, 1999), <http://www.icty.org/case/tadic/4>.

States either to refrain from certain conduct or to provide for legislations concerning individual criminal responsibility in the case of violations of international humanitarian law.”⁹⁷

There may be a couple of prominent shortcomings in the level of protection against destruction of cultural property in international law. For one, the implementation and monitoring of nations which have ratified treaties must be sufficient to ensure rigorous compliance. Moreover, there are invariable difficulties of proof and resources which can be devoted to the investigation and prosecution of these crimes against cultural property.

In 1948 the United Nations adopted the Genocide Convention which defined the crime of genocide.⁹⁸ The final version of the Convention was silent as to the question of the intentional destruction of material cultural heritage. But draft versions did include the crime of destruction of cultural property. One early draft included as the crime of genocide the “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.”⁹⁹ This crime of cultural genocide though was rejected by the UN General assembly for a number of reasons, including:

[T]hat the concept was not susceptible to adequate definition, thereby potentially giving rise to abusive and illegitimate claims of genocide; that it might interfere with legitimate efforts by states to foster a national community and civilize so-called ‘primitive’ (generally colonial or indigenous) peoples; that the destruction of a group’s cultural attributes did not rise to the level of physical destruction, the main concern of the convention; that the subject was more appropriately left to the realm of human rights; and that its inclusion might prevent states from joining the Convention.¹⁰⁰

The Polish jurist Rafael Lemkin¹⁰¹ provided important theoretical foundations for parts of the Genocide Convention.¹⁰² Lemkin wrote that

⁹⁷ CAROLINE EHLERT, *Prosecuting the Destruction of Cultural Property in International Criminal Law: With a Case Study on the Khmer Rouge’s Destruction of Cambodia’s Heritage* 3 (2014).

⁹⁸ Matthew Lippman, *Art and Ideology in the Third Reich: The Protection of Cultural Property and the Humanitarian Law of War*, 17 DICK. J. INT’L L. 1, 60–63 (1998).

⁹⁹ Draft Convention for the Prevention and Punishment of Genocide, UN Doc. E/477 annexed to ECOSOC Res. 77 (V) of 6 August 1947, Article II(2)(e).

¹⁰⁰ Steven R. Ratner & Jason S. Abrams, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 33 (3 ed. 2001).

¹⁰¹ Ryszard Szawłowski, *Raphael Lemkin (1900-1959): The Polish Lawyer Who Created the Concept of Genocide Diplomatic File*, 14 POL. Q. INT’L AFF. 98, 99 (2005).

¹⁰² Convention of the Prevention and Punishment of the Crime of Genocide, 9 December

certain serious violations of order should rise to the level of universal jurisdiction. In effect, if a perpetrator is apprehended in a different nation than the one where the serious violation took place, that state could initiate a prosecution. One of these acts, vandalism, should be considered serious enough to warrant universal jurisdiction:

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

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

In the acts of barbarity, as well as in those of vandalism, the asocial and destructive spirit of the author is made evident. This spirit, by definition, is the opposite of the culture and progress of humanity. It throws the evolution of ideas back to the bleak period of the Middle Ages. Such acts shock the conscience of all humanity, while generating extreme anxiety about the future. For all these reasons, acts of vandalism and barbarity must be regarded as offenses against the law of nations.¹⁰³

In 1996 the ILC Draft Code also decided against prohibiting the crime of cultural genocide.¹⁰⁴ The ICTY Trial Chamber also took a dim view of the idea of cultural genocide, concluding that “customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group,” and as a consequence, “an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under

1948, 78 U.N.T.S. 277 (1948).

¹⁰³ Raphael Lemkin, *Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations* (1933).

¹⁰⁴ Int'l Law Comm'n [ILC], Draft Code of Crimes Against the Peace and Security of Mankind, art. 90-91 (1996). As clearly shown by the preparatory work for the [Genocide] Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word 'destruction', which must be taken only in its material sense, its physical or biological sense.

the definition of genocide.”¹⁰⁵ But the ICTY Trial Chamber did note that:

Where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.¹⁰⁶

In a dissenting opinion, ICTY Appeals Chamber Judge Shahabuddeen accepted the lower court’s ruling that cultural property fell outside the *actus reus* of genocide. However he emphasized the trial court’s reasoning that “[t]he destruction of culture may serve evidentially to confirm an intent, to be gathered from other circumstances, to destroy the group as such.”¹⁰⁷

The ICTY also had to contend with the issue of whether an alleged act has violated international humanitarian law: “(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met . . . ; (iii) the violation must be ‘serious’, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a ‘serious violation of international humanitarian law’ . . . ; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.”¹⁰⁸

The ICJ has also carefully refrained from equating cultural heritage destruction with genocide.¹⁰⁹ Although the concept of cultural genocide was

¹⁰⁵ Prosecutor v. Krstić, Case No. IT-98-33, Judgment, ¶ 580 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), <http://www.icty.org/case/krstic/4>.

¹⁰⁶ *Id.*

¹⁰⁷ Prosecutor v. Krstić, Case No. IT 98-33, Judgment, ¶ 53 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 19, 2004); *see also* O’KEEFE, *supra* note 18, at 356.

¹⁰⁸ Prosecutor v. Dusko Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

¹⁰⁹ As the ICTY Court has held:

[I]n the Court’s view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of

not incorporated into the Convention on Genocide, the concept has been used to establish intent. The ICTY used cultural heritage as a way to show the intent of Serbs to eradicate the culture of Bosnian Muslims.¹¹⁰

Professor Lawrence Davidson, argues that cultural genocide seems to be expanding:

Cultural genocide is alive and spreading in our world, and stands as a primary warning that if we do not break through the boundaries of our thought collectives we are doomed to reenact the wretched past, over and over again. But it is doing so under the radar, so to speak, for there are no laws against it. And, as yet, it is not perceived to have reached the level of international scandal that makes for new laws and regulations. It would seem that such a scandal is what it would take for an event to break through the thought collectives of myriad cultures and peoples and get them to act collectively in their own interest. And even then, historical memory is all too brief.¹¹¹

This is happening despite the inability of international criminal law to respond to it as a separate offence. Moving forward, as culture continues to suffer spoliation at the hands of individuals who are not part of typical armed conflicts, and as minority and other groups continue to see the destruction of their culture, the international legal community may need to rethink their hesitancy to apply the tools of international criminal law to cultural genocide.

B. War Crimes as one basis for prosecution of intentional destruction

The type of destruction which took place in the Balkan Wars during the

genocide set out in Article II of the Convention. In this regard, the Court observes that, during its consideration of the draft text of the Convention, the Sixth Committee of the General Assembly decided not to include cultural genocide in the list of punishable acts. Moreover, the ILC subsequently confirmed this approach Furthermore, the ICTY took a similar view in the Krstić case, finding that even in customary law, - despite recent developments - the definition of acts of genocide are limited to those seeking the physical or biological destruction of a group. The Court concludes that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. 91¶ 344 (Feb. 26, 2007), <http://www.icj-cij.org/docket/files/91/13685.pdf>.

¹¹⁰ O'KEEFE, *supra* note 18, at 346-47.

¹¹¹ Lawrence Davidson, CULTURAL GENOCIDE 131 (2012).

1990s, and which took place in Mali in 2012 has continued in Syria and Iraq connects in many ways to armed conflict. As the link between a people and their cultural heritage has emerged as an important focus of international law and policy, militants have chosen to target cultural heritage to perform destruction on an international stage, using righteous condemnation of senseless destruction to spread their vile message.¹¹² The ICTY defined armed conflict as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”¹¹³ Professor Federico Lenzerini makes a distinction between ancient armed conflict and contemporary norms. He noted the destruction of the Temple of Serapis in Alexandria and even the destruction of the giant Buddha statues in the Bamiyan valley can be seen as the targeting of cultural sites as an objective to help defeat the enemy and to “extinguish definitively all ashes of its resistance”.¹¹⁴

There is no comprehensive list of war crimes. Sources may include the following:

- (i) military manuals; (ii) the national legislation of states belonging to the major legal systems of the world; or, if these elements are lacking, (iii) the general principles of international justice common to nations of the world, as set out in international instruments, acts, resolutions and the like; and (iv) the legislation and judicial practice of the state to which the accused belongs or on whose territory the crime has allegedly been committed.¹¹⁵

After World War I, some initial prosecutions of twelve high-ranking members of the German military showed some promise for international criminal law.¹¹⁶ However these trials and the general lack of an international system of justice after World War I were a product of the belief that the

¹¹² Derek Fincham, *Display of Islamic Art Exposes Terrorists' Lie*, HOUSTON CHRONICLE, (Apr. 3, 2015), <http://www.chron.com/opinion/outlook/article/Fincham-Display-of-Islamic-art-exposes-6178172.php>.

¹¹³ Prosecutor v. Dusko Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

¹¹⁴ Federico Lenzerini, *The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage*, in ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW 40, 40–42 (Francesco Francioni & James Gordley eds., 2013).

¹¹⁵ ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 85 (2nd ed. 2008).

¹¹⁶ M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 Harv. Hum. Rts. J. 11, 20 (1997) (arguing that “by 1923 the Allies’ political will to pursue justice by prosecuting and punishing those who had violated international humanitarian law all but dissolved.”).

conflict was “the war to end all wars” and prosecuting individuals would prevent a lasting peace¹¹⁷ After World War II, during the Nuremberg Trial, Article 6(b) of the International Military Tribunal Charter granted that court with jurisdiction over “violations of the laws and customs of war”. Later, in 1949, the Geneva Conventions agreed that States parties to those conventions would erect penal sanctions for violations of the law of armed conflict.¹¹⁸The Austrian Professor, and drafter of the 1920 Austrian Republican Constitution defined a war crime as:

War crimes in the wider sense of the term, including offenses of international law committed by resorting to or provoking war, are delicts in a strictly legal sense. They are violations of international law committed by States or by individuals; the latter may or may not be members of the armed forces. War crimes in the narrower sense of the term are at the same time violations of national (municipal) law in so far as they constitute crimes according to the general criminal law of a State or according to particular norms of its criminal law providing sanctions against the violations of the rules of international law concerned. War crimes (in the broader sense of the term) may be committed on the territory of the State which, or whose subject, is the delinquent, or on enemy territory occupied by the armed forces of the State which, or whose subject, is the delinquent.¹¹⁹

The U.S. Military tribunal held in a post-World War II decision that: “It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations

¹¹⁷ *Id.* at 21.

¹¹⁸ Article 50 of the three Geneva Conventions of 1949 defined these grave breaches as: [T]hose involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

¹¹⁹ Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530, 531–32 (1943).

generally.”¹²⁰

After the Second World War, an international consensus emerged to prevent the death and destruction from happening again. This resulted in the formation of the United Nations, the United Nations Economic, Scientific and Cultural Organization (UNESCO). The four Geneva Conventions were adopted in 1949, as were the Universal Declaration of Human Rights, the Genocide Convention, and in 1954 the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention). The 1954 Hague Convention begins with the premise in its preamble that cultural property is the “cultural heritage of all mankind”.

In 1993 the ICTY Statute carried forward Article 6(b) of the IMT Statute with respect to violations of the laws and customs of war:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.¹²¹

This approach was extended with the ICTR Statute dealing with the conflict in Rwanda, which was an internal conflict, and which allowed for the prosecution of individuals for violations of international criminal law through the ICTR’s jurisdiction over violations of Article 3 of the 1949 Geneva Convention.

The Rome Statute defines war crimes as “serious violations of the laws and customs applicable in international armed conflict” and “serious violations of the laws and customs applicable in an armed conflict not of an international character. This language is also reflected in the statutes of other post-conflict tribunals.¹²²

A threshold matter for triggering the law of armed conflict will inevitably be whether an armed conflict has occurred. War crimes require an armed conflict. The ICC Elements of Crimes require an alleged act “took

¹²⁰ *United States v. List*, 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 759, 1239 (1950).

¹²¹ Int’l Crim. Trib. for the Former Yugoslavia Res., Article 3 (2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

¹²² *See id.* at Article 3.

place in the context of and was associated with an . . . armed conflict.”¹²³ A leading commenter on the Geneva Convention defines armed conflict as: “Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict . . ., even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.”¹²⁴

According to the ICTY Appeals Chamber definition of armed conflict: “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.”¹²⁵ The ICC has also affirmed this definition.¹²⁶

There can sometimes be a meaningful distinction drawn between international and non-international armed conflict. The distinction matters because international humanitarian law only applies in cases of international armed conflicts. As the ICTY Appeals Chamber noted in the Tadic decision: “Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.”¹²⁷ However the Appeals Chamber made clear that: “What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.”¹²⁸

Similarly, the ICC Statute offers twelve serious violations of the law of war applicable in armed conflicts which are non-international.¹²⁹ As the Tadic court held, “resort to armed forces between States” constitutes international armed conflict, while “protracted armed violence between governmental authorities and organized groups or between such groups

¹²³ International Criminal Court, Elements of Crimes, Article 8(2)(a)(i)(4) (2011).

¹²⁴ International Committee of the Red Cross, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Volume I, 32 (1952).

¹²⁵ Prosecutor v. Dusko Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

¹²⁶ Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Judgment, ¶ 209 (Jan. 19, 2007), <https://www.icc-cpi.int/drc/lubanga>; Prosecutor v. Katanga, ICC-01/04-01/07-717, Judgment, ¶ 238-39 (Jan. 30, 2008), <https://www.icc-cpi.int/drc/katanga>.

¹²⁷ Prosecutor v. Dusko Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 126 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

¹²⁸ *Id.* at 119.

¹²⁹ Statute of the International Court of Justice, Art. 8(2)(e).

within a State” would be considered an internal armed conflict.¹³⁰ Carving out “protracted armed violence” allowed the exclusion of “cases of civil unrest or single acts of terrorism”. This also distinguished armed conflict from “banditry, unorganized and short-lived insurrections or terrorist activities which are not subject to international humanitarian law.”¹³¹

Both the ICTY and the ICTR have reasoned that international armed conflict “suggests the existence of hostilities between armed forces organized to a greater or lesser extent”, making it “necessary to evaluate both the intensity of the conflict and organization of the parties” in order to make a determination if there is an internal armed conflict.¹³² The following criteria have been used: (i) the seriousness of attacks and potential increase in armed clashes; (ii) the attacks spread over a certain territory and over a certain period of time; (iii) the increase in the number of government forces; (iv) the mobilization and the distribution of weapons among both parties to the conflict; (v) whether the conflict has attracted the attention of the United Nations Security Council, and if any resolutions have spoken to the conflict.¹³³

The Rome Statute has a narrower definition of non-international armed conflict than in the Article 3 of the Geneva Conventions.¹³⁴ In the Rome Statute, Articles 8(2)(d) and (f) provide “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” are not considered armed conflicts. Article 8(2)(f) requires that non-international armed conflict must take place between “governmental authorities and organized armed groups or between such groups.” Article 1(1) of Additional Protocol II requires some kind of organization of the armed groups and Article 8(2)(f) of the Rome Statute requires the conflict be “protracted”. The Rome Statute in Article 8(2)(e) also prohibits the destruction of cultural property in internal armed conflicts.

Some authors propose that there should be a new offense created specifically as the destruction of cultural property. This may raise the profile of the efforts to prevent this kind of intentional destruction, but such an offense may not be strictly necessary. The work of the ICTY for example demonstrates that post-conflict tribunals can effectively prosecute

¹³⁰ Prosecutor v. Dusko Tadić, Case No. IT-94-1, Opinion and Judgment, ¶ 551 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) <http://www.icty.org/case/tadic/4>.

¹³¹ *Id.* at 562.

¹³² *Id.*

¹³³ EHLERT, *supra* note 97, at 115.

¹³⁴ Cultural property was not explicitly protected under the Geneva Conventions, which set up a divide between cultural heritage protection and other aspects of international human rights law. Toman argues armed conflict law sits “halfway between military necessity and the principles of humanity and chivalry which both determine the formation and application of the law.” Toman, *supra* note 9, at 73.

individuals for intentional destruction. One more problematic area though is the Rome Statute, which fails to include in its definition movable cultural objects. If it adopted for example the broader definition used in Article 1 of the 1954 Hague Convention, the ICC would be able to bring prosecutions against not only those who destroy monuments and sites, but also movable objects as well.

In the *Strugar* case, the ICTY Trial Chamber held that Article 3(d) of the ICTY Statute which dictates the protection of cultural property is a rule of international humanitarian law, which applies to both international and non-international armed conflicts.¹³⁵ In the *Strugar* case, the ICTY Trial Chamber reached a guilty verdict for the crime of “destruction or willful damage” to cultural institutions as provided under Article 3(d) of the ICTY Statute. *Strugar* played a role in the bombardment of the Old Town of Dubrovnik on December 6, 1991. During a series of bombardments which stretched three months, more than fifty civilians died and hundreds of historic buildings were damaged or destroyed.¹³⁶ Dubrovnik was listed in the UNESCO World Heritage list in 1979, granting it status as a site of importance for humanity as a whole.¹³⁷ *Strugar* was a commander in the Yugoslavian army, and ordered the bombing of the city. This bombing had no plausible military necessity justifying the attack. *Strugar* was charged with violating the laws and customs of war, in particular, with “unjustified devastation, unlawful attacks on civilian objects, destruction or willful damage to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.”¹³⁸

The destruction of the Mostar Bridge in Bosnia-Herzegovina presented an interesting case of whether a cultural monument could be the rightful target of a necessary military operation.¹³⁹ The Ottoman architect Sinan designed the bridge, and it was completed in 1566. The bridge spanned ethnically and religiously diverse neighborhoods. The bridge was destroyed by Croatian forces in 1993. Six Croatian commanders were charged for

¹³⁵ Prosecutor v. *Strugar*, Case No. IT-01-42, ¶ 230 (Int’l Crim. Trib. for the Former Yugoslavia 2005), <http://www.icty.org/case/strugar/4>.

¹³⁶ Agence France-presse, *Ex-Yugoslav Admiral Pleads Guilty in Shelling of Dubrovnik*, N.Y. TIMES, (Aug. 28, 2003), <http://www.nytimes.com/2003/08/28/world/ex-yugoslav-admiral-pleads-guilty-in-shelling-of-dubrovnik.html>.

¹³⁷ See, e.g., David Binder, *Old City Totters in Yugoslav Siege*, N.Y. TIMES, (Nov. 9, 1991), <http://www.nytimes.com/1991/11/09/world/old-city-totters-in-yugoslav-siege.html> (“Dubrovnik, listed as an international cultural treasure by the United Nations, has become a casualty of the undeclared civil war that has torn Yugoslavia apart since the Croatian republic declared independence last June.”).

¹³⁸ Prosecutor v. *Strugar*, Case No. IT-01-42-PT, Judgment, Counts 4-6 (ICTY Judgment, Third Amended Indictment filed Dec. 10, 2003).

¹³⁹ Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Annex, 68, ¶ 295-297, S/1994/674 (May 24, 1994).

various violations of the Geneva Conventions, including for the crimes of murder, rape, inhuman treatment, and persecution. The shelling of the Bridge raised the interesting question of military necessity because the bridge helped supply the Bosnian Muslim forces. The Chamber found that the Bridge was a military target at the time of the attack, but that its destruction also served to isolate the Muslim civilian population on the other side of the river, worsening the humanitarian situation there.¹⁴⁰ The Chamber noted the destruction of the Bridge had a serious impact on the cultural life of the Muslim population of Mostar. Though the destruction of the Bridge was justified by military necessity under Article 3(d) of the ICTY statute, the suffering of the civilian population was “indisputable and substantial”, which was “disproportionate to the concrete and direct military advantage expected by the destruction of the Old Bridge.”¹⁴¹ In particular, the Chamber pointed to the “immense cultural, historical and symbolic value” of the Mostar Bridge.¹⁴²

The foundation for the prosecution of intentional destruction of cultural property as an aspect of a War Crime must be predicated on the following. At the time the destruction was committed, there must have been an armed conflict or some kind of occupation. Next, there must be a connection or nexus between the offense on the one hand and the conflict or occupation on the other. Finally, the defendant must have knowledge of the occupation or conflict at the time the destructive acts were committed.

In addition there are four broad requirements for the offense. First the target of the destruction must have been an institution dedicated to religion, charity or education, the arts or science, or a historic monument or a work of art or science. Next, the site or object must have suffered destruction or been the target of destruction. Also, the destruction must not have been justified by military necessity. And finally, the destroyer must have known about the cultural or protected status of the object or site. The prosecution of the destruction of cultural property under the law of war stands as a relatively uncontroversial prospect. There are a number of precedent cases emanating from the work of the ICTY, and the Rome Statute also prohibits attacking cultural sites or objects of cultural property.

There are a number of potential flaws within the framework used to prosecute the destruction of cultural property as a war crime. First, many of the different statutes organizing international tribunals have different definitions of what the protected sites are. None of them for example adopt

¹⁴⁰ Prosecutor v. Prlić, Case No. IT-04074, Judgment, Vol. III, at 459-60 (Int'l Crim. Trib. for the Former Yugoslavia filed May 29, 2013), <http://www.icty.org/x/cases/prlic/tjug/en/130529-3.pdf>.

¹⁴¹ *Id.* at 460.

¹⁴² *Id.* at 460 – 61.

the 1970 UNESCO Convention's definition. In addition, though the ICTY statute protects movable cultural objects, the Rome Statute does not. Second, the statutes of the international tribunals allow for the defense of military necessity, which has been criticized by commenters in the past.

War crimes represent violations of a norm in international humanitarian law which carries criminal responsibility under international law. The precedent for imposing individual criminal responsibility for the violation of international humanitarian law comes directly from the London and Tokyo Charters, which provided for the Nuremburg and Tokyo tribunals erected after World War II.¹⁴³ Apart from the laws laying out the specific requirements for offenses under cultural genocide and war crimes, customary international law also can offer to shape Norms or practice rise to customary international law when "a general practice" becomes accepted as law.¹⁴⁴ The creation of this customary international law requires a belief that the practices should exist as a matter of law, known as *opinion juris*. Also, the practice must be widespread. To do this an evaluation must include the number of states which accept the practice.

Roger O'Keefe sees "no doubt that customary international law recogni[z]es individual criminal responsibility for unlawfully directing attacks against cultural property . . . Whether in international or non-international armed conflict."¹⁴⁵ This admonition extends beyond even the prohibition against attacking ordinary civilian property. An offense falls within the subject matter jurisdiction of international criminal law if three conditions are present: "First, it must entail individual responsibility and be subject to punishment. Second, the norm must be part of the body of international law. Third, the offense must be punishable regardless of whether it has been incorporated into domestic law."¹⁴⁶

III. INTERNATIONAL COURTS WITH JURISDICTION

None of the other major Conventions erected to stem the trade in illicit cultural objects, or to protect cultural objects have laid out a framework for jurisdiction.¹⁴⁷ One concrete step that can be taken moving forward is to consider additional protocols or new positive international law which offers a set of concrete strategies for the international community when faced with mass destruction of cultural heritage.

¹⁴³ M. Cherif Bassiouni, *CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION* 473–74 (2011).

¹⁴⁴ Statute of the International Court of Justice, Art. 38(1)(b).

¹⁴⁵ O'KEEFE, *supra* note 18, at 343.

¹⁴⁶ EHLERT, *supra* note 97, at 7.

¹⁴⁷ M. Cherif Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYRACUSE J. INT'L L. & COM. 281, 281 (1983).

A. *Post-Conflict Tribunals and the Prosecution of Spoliation*

In parts of Bosnia and Herzegovina, some armed groups wanted to eliminate entire cultures by destroying mosques to undermine and remove the fundamental places essential for the Muslim population.¹⁴⁸ During the Nazi era, German forces also destroyed synagogues and sites of Jewish worship as well.¹⁴⁹

The prosecution of crimes involving cultural property during the ICTY proceedings did not rely on the situs State's ratification of the 1954 Hague Convention. Instead, that convention was cited as evidence of customary international law.¹⁵⁰ As Bassooni argues, "There are several international crimes that have not yet risen to the level of *jus cogens* but whose founding instruments explicitly or implicitly provide for universal jurisdiction."¹⁵¹

The 1954 Hague Convention in Article 28 provides: "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." The 1970 UNESCO Convention in Article 12 provides: "The States Parties to this Convention shall respect the cultural heritage within the territories for the international relations of which they are responsible and shall take all appropriate measures to prohibit and prevent the illicit import, export and transfer of ownership of cultural property in such territories."

International justice often times struggles because of the limited number of defendants that can be targeted in the face of widespread atrocities and in the difficulty with engaging in local populations who have had unpleasant interactions with the judicial system in the past. As Professor Stromseth

¹⁴⁸ BEVAN, *supra* note 59, at 9–20. Bevan connects the destruction of architecture with the attack on a culture and people:

During the 1990s the wars in the former Yugoslavia, with the torture, mass murders and concentration camps of Bosnia on the one hand and the razing of Mosques, the burning of libraries and the sundering of bridges on the other, made me realize that my childhood guilt at considering the fate of material culture was misplaced. The link between erasing any physical reminder of a people and its collective memory and the killing of the people themselves is ineluctable. The continuing fragility of civilized society and decency is echoed in the fragility of its monuments.

Id. at 18–19.

¹⁴⁹ *Id.* at 29–31.

¹⁵⁰ See ICTY, Art. 3(d), "seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science" were included as violations of the laws or customs of war."

¹⁵¹ M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 125 (2001).

argues, more outreach is need in international justice generally: “Focused, systematic efforts to understand and grapple with the criticisms of domestic audiences are essential if tribunals hope to build rather than undermine public confidence in fair justice. What is needed is meaningful outreach that grapples honestly with these challenges and difficulties, not sugar-coated press releases.”¹⁵²

B. *The International Criminal Court*

Article 8(1) of the Rome Statute provides the ICC with jurisdiction over war crimes when “committed as part of a plan or policy” or “as part of a large-scale commission of such crimes”. Article 8 (2) goes on to define war crimes, and includes in article 8 2 (a)(iv) the “Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;”. Article 8 2 (b) defines serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, and includes in Article 8 2 (b) (ix) “Intentionally directing attacks against building 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;”. Charges were also brought against Al Faqi under Article 8 2(e) which provides “Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law” and includes under Article 8 2(e)(iv) “Intentionally 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;”. Article 8 2(f) makes clear that Paragraph 2 (e) “applies to armed conflicts not of an international character and does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.” Instead paragraph 2 (e) applies to “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”

Articles 8(2)(b)(ix) and 8 (2)(e)(iv) of the Rome Statute grant the ICC jurisdiction over the crimes of destruction of cultural property in both national and international armed conflicts. This provision is also present in the Iraqi Special Tribunal Statute.¹⁵³

¹⁵² Stromseth, *supra* note 90, at 434.

¹⁵³ Iraqi Special Tribunal Statute, Arts. 13(b)(10) (international armed conflict) and 13 (d)(4) (non-international armed conflict).

Criminal laws can of course apply to policing the individuals responsible for stealing, looting, selling and transporting illicit art and antiquities. However too often police and prosecutors, or what we might call a law enforcement apparatus, have simply focused their efforts on securing the return of objects to the original owners or nations of origin. Rather than simply focusing on the objects and decrying the destruction, we should also target the individuals and networks which use the destruction of culture to further their own agenda and generate attention for their cruel agendas. How a legal system exercises its powers is key to understanding its policy priorities. Either in the national, international, or local context, what actors and courts will have jurisdiction to regulate matters a great deal. Artworks and objects of antiquity are mistreated in this way because they have tremendous value (or at least perceived value) to the criminals who destroy them.

Francioni argues that “international law of armed conflict has converged with international criminal law and has become an element for innovation and progressive development of international cultural heritage law in three directions: 1. The elevation of attacks against cultural property to the legal status of international crimes, especially war crimes and crimes against humanity; 2. The consolidation of the law of individual criminal responsibility under international law, not only under domestic law, for serious offences against cultural objects; 3 the progressive development of the law of state responsibility for the intentional destruction of cultural heritage.”¹⁵⁴ O’Keefe argues the actus reus of the offence of destruction of cultural property derives from the rule of customary international law forbidding its targeting in armed conflict, unless “attacks against cultural property are not unlawful if by its nature, location, purpose or use such property makes an effective contribution to military action and its total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.”¹⁵⁵ The mens rea of the offense of destruction of cultural property requires the attack must be done with intent and knowledge. O’Keefe argues the defendant must “intentionally direct an attack against the relevant object in the knowledge that it is cultural property.”¹⁵⁶

There are a number of international criminal tribunals which are capable of hearing international cultural heritage disputes, such as the ICTY. These judge international crimes which occur within a specific territory or

¹⁵⁴ Francesco Francioni, *Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law*, in ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW 206, 13 (Francesco Francioni & James Gordley eds., 2012).

¹⁵⁵ O’KEEFE, *supra* note 18, at 344.

¹⁵⁶ *Id.* at 345.

geographic jurisdiction during a limited span of time. Secondly there are also mixed courts, which are nationally located tribunals which have some international reach. These courts are characterized by “national and international elements. . . Embodied in the organization, structure and functioning of the Court systems, in the criminal procedures employed, and in the application of laws”.¹⁵⁷ Finally, the ICC as a Court with a potential to last permanently, and with broad potential territorial jurisdiction, offers a forum of the prosecution of war crimes, which includes the destruction or intentional targeting of cultural heritage.

C. *The Destruction in the Aftermath of the Arab Spring*

On March first of 2016, the trial of alleged Malian jihadi Ahmad al-Faqi al-Mahdi began for his role in the destruction of historic monuments in Timbuktu. Al-Faqi was charged with destroying nine mausoleums and the historic Sidi Yahia mosque. The case marks the first time since its establishment in 1998 with the Rome Statute, that the ICC has taken up the issue of cultural heritage destruction.

The prosecutors alleged that Al-Faqi worked with a group known as Ansar Dine, a radical group with ties to al-Qaeda. The allegations also state that Al-Faqi played an important role in an anti-vice authoritarian collective which enforced a version of sharia law on individuals. At the court hearing in September Al-Faqi described his background as a civil servant, and teacher in Mali’s department of education.¹⁵⁸

During the Timbuktu occupation, militants destroyed medieval shrines, the tombs of Islamic saints revered by the Sufi sect of Islam, and destroyed the Sidi Yahia mosque. The buildings were an important part of the UNESCO World Heritage Site which was referred to as the “city of 333 saints”. The radical Islamists considered these buildings and the Sufi religion blasphemous.

The Azawad region of Mali, where armed conflict escalated in 2012 would qualify as a conflict zone. The turmoil began with a Tuareg uprising and a war of independence, which in turn led to an opening for Ansar Dine to seize control of large cities in the Azawad region. This means the ongoing armed conflict would trigger jurisdiction for war crimes which may have taken place in the region. So the path would seem to be clear to prosecute for the intentional destruction of cultural heritage sites as a war

¹⁵⁷ Kai Ambos & Mohamed Othman, *Introduction*, in *NEW APPROACHES IN INTERNATIONAL CRIMINAL JUSTICE: KOSOVO, EAST TIMOR, SIERRA LEONE AND CAMBODIA 2* (Kai Ambos ed. 2003).

¹⁵⁸ David Smith, *Alleged Militant Appears at The Hague Charged with Cultural Destruction in Mali*, *THE GUARDIAN*, (Sept. 30, 2015), <https://www.theguardian.com/law/2015/sep/30/ahmad-al-faqi-al-mahdi-the-hague-international-criminal-court-mali-timbuktu>.

crime. But the ICC has an opportunity to consider the destruction of this cultural heritage a crime against humanity as well—a further precedent which would carry forward the precedents set by the ICTY. The discriminatory intent necessary to prosecute for an attack against cultural heritage can be seen in the persecutory intent. That intent was surely in the mind of the destroyers and was directed against the residents of Timbuktu. The UN Special Rapporteurs on cultural rights pointed out that the destruction of cultural heritage in 2012 meant “the denial of their identity, their beliefs, their history, and their dignity.”¹⁵⁹

In January of 2014, Fatou Bensouda, a prosecutor for the ICC formally began the investigation into the war crimes in Mali. In a statement Bensouda stated: “At each stage during the conflict, different armed groups have caused havoc and human suffering through a range of alleged acts of extreme violence. I have determined that some of these deeds of brutality and destruction may constitute war crimes as defined by the Rome Statute”.¹⁶⁰ The ICC prosecutor Fatou Bensouda in announcing the charges stated:

The people of Mali deserve justice for the attacks against their cities, their beliefs and their communities. Let there be no mistake: the charges we have brought against Ahmad Al Faqi Al Mahdi involve most serious crimes; they are about the destruction of irreplaceable historic monuments, and they are about a callous assault on the dignity and identity of entire populations, and their religious and historical roots. The inhabitants of Northern Mali, the main victims of these attacks, deserve to see justice done.¹⁶¹

Prosecutor Bensouda went on to make clear that intentional attacks against historic monuments and buildings dedicated to religion are serious crimes under the Rome Statute. She argued that “cultural heritage is the mirror of humanity” and these kinds of attacks affect humanity as a whole, and in response we must “stand up to” this kind of destruction and defacement.

These charges were brought for two reasons. First the strength of the

¹⁵⁹ “A Very Dark Future for the Local Populations in Northern Mali,” Warn UN Experts (United Nations Human Rights Office of the High Commissioner), (Jul. 10, 2012).

¹⁶⁰ Annie Shaw, *First cultural destruction trial opens at The Hague’s International Criminal Court*, THE ART NEWSPAPER (Feb. 29, 2016), <http://theartnewspaper.com/news/news/first-cultural-destruction-trial-opens-at-the-hague-s-international-criminal-court/>.

¹⁶¹ Fatou Bensouda, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Following the Transfer of the First Suspect in the Mali Investigation: “Intentional Attacks against Historic Monuments and Buildings Dedicated to Religion Are Grave Crimes”* (International Criminal Court Sep. 26, 2015).

evidence collected by her office. Second, authorities in Mali and Niger offered their cooperation in the surrender, as well as other “regional and international actors” from the region. These charges are being brought to highlight the severity of these crimes, and also to deter the commission of similar crimes moving forward.

Immediately after the destruction of the sites in Mali was known, Bensouda was making calls for the prosecution of those responsible for committing these war crimes.¹⁶² The crimes against culture perpetrated in Timbuktu should be punished and subjected to a criminal justice system—any thinking person would agree that some form of punishment would be appropriate. And the prosecution in this case was possible because of ground work laid before the onset of hostilities in Mali. The work of other international criminal courts, and the scholars that inform these judicial decisions, have laid the foundation for the prosecution of an individual for cultural destruction at the International Criminal Court. This prosecution was made possible because of work that was done long before the unfortunate destruction at Timbuktu. The work of the International Criminal Court, the fact that Mali has signed on to the Rome Treaty, and the work of the ICC prosecutor Fatou Bensouda all made this prosecution possible.

Timbuktu has been nicknamed the “City of 333 Saints”. It is located about 600 miles Northeast of Mali’s capital city of Bamako. In early 2012 the city was overrun by Al-Qaeda-affiliated militants. Later that year, in June, the militants destroyed more than a dozen of the city’s mausoleums, which dated to the 15th and 16th centuries.¹⁶³ Mosques and mausoleums containing tombs of Sufi saints, all recognized by UNESCO and registered on the list of endangered World Heritage sites, were damaged and demolished by extremist groups, including Ansar Dine.¹⁶⁴ These extremists strongly oppose the Sufi wing of Islam, and view its beliefs and cultural sites as heretical. Sufi shrines have been attacked not only in Timbuktu, but also in Tunisia and Libya.¹⁶⁵

¹⁶² *Timbuktu Shrine Destruction “a War Crime,”* THE TELEGRAPH (Jul. 2, 2012), <http://www.telegraph.co.uk/news/worldnews/africaandindianocan/mali/9369271/Timbuktu-shrine-destruction-a-war-crime.html>.

¹⁶³ UNESCO World Heritage Centre, *Timbuktu - UNESCO World Heritage Centre*, <http://whc.unesco.org/en/list/119>.

¹⁶⁴ See Joris Kila et al, *From Crimes Against Art to Crimes Against Cultural Property*, in *CULTURAL PROPERTY CRIME: AN OVERVIEW AND ANALYSIS OF CONTEMPORARY PERSPECTIVES AND TRENDS* 174 (2014).

¹⁶⁵ David D. Kirkpatrick, *Libya Officials Seem Helpless as Sufi Shrines Are Vandalized*, N.Y. TIMES (Aug. 28, 2012), <https://www.nytimes.com/2012/08/29/world/africa/in-libya-extremists-vandalize-sufi-shrines-with-impunity.html?nytmobile=0> [<https://perma.cc/C756-MBDL>]; see also Kiran Alvi, *Islamists Make Sufi Shrines A Target In North Africa*, NPR (Feb. 10, 2013), <http://www.npr.org/sections/thetwo-way/2013/02/10/171508858/islamists-make-sufi-shrines-a-target-in-north-africa>.

Timbuktu is considered the spiritual center of Islamism in Africa since the 15th century. It was added to UNESCO's World Heritage List in 1988.¹⁶⁶ According to UNESCO, its three primary mosques, Djingareyber, Sankore and Sidi Yahia, recall the golden age of Timbuktu and are among the most extraordinary monuments in the world.

On June 28, 2012 the World Heritage Committee, at its Session in Saint Petersburg, heard and accepted the request by the government of Mali to place Timbuktu and associated sites on the list of World Heritage Sites in Danger. The aim was to "raise cooperation and support for the sites threatened by the armed conflict in the region".¹⁶⁷

Perhaps in retaliation to the comments made by the World Heritage Committee, the leaders of Ansar Dine on June 29th, decided to deliberately destroy parts of Timbuktu's cultural heritage. The monuments in Timbuktu were targeted in a ruthless manner, even in the face of strong international condemnation, perhaps because the members of Ansar Dine found them to be idolatrous. Many of the mausoleums in Timbuktu were dedicated to Muslim saints, and this ran counter to the vision of Islam practiced by members of Ansar Dine (which means "defenders of faith"). A spokesperson for Ansar Dine, Oumar Ould Hamaha said the destructions was a "divine order" because the prophet Mohammed taught "each time that someone builds something on top of a grave, it needs to be pulled back to the ground. We need to do tis so that future generations don't get confused, and start venerating the saints as if they are God."¹⁶⁸ Even as the destruction was ongoing, the ICC prosecutor Fatou Bensouda stated that the destruction in the city of the heritage sites could be considered a war crime.

The entrance door of the Sidi Yahia mosque was also demolished. That door was a point of reverence, and according to some would only be demolished at the end of the world.¹⁶⁹ After the battle of Gao, which took place on the 26th and 27th of June, 2012, the Al-Qaeda-affiliated group Ansar Dine (meaning "Defenders of Faith") and its allied groups took control of main cities in Northern Mali, including Timbuktu.

Other sites and monuments which suffered intentional destruction were the tombs of Sidi Mahmoud, Sidi Moctar, and Alpha Moya, the mausoleums

¹⁶⁶ UNESCO World Heritage Centre, *Timbuktu* - UNESCO World Heritage Centre, <http://whc.unesco.org/en/list/119>.

¹⁶⁷ *Heritage sites in northern Mali placed on List of World Heritage in Danger*, UNESCO World Heritage Centre, <http://whc.unesco.org/en/news/893>.

¹⁶⁸ Baba Ahmed & Rukmini Callimachi, *Islamist Fighters in Timbuktu Continue Destruction of City's Mausoleums, Heritage*, NATIONAL POST (Jul. 2, 2012), <http://news.nationalpost.com/news/islamist-fighters-in-timbuktu-continue-destruction-of-citys-mausoleums-heritage>.

¹⁶⁹ *Timbuktu's Sidi Yahia mosque "attacked by Mali militants"*, BBC NEWS (Jul. 2, 2012), <http://www.bbc.com/news/world-africa-18675539>.

of Cheikh el-kebir, Alwalidji Baber Babeidje, and Alwalidji Ahamadou Foulane. In addition, the Djingareyber cemetery and the artifacts in and around the cemetery were smashed and destroyed. When these demolitions had been completed to the satisfaction of those responsible, a bulldozer was used to clear the rubble.¹⁷⁰

World cultural heritage sites are those which are of “outstanding universal value”.¹⁷¹ Very quickly after the destruction of these sites in Timbuktu was revealed, the international community issued consistent calls of condemnation. The UNESCO Director General Irina Bokova on June 30, 2012 called on those responsible to “stop these terrible and irreversible acts, to exercise their responsibility and protect this invaluable cultural heritage for future generations”.¹⁷²

The World Heritage Committee also called for an end to the “repugnant acts” taking place in Timbuktu on July 3, 2012.¹⁷³ The United Nations Security Council also threatened to sanction Ansar Dine, though it fell short of approving a proposal by the Economic Community of West African States to establish a special force for immediate intervention in Timbuktu.¹⁷⁴

On July 10, 2012, the African Commission on Human and Peoples’ Rights highlighted the destruction of “these sacred monuments classified by UNESCO as a world heritage” and noted that the sites “instill in every African a sense of existence and pride.”¹⁷⁵ There must be justifications for shielding art authenticators sufficient to convince state legislators to implement these reforms, and the reforms must be calibrated properly. Mali, Niger, and the ICC all worked together to bring Mr. Al Faqi to the court’s jurisdiction. In September of 2016 the ICC recognized that Al Faqi was

¹⁷⁰ Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Summary of the Judgment and Sentence ¶ 21 (Sep. 28, 2015), <https://www.icc-cpi.int/itemsDocuments/160926Al-MahdiSummary.pdf>; see Adam Nossiter, *Mali Islamists Attack Religious Sites*, N.Y. TIMES (Jul. 2, 2012), <http://www.nytimes.com/2012/07/03/world/africa/mali-islamists-exert-control-with-attacks-on-mosques.html>.

¹⁷¹ Convention Concerning the Protection of World Cultural and Natural Heritage, art. 1, ¶ 4, Nov. 16, 1972, 1037 U.N.T.S. 151.

¹⁷² UNESCO Director-General calls for a halt to destruction of cultural heritage site in Timbuktu, UNESCO World Heritage Centre (Jun. 30, 2012), <http://whc.unesco.org/en/news/901/>.

¹⁷³ World Heritage Committee calls for end to destruction of Mali’s heritage and adopts decision for its support, UNESCO World Heritage Centre (Jul. 3, 2012), <http://whc.unesco.org/en/news/907/>.

¹⁷⁴ Ron Depasquale, *UN threatens sanctions on Mali’s shrine vandals*, ISLAMIC INFORMATION PORTAL (Jul. 6, 2012), <http://islam.ru/en/content/news/un-threatens-sanctions-malis-shrine-vandals>.

¹⁷⁵ Press Release on the Destruction of Cultural and Ancient Monument in the Malian city of Timbuktu, African Commission on Human and People’s Rights (Jul. 10, 2012), <http://www.achpr.org/press/2012/07/d115/>.

guilty of the crime of deliberate destruction of cultural heritage and he was sentenced to nine years in prison.¹⁷⁶

This case offers a smooth path forward for the ICC to offer important new precedent decrying the destruction of cultural heritage. There can be little criticism of the following facts. That the destruction committed was an intentional act of senseless brutality which violates international law. The reports and subsequent investigation show a “reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed” as provided under Article 53.1 of the Rome Statute. Moreover the destruction has taken place within Mali, a country that signed on to the Rome statute in 2000.

The ongoing destruction taking place in Syria and parts of Iraq also threatens sites and irreplaceable monuments. Syria has a history which dates to the very beginning of human civilization, through the Bronze Age, and dating through the Greek, Roman, and Byzantine eras. Parts of Syria and northern Iraq also have been the haven for minority religions and religious groups such as the Yazidis, Druze, and Zoroastrians.¹⁷⁷ A full account of the damage done in Syria and Iraq by the Islamic State of Iraq and the Levant (ISIL) fighters may not be known until the end of conflict there. But some of the most unfortunate destruction includes the destruction of the large souk in Aleppo which was destroyed by bombing and fire.¹⁷⁸ The Mosque of Aleppo has been severely damaged, along with much of the historic center of the city.¹⁷⁹ Lastly, many reports have documented the destruction at parts of the ancient crossroads of Palmyra have suffered looting and intentional destruction.¹⁸⁰

ISIS forces have captured and controlled the city of Mosul in northwestern Iraq in 2014. This has led to the destruction of many artifacts on display at the Mosul Museum, and destruction of parts of the ancient site of Nineveh, located near Mosul.¹⁸¹ This included the destruction of shrines near the Nebi Yunus, a shrine devoted to the Judeo-Christian Prophet

¹⁷⁶ *Timbuktu Trial: “A major step towards peace and reconciliation in Mali,”* UNESCO WORLD HERITAGE CENTRE (Sept. 27, 2016), <http://whc.unesco.org/en/news/1559/>.

¹⁷⁷ Gerstenblith, *supra* note 71, at 357.

¹⁷⁸ Patrick Strickland, *Rebuilding Syria’s Aleppo under fire*, AL JAZEERA (May 4, 2016), <http://interactive.aljazeera.com/aje/2016/rebuilding-syrias-aleppo/>.

¹⁷⁹ See Emma Cunliffe et al., *The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations*, 23 INT’L J. L. CULTURAL PROP. 1, 5–6, 8 (2016).

¹⁸⁰ Derek Fincham, *Syria will need the culture that ISIS hopes to destroy*, HOUSTON CHRONICLE (Aug. 28, 2015), <http://www.houstonchronicle.com/opinion/outlook/article/Fincham-Syria-will-need-the-culture-that-ISIS-6472801.php>.

¹⁸¹ Will Worley, *ISIS destroys gates to ancient city of Nineveh near Mosul*, THE INDEPENDENT (Apr. 12, 2016), <http://www.independent.co.uk/news/world/middle-east/isis-destroys-gates-ancient-city-nineveh-mosul-a6980686.html>.

Jonah.¹⁸² In Syria ISIS has also intentionally destroyed structures such as the Temple of Bel in Palmyra, and even killed heritage professionals, such as the tragic slaughter of Dr. Khaled al-Assad.¹⁸³ One flaw in the current state of international law is the inability of war crimes instruments to apply to the use of massive military force domestically.¹⁸⁴

ISIS has undertaken a wide-ranging operation aimed at destroying cultural heritage sites. One of the worst examples was the mechanical destruction of the lamassu at the gate of Ninevah.¹⁸⁵ The destruction of sites and museum objects has been carefully done so as to maximize international outrage. The difficulty though is how a tribunal could exercise its jurisdiction over these acts.

The first option to prosecute the perpetrators of intentional destruction would be domestic courts in either Syria or Iraq. Syrian law prohibits the destruction of damage to cultural objects.¹⁸⁶ The ICC would sadly be unlikely to provide a forum for prosecution of destruction of cultural heritage in Syria or Iraq. Neither is a State Party to the Rome Statute. And Article 11 of the Rome Statute prevents the retroactivity of jurisdiction, barring jurisdiction for “crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration.” The United Nations Security Council could, under Chapter VII of the United Nations Charter ask the ICC to exercise jurisdiction. A recent attempt to refer the situation in Syria to the ICC was however vetoed by Russia and China.¹⁸⁷

Another option would be the creation of a special tribunal, in the same way the conflicts in the former Yugoslavia and Cambodia have sought post-conflict justice. This may depend on the makeup and composition of the post-conflict regime in Syria and whether Assad or another regime would

¹⁸² Christopher Jones, *And Now It's Gone: Shrine of Jonah Destroyed by ISIS, Gates of Nineveh: An Experiment In Blogging Assyriology* (Jul. 24, 2014), <https://gatesofnineveh.wordpress.com/2014/07/24/and-now-its-gone-shrine-of-jonah-destroyed-by-isis/>.

¹⁸³ Kareem Shaheen & Ian Black, *Beheaded Syrian scholar refused to lead Isis to hidden Palmyra antiquities*, THE GUARDIAN (Aug. 19, 2015), <https://www.theguardian.com/world/2015/aug/18/isis-beheads-archaeologist-syria>.

¹⁸⁴ Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VAND. J. TRANSNAT'L L. 693, 699–700 (2013).

¹⁸⁵ Jane Arraf, *Iraqis mourn destruction of ancient Assyrian statues*, AL JAZEERA (Mar. 1, 2015), <http://www.aljazeera.com/blogs/middleeast/2015/03/iraq-isis-destruction-ancient-assyrian-statues-mosul-150301175854102.html>.

¹⁸⁶ Marina Lostal, *Syria's World Cultural Heritage and Individual Criminal Responsibility*, INT'L REV. L. 3, 12–14 (2015). She points to the following provisions which may be useful for a prosecution. Antiquities Law, Legislative Decree N. 222, October 26th 1963, as amended by Legislative Decree N. 295 (2/12/1969) and Law N. 1 (28/2/1999).

¹⁸⁷ Recent Draft Resolution: U.N. SCOR, 69th Sess., 7180th mtg. at 4, U.N. Doc. S/PV.7180 (May 22, 2014).

allow this to take place.¹⁸⁸

Under the ICC, a case will be inadmissible if a state with jurisdiction has investigated and makes a determination not to prosecute. As a result, a State can avoid ICC jurisdiction under the Rome Statute by demonstrating their ability to investigate, and if necessary prosecute these serious crimes. In this way, the ICC works to complement domestic judicial mechanisms.¹⁸⁹ Professor Francesco Francioni argues there are a number of aspects of culture which can have positive or even negative impacts in some cases:

[W]ithin most states there is co-existence of different cultures, traditions, minorities. In some States these cultural differences are filtered and distilled into a higher idea of a common polity, attracting a superior allegiance from the people. In others, diversity is maintained through a constitutional equilibrium of power-sharing (as in Switzerland) or through the integration of diversity into a true multicultural society founded on constitutional guarantees of fundamental freedoms and human rights (as in the United States). In other cases, culture can become the source of intolerance, claims for separation, and sometimes for violent oppression and ethnic conflict.¹⁹⁰

Anthropogeographers Andreas Dittmann and Hussein Almohamad argue that merely describing the destruction of heritage like that conducted by ISIS as barbarism misses the larger point. It is what they describe as a “comprehensive provocative strategy”.¹⁹¹ Given that one goal of these groups may be to provoke, what goal, if any, does subjecting individual actors to criminal liability serve? The impact seems counterproductive. These individuals seem to welcome prosecution.

IV. CONCLUSION

Prosecution of individuals is not a panacea for the damages caused by the illicit trade in art and antiquities, but it certainly is an under-utilized response. We punish to control crime and exact state-sponsored retribution on the criminal. This punishment has an expressive impact not seen in other

¹⁸⁸ See Martin Walls, “Chautauqua Blueprint” to Prosecute Syrian War Crimes Unveiled, *Institute for National Security and Counterterrorism* (Oct. 3, 2013), <http://insct.syr.edu/chautauqua-blueprint-prosecute-syrian-war-crimes-unveiled/>.

¹⁸⁹ Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 *MIL. L. REV.* 20 (2001); see also Scheffer, *supra* note 94, at 10–11.

¹⁹⁰ Francioni, *supra* note 83, at 1210–11.

¹⁹¹ Andreas Dittmann & Hussein Almohamad, *Devastation of Cultural Heritage and Memory in Syria and Iraq: Component of a Multi-Level Provocation Strategy?*, 5 *INT’L J. HUMANITIES & SOC. SCIENCE* 11, 28 (2015).

legal remedies.¹⁹² In many cases of course the facts on the ground dictate the available course of action for prosecutors. How much evidence is available and whether a suitable criminal offense exists, not to mention how much resources a prosecutor has at their disposal.

As this article has discussed, one reaction to the destruction of cultural heritage is to attach individual criminal responsibility to those who perpetrate these acts. The intentional destruction of the Buddhas of Bamiyan in 2001 caused UNESCO and others to consider the idea of crimes against a culture or crimes against cultural heritage.¹⁹³ Initially the creation of this criminal offense served mainly an expressive function, demonstrating collective revulsion at the senseless destruction of cultural heritage. It generated some innovative thinking and caused us to consider what legal and policy responses may be appropriate. With the continuing destruction of cultural heritage, we should continue working to craft the appropriate international criminal law, and the law enforcement apparatus that can effectively police and respond to the most serious and intentional acts of destruction.

The recent guilty confirmation of Al-Faqi at the ICC offers a useful potential tool and model. Unless international cooperation rises and counters this threat, the damage and destruction of art and archaeological context will continue. There are a number of theoretical models and critiques of the deterrent impact of increased criminal sanctions or other increased penalties. In predicting and trying to shape human behavior through the criminal law we need to first understand why terrorists destroy culture. As to this, I can only offer speculation. No civilized people would destroy the past like this. And I suspect the great destroyers of culture know this. They murder and destroy culture to gain our attention—to spread the message that they control territory in Mali, Iraq, Syria, and elsewhere. History teaches us that those who have resorted to this extreme cultural destruction and looting have gone on to commit further human rights violations. Mali was gripped by a senseless civil war, but also a country with a proud and ancient heritage. The militants hope to destroy that past and make Syria's recovery more difficult.

The struggle to safeguard cultural heritage from intentional destructions remains a mosaic effort—one that seems destined to strain to balance the needs of domestic policing, and international regulation over a resource which is the common heritage of all mankind. As the next stage of international condemnation of intentional destruction struggles against those

¹⁹² E.g., Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 178 (2007).

¹⁹³ Francioni & Lenzerini, *supra* note 114, at 621.

who welcome that very condemnation, we will see greater attention paid to the prevention of the intentional destruction of heritage, as well as to the more general problem of preventing these kinds of villainous art-hating regimes from rising to power in the first place.