

2016

Protecting Cultural Heritage as a Means for International Peace, Security and Stability

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Mark V. Vlasic and Helga Turku, Protecting Cultural Heritage as a Means for International Peace, Security and Stability, 49 *Vanderbilt Law Review* 137 (2021)

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Protecting Cultural Heritage as a Means for International Peace, Security and Stability: The Case of ISIS, Syria and Iraq

Mark V. Vlastic* & Helga Turku**

ABSTRACT

Cultural aggression has become a strategy to obtain an advantage during war. In a deliberate and methodical pattern extremists have not only damaged and destroyed historical sites in Iraq and Syria, but they have also looted antiquities to raise money for their terrorist activities. In addition to degrading the victims' identities, such acts decrease the wealth of knowledge of the world as a whole. By examining various treaties and case law on cultural property, this Article highlights the importance of holding these perpetrators accountable. Furthermore, the protection of cultural property in war zones should be an element in the whole strategy for bringing peace, stability, and security to the region. To this end, this Article suggests the creation of a public-private initiative to fight the trafficking of stolen antiquities from conflict zones.

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The authors would like to thank Jessica C. Vapnek for her valuable feedback, and the editorial community from Oxford's *Journal of International Criminal Justice* for their helpful edits on a more narrowly focused piece related to conflict antiquities.

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I. INTRODUCTION

War necessarily brings death and destruction. No armed conflict has been fought without some collateral damage to both public and private property. Unfortunately, belligerents also use psychological warfare to obtain an advantage during war. Cultural aggression—that is, destruction of cultural property¹—has become the extremists’ strategy to erase the manifestation of the victims’ identities. Tragically, such cultural cleansing has often been a weapon and tactic of war, and its consequences are permanent and profound. Obliterating cultural heritage allows the enemy to orphan future generations and severely damage their understanding of who they are as a people.

1. This Article uses the terms antiquity and artifact interchangeably. See Robert L. Tucker, *Stolen Art, Looted Antiquities, and the Insurable Interest Requirement*, 29 QUINNIPIAC L. REV. 611, 628 (2011) (citing ART LAW HANDBOOK § 6.02[A], at 391 (Roy S. Kaufman, ed., 2000)) (explaining that the term “cultural property” has a broader meaning to include “objects of artistic importance,” such as fine art).

Degrading victims' histories diminishes their cultural prominence among the world community and decreases the wealth of knowledge of the world as a whole.

The orchestrated destruction and theft of cultural property by the so-called Islamic State of Iraq and the Levant (ISIL, also known as Islamic State of Iraq and Syria [ISIS] or Daesh) are perhaps some of the most brutal forms of cultural cleansing in recent history. In a deliberate and methodical pattern, ISIS has not only damaged and destroyed historical sites, but it has also looted them to raise money for its terrorist activities. Given the long-term negative effects of cultural heritage destruction, especially in conflict zones, it is important that the society of states² addresses this issue through its courts, institutions, and fora. Furthermore, protecting cultural property in conflict zones should be an element in the whole strategy for bringing peace, stability, and security to the region.

In Part II, this Article first gives a brief description of the systematic destruction and theft of cultural property by ISIS in Iraq and Syria. Part III presents reasons why protecting cultural property may be a necessary element in the international efforts to bring peace, stability, and security in the region. Part IV highlights the current international criminal law dealing with the protection of cultural property during armed conflict. Part V examines some direct and indirect measures implemented by the international community to protect stolen artifacts smuggled from conflict zones. Finally, Part VI concludes by considering ways to fight the trafficking of stolen antiquities from conflict zones.

II. DESTRUCTION AND THEFT OF CULTURAL PROPERTY BY ISIS IN IRAQ AND SYRIA

ISIS started drawing intense international attention in 2014. At the time, it had taken over almost half of Syrian territory and controlled several important cities in Iraq.³ In contrast to previous high profile terrorist organizations, such as al-Qaeda or Hezbollah, ISIS is

2. THE EXPANSION OF INTERNATIONAL SOCIETY 1 (Hedley Bull & Adam Watson eds., 1984) (defining society of states as "a group of states (or, more generally, a group of independent political communities) which not merely form a system, in the sense that the behavior of each is a necessary factor in the calculations of the others, but also have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognize their common interest in maintaining these arrangements").

3. Due to the fluidity of the situation currently in Iraq and Syria, it is not clear how much territory ISIS currently controls. At the height of their power in 2014–2015 they controlled considerable territory in these two states. This may or may not be true at the present time. See *Islamic State Group: Crisis in Seven Charts*, BBC.COM (Aug. 3, 2016), <http://www.bbc.com/news/world-middle-east-27838034> [<https://perma.cc/AQX5-7DVA>] (archived Sept. 15, 2016).

well-financed and able to pay annual salaries to its members.⁴ While its primary revenue comes from oil, a lesser known source of income is the trade in looted antiquities.⁵ The profits from the trafficking of antiquities are considerably smaller than oil revenues, but it is a lucrative trade because few resources are needed for a high margin of return.

ISIS uses distorted readings of the Quran to explain its organized destruction of cultural property, claiming that it represents sacrilegious vestiges. While this simple, albeit abominable propaganda method has captured international headlines for the past few years, the reality is different.⁶ In its magazine, *Dabiq*, ISIS notes the necessity of destroying the “nationalist agenda” that the statues, temples, and sites signify.⁷ However, this magazine fails to mention that ISIS is likely earning millions of dollars from the trade of looted antiquities.

Since this criminal organization took over large swaths of territory in Syria and Iraq, the looting and trafficking of antiquities has reached industrial proportions. While the exact numbers are unknown, the U.S. Department of State believes that ISIS “has probably earned several million dollars from antiquities sales since mid-2014.”⁸ The Russian government has stated that “[t]he profit derived by the Islamists from the illicit trade in antiquities and archaeological treasures is estimated at US \$150–200 million per year.”⁹

4. See generally *id.* (recognizing that while at peak of its power, ISIS brought in large amounts of revenue, but, with recent losses of territory and people under its control, sources of revenue likely will decrease).

5. Duncan Marvin, *Calculating the Revenue From Antiquities to Islamic State*, WALL ST. J. (Feb. 11, 2015), <http://www.wsj.com/articles/calculating-the-revenue-from-antiquities-to-islamic-state-1423657578> [<https://perma.cc/L6V7-9LD8>] (archived Sept. 19, 2016).

6. See *Why IS Militants Destroy Ancient Sites*, BBC.COM (Sept. 1, 2015), <http://www.bbc.com/news/world-middle-east-34112593> [<https://perma.cc/8QTD-M8JG>] (archived Sept. 15, 2016).

7. *Id.*

8. Andrew Keller, Deputy Assistant Sec’y for Counter Threat Fin. and Sanctions, U.S. Dep’t of State (DOS), Bureau of Econ. and Bus. Affairs, *Documenting ISIL’s Antiquities Trafficking: The Looting and Destruction of Iraqi and Syrian Cultural Heritage: What We Know and What Can Be Done*, U.S. DEP’T OF STATE (Sept. 29, 2015), <http://www.state.gov/e/eb/rls/rm/2015/247610.htm> [<https://perma.cc/56ND-CCKB>] (archived Sept. 15, 2016).

9. Permanent Rep. of Russian Federation to the U.N., Letter and Annex dated Mar. 31, 2016 from the Permanent Rep. of Russian Federation to the United Nations addressed to President of the Security Council, U.N. Doc. S/2016/298 (Mar. 31, 2016). See generally *Modeling the Antiquities Trade in Iraq and Syria*, ORIENTAL INSTITUTE AT THE UNIVERSITY OF CHICAGO, <https://oi.uchicago.edu/research/projects/mantis> (last visited Oct. 2, 2016) [<https://perma.cc/82L5-E5QK>] (archived Oct. 2, 2016) (describing the project as an interdisciplinary research using past data from excavation publications and auction sales; while a work in progress, it is hoped that this study will shed some light into the international illicit trade of antiquities from the region); Fiona Rose-Greenland, *How much money is ISIS actually making from looted art?*, SCROLL.IN (June

ISIS is not alone in this enterprise. Other groups that are also involved in the trafficking or looting of antiquities in various capacities and degrees include the Bashar al-Assad regime, the al-Nusra Front for the People of the Levant (an al-Qaeda affiliate in Syria), Hezbollah, and most non-state actors involved in the Syrian conflict.¹⁰ However, ISIS is different from these other actors involved in the looting of antiquities because it has institutionalized the plundering and destruction process. Specifically, ISIS is “regulating” the looting by providing licenses, taxing, and marketing the antiquities.¹¹

A. State “Licenses”

Various international actors are involved in fighting ISIS, and its power is slowly disintegrating. However, at the height of its stronghold in Iraq and Syria (2014–2015) ISIS created departments (*diwans*) to administer its affairs. The Natural Resources Department purportedly managed illicit excavations. Documents recovered by the U.S. Special Forces during a raid shed light on the link between “blood antiquities”¹² and ISIS leadership.¹³ During an operation against Abu Sayyaf, the chief financial officer for ISIS, the U.S. troops discovered not just financial data and records but also antiquities.¹⁴ According to the evidence, ISIS prohibited anyone within the group’s territory from

2, 2016), <http://scroll.in/article/809106/how-much-money-is-isis-actually-making-from-looted-art> [<https://perma.cc/WAA2-37H3>] (archived Sept. 15, 2016).

10. See Brigadier General (Ret.) Russell Howard et al., *Digging in and Trafficking Out: How the Destruction of Cultural Heritage Funds Terrorism*, CTC SENTINEL (Feb. 2015), at 15–16, <https://www.ctc.usma.edu/posts/digging-in-and-trafficking-out-how-the-destruction-of-cultural-heritage-funds-terrorism> [<https://perma.cc/AW5M-8XLF>] (archived Sept. 15, 2016).

11. See Mark V. Vlasic & Helga Turku, *Countering IS’s Theft and Destruction of Mesopotamia*, WORLD POL’Y (July 7, 2015), <http://www.worldpolicy.org/blog/2015/07/07/countering-is%E2%80%99s-theft-and-destruction-mesopotamia> [<https://perma.cc/3WZC-DGU5>] (archived Sept. 15, 2016). See also ANDREW KELLER, U.S. DEP’T OF STATE, U.S. DEP’T OF STATE PRESENTATION ON DOCUMENTING ISIL’S ANTIQUITIES TRAFFICKING 3 (Sept. 29, 2015), https://eca.state.gov/files/bureau/final_presentation_to_met_on_isil_antiquities_trafficking_for_das_keller_9.29.2015.pdf [<https://perma.cc/LS98-2WHD>] (archived Sept. 15, 2016).

12. See Mark Vlasic & Jeffrey DeSousa, *Stolen Assets & Stolen Culture: The Illicit Antiquities Trade, the Perpetuation of Violence and Lessons from the Global Regulation of Blood Diamonds*, 2 DURHAM L. REV. 1, 167 (2012). See also Mark Vlasic, Opinion, *Islamic State Sells ‘Blood Antiquities’ from Iraq and Syria*, WASH. POST (Sept. 14, 2014), http://www.washingtonpost.com/opinions/islamic-state-sells-blood-antiquities-from-iraq-and-syria-to-raise-money/2014/09/14/49663c98-3a7e-11e4-9c9f-ebb47272e40e_story.html?tid=HP_opinion [<https://perma.cc/YK88-CH49>] (archived Sept. 19, 2016) [hereinafter Vlasic Opinion].

13. KELLER, *supra* note 11, at 5.

14. Karen DeYoung & Missy Ryan, *Senior ISIS Leader Killed in U.S. Raid in Syria*, WASH. POST (May 16, 2015), http://www.washingtonpost.com/world/national-security/us-kills-islamic-state-leader-in-syria-raid/2015/05/16/31280b26-fbca-11e4-a13c-193b1241d51a_story.html [<https://perma.cc/XS3V-4Z4T>] (archived Sept. 19, 2016).

excavating without a stamped permit from the Natural Resources Department.

Other reports show ISIS managing revenue from looted antiquities. For example, in 2014, ISIS issued an excavation license to a local near the archaeological site of Mari on the Euphrates River.¹⁵ As part of the deal, the individual would give 60 percent of the proceeds to ISIS.¹⁶ It is reported that ISIS militants monitor excavations and destroy objects portraying human features (considered idolatrous) while taxing the rest of the treasures.¹⁷

B. Taxation and Revenue from Blood Antiquities

Taxation is one of the more secure ways ISIS derives profits from the illegal trafficking of antiquities. This criminal organization is believed to claim a 20 to 50 percent “tithe,”¹⁸ or tax on the sales of antiquities by private smugglers in its territory.¹⁹ Anecdotal accounts from the region indicate that items are sold for millions of dollars. For example, a middleman from southern Turkey claims to have had a single item sell for \$1.1 million.²⁰ Although it is unclear whether this is the wholesale price or retail, a 20 to 50 percent tax on a \$1.1 million sale would represent \$220,000–\$550,000 in revenue for ISIS.²¹

Additional accounts indicate that ISIS is now marketing metal detectors to local residents so that they can unearth new antiquities. Amr al-Azm, a professor at Shawnee University in Ohio, says that ISIS also hires contractors to bulldoze and tear large sites apart to expedite the excavation.²²

15. *Al-Rikaz Department of ISIS Licenses Excavation Works in Exchange for Monetary Percentage*, APSA2011.COM, <http://apsa2011.com/apsanew/al-rikaz-department-of-isis-licenses-excavation-works-in-exchange-for-monetary-percentage/> (last visited Sept. 15, 2015) [<https://perma.cc/Q6KL-RR39>] (archived Sept. 15, 2016).

16. *Id.*

17. Simon Cox, *The Men Who Smuggle the Loot that Funds IS*, BBC MAGAZINE (Feb. 17, 2015), <http://www.bbc.com/news/magazine-31485439> [<https://perma.cc/HT5N-AM2V>] (archived Sept. 15, 2016).

18. According to a conversation with Professor Amr al-Azm. See Mark V. Vlastic & Helga Turku, *Congressional Monuments Men? The Role of Congress in Fighting Terrorist Financing, While Preserving Our Cultural Heritage*, HUFFINGTON POST (Dec. 6, 2014), http://www.huffingtonpost.com/mark-v-vlastic/congressional-monuments-m_b_6281664.html [<https://perma.cc/C4Z2-KHE8>] (archived Sept. 15, 2016).

19. Oliver Moody, *Isis Fills War Chest by Selling Looted Antiquities to the West*, TIMES (Dec. 17, 2014), at 13, <http://www.thetimes.co.uk/tto/news/world/middleeast/article4299572.ece> [<https://perma.cc/PMX2-BZWT>] (archived Sept. 16, 2016).

20. Cox, *supra* note 17.

21. See YAYA J. FANUSIE & ALEXANDER JOFFE, MONUMENTAL FIGHT: COUNTERING THE ISLAMIC STATE'S ANTIQUITIES TRAFFICKING, CENTER ON SANCTIONS & ILLICIT FINANCE FOUNDATION FOR DEFENSE OF DEMOCRACIES 10 (Feb. 2015), http://www.defenddemocracy.org/content/uploads/documents/Monumental_Fight.pdf [<https://perma.cc/K62T-NGV6>] (archived Sept. 16, 2016).

22. See Vlastic & Turku, *supra* note 18.

C. Theft and Confiscation

The magnitude of the destruction of and theft from historical sites in Iraq and Syria is well-documented. Satellite data show that ISIS has engaged in industrial-scale destruction, including bulldozing archaeological sites.²³ But, although this criminal organization released propaganda images showing destruction in the Mosul Museum, Nimrud, and Palmyra, they use “the smoke-screen of destruction . . . to cover their looting of antiquities.”²⁴

Syrian archeologist, Dr. Mark Altaweel, explains that looting helps ISIS fund its operations on the ground. The group allows looters to come into the site to dig up artifacts and then it takes a cut. “Things that are not visible, they don't blow up—but if they have value, they will loot,” he said, adding that some artifacts can be sold for up to and beyond \$20,000–30,000 on the black market.²⁵

Soon after the video of Mosul Museum became public, experts realized that some of the sculptures being destroyed were plaster replicas and that the group had stolen valuable originals with the intent to sell them.²⁶ Based on the available information, it appears that ISIS follows a twofold strategy: “[i]t destroys large monuments, sculptures, temples (that it likely cannot sell on the black market due to their size, etc.) for propaganda purposes. At the same time, ISIS is actively plundering smaller/midsized objects”²⁷

ISIS's internal financial documents show that it also profits from “confiscations.”²⁸ This process includes both original owners and items seized from looters operating without an ISIS license. According to reports, the ISIS Natural Resources Department strictly enforces its licensing system and confiscates antiquities being trafficked without

23. See *id.*; *Incident Analyzer*, ANTIQUITIES COALITION (Apr. 13, 2016), <http://incidentpointanalyzer.mapp.hexagongeospatial.com/?publicView=2c91808153571dbf015415474e3c7036fa52514f030e72c71> [https://perma.cc/PZ79-GQHS] (archived Oct. 13, 2016) (showing incidents of antiquity destruction around the world).

24. Vlastic & Turku, *supra* note 11.

25. Dominic Bailey, *Palmyra: Islamic State's Demolition in the Desert*, BBC.COM (Oct. 5, 2015), <http://www.bbc.com/news/world-middle-east-34294287> [https://perma.cc/8FW9-Q8VB] (archived Sept. 16, 2016).

26. See *Islamic State 'Destroys Ancient Iraq Statues in Mosul*, BBC NEWS (Feb. 26, 2015), <http://www.bbc.com/news/world-middle-east-31647484> [https://perma.cc/3USM-MZVK] (archived Sept. 15, 2016); see also *Statues Destroyed by Islamic State in Mosul 'Were Fakes with Originals Safely in Baghdad'*, TELEGRAPH (Mar. 15, 2015), <http://www.telegraph.co.uk/news/worldnews/islamic-state/11473515/Statues-destroyed-by-Islamic-State-in-Mosul-were-fakes-with-originals-safely-in-Baghdad.html> [https://perma.cc/QT5L-RFNV] (archived Sept. 27, 2016).

27. Mark V. Vlastic & Helga Turku, *Timbuktu, ISIS and the Long Arm of Justice*, HUFFINGTON POST (Oct. 3, 2015), http://www.huffingtonpost.com/mark-v-vlastic/timbuktu-and-the-long-arm_b_8239050.html [https://perma.cc/KQ9Z-P5MS] (archived Oct. 2, 2016).

28. See generally Keller, *supra* note 8.

proper approval.²⁹ It is important to note that the ISIS propaganda machine is aimed both at the international and local audience. On July 2, 2015, the criminal organization seized and purportedly destroyed statues looted from Palmyra by an individual without proper ISIS authorization. The jihadist group publically whipped the smuggler to demonstrate to the local audience what happens to unauthorized looters.³⁰ Those images were widely published on the Internet, once again conveying ISIS's message of violence and brutality.

D. Active Involvement in Looting

Given the highly contradictory nature of ISIS propaganda and action, it is difficult to distinguish activity that is licensed, taxed, and encouraged by ISIS from the looting, smuggling, and selling conducted by the organization itself. Perhaps its behavior is not uniform in all sites. There are reports indicating that ISIS is directly involved in organizing equipment and directing operations at archeological sites.³¹ However, in Nimrud, ISIS reportedly looted valuable treasures prior to destroying the site.³² How they choose what antiquities will be destroyed and what will be preserved for future sale is subject to debate. Given the indications that ISIS does not randomly loot and sell artifacts, but prioritizes acquisitions according to their value, one might speculate that archeologists are working (willingly or unwillingly) in their ranks.³³

29. See Aymenn Jawad Al-Tamimi, *The Archivist: Unseen Documents from the Islamic State's Diwan al-Rikaz*, JIHADODOLOGY (Oct. 12, 2015), <http://jihadology.net/2015/10/12/the-archivist-unseen-documents-from-the-islamic-states-diwan-al-rikaz/> [https://perma.cc/7Z73-K72A] (archived Sept. 16, 2016).

30. *Islamic State Militants 'Destroy Palmyra Statues'*, BBC NEWS (July 2, 2015), <http://www.bbc.com/news/world-middle-east-33369701> [https://perma.cc/8LNJ-4YCK] (archived Sept. 16, 2016).

31. See Sangwon Yoon, *Islamic State is Selling Looted Art Online for Needed Cash*, BLOOMBERG (July 28, 2015), <http://www.bloomberg.com/news/articles/2015-06-28/isis-has-new-cash-cow-art-loot-it-s-peddling-on-ebay-facebook> [https://perma.cc/Y6FN-2X9H] (archived Sept. 16, 2016).

32. See Samuel A. Hardy, *Islamic State B-Movie of Attack on Nimrud*, CONFLICT ANTIQUITIES (Apr. 12, 2015), <https://conflictantiquities.wordpress.com/2015/04/12/iraq-nimrud-buildings-destroyed-site-not-bulldozed-islamic-state/> [https://perma.cc/M47Y-CS2U] (archived Sept. 16, 2016) (revealing discrepancies in the video which help to speculate which items ISIS stole prior); *ISIS Extremists Bulldoze Ancient Assyrian Site Near Mosul*, GUARDIAN (Mar. 6, 2015), <http://www.theguardian.com/world/2015/mar/05/islamic-state-isis-extremists-bulldoze-ancient-nimrud-site-mosul-iraq> [https://perma.cc/N9JS-3S3Z] (archived Sept. 16, 2016).

33. See Samuel Andrew Hardy, *Is Looting-to-Order 'Just a Myth?'* COGENT SOCIAL SCI. (Sept. 14, 2015), <http://dx.doi.org/10.1080/23311886.2015.1087110> [https://perma.cc/FTK6-3WW5] (archived Sept. 16, 2016).

E. Marketing of Antiquities

Anecdotal evidence suggests that ISIS actively markets stolen antiquities through social media.³⁴ Looters, smugglers, and middlemen use platforms, such as WhatsApp, to exchange photographs of artifacts.³⁵ Officials involved in stopping the trade say that “[ISIS] is now selling looted antiquities worth millions of pounds directly to western collectors.”³⁶

While, in the past, unscrupulous dealers used middlemen to buy looted antiquities from conflict zones, if these reports are true, they are now buying them directly from ISIS. Willy Bruggeman, current president of the Belgian federal police council and a former deputy director of Europol, said that “[ISIS is] now using their own networks to come into contact with the final buyers,” adding that, “[w]hen I was working on these cases at Europol, you could see many levels of transactions in this area—now they want to have a one-to-one relationship with the collectors.”³⁷ The Russian authorities echo this observation, stating that once these objects are out of the war zones, they are “offered to collectors from various countries, generally through Internet auction sites such as eBay and specialized online stores.” This criminal organization is “exploiting the potential of social media more and more frequently so as to cut out the middleman and sell artifacts directly to buyers.”³⁸ Unfortunately, because of the nature and sophistication of smuggling networks, “less than 1 percent of the pieces known to have been stolen by the militants from churches and ancient towns across Iraq and Syria have been recovered.”³⁹

34. Joe Parkinson et al., *Syrian ‘Monuments Men’ Race to Protect Antiquities as Looting Bankrolls Terror*, WALL ST. J. (Feb. 10, 2015), <http://www.wsj.com/articles/syrian-monuments-men-race-to-protect-antiquities-as-looting-bankrolls-terror-1423615241> [<https://perma.cc/2VVS-RF82>] (archived Sept. 16, 2016).

35. Mike Giglio & Munther Al-Awad, *13 Exclusive Photos of Looted (And Fake) Syrian Artifacts for Sale*, BUZZFEED (Aug. 5, 2015), <http://www.buzzfeed.com/mikegiglio/13-exclusive-photos-of-looted-and-fake-syrian-artifacts-for#.laGMKbxld> [<https://perma.cc/9X8M-G2A7>] (archived Sept. 16, 2016).

36. Moody, *supra* note 19.

37. *Id.*

38. Louis Charbonneau, *Islamic State Nets Millions From Antiquities: Russia*, REUTERS (Apr. 6, 2016), <http://www.reuters.com/article/us-mideast-crisis-antiquities-russia-idUSKCN0X32HK> [<https://perma.cc/GE4Z-MQXL>] (archived Sept. 16, 2016).

39. Moody, *supra* note 19.

III. PROTECTING CULTURAL PROPERTY AS A MEANS FOR INTERNATIONAL PEACE AND SECURITY

Cultural property has historically had special protection in the law.⁴⁰ While there are a multitude of explanations for why cultural property deserves such special treatment, the following are perhaps the most important. First, it constitutes “one of the basic elements of civilization,” as stated in the 1954 Hague Convention Preamble. Cultural property is important to the dignity and identity of people,⁴¹ and they should have access to it to learn about their past. Second, archeological knowledge often plays a role in legitimizing or delegitimizing interests, particularly in contexts where states seek to establish sovereignty and build nationhood. In other words, “archaeological knowledge . . . can and does have a direct impact on people’s sense of cultural identity, and thus becomes a legitimate target and point of contention.”⁴² Third, cultural property has scholarly value, as it tells us who we are and where we come from. As the United Nations Educational, Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO 1970) states, “its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.”⁴³ Careful preservation of original context can furnish pieces of our heritage, and once this window into the past is destroyed, the scientific, historical, and cultural information about a particular object or civilization is irreparably harmed.

In light of ISIS’s use of cultural property as a weapon of war, both to promote and to finance violence, there are grounds to believe that the protection of cultural property is linked with international peace, stability, and security. This new approach complements the more

40. As early as 480 B.C., Greek historian Herodotus decried the destruction of a temple by the Persian Army:

At the last-named place there was a temple of Apollo, very rich, and adorned with a vast number of treasures and offerings. There was likewise an oracle there in those days, as indeed there is at the present time. This temple the Persians plundered and burnt . . . for the purpose of . . . conveying to King Xerxes the riches which were there laid up.

Herodotus, *THE PERSIAN WARS*, BOOK VIII - URANIA ¶ 33 (George Rawlinson trans., 1942).

41. See Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 562 (1995) (articulating the historical ties to cultural property).

42. LAURAJANE SMITH, *ARCHAEOLOGICAL THEORY AND THE POLITICS OF CULTURAL HERITAGE* 3 (Routledge 2004).

43. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, UNESCO, Preamble, ¶ 3, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter *Preventing Illicit Import, Export and Transfer of Ownership*].

accepted view of cultural property as a social good in itself,⁴⁴ and strengthens the protection of cultural heritage as part of a platform for fighting terrorism and bringing about peace, stability, and security. There are two factors that elevate the importance of protecting cultural heritage in conflict zones: (1) revenues from looted antiquities finance terrorism, and (2) history is necessary for the narrative of national reconciliation.

A. Revenues from Looted Antiquities Finance Terrorism

The destruction of historical sites in Iraq and Syria presents the world with complicated challenges, as there are links between the trafficking of looted antiquities and terrorist financing. This issue raises important legal, ethical, international, and national security concerns because culture and jihad have become grimly connected through the sale of blood antiquities on the black art market.

This link is not new, for there are decade-old indications that terrorists have used stolen antiquities to finance their attacks on civilians. Sometime in 2000–2001, Mohammed Atta, 9/11 hijacker and ringleader, contacted a German art expert at Göttingen University to pitch a sale of Afghani “ancient artifacts of considerable value.”⁴⁵ Although the German professor never saw the artifacts in question, he recommended that Atta contact Sotheby’s.⁴⁶

While nothing came of this particular inquiry, there are numerous reports that terrorists and other criminal groups use looted artifacts to raise money and fund their activities. During an anti-insurgency operation in June 2005, U.S. troops arrested five individuals in an underground bunker in northwest Iraq. The U.S. troops also found, among other items, statuettes, cylinder seals, and thirty vases that had been stolen from the National Museum of Iraq.⁴⁷

According to U.S. Marine Corps Colonel Matthew Bogdanos, who served in Iraq and worked to collect the artifacts stolen from the National Museum of Iraq in 2003, this was not an isolated event.⁴⁸ He claims that, just like insurgents in Afghanistan found opium to be their cash crop, insurgents in Iraq raise money by selling looted antiquities on the black market.⁴⁹ He further argues that looted sites and black

44. See John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 345–49 (1989) (discussing the expressive value of cultural property).

45. See *Art as Terrorist Financing?*, DER SPIEGEL (F.R.G.), July 18, 2005, at 20.

46. *Id.*

47. Col. Matthew Bogdanos, *The Terrorist in the Art Gallery*, N.Y. TIMES (Dec. 10, 2005), http://www.nytimes.com/2005/12/10/opinion/10bogdanos.html?pagewanted=all&_r=0 [<https://perma.cc/77QE-6YBF>].

48. Matthew Bogdanos, *Thieves of Baghdad: Combating Global Traffic in Stolen Iraqi Antiquities*, 31 FORDHAM INT’L L. J. 725, 730 (2007) [hereinafter Bogdanos, *Thieves of Baghdad*].

49. *Id.*

market antiquities are not “victimless crimes” but instead that “the cozy cabal of academics, dealers, and collectors who turn a blind eye to the illicit side of the trade is, in effect, supporting the insurgents who are killing our troops in Iraq.”⁵⁰

Terror and violence are not contained in conflict zones, but spread rather easily into neighboring states and beyond. The horrific November 13, 2015 Paris massacres are a reminder that terrorists are not simply attacking innocent civilians, but they are also targeting civilization as a whole.⁵¹ They traveled from Syria to assault these civilians and their way of life in a city whose culture, museums, and universities make it the nucleus of lofty ideals and artistic creation. The disturbing reality is that there is a “growing connection between the high culture epitomized by great Western cities and the nefarious purposes” of ISIS.⁵²

The United Nations has acknowledged that eliminating trafficking in antiquities from Syria and Iraq is linked to peace and security in three different resolutions. The UN Security Council adopted Resolution 2199 in February 2015, which condemned the trade with al-Qaida-associated groups and called for “all Member States [to] take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011”⁵³

In May 2015, a UN General Assembly Resolution, *Saving the Cultural Heritage of Iraq*, suggested that those involved in cultural cleansing in Iraq and beyond could be committing war crimes. This broad international condemnation affirmed that “attacks intentionally directed against buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments, may amount to war crimes.”⁵⁴ More importantly this resolution opened the door for future prosecution of such crimes, as it stressed “the importance of holding accountable” the perpetrators who directly attack cultural property.⁵⁵

50. *Id.*

51. See Robert Windrem, *Terror on a Shoestring: Paris Attacks Likely Cost \$10,000 or Less*, NBC NEWS (Nov. 18, 2015), <http://www.nbcnews.com/storyline/paris-terror-attacks/terror-shoestring-paris-attacks-likely-cost-10-000-or-less-n465711#%2410,000> [<https://perma.cc/SUZ3-3C6R>] (archived Sept. 17, 2016) (explaining that these terrorist attacks are sophisticated but not expensive enough to be easily deterred due to finances).

52. *Culture and Jihad, Grimly Connected Through the Art Market’s “Blood Antiquities”*, ECONOMIST (Nov. 30, 2015), <http://www.economist.com/blogs/prospero/2015/11/antiquities-and-terror> [<https://perma.cc/2US2-G8UG>] (archived Sept. 17, 2016).

53. S.C. Res. 2199, ¶ 17 (Feb. 12, 2015).

54. G.A. Res. A/69/L.71, ¶ 5 *Saving the Cultural Heritage of Iraq* (May 21, 2016), http://www.un.org/ga/search/view_doc.asp?symbol=A/69/L.71 [<https://perma.cc/C4H7-PQMP>] (archived Sept. 17, 2016).

55. See *id.* at ¶ 6 (calling on all states to “take appropriate action according to applicable international law . . .”).

The latest UN resolution, Resolution 2249, addressing the issue of antiquities trafficking was adopted in November 2015. Here, the UN Security Council noted that “eradication of cultural heritage and trafficking of cultural property . . . constitutes a global and unprecedented threat to international peace and security.”⁵⁶ The resolution condemned, in the strongest terms, ISIS’s systematic and “barbaric acts of destruction and looting of cultural heritage” carried out in Iraq and Syria.⁵⁷

The U.S. government has also recognized that trafficking in antiquities is linked to terrorist financing, stating that there are “credible reports that U.S. persons have been offered cultural property that appears to have been removed from Syria and Iraq recently.”⁵⁸ In August 2015, the Federal Bureau of Investigations (FBI) warned American art dealers that trading in looted cultural property from Iraq and Syria is a terrorist financing offense, prosecuted under 18 U.S.C. § 2339A.⁵⁹

B. *History Is Necessary for National Reconciliation*

While profits from stolen antiquities are being used for evil, their protection may help rebuild functioning states in Iraq and Syria. The UN General Assembly Resolution *Saving the Cultural Heritage of Iraq* affirmed

that the destruction of cultural heritage, which is representative of the diversity of human culture, erases the collective memories of a nation, destabilizes communities and threatens their cultural identity, and emphasiz[ed] the importance of cultural diversity and pluralism as well as freedom of religion and belief for achieving peace, stability, reconciliation and social cohesion.⁶⁰

In her address at the Metropolitan Museum of Art in New York, U.S. Assistant Secretary of State Ann Richard expressed a similar idea. She noted that preservation of cultural heritage in conflict zones is “critical to reconstruction, reconciliation, and rebuilding of civil society” because it is “a source of pride and self-definition for their present and future.”⁶¹

56. S.C. Res. 2249 (Nov. 20, 2015).

57. *Id.* at ¶ 3.

58. *ISIL and Antiquities Trafficking FBI Warns Dealers, Collectors About Terrorist Loot*, FBI (Aug. 26, 2015), <https://www.fbi.gov/news/stories/2015/august/isil-and-antiquities-trafficking> [<https://perma.cc/48C4-PE64>] (archived Sept. 17, 2016).

59. *Id.*

60. G.A. Res. A/69/L.71, *supra* note 54.

61. Mark Vlasic, *Stolen History: Why should we care about saving Syria's antiquities?*, FOREIGN POL’Y (Dec. 13, 2013), <http://foreignpolicy.com/2013/12/13/stolen-history/> [<https://perma.cc/NWF2-Z96W>] (archived Sept. 17, 2016).

Borrowing heavily from the field of international relations and the constructivist school of thought, there is scholarship that suggests that history can be used to create unity within a state.⁶² Syria and Iraq, at some point, hopefully in the near future, will have to create a platform for national reconciliation and nation-building that transcends religious and ethnic divides. These states will have to find a way to bring their war-torn people together and rebuild a nation of different religions, languages, and ethnicities. In other words, they will have to create a new, peaceful national identity.

Historical narratives, usually the glorification of a past golden age, are a common means to strengthen claims of self-identity and solidify the idea of a nation. Some scholars argue that “the goal of nation building should not be to impose common identities on deeply divided peoples but to organize states that can administer their territories and allow people to live together despite differences.”⁶³ While a state needs to be able to provide basic necessities for its citizens, any government or administrative entity must have legitimacy in order to succeed in the long run. Accordingly, it may be argued that citizens must believe, at some basic level, that the state has “the moral right to govern.”⁶⁴ In the long run, a state is not successful through the use of force, but rather through the shared perception that the state possesses a principled basis for rule. For many, shared history (partially exemplified through cultural heritage), common values, and a sense of identity are some of the elements that help transform an administrative entity into a state.

Constructivism argues that creation of national identity is possible because it is a “cultural artefact[] of a particular kind,”⁶⁵ produced by a “complex ‘crossing’ of distinct historical forces . . . that once created, [becomes] ‘modular,’ capable of being transplanted, with varying degrees of consciousness, to a great variety of social terrains, to merge and be merged with a correspondingly wide variety of political and ideological constellations.”⁶⁶ National identity has been described as “an imagined political community—and imagined as both inherently limited and sovereign.”⁶⁷ Although it is an extremely powerful force,

62. See generally *THE INVENTION OF TRADITION* (Eric Hobsbawm & Terence Ranger eds., 1983) [hereinafter *INVENTION OF TRADITION*] (reviewing how history has been used to create national identity and promote national unity, thus legitimizing institutions and states); BENEDICT R. O’G. ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (3rd. 2006) (discussing the nation as a socially constructed idea and how history aids such process).

63. Marina Ottaway, *Think Again: Nation Building*, FOREIGN POL’Y (Nov. 9, 2009), <http://foreignpolicy.com/2009/11/09/think-again-nation-building/> [<https://perma.cc/X2DC-8Z6Z>] (archived Sept. 17, 2016).

64. HELGA TURKU, *ISOLATIONIST STATES IN AN INTERDEPENDENT WORLD* 60 (2009).

65. ANDERSON, *supra* note 62, at 4.

66. *Id.*

67. *Id.* at 6.

national identity is an abstract discourse because, even in the smallest nation, members will never meet their fellow countrymen, yet everyone in that nation envisions an image of togetherness. In a way, members of a nation choose to remember what they have in common and to forget what separates them.⁶⁸ Thus, it may be argued that national identity is not only necessary to legitimize the existence of the state,⁶⁹ but also necessary to bring members of its society together regardless of their language, faith, ethnicity, and gender.

Symbols are an essential element of historical narratives that establish social cohesion and collective identities.⁷⁰ The study of a glorious, distant past creates historical continuity, which is vital for the construction of national and ethnic identities. History “provides the nation with an authenticating image of its present self which makes it feel secure within its own definitional frames of reference.”⁷¹

Symbols signifying and identifying a group of people as a nation can trigger strong emotional responses and serve as signifiers of the group’s cohesiveness. “National symbols . . . are conceptual representations of group membership.”⁷² They are necessary for historical narration about the nation and its importance. Storytelling through symbols, artifacts, historical sites, buildings, monuments, sculptures, and paintings, which create a narrative that is both easy to digest and easily transmittable within a group, are necessary for the very possibility of a national identity.⁷³

Shared memories are also vital to collective cultural identities, and “essential to [their] survival and destiny.”⁷⁴ Without memory, there is no identity; without identity, there is no nation.⁷⁵ Linking oneself with “remote ancestors and earlier cultures in the homeland in a relatively unbroken line of succession”⁷⁶ is one of the essential ingredients for unity.

[M]eanings can only be ‘stored’ in symbols . . . [for they] relate an ontology and a cosmology to an aesthetics and a morality: their peculiar power comes from their presumed ability to identify fact with value at the most fundamental

68. *Id.*; see also Ernest Renan, *Qu est-ce qu’une nation?* in *OEUVRES COMPLETES DE ERNEST RENAN* 892 (1991 ed.).

69. See ERIC HOBSBAWM, *THE AGE OF REVOLUTION: 1789-1848*, 9 (1996).

70. See *INVENTION OF TRADITION*, *supra* note 62, at 9 (discussing national traditions “establishing . . . the membership of groups, real or artificial communities” and “legitimizing institutions”).

71. YASIR SULEIMAN, *THE ARABIC LANGUAGE AND NATIONAL IDENTITY* 38 (2003).

72. David Butz, *National Symbols as Agents of Psychological and Social Change*, 30 *POL. PSYCHOL.* 779, 780 (2009).

73. See *id.*

74. ANTHONY D. SMITH, *MYTHS AND MEMORIES OF THE NATION* 10 (1999).

75. Anthony D. Smith, *Memory and Modernity: Reflections on Ernest Gellner’s Theory of Nationalism*, 2 *NATIONS AND NATIONALISM* 371, 383 (1996).

76. ANTHONY D. SMITH, *ETHNO-SYMBOLISM AND NATIONALISM: A CULTURAL APPROACH* 63 (2009).

level, to give to what is otherwise merely actual, a comprehensive normative import.⁷⁷

Cultural property, therefore, creates a backdrop where a nation can synthesize its worldview. Post-conflict Syria and Iraq will have to rediscover shared memories of the past in order to rebuild a peaceful nation.

John Merryman also suggests that “cultural property is put to a variety of political uses in a variety of political contexts—ethnic, regional, and national.”⁷⁸ He uses the example of the National Museum of Anthropology in Mexico City to illustrate an “extraordinarily sophisticated and effective use of cultural property to instill a sense of national identity and national pride.”⁷⁹ Similarly to other ethnically diverse states, Mexico has encountered its fair share of issues with nation-building because different groups identify with their own regional ethnic identity rather than the larger Mexican nation.

The Museum attempts to show the Mexican viewer that he is part of a great nation in which elements of native pre-Columbian and introduced European cultures have been combined to produce something important that is uniquely Mexican. Mexicans from remote villages grow perceptibly in stature as they move from room to room in the Museum, particularly on the upper floor, where the visual anthem to nationalism reaches a crescendo.⁸⁰

Another example where artifacts are able to produce immense emotional response and foment national unity is the Parthenon Marbles, also known as the Elgin Marbles. A Greek Minister of Culture, Melina Mercouri, referred to them as “the symbol and the blood and soul of the Greek people . . . [W]e have fought and died for the Parthenon and the Acropolis⁸¹ . . . This is our history, this is our soul.”⁸² More than three decades later, in protesting against the British Museum’s decision to loan the Elgin Marbles to Russia, another Greek prime minister again reiterated that “Greeks are one with [their] history and civilization, which cannot be broken up, loaned out, or conceded.”⁸³ These marbles are not only beautiful but they have an expressive power to transmit emotions.

77. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 127 (1973). While Gertz focuses on religious symbols, his ideas about symbols can be applied to other kinds of symbols.

78. Merryman, *supra* note 44, at 350.

79. *Id.*

80. *Id.*

81. Q&A: *Melina Mercouri: Greece's Claim to the Elgin Marbles*, N.Y. TIMES, Mar. 4, 1984, at E9.

82. *Greece's Claim to the Elgin Marbles*, S.F. CHRONICLE, May 26, 1983, at 26, col. 1 (quoting Greek Minister of Culture Melina Mercouri).

83. *Elgin Marbles: British Museum Loan 'an Affront to the Greek People'*, BBC NEWS (Dec. 5, 2014), <http://www.bbc.com/news/entertainment-arts-30348886> [<https://perma.cc/M99P-YLN4>] (archived Sept. 17, 2016).

Indeed, UNESCO Goodwill Ambassador Marianna Vardinoyannis, in launching an international campaign for the reunification of the Parthenon Marbles in 2014, explained that, “our claim [is] that the integrity of the monument is very important and that the sculptures are an integral part of a cultural whole . . . an integral part of a monument considered as the most important monument of cultural heritage of the entire world.”⁸⁴ The Parthenon Marbles are the collective heritage of all, and thus important to the greater community. Studied in their proper context, they are a source of information about history and culture.⁸⁵ Art is therefore both a “source of power and an object of knowledge.”⁸⁶

Recognizing that national reconciliation and peacebuilding are highly complex, multifaceted processes, preservation of history is one element that can facilitate the process. Identity is articulated through collective understanding of what unites a group of people. The manifestation of a people’s culture through art produces an awareness that a common community exists.

The national artistic patrimony is therefore closely linked to the process of education: the study of a nation’s art is part of the process through which citizens learn who they are A perception of a common culture and common past is one way of learning that we are part of a community, that we belong to one another in a special way.⁸⁷

Looking back at a rich history legitimizes and facilitates this process, especially when the present is bleak. “Protecting heritage [is] an integral part of all peacebuilding efforts.”⁸⁸ As such, preservation of historical sites and artifacts, which create a narrative of a rich past, is an important element of national reconciliation. In the words of Thomas Cambell, Director of The Metropolitan Museum of Art, “culture is essential to the renewal of society.”⁸⁹

84. *A New International Campaign for the Return of the Parthenon Sculptures*, ELPIDA (2014), http://www.elpida.org/en/news/return_restore_restart.html#.V1X815GDGko (last visited Sept. 17, 2016) [<https://perma.cc/Q583-8J4J>] (archived Oct. 2, 2016).

85. See Paul M. Bator, *An Essay on the International Art Trade*, 34 STAN. L. REV. 275, 295 (1981–1982).

86. *Id.* (referring to a statement by Lionel Trilling, one of the “New York Intellectuals”).

87. *Id.* at 304.

88. *State Secretary Kerry and Director-General Bokova Call for End to Cultural Destruction in Iraq and Syria*, UNESCO MEDIA SERVICES (Sept. 23, 2014), http://www.unesco.org/new/en/media-services/single-view/news/state_secretary_kerry_and_director_general_bokova_call_for_end_to_cultural_destruction_in_iraq_and_syria/#.VLt6AGTF-o [<https://perma.cc/Z5M7-RLC8>] (archived Sept. 17, 2016).

89. *Id.*

IV. EXISTING INTERNATIONAL TREATIES AND LAWS TO PROTECT CULTURAL PROPERTY DURING WAR

A. *The Special Status of Cultural Property During War*

Swiss legal philosopher Emer de Vattel, condemned the “willful destruction” of cultural property because it is never “conducive to the rightful object of war.”⁹⁰ In the eighteenth century he wrote that those who destroy cultural property during war are “sworn enem[ies] of the human race to deprive it lightly of such monuments of the arts and models of taste.”⁹¹ In March 2001, these sentiments were repeated after the premeditated destruction of the great statues of the Buddhas of Bamiyan by the then-Taliban government in Afghanistan. In the preamble to a resolution on the protection of the cultural heritage of Afghanistan,⁹² the World Heritage Convention⁹³ General Assembly condemned “the willful destruction of the cultural heritage of Afghanistan by the Taliban forces, particularly the statues of Bamiyan, as [a] ‘crime against the common heritage of humanity.’”⁹⁴

Similarly to the Taliban’s destruction of pre-Islamic heritage in Afghanistan, ISIS has systematically destroyed cultural property within their self-styled caliphate. On July 25, 2014, ISIS militants demolished a revered Muslim/Christian/Jewish shrine traditionally said to be the burial place of the prophet Younis, or Jonah (of whale fame) in Mosul, Iraq.⁹⁵ The mosque was built on an archaeological site dating back to the eighth century BC and is mentioned in the Hebrew and Christian Bible and the Qur’an.⁹⁶ ISIS militants destroyed the mosque because, to them, it “had become a place for apostasy, not prayer.”⁹⁷ But the Tomb of Jonah was not just another sacred place in

90. EMER DE VATTEL, *LES DROIT DES GENS, OU, PRINCIPES DE LA LOI NATURELLE, APPLIQUE A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* 168 (1758).

91. *Id.*

92. Resolution on the Protection of the Cultural Heritage of Afghanistan Adopted by the General Assembly of States Parties to the World Heritage Convention at Its Thirteenth Session (Paris, Oct. 30–31, 2001), UNESCO Doc. WHC-01/CONF.208/23, at 12 (Nov. 22, 2001).

93. Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 U.N.T.S. 151 (Dec. 17, 1975) [hereinafter *World Heritage Convention*].

94. UNESCO Doc. WHC-01/CONF.208/23, *supra* note 92, at 12. After the destruction of the Buddhas, the General Conference UNESCO adopted a resolution entitled Acts Constituting a Crime against the Common Heritage of Humanity. See Records of the General Conference, 31st Session, vol 1, UNESCO Doc 31C/Res., at 65 (Paris, Oct. 3, 2001–Nov. 3, 2001) (“Acts Constituting a Crime against the Common Heritage of Humanity”).

95. *ISIS Blows Up Shrine in City of Mosul*, BBC NEWS (July 25, 2014), <http://www.bbc.com/news/world-middle-east-28485029> [<https://perma.cc/YH2L-2J8N>] (archived Sept. 17, 2016).

96. *Id.*

97. *ISIS Militants Blow up Jonah’s Tomb*, GUARDIAN (July 24, 2014), <http://www.theguardian.com/world/2014/jul/24/isis-militants-blow-up-jonah-tomb> [<https://perma.cc/3WC2-QUN7>] (archived Oct. 2, 2016).

Mosul for Jews, Christians, and Muslims; to many, it was a symbol of tolerance and a powerful reminder of the values and traditions all religions shared. It is likely that, in their perverse reality, the extremists perceived this symbol of tolerance as a threat.

Over the course of a few months, ISIS also blew up one of the jewels of the ancient city of Palmyra, built more than two thousand years ago and considered to be one of the most important cultural centers of the ancient world. The Temple of Bel, the Temple of Baalshamin, and the Arch of Triumph, which had survived thousands of years in the desert and many marching armies, were pulverized by ISIS.⁹⁸ By stripping these societies of their art and proud past, terrorist and criminal organizations are attempting to pave the way for the creation of quasi-states that are intolerant of many shared values, including cultural diversity.

Irina Bokova, Director General of UNESCO, categorized these acts as “barbaric” attempts to “erase world history.”⁹⁹ She strongly condemned the destruction of churches, shrines, historical buildings, and ancient manuscripts in ISIS-controlled areas; such destruction is an example of “an ideology of hatred and exclusion”¹⁰⁰ and is an assault “against people . . . their identities . . . their values and history . . . [and] their future.”¹⁰¹

U.S. Secretary of State John Kerry echoed a similar view while speaking at the Metropolitan Museum of Art. He noted that this cultural property encompasses “personal reminders of the power of human creation. Each artifact tells a story—a human story, our story.”¹⁰² What we are witnessing in Iraq and Syria is “cultural barbarism at its worst.”¹⁰³ Highlighting the fact that extremists are not the only ones destroying archeological sites, Secretary Kerry noted that the Assad regime forces “care more about regaining territory in Aleppo than protecting its ancient treasures.”¹⁰⁴ The destruction of Iraq and Syria’s heritage, the cradle of civilization, is an “insult” to

98. *Islamic State ‘Blows Up Palmyra Arch,’* BBC NEWS (Oct. 5, 2015), <http://www.bbc.com/news/world-middle-east-34440759> [<https://perma.cc/X5ZY-Z9L7>] (archived Sept. 17, 2016).

99. *UNESCO Chief: ISIS trying to erase world history,* CNN, <http://edition.cnn.com/videos/world/2015/03/09/intv-amanpour-irina-bokova.cnn> (last visited Oct. 2, 2016) [<https://perma.cc/3GLH-FK6M>] (archived Oct. 2, 2016).

100. *Director-General of UNESCO Irina Bokova Condemns the Destruction of the Imam Dur Shrine in Iraq,* UNESCO MEDIA SERVICES (Oct. 27, 2014), http://www.unesco.org/new/en/media-services/single-view/news/director_general_of_unesco_irina_bokova_condemns_the_destruction_of_the_imam_dur_shrine_in_iraq/#.VL15NWTF--r [<https://perma.cc/EPR4-L2D5>] (archived Sept. 17, 2016).

101. *State Secretary Kerry and Director-General Bokova Call for End to Cultural Destruction in Iraq and Syria,* *supra* note 88.

102. John Kerry, *Remarks at Threats to Cultural Heritage in Iraq and Syria Event*, U.S. DEP’T OF STATE (Sept. 22, 2014), <http://www.state.gov/secretary/remarks/2014/09/231992.htm> [<https://perma.cc/KC6B-LZDX>] (archived Sept. 17, 2016).

103. *Id.*

104. *Id.*

these proud people.¹⁰⁵ He added that “[e]xtremists want to rob future generations of any connection to this past.”¹⁰⁶

Statements expressing deep condemnation and shock at the destruction of cultural property in the twenty-first century, have become commonplace. The preamble to the Convention for the Protection of Cultural Property in the Event of Armed Conflict states that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind,”¹⁰⁷ which makes international law and international courts the most appropriate fora for response to such crimes. International criminal tribunals have developed a body of law that can be used to hold accountable those who destroy and/or plunder cultural property. The following is a brief discussion of relevant treaties and case law addressing the destruction of cultural property during both armed conflict and peacetime.

B. *International Conventions on Cultural Property*

Some important international treaties governing cultural property during war and peace include: 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention); 1970 UNESCO Convention; 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage (UNESCO 1972 Convention); and International Institute for the Unification of Private Law Convention on Illegally Exported Cultural Property (UNIDROIT 1995 Convention). The 1954 Hague Convention¹⁰⁸ (dealing with cultural property during war) and the 1970 UNESCO Convention,¹⁰⁹ (regulating international trade in cultural property during peacetime) are arguably the pillars of international agreements on cultural property. Not all UN members have ratified these international conventions addressing issues of protection and ownership of cultural property; however, their provisions provide valuable guidance to international and domestic courts dealing with issues of cultural heritage.¹¹⁰

105. *Id.*

106. *Id.*

107. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, pmb., May 14, 1954, 249 U.N.T.S. 215.

108. Pursuant to the 1954 Hague Convention, arts. 9 and 16, cultural property bears a blue shield during armed conflict to facilitate its identification, and is under special protection. Member States must refrain from any act of hostility directed against these identified objects. *Id.* at arts. 9, 16.

109. *Preventing Illicit Import, Export and Transfer of Ownership*, *supra* note 43, at pmb.

110. See Marilyn E. Phelan, *Cultural Property: Who Owns It and What Laws Protect It?*, 74 TEX. B.J. 202, 204 (2011) (explaining that while treaties cannot provide a universal system for stolen and illegally exported cultural artifacts, the provisions of these treaties provide valuable guidance for property ownership issues).

1. The Hague 1954 Convention

The 1954 Convention, which prohibits the destruction and theft of cultural property during domestic or international conflict, takes an internationalist approach to cultural property, stating that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind . . . [because] . . . each people makes its contribution to the culture of the world.”¹¹¹ A people’s or a nation’s heritage is important not only to the constituents themselves but also to civilization as a whole. Each sovereign state is a custodian of its cultural heritage and has a normative duty to itself and to the world community to protect its treasures.¹¹² This convention is designed to protect cultural property during an armed conflict and in its aftermath, during peacetime. Specifically, it has provisions against the trafficking of looted cultural property from a conflict zone during peacetime.¹¹³

2. The UNESCO 1970 Convention

The second important international agreement to protect cultural property during peacetime is UNESCO 1970.¹¹⁴ This Convention was a reaction to the looting of cultural property in newly-formed independent states in Africa in the 1960s.¹¹⁵ The increased illegal activity in post-colonial states at this time, the plundering of ancient sites, and a growing demand for such items created the need for an international response.¹¹⁶ This convention was designed to control the market in artworks and cultural objects and prohibit the illicit international trade in such objects.¹¹⁷ More importantly, it highlights the damage to and “impoverishment of the cultural heritage” of a state of origin through the “illicit import, export and transfer of ownership of cultural property.”¹¹⁸

111. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 107.

112. See SHARON WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY* 54–55 (1978).

113. See *id.* (“This is the first multinational convention whose aim is to protect cultural property from destructive threats in time of peace.”); Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* 107 at art. 4(3).

114. *Preventing Illicit Import, Export and Transfer of Ownership*, *supra* note 43.

115. Folarin Shyllon, *Looting and Illicit Traffic in Antiquities in Africa*, in *CRIME IN THE ART AND ANTIQUITIES WORLD: ILLEGAL TRAFFICKING IN CULTURAL PROPERTY*, 135 (Stefano Manacorda & Duncan Chappel eds., 2011).

116. Clemency Chase Coggins, *United States Cultural Property Legislation: Observations of a Combatant*, 7 *INT’L J. CULTURAL PROP.* 52, 52–54 (1998).

117. See *Preventing Illicit Import, Export and Transfer of Ownership*, *supra* note 43.

118. *Id.* at art. 2.

The preamble to UNESCO 1970 calls for international action to protect cultural property because it “constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.”¹¹⁹ The convention emphasizes the interests of states in “national cultural heritage,” making it illegal to trade and export cultural property, as contrary to patrimony laws.¹²⁰ Members agree to prevent the importation of such objects and facilitate their return to source states.¹²¹ Currently there are 129 Member States, including major destination states such as France, Japan, Switzerland, the United Kingdom, and the United States.¹²²

3: The UNESCO 1972 Convention

The 1972 UNESCO Convention¹²³ created an Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value,¹²⁴ known as the World Heritage Committee. Member States submit a formal inventory of their cultural and natural heritage to the World Heritage Committee. The Committee in turn maintains and publishes a list of these assets on its “World Heritage List.”¹²⁵ Sadly, Iraq and Syria have ten registered sites with UNESCO, of which nine are in danger of being damaged or have already been destroyed or vandalized. These endangered World Heritage Sites are as follows: in Iraq, Hatra Ashur (Qal'at Sherqat) and Samarra Archaeological City; in Syria, the Ancient City of Damascus, the Ancient City of Bosra, the Site of Palmyra, the Ancient City of

119. *Id.* at pmb1.

120. *Id.* at arts. 3, 5.

121. *See id.* at arts. 7, 9, 13.

122. For a list of State Parties, see *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E> (last visited Sept. 19, 2016) [<https://perma.cc/RT9U-E8ZL>] (archived Sept. 19, 2016). Within the last few years a number of states have signed the 1970 UNESCO convention and enacted implementing laws. This was largely in part a response to the prevalent looting of museums in Iraq following the 2003 incident and other incidents that followed.

123. Convention Concerning the Protection of the World Cultural and Natural Heritage, arts. 6, 15, Nov. 16, 1972, 1037 U.N.T.S. 151, <http://whc.unesco.org/archive/convention-en.pdf> (last visited Sept. 19, 2016) [<https://perma.cc/X3HZ-29D6>] (archived Oct. 2, 2016). Article 6 notes that parties to the convention recognize that the cultural and natural heritage of outstanding universal value “constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.” Parties to the convention agree to give their help to the identification, protection, conservation, and preservation of such heritage.

124. *Id.* at art. 8.

125. *Id.* at art. 11(2).

Aleppo, Crac des Chevaliers, Qal'at Salah El-Din, and the Ancient Villages of Northern Syria.¹²⁶

4. The UNIDROIT 1995 Convention

Building on the 1970 UNESCO Convention principles, the UNIDROIT 1995 Convention calls on members to return stolen cultural property to the original owner.¹²⁷ Cultural property that is unlawfully excavated, or lawfully excavated but unlawfully retained, is considered stolen.¹²⁸ Member States may ask courts in another State Party to order the return of illegally exported cultural objects back to the requesting state.¹²⁹

C. Cultural Property Precedents in International Tribunals

The UNESCO director general has called on the international community to address the issue of cultural property destruction in conflict zones and adjudicate it as a war crime.¹³⁰ “Saving the Cultural Heritage of Iraq”—a nonbinding UN General Assembly Resolution—reiterates that “attacks on cultural heritage are used as a tactic of war in order to spread terror and hatred, fan conflict and impose violent extremist ideologies.”¹³¹ More importantly, the Resolution “affirms that attacks intentionally directed against buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments, may amount to war crimes.”¹³² This document is a strong message to those involved in “cultural cleansing”¹³³ in Iraq and beyond, and it “stresses the importance of holding accountable perpetrators”¹³⁴ who directly attack cultural property.

126. *World Heritage List*, UNESCO, <http://whc.unesco.org/en/list/> (last visited Sept. 19, 2016) [<https://perma.cc/7U42-CAVW>] (archived Sept. 19, 2016).

127. See UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Art. 3(1), June 24, 1995, 2421 U.N.T.S. 457, <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.pdf> (last visited Sept. 19, 2016) [<https://perma.cc/PLP6-UCRK>] (archived Sept. 19, 2016). The Convention does not require that a theft be proven.

128. *Id.* at art. 3(2).

129. *Id.* at art. 5(1).

130. See *Director-General Irina Bokova Firmly Condemns the Destruction of Palmyra's Ancient Temple of Baalshamin, Syria*, UNESCO NEWS, <http://en.unesco.org/news/director-general-irina-bokova-firmly-condemns-destruction-palmyra-s-ancient-temple-baalshamin> [<https://perma.cc/VY9B-6WLE>] (archived Sept. 19, 2016) (discussing the condemnation of the destruction of the ancient temple of Baalshamin by the director general of UNESCO).

131. G.A. Draft Res., *Saving the Cultural Heritage of Iraq* U.N. Doc. A/69/L.71* (May 21, 2015), http://www.un.org/ga/search/view_doc.asp?symbol=A/69/L.71 [<https://perma.cc/5Q48-VM7W>] (archived Oct. 2, 2016).

132. *Id.* at ¶ 2.

133. *Id.* at ¶ 5.

134. *Id.* at ¶ 6.

Recently, the International Criminal Court (ICC), established by the Rome Statute, successfully prosecuted Ahmad al-Faqi Al-Mahdi,¹³⁵ who was affiliated with Ansar Dine (a radical Islamic organization linked to al-Qaeda), for “directing attacks against historic monuments and/or buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali.”¹³⁶ The prosecution of acts against cultural property as a war crime is not new, for there are precedents from the Nuremberg Trials and International Criminal Tribunal for the Former Yugoslavia (ICTY), which adjudicated cases (e.g., *Strugar*,¹³⁷ *Krstić*,¹³⁸ and *Jokić*¹³⁹) dealing with the destruction of places of worship and historic monuments.

However, the Al-Mahdi case is an important precedent for future prosecution of crimes against cultural property for several reasons. First, it is the first time that a war crime against cultural property constitutes the only charge in an ICC proceeding. By choosing to prosecute a case composed solely of crimes against cultural property, the ICC is sending a clear message about the gravity of its destructiveness. Indeed, there is a strong link between attacks against cultural heritage and genocide. In *Krstić*, the ICTY noted 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.”¹⁴⁰ Second, Al-Mahdi’s case is different from previous war crime prosecutions of acts against cultural property because the attacks occurred during an armed conflict of a non-international character.¹⁴¹ While there is no

135. See *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following admission of guilt by the accused in Mali war crime case: “An important step for the victims, and another first for the ICC”*, INT’L CRIM. CT. (Mar. 1, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=160324-otp-stat-al-Mahdi> [<https://perma.cc/9B9P-6VWL>] (archived Sept. 16, 2016).

136. *Al Mahdi Alleged Crimes*, INT’L CRIM. CT., <https://www.icc-cpi.int/mali/al-mahdi/pages/alleged-crimes.aspx> (last visited Oct. 2, 2016) [<https://perma.cc/43DB-LQMD>] (archived Sept. 16, 2016); In August 2016, Al-Mahdi plead guilty and urged fellow Muslims to restrain from committing similar acts. See ‘Al Mahdi Trial Hearing,’ ICC-01/12-01/15-T-4-Red-ENG (Aug. 23, 2016); A month later, Al-Mahdi was convicted ‘of the war crime of attacking protected objects as a co-perpetrator under Articles 8(2)(e)(iv) and 25(3)(a) of the Statute [and sentenced] to nine years of imprisonment.’ See Al Mahdi (Judgment and Sentence) ICC-01/12-01/15 (Sept. 27, 2016).

137. *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005).

138. *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Aug. 02, 2001).

139. *Prosecutor v Jokić*, Case No. IT-01-42/1-S, Sentencing Judgment (Int’l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004).

140. *Prosecutor v. Krstić*, *supra* note 138, at ¶ 580.

141. See *Situation in Mali: Ahmad Al Faqi Al Mahdi Surrendered to the ICC on Charges of War Crimes Regarding the Destruction of Historical and Religious Monuments in Timbuktu*, INT’L CRIM. CT. (Sept. 26, 2015), <https://www.icc->

distinction in the law regarding whether an attack occurs during an international or non-international conflict, previous international law cases dealing with war crimes against cultural heritage have had an international dimension.¹⁴² The following is a brief discussion of existing international criminal law cases for the prosecution of crimes against cultural property.

1. Categories of Crimes Under Which Destruction of Cultural Property Can Be Prosecuted

a. War Crimes

International criminal law has provisions against the destruction of cultural heritage during war.¹⁴³ In order for these crimes to come under the umbrella of international law, there needs to be an armed conflict (either domestic or international in nature) that has a “nexus”¹⁴⁴ to the destruction of cultural property. In *Stakić*,¹⁴⁵ the ICTY pointed out that the existence of the conflict must play “a substantial part in the perpetrator's ability to commit [the crime], his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”¹⁴⁶ Attacks against cultural

cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1154.aspx [https://perma.cc/89QA-TZBS] (archived Sept. 16, 2016).

142. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Fr.-Gr. Brit.-N. Ir.-Russ.-U.S., art 6(b), Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter *Nuremberg Charter*] (vesting the International Military Tribunal with jurisdiction over war crimes, including “plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity”); see also U.N. Secretary-General, *Report of the Secretary-General Pursuant to Security Council Resolution 808*, U.N. Doc. S/25704 (May 3, 1993) [hereinafter *ICTY Statute*] (empowering the international tribunal to adjudicate crimes of “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”).

143. See generally ROGER O'KEEFE, *THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT* (James Crawford & John S. Bell eds., 2006) (presenting a substantive discussion of relevant international criminal law and protection of cultural property during armed conflict); Roger O'Keefe, *Protection of Cultural Property Under International Criminal Law*, 11 MELB. J. OF INT'L L. 339 (2010).

144. See *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, ¶ 342 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgment, ¶¶ 569–70 (Int'l Crim. Trib. for Rwanda, May 26, 2003).

145. *Prosecutor v. Stakić*, *supra* note 144; see *Prosecutor v. Rutaganda*, *supra* note 144; see also *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

146. *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 58 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) (additionally noting that “[w]hat ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment -- the armed conflict -- in which it is committed. . . . [I]f it can be established . . . that the perpetrator acted in

property that are “geographically remote from the actual fighting” may be war crimes, but the acts must be “in furtherance of or under the guise of the armed conflict.”¹⁴⁷

i. Unlawful Attacks Against Cultural Property

Under international criminal law, individuals may be criminally liable for unlawfully directing attacks¹⁴⁸ against cultural property¹⁴⁹ during an armed international or non-international conflict. The *Strugar* Trial Chamber convicted Pavle Strugar, a retired Lieutenant-General of the then Yugoslav Peoples’ Army (JNA), for the war crime 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,” within the meaning of Article 3(d) of the ICTY Statute.¹⁵⁰ The JNA forces shelled a UNESCO-protected site—the Old Town of Dubrovnik—while he was in command of the unit. The Chamber held that acts of hostility directed against cultural property with no military necessity are a war crime, regardless of whether the conflict is international or non-international.¹⁵¹ This principle was confirmed in *Hadžihasanović*¹⁵² by the Appeals Chamber, which affirmed that “[t]he jurisprudence of the International Tribunal indicates that protection of cultural property in customary international law applies in all situations of armed conflict.”¹⁵³ Similarly, the Rome Statute gives the court jurisdiction over the war crime of “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable

furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.”) [hereinafter *Prosecutor v. Kunarac* (2002)]; see *Prosecutor v. Rutaganda*, *supra* note 144, at ¶¶ 569–70.

147. *Prosecutor v. Stakić*, *supra* note 144, at ¶ 342; *Prosecutor v. Kunarac*, *supra* note 146, at ¶ 57–58.

148. The Appeals Chamber of the ICTY determined that under international criminal law, individual criminal responsibility attaches to attacks against civilian objects in both international and non-international armed conflict. See *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment, ¶ 277 (Int’l Crim. Trib. for the Former Yugoslavia July 17, 2008) [hereinafter *Prosecutor v. Strugar* (2008)]; see also *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-AR73.3, Appeals Chamber Decision on Joint Defense Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, ¶ 30 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 11, 2005).

149. See *ICTY Statute*, *supra* note 142, at art 3(d) (defining cultural property as “institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”).

150. *Id.*

151. *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment, ¶ 230 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005) [hereinafter *Prosecutor v. Strugar* (2005)].

152. *Prosecutor v. Hadžihasanović*, *supra* note 148, at ¶¶ 44–48.

153. *Id.* at ¶ 44.

purposes [and] historic monuments” in both international and non-international armed conflicts.¹⁵⁴

1. *Actus Reus*

Attacks against cultural property can be justified by military necessity. The Rome Statute highlights this exception stating that “directing attacks against buildings dedicated to religion . . . art . . . [and] historic monuments . . .” is a war crime “provided they are not military objectives.”¹⁵⁵ The ICTY has used Article 52(2) of *Additional Protocol I*¹⁵⁶ to define a military objective. Accordingly, an attack on cultural property may be justified if an object “by [its] nature, location, purpose or use make[s] an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”¹⁵⁷

The Trial Chamber in *Hadžihasanović*¹⁵⁸ held that an act of hostility toward cultural property could be justified only when used for military purpose. More importantly, the Chamber distinguished the exceptions provided by ICTY Statute Article 3(d) (on the protection of religious institutions) from the broader protection afforded by the 1954 Convention and Additional Protocol I, which “prohibit[] all acts of hostility against protected property.”¹⁵⁹

The various legal documents differ on whether or not actual damage or destruction is an element of the war crime of attacking cultural property. Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute mention “directing attacks against” as the prerequisite for this crime, while Article 3(d) of the ICTY Statute requires “destruction or . . . damage” to cultural property.¹⁶⁰

2. *Mens Rea*

Under the Rome Statute a person is criminally liable for attacking cultural property during armed conflict when the act is done with

154. Rome Statute of the International Criminal Court, UN Doc. No. A/CONF. 183/9, at arts. 8(2)(b)(ix), 8(2)(e)(iv) (July 17, 1998) [hereinafter *Rome Statute*].

155. *Id.* International tribunals and academia have discussed the doctrine of military necessity at great lengths. Acknowledging its fundamental importance, an in-depth analysis of this concept is beyond the immediate scope of this Article.

156. Prosecutor v. Brđanin, Case No IT-99-36-T, Judgment, ¶ 596 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

157. *Id.*

158. Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Judgment, ¶¶ 58, 61, 64 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006).

159. *Id.* at ¶ 61.

160. Under this definition the ICC does not require actual damage or destruction. See Int'l Crim. Ct., *Elements of Crimes*, arts. 8(2)(b)(ix), 8(2)(e)(iv), Doc No. ICC-ASP/1/3 (Sept. 9, 2002) [hereinafter *ICC Elements of Crimes*].

“intent and knowledge,”¹⁶¹ and “awareness that a circumstance exists.”¹⁶² The statute is specific in requiring that the accused “means to engage in the conduct.”¹⁶³ Although the statute states that relevant facts and circumstances can shed light onto the *mens rea* of the perpetrator,¹⁶⁴ the ICTY definition of *mens rea* for this crime is broader. In *Strugar*, the Appeals Chamber defined intent as meaning “either deliberately or through recklessness.”¹⁶⁵ Making a clear distinction between civilian objects that overlap with cultural property,¹⁶⁶ the Chamber found that UNESCO emblems in the Old Town of Dubrovnik were visible from the JNA positions on Žarkovica.¹⁶⁷ Based on the evidence, the *Stugar* Appeals Chamber concluded that the attack on cultural property “was deliberate and not justified by any military necessity.”¹⁶⁸

ii. Unlawful Acts of Hostility Against Cultural Property Other Than Attacks

Any court adjudicating cases of cultural property crimes in Iraq and Syria will have to address unlawful acts of hostility against cultural property other than “attacks.” ISIS has attacked cultural property in a substantial, systematic, and institutionalized manner. Much of its destruction is pre-planned, orchestrated, and well-documented. ISIS has planted explosives and used jackhammers and bulldozers, which are clear cases of individual criminal responsibility.

Existing international criminal law has provisions to prosecute acts of hostility against cultural property in both international (regardless of whether they occur during hostilities or foreign occupation) and non-international armed conflict. Decisions from the Nuremberg Trials and the ICTY¹⁶⁹ provide case precedents where perpetrators were convicted of having planned the destruction of cultural property in armed conflict.

161. *Rome Statute*, *supra* note 154, at art. 30(1).

162. *Id.* at art. 30(3).

163. *Id.* at art. 30(2)(a).

164. *See ICC Elements of Crimes*, *supra* note 160, at ¶ 3.

165. *Prosecutor v. Strugar* (2008), *supra* note 148, at ¶ 277.

166. *Prosecutor v. Strugar* (2005), *supra* note 151, at ¶ 329.

167. *Prosecutor v. Strugar* (2008), *supra* note 148, at ¶ 279.

168. *Id.*

169. Case law stemming from the crimes enumerated in the statute includes the previously cited *Blaškić*, *Kordić*, *Naletilić* and *Brđanin* cases—the defendant was convicted in each case—the *Plavšić* case—the defendant pled guilty—and the *Hadžihasanović* case—the accused were acquitted; *ICTY Statute*, *supra* note 142, at art 3(d).

1. *Actus Reus*

Deliberate acts against cultural property may be justified if there is military necessity, such as impeding the progress of enemy forces, denying cover, or clearing a line of fire. Yet, such planned acts on cultural property must be proportionate to the military necessity.¹⁷⁰ In *Brđanin*, the accused was found guilty of attacking institutions dedicated to religion using a hand-held rocket launcher, explosives, mining, shelling, arson, and heavy machinery. The Appeals Chamber held that

[t]he very manner in which many of the sites were damaged . . . including the time required to mine . . . [and] blow them up . . . suggests that these installations contained no military threat, but were instead systematically destroyed because of their religious significance to the ethnicities targeted.¹⁷¹

Moreover, the attack on cultural property did not provide “any kind of advantage in weakening the military forces opposing the Bosnian Serbs, favored the Bosnian Serb position, or [] otherwise justify [] military [action].”¹⁷²

2. *Mens Rea*

Unlawful acts of hostility against cultural property other than attacks require intent and knowledge.¹⁷³ The ICTY Statute states that the perpetrator should know that the cultural property being seized or destroyed is “dedicated to religion, charity and education, the arts and sciences, historic monuments, and works of art and science.”¹⁷⁴ The Rome Statute on the other hand requires that the perpetrator knows that the property belongs to the enemy and that the cultural property destroyed be “protected from that destruction . . . under the international law of armed conflict.”¹⁷⁵ The Rome Statute requirement is broader in that it is sufficient to know that the property in question belongs to the enemy and it is protected under the international law of armed conflict.

170. See *Rome Statute*, *supra* note 154, at arts. 8(2)(b)(xiii), 8(2)(e)(xii).

171. Prosecutor v. Brđanin, Case No IT-99-36-A, Judgment, ¶ 341 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007).

172. *Id.*

173. See *Rome Statute*, *supra* note 154, at art. 30(1); see also Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 185 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

174. *ICTY Statute*, *supra* at note 142, at art 3(d).

175. *ICC Elements of Crimes*, *supra* note 160, at arts. 8(2)(b)(xiii), 8(2)(e)(xii).

iii. Unlawful Appropriation of Cultural Property

The existing international body of law recognizes individual criminal liability for unlawful appropriation of cultural property, both in international and non-international armed conflict.¹⁷⁶ It is sufficient that an armed conflict exists; hence there is no requirement that the crime be committed in occupied territory. The first international tribunal to address the question of “plunder of public or private property”¹⁷⁷ in the context of war crimes was the International Military Tribunal at Nuremberg (IMT). This Tribunal held that acts of plunder, including pillage, “infringe various norms of international humanitarian law.”¹⁷⁸ The ICTY has also adjudicated cases dealing with this issue. Its Statute grants the Tribunal jurisdiction over the specific war crime of “seizure of . . . institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science” and “plunder of public or private property.”¹⁷⁹

The Rome Statute also recognizes the crime in both international and non-international armed conflict. Similarly to the exceptions noted in other crimes against cultural property, military necessity may justify seizing the enemy's property.¹⁸⁰ However, the perpetrator should be “aware of factual circumstances that established the existence of an armed conflict.”¹⁸¹ While justifying the appropriation of the enemy's cultural property as a legitimate war necessity exception might be a bit difficult to successfully argue in court, the *mens rea* for the offense requires intent and knowledge.¹⁸²

b. Crimes Against Humanity—Persecution

International criminal law recognizes persecution based on race, religion, and politics. Unlike the elements of the war crimes against cultural property, persecution as a crime against humanity does not require the existence of an armed conflict as a legal precondition.¹⁸³ Whether persecution as a crime against humanity is committed in the context of armed conflict (international or non-international), and whether such crime has a nexus to the armed conflict, is immaterial.

176. See *Prosecutor v. Kordić*, Case No. IT-95-14/2-A, Judgment, ¶¶ 77–79 (Int'l Crim. Trib. for the Former Yugoslavia Dec.17, 2004) [hereinafter *Prosecutor v. Kordić* (2004)].

177. *Nuremberg Charter*, *supra* note 142, at art. 6(b).

178. *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, ¶ 147 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004) [hereinafter *Prosecutor v. Blaškić* (2004)].

179. *ICTY Statute*, *supra* at note 142, at arts. 3(d), 3(e).

180. See *Rome Statute*, *supra* note 154, at arts. 8(2)(b)(xiii), 8(2)(e)(xii).

181. *Id.*

182. *Rome Statute*, *supra* note 154, at art. 30(1).

183. See *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 713 (Int'l Criminal Tribunal for the Former Yugoslavia, May 7, 1997).

The IMT at Nuremberg was the first international court to recognize the plunder and destruction of cultural property in occupied territories as a crime against humanity.¹⁸⁴ Building upon this precedent, the *Blaškić* Trial Chamber used the *Rosenberg*¹⁸⁵ Nuremberg judgment to argue that the crime of persecution as defined in Article 5(h) of the ICTY Statute “encompasses not only bodily and mental harm and infringements upon individual freedom but also acts which appear less serious, such as those targeting property, so long as the victimized persons were specially selected on grounds linked to their belonging to a particular community.”¹⁸⁶

Various ICTY trial chambers have affirmed that discriminatory destruction of, or extensive damage to,¹⁸⁷ cultural property can amount to a crime against humanity.¹⁸⁸ The *Karadžić* Trial Chamber, for example reaffirmed that destruction of property can constitute a crime against humanity, but this depends “on the nature and the extent of the destruction and if committed with discriminatory intent.”¹⁸⁹ Moreover, the acts against cultural property “can be of equal gravity to other crimes”¹⁹⁰ listed under Article 5 of the ICTY Statute.¹⁹¹

The Rome Statute also recognizes persecution as a crime against humanity,¹⁹² but there is a slight difference between the ICTY Statute and the Rome Statute. The former recognizes discrimination on

184. See *Judicial Decisions Involving Questions of International Law—International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. OF INT’L L. 172, 249 (1947).

185. See *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, ¶ 228 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

186. *Id.* at ¶ 233.

187. See *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Judgment, ¶ 207 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009) [hereinafter *Prosecutor v. Milutinović* (2009)].

188. See *id.* at ¶ 205; see also *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, ¶ 119 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2007); *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, ¶¶ 782–83 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006); *Prosecutor v. Brđanin* (2004), *supra* note 158, at ¶ 1023; *Prosecutor v. Babić*, Case No. IT-03-72-S, Sentencing Judgment, ¶¶ 30–31 (Int’l Crim. Trib. for the Former Yugoslavia June 29, 2004); *Prosecutor v. Deronjić*, Case No. IT-02-61-S, Sentencing Judgment, ¶ 122 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 30, 2004) [hereinafter *Prosecutor v. Deronjić* (2004)]; *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶ 768 (Int’l Criminal Tribunal for the Former Yugoslavia, July 31, 2003); *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1-S, Sentencing Judgment, ¶ 15 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003); *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 207 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

189. *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment, ¶ 531 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016).

190. *Id.*

191. Enumerated crimes include murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial, and religious grounds, and other inhumane acts. *ICTY Statute*, *supra* note 144, at art. 5; see *Prosecutor v. Blaškić* (2004), *supra* note 180; *Prosecutor v. Kordić* (2004), *supra* note 178, at ¶ 108.

192. *Rome Statute*, *supra* note 156, at art. 7(1)(h).

political, racial, and religious grounds,¹⁹³ while the latter is more expansive, as it includes “other grounds that are universally recognized as impermissible under international law.”¹⁹⁴

i. Actus Reus

Crimes against humanity are defined as “widespread or systematic attacks”¹⁹⁵ on a civilian population.¹⁹⁶ The Appeals Chamber in *Kunarac* observed that, in order for an act against cultural property to constitute persecution as a crime against humanity, “only the attack, not the individual acts of the accused, must be widespread or systematic,”¹⁹⁷ that is, the acts of the accused need only be part of this concerted effort to destroy cultural property. Therefore, “a single or relatively limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.”¹⁹⁸

Milutinović highlighted that other elements of persecution may be accomplished by means of discriminatory destruction or damage to cultural property. The Trial Chamber held that “the destruction or damage” to cultural property must be the result of “an act directed against this property.”¹⁹⁹ And similarly to other crimes against cultural property, military necessity justifies the destruction or damage of religious sites and cultural monuments that would otherwise fall under the umbrella of persecution as a crime against humanity.²⁰⁰

ii. Mens Rea

The required mens rea for a crime against humanity is intent to commit the underlying act and knowledge that the offense is part of a widespread and systematic attack against targeted civilians.²⁰¹

193. See *ICTY Statute*, *supra* note 144, at art. 5(h) (listing persecutions on political, racial, and religious grounds, when committed in armed conflict and directed against any civilian population, as crimes for which the International Tribunal has the power to prosecute).

194. *Rome Statute*, *supra* note 156, at art. 7(1)(h).

195. See *ICTY Statute*, *supra* note 144, at ¶ 48; S.C. Res. 955, art. 3 (Nov. 8, 1994); see also *Rome Statute*, *supra* note 156, at art. 7(1).

196. See *Nuremberg Charter*, *supra* note 142, at art. 6(c); Control Council Law No. 10, art II(1)(c); *ICTY Statute*, *supra* note 142, at art. 5; S.C. Res. 955, art 3 (Nov. 8, 1994); *Rome Statute*, *supra* note 154, at art. 7(1).

197. *Prosecutor v. Kunarac* (2002), *supra* note 146, at ¶ 96; see *Prosecutor v. Deronjić* (2004), *supra* note 188 (narrating the accused pleading guilty to the crime against humanity of persecution, which included killings of civilians and destruction of a single mosque).

198. *Prosecutor v. Kunarac* (2002), *supra* note 146, at ¶ 96.

199. *Prosecutor v. Milutinović* (2009), *supra* note 187, at ¶ 206.

200. See *id.* at ¶ 208.

201. *Prosecutor v. Kunarac*, (2002), *supra* note 146, at ¶ 102.

However, persecution has an additional element in that the perpetrator must act with the intent to discriminate on grounds of race, religion, and politics.²⁰² Such discriminatory destruction of cultural property must be committed “with the intent to destroy or damage the religious or cultural property in question, or in reckless disregard of the likelihood of such destruction or damage.”²⁰³

V. EFFORTS TO COMBAT THE PLUNDER OF ANTIQUITIES FROM SYRIA, IRAQ, AND RELATED CONFLICT ZONES

Strengthening international law and prosecuting perpetrators is only one dimension of the fight against looted antiquities from war zones. The international community and individual states have taken significant steps to supplement the international judicial branch.²⁰⁴ Among an array of measures²⁰⁵ to fight trafficking of looted antiquities from war zones, the publication of Red Lists has produced some tangible results. In partnership with UNESCO, the International Council of Museums (ICOM)²⁰⁶ has published fifteen Red Lists containing cultural objects at risk around the world.²⁰⁷ These Red Lists are intended to help law enforcement officials and all other professionals concerned with the trafficking of cultural property. The lists “classify the endangered categories of archeological objects or works of art in the most vulnerable areas of the world, in order to prevent them being sold or illegally exported,”²⁰⁸ and have had some success. Items identified and seized by the authorities based on these lists include objects from ancient Mesopotamia, pre-Columbian ceramics, and African and Cambodian art.²⁰⁹

202. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 275 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

203. *Prosecutor v. Milutinović*, (2009), *supra* note 187, at ¶ 210.

204. See Helga Turku, *The International System of States' Checks and Balances on State Sovereignty: The Case of Switzerland*, 38 N.C. J. INT'L L. & COMM. REG. 809 (2013) (discussing a parallel between separation of powers in the domestic sphere, and checks and balances in the international arena).

205. For an extensive list of all international efforts made to curb the trafficking of cultural property from war zones, see SLIVIA PERINI & EMMA CUNLIFFE, TOWARDS A PROTECTION OF THE SYRIAN CULTURAL HERITAGE: A SUMMARY OF THE NATIONAL AND INTERNATIONAL RESPONSES VOL. III (SEPT. 2014-SEPT. 2015) (3rd ed. 2015).

206. See generally *Code of Ethics*, INT'L COUNCIL OF MUSEUMS, <http://icom.museum/ethics.html#section2> (last visited Sept. 18, 2016) [<https://perma.cc/UHC3-TZHK>] (archived Sept. 18, 2016).

207. *Red Lists Database*, INT'L COUNCIL OF MUSEUMS, <http://icom.museum/resources/red-lists-database/> (last visited Sept. 18, 2016) [<https://perma.cc/63RF-RF9H>] (archived Sept. 18, 2016).

208. *Red List*, INT'L COUNCIL OF MUSEUMS <http://icom.museum/programmes/fighting-illicit-traffic/red-list/> (last visited Oct. 2, 2016) [<https://perma.cc/EJ55-FFWX>] (archived Sept. 18, 2016).

209. See *id.*

UNESCO, the U.S. Department of State, and ICOM have worked together to publish an Emergency Red List of Syrian Cultural Objects, aimed at preventing the transport and trade of Syria's invaluable cultural property.²¹⁰ This list is especially important because artifacts from that region date from prehistory and ancient history to the Islamic era, Middle Ages, and Ottoman period.²¹¹ Regional actors are also engaged in preservation efforts. For example, the government of Egypt hosted a ministerial meeting, co-organized by the Antiquities Coalition and the Middle East Institute, which included ten Arab states and international experts and sought to find common solutions to the crisis in the region. The conference aimed to unify "regional and international efforts to combat the phenomena of looting and destroying antiquities by terrorist organizations."²¹²

A. American Efforts to Combat the Destruction and Theft of Antiquities

1. Law Enforcement, New Legislation, and Other Efforts

a. Early American Law Enforcement Efforts in Iraq

The earliest organized U.S. efforts to stop the looting and trading of antiquities in Iraq took place shortly after April 2003. At the time, it was reported that the Iraq Museum had been ransacked and more than 170,000 of the finest antiquities had been stolen. Although the numbers were later revised to between 14,000–15,000 pieces, the investigation determined that there had been three thefts at the museum by three different groups: professionals who stole several dozen of the most prized treasures, random looters who stole more than three thousand excavation-site pieces, and insiders who stole almost eleven thousand cylinder seals and pieces of jewelry. The looting was compared to "a tragedy with echoes of past catastrophes: the Mongol

210. *Emergency Red List of Syrian Antiquities at Risk is Launched in New York*, UNESCO (Sept. 26, 2013), http://www.unesco.org/new/en/media-services/single-view/news/emergency_red_list_of_syrian_antiquities_at_risk_is_launched_in_new_york/#.VLwjGGTF--o [<https://perma.cc/BU7R-X7XW>] (archived Sept. 18, 2016).

211. See, e.g., *Emergency Red List of Syrian Cultural Objects at Risk*, INT'L COUNCIL OF MUSEUMS, <http://icom.museum/resources/red-lists-database/red-list/syria/> (last visited Sept. 18, 2016) [<https://perma.cc/KU7S-ZCGN>] (archived Sept. 18, 2016) (listing the time periods from which various categories of Syrian cultural objects originated).

212. *Egypt to Host Conference to Combat Destruction of Antiquities by "Terrorists"*, AHRAMONLINE (May 6, 2015), <http://english.ahram.org.eg/NewsContent/1/64/129536/Egypt/Politics-/Egypt-to-host-conference-to-combat-destruction-of-.aspx> [<https://perma.cc/UPX7-JC9B>] (archived Oct. 13, 2016).

sack of Baghdad in 1258, and the fifth-century destruction of the library of Alexandria.”²¹³

As a response, the U.S. military created a task force to investigate and collect the stolen artifacts.²¹⁴ Working closely with the Iraqis, and using a variety of approaches including “community outreach, raids, seizures, and amnesty, the task force and others around the world have recovered more than five thousand of the missing antiquities.”²¹⁵ The FBI also created a task force, the Rapid Deployment National Art Crime Team, to respond to the situation. Modeled after similar units in Italy and Spain, it was the first national-level art theft unit in the United States specifically designed to “investigate and bring to successful prosecutions those who steal and deal in stolen art and antiquities and to recover those art objects.”²¹⁶

b. New Legislation Related to ISIS and Antiquities from War Zones

The United States passed a new law, the Protect and Preserve International Cultural Property Act (PPICPA), in May 2016.²¹⁷ This law creates an interagency coordinating committee to help “protect and preserve international cultural property at risk from political instability, armed conflict, or natural or other disasters.”²¹⁸ According to this law, representatives from the federal agencies responsible for protection of cultural property and from the Smithsonian Institution must be included in this interagency committee. Furthermore, the U.S. president will apply specified import restrictions to Syrian cultural-heritage objects within ninety days, regardless of whether or not Syria is a State Party to the UNESCO 1970 Convention, notwithstanding the requirement that an emergency condition applies.²¹⁹

There is an important exception to the prohibition of imported Syrian cultural property into the United States: the PPICPA provides shelter to cultural property from this war zone. Specifically, the president may waive specified import restrictions when (1) the

213. Eleanor Robson, *The Collection Lies in Ruins, Objects from a Long, Rich Past in Smithereens*, GUARDIAN (Apr. 14, 2003), <http://www.theguardian.com/artanddesign/2003/apr/14/heritage.highereducation> [https://perma.cc/MJJ9-NN67] (archived Oct. 3, 2016).

214. Colonel Matthew Bogdanos recounts these efforts in great detail in Matthew Bogdanos, *The Casualties of War: The Truth about the Iraq Museum*, 109 AM. J. OF ARCHEOLOGY 477, 482 (2005) [hereinafter Bogdanos, *Casualties*]. See generally MATTHEW BOGDANOS & WILLIAM PATRICK, *THIEVES OF BAGHDAD* (2005). Bogdanos donated the proceeds of the book to the Iraqi Museum.

215. Bogdanos, *Casualties*, *supra* note 214, at 477.

216. *Id.* at 482 n.24 (quoting J.E. Kaufman, *FBI Steps Up First National Art Theft Squad in US*, ART NEWSPAPER, Feb. 26, 2005).

217. Protect and Preserve International Cultural Property Act, Pub. L. No. 114–51 (2016).

218. *Id.* at § 2.

219. *Id.* at § 3.

custodian or owner of the cultural property has requested that the item be temporarily sheltered in the United States for protection, (2) the custodian or owner has requested that the item be returned, and (3) the waiver does not contribute to the illegal trafficking in cultural property or terrorist financing or activities.²²⁰ Archaeological or ethnological material from Syria that is being brought into the United States for shelter is immune from seizure²²¹ and may be studied or exhibited without profit.

Interestingly, this new law does not alter American legal doctrine on cultural property but instead expands it to provide shelter for antiquities at risk. This law empowers a committee to enforce, educate, and coordinate efforts to combat the trafficking in cultural property from a war zone. Perhaps the more humane aspect of this law is that it opens the door to legal custodians or owners seeking to protect cultural heritage under threat.

c. Government Grant Efforts

In addition to new legislation by the U.S. Congress, a number of U.S. government departments are funding preservation efforts. The U.S. Department of State has provided funding to the American Schools of Oriental Research to document and record the condition of cultural heritage sites in Syria. Similar efforts are also being carried out in Iraq. The National Science Foundation has partnered with the American Association for the Advancement of Science to track the destruction of the historical sites in Syria using geospatial technologies, and the U.S. government has provided Iraqi conservation experts with critical training on emergency documentation and disaster preparedness and response at the Iraqi Institute for the Conservation of Antiquities and Heritage.²²²

In addition to government efforts, American researchers, scholars, lawyers, and civil society have supported source states attempting to reclaim their stolen artifacts. For example, the Antiquities Coalition has supported the efforts of the Egyptian government to help curb looting from Egypt and the resulting sales in the United States²²³ and

220. *See id.*

221. *See* 22 U.S.C. § 2459 (1965) (stating that any foreign work of art or object of cultural significance imported into the United States for temporary exhibition, without profit, is immune from enforcement of judicial process).

222. John Kerry, U.S. Sec'y of State, Remarks at Threats to Cultural Heritage in Iraq and Syria Event (Sept. 22, 2014).

223. *See* Tom Mashberg, *Egypt Asks U.S. to Impose Sharp Curbs on Importing of Antiquities*, N.Y. TIMES (Mar. 24, 2014), http://www.nytimes.com/2014/03/15/arts/design/egypt-asks-us-to-impose-sharp-curbs-on-importing-of-antiquities.html?_r=0 [<https://perma.cc/VM52-7ACL>] (archived Sept. 19, 2016).

partnered with the Middle East Institute to support an Egypt-based ministerial meeting on heritage at risk,²²⁴ among other initiatives.

2. American Museums Respond to the Looting Crisis

American museums have also responded to the gravity of the issue of looted artifacts from Iraq and Syria.²²⁵ In June 2004, the Association of American Museum Directors (AAMD) published *Report on the Acquisition of Archaeological Materials and Ancient Art*, (AAMD Guidelines) suggesting that members should adopt rules to purchase an archeological item that has been out of its state of modern discovery for a period of ten years prior to acquisition.²²⁶ However, the ten-year wait period was revised in 2008 when the AAMD recommended to its member museums that November 17, 1970 (the date of the UNESCO 1970 Convention)²²⁷ be selected as “providing the most pertinent threshold for the application of more rigorous standards to the acquisition of archaeological materials and ancient art as well as for the development of a unified set of expectations for museums, sellers and donors.”²²⁸ Confirming this change, in July 2008 the American Association of Museums (AAM) issued *Standards Regarding Archaeological Material and Ancient Art* (AAM Standards), which stated that museums should require documentation that an object was

224. See Nevine El-Aref, *Cairo Declaration to Protect Middle Eastern Cultural Heritage*, AHRAMONLINE (May 18, 2015), <http://english.ahram.org.eg/NewsContent/9/40/130553/Heritage/Ancient-Egypt/Cairo-Declaration-to-protect-Middle-East-cultural-.aspx> [https://perma.cc/EL5K-C5W4] (archived Sept. 19, 2016).

225. See Jane A. Levine, *The Importance of Provenance Documentation in the Market for Ancient Art and Artifacts: The Future of the Market May Depend on Documenting the Past*, 19 DEPAUL J. ART TECH. & INTELL. PROP. L. 219, 226–28 (2009).

226. ASS'N OF ART MUSEUM DIRS., REPORT OF THE AAMD TASK FORCE ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART (2004), <https://aamd.org/sites/default/files/document/June%2010%20Final%20Task%20Force%20Report.pdf> [https://perma.cc/3HTL-F2NX] (archived Sept. 19, 2016). The AAMD's June 2004 policy recommendation was criticized for two reasons. First, the ten-year rolling policy was an inadequate legal protection, as states have statutes of limitation that run longer than ten years. Second, measuring provenance on a rolling time period may be used by unethical dealers to hold on to items with dubious provenance for the prescribed time period and then sell these artifacts in the legal market.

227. In October 2006, the J. Paul Getty Museum became the first American museum to adopt an acquisition policy requiring evidence that an archeological material has been out of its state of origin or has been legally exported from its state of origin since November 17, 1970, the date on which the 1970 UNESCO Convention was signed. See Press Release, J. Paul Getty Museum, J. Paul Getty Museum Announces Revised Acquisitions Policy (Oct. 26, 2006) (http://www.getty.edu/news/press/center/revised_acquisition_policy_release_102606.html) [https://perma.cc/B3J6-LLGT] (archived Sept. 19, 2016).

228. ASS'N OF ART MUSEUM DIRS., NEW REPORT ON ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART (2008), <https://aamd.org/sites/default/files/document/Antiquities%20Guidelines%20with%20Intro%2006.08.pdf> [https://perma.cc/6RMT-D6NE] (archived Sept. 19, 2016) [hereinafter MUSEUM DIRS., NEW REPORT].

out of its probable country of modern discovery by November 17, 1970.²²⁹

Both the AAMD and the AAM recommend rigorous research into the provenance of an artifact as a precondition to its acquisition. The AAMD requires its members to “thoroughly research the ownership history of archaeological materials or works of ancient art . . . prior to their acquisition, including making a rigorous effort to obtain accurate written documentation with respect to their history, including import and export documents.”²³⁰ The AAM has a similar provision: “Museums should rigorously research the provenance of an object prior to acquisition, make a concerted effort to obtain accurate written documentation with respect to the history of the object, including export and import documents, and require sellers, donors, and their representatives to provide all available information and documentation.”²³¹

Both the AAMD and AAM advise their members to require sellers and donors to provide complete provenance documentation. The AAMD Guidelines instruct members to not “acquire a work unless research substantiates that the work was outside its country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery after 1970.”²³² Similarly, under the AAM Standards, members are instructed to “promptly publish” acquisitions of artifacts, including provenances and images, thus making the information available to all interested parties.²³³

The AAMD Guidelines and the AAM Standards acknowledge that, at times, it will not be possible to document the provenance of an artifact back to 1970, despite due diligence, good faith, and rigorous research. The AAMD has an online registry where member museums publish objects that, although acquired without proper documentation,²³⁴ based on an “informed judgment,” were outside the state of modern discovery prior to 1970.²³⁵

229. AM. ASS'N OF MUSEUMS, *Standards Regarding Archaeological Material and Ancient Art* 1 (2008), <https://aamd.org/sites/default/files/document/Antiquities%20Guidelines%20with%20Intro%2006.08.pdf> [<https://perma.cc/P4J8-NHGX>] (archived Oct. 3, 2016).

230. MUSEUM DIRS., NEW REPORT, *supra* note 228.

231. *Standards Regarding Archaeological Material and Ancient Art*, AM. ALLIANCE OF MUSEUMS, <http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/archaeological-material-and-ancient-art> (last visited Oct. 3, 2016) [<https://perma.cc/6EGC-97GS>] (archived Oct. 3, 2016).

232. MUSEUM DIRS., NEW REPORT, *supra* note 228.

233. *Id.*

234. Artifacts that cannot be traced back to November 1970.

235. *New Acquisitions of Archaeological Material and Works of Ancient Art*, ASS'N OF ART MUSEUM DIRS., <https://aamd.org/object-registry/new-acquisitions-of-archaeological-material-and-works-of-ancient-art/more-info> (last visited Sept. 19, 2016) [<https://perma.cc/KNU3-D3JD>] (archived Sept. 19, 2016).

VI. SUGGESTIONS FOR NEW MEASURES TO COMBAT ILLEGAL TRAFFICKING OF LOOTED ARTIFACTS

A. Demand-Driven Business

The illegal trade in antiquities is often a demand-driven business, where the desire to possess art may be helping destroy it. The looting of historical sites in Iraq and Syria is likely motivated by profit therefore, “the rate of looting should respond to the basic economic principles of supply and demand.”²³⁶ If dealers or collectors in market states (or destination states) refuse to buy antiquities with no (or questionable) provenance, then incentives for trading stolen antiquities will decrease. Because it is almost impossible to control the looting and destruction of sites in certain source states, like Iraq and Syria, under the current conditions, the international community and market states, such as the United States, should focus their efforts on those who contribute directly or indirectly to the looting of historical sites in these war zones by creating a demand for them.

To understand the possible market for antiquities looted from war zones, much can be learned from post-conflict Cambodia. According to a comprehensive study by Simon Mackenzie and Tess Davis, there are often very few stages between a looted antiquity and a buyer.²³⁷ Another study by Mackenzie on the illicit trade of antiquities shows that dealers and collectors indulge in a significant amount of denial about their role in the market; while all collectors recognize that unethical dealers are involved in the trade of stolen artifacts, they all claim to be ethical and steer clear of shady practices.²³⁸ Market participants justify their failure to acquire artifacts with proper provenance by maintaining that lack of proper information about the artifacts does not necessarily mean that an artifact is stolen.²³⁹

Mackenzie maintains that low risks of detection and low deterrence from the current punishments are some of the factors that contribute to the current demand for looted artifacts.²⁴⁰ He proposes that states should adopt a legal rubric and register all artifacts that are currently held in collections, including museums, private collections, and dealer and auction house inventories.²⁴¹ Although registering all artifacts currently in possession would mean an amnesty of a sort for dealers and collectors to launder title to these

236. Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT'L L. 169, 174 (2007).

237. See generally Simon Mackenzie & Tess Davis, *Temple Looting in Cambodia: Anatomy of a Statue Trafficking Network*, BRIT. J. OF CRIMINOLOGY, 722–40 (2014).

238. S.R.M. MACKENZIE, GOING, GOING, GONE: REGULATING THE MARKET IN ILLICIT ANTIQUITIES 25–32 (2005).

239. *Id.* at 47–60.

240. *Id.* at 243.

241. *Id.* at 237–46.

objects, regardless of their provenance,²⁴² it will help stem the trade going forward. If an artifact is not registered within a given time frame, the possessor would have to demonstrate clear legitimate title and excavation history.²⁴³ Those trading in any unregistered artifacts would face criminal charges.

Another group of academics who propose solutions are at the opposite end of the market regulation spectrum. Eric Posner, for example, believes that it is unwise to strengthen legal regimes for protection of cultural property through enhanced sanctions, strengthening compliance with treaties, creating stricter standards of enforcement, or pressuring states to become members of international regimes.²⁴⁴ He suggests that “the distinctive features of cultural property do not justify the existing treaty regimes or proposals to strengthen them” because “cultural property is, in most ways, just like ordinary property, and existing laws and practices that govern the treatment of ordinary property should apply to cultural property as well.”²⁴⁵ Posner argues that cultural property “is valuable to the extent that people care about it,”²⁴⁶ hence its economic, aesthetic, and historical values are somewhat relative. He seems to believe that cultural property should not be treated much differently from oil or other natural resources,²⁴⁷ and that “origin states do not have a strong moral right to the cultural property created by predecessor populations.”²⁴⁸ On this basis, he opines that calls for greater law enforcement create an “an artificial black market [and suggests that] states should try to create a legal market which could then be lightly regulated in order to correct some of the problems of the antiquities market.”²⁴⁹

While a free market economy has a wealth of values and benefits, Posner’s argument based on the rational choice perspective may be seen by some as undermining what it means to be human, to appreciate history, and to find meaning in the past in order to understand the present and the future. It is hard to imagine how one can explain to the Kom peoples that the Afo-A-Kom is just another object like gold or diamonds when Cameroon’s representative refers to it in reverent terms: “It is beyond money, beyond value. It is the heart of the Kom,

242. *Id.* at 240.

243. *Id.*

244. Eric Posner, *The International Protection of Cultural Property: Some Skeptical Observations* 1 (Univ. of Chicago Pub. Law & Legal Theory Working Papers, Paper No. 141, 2006).

245. *Id.*

246. *Id.* at 8.

247. *Id.* at 11.

248. *Id.* at 16.

249. *Id.* at 15.

what unifies the tribe, the spirit of the nation, what holds us together.”²⁵⁰

B. *Calls for Stronger Law Enforcement and Standards*

Having spent a significant part of his life combating the looting of antiquities from Iraq and elsewhere, Colonel Matthew Bogdanos suggests, among other things, that an international law-enforcement response might be able to curtail the rate of looting and trading in antiquities. Because border controls alone are ill-equipped to handle the flux and the scope of items to be searched at any given time, the answer to interdiction “is an organized, systematized, and seamlessly collaborative law-enforcement effort by the entire international community.”²⁵¹

Bogdanos adds that coordinated efforts to investigate traffickers, dealers, and buyers in different countries, coupled with credible threats of prosecution and incarceration, could help alleviate the problem.²⁵² He also proposes better cooperation between law enforcement and the cultural heritage community, that is, “the art community . . . [should serve] . . . as law enforcement’s eyes and ears. Knowledgeable scholars and dealers should help identify and intercept shipments.”²⁵³ At the same time, the museums, archeologists, and dealers should adhere to a strict code of conduct, similar to rules of ethics for lawyers and doctors. These measures may induce stakeholders to trade in legal artifacts only.

C. *A Public Awareness Campaign Against the Morally Abhorrent Destruction of Cultural Property*

Public awareness campaigns against the morally abhorrent destruction of archeological sites and the strong links to terrorism may be another means to the fight against the trafficking of antiquities. Any comprehensive approach to stopping the illegal trade of antiquities “depends on increasing public awareness of the importance of cultural property and of the magnitude of the current crisis.”²⁵⁴

Indeed, much can be learned from the marketplace’s sensitivity to Nazi-era looted art. The art industry has employed multiple schemes in order to reduce the chance that Nazi-looted art appears on the legitimate marketplace. The value of art is enhanced, or reduced, based upon the provenance of an item in question. Indeed, there is a public

250. J. MERRYMAN ET AL., *LAW, ETHICS AND THE VISUAL ARTS*, 366 (1979). For a discussion of the Afo-A-Kom case see *id.* at 363–70.

251. Bogdanos, *Thieves of Baghdad*, *supra* note 48, at 736–37.

252. See MATTHEW BOGDANOS & WILLIAM PATRICK, *supra* note 214, at 273–75.

253. See *id.* at 274.

254. Bogdanos, *Thieves of Baghdad*, *supra* note 48, at 734.

shaming process—implemented by the news media and by many in society—that awaits those who deal in such Nazi-related goods.

When looking to blood antiquities, scholars have called for a campaign that “resonates with mainstream society” and creates a “climate of universal condemnation.”²⁵⁵ Small-scale efforts to increase awareness are taking place in some academic and policy circles. There are hundreds of op-eds and articles that specifically refer to the urgency of stopping the trafficking of “blood antiquities,”²⁵⁶ linking the term with the campaign to stop illegally mined diamonds from conflict zones in Africa. While the blood diamond campaign was associated with visually disturbing images of mutilated limbs, the campaign for “blood antiquities” can easily be linked to the grotesque beheading of journalists and aid workers captured by ISIS. Money spent on these looted antiquities is directly helping ISIS’s terror campaign. As mentioned earlier in this Article, ISIS uses its “own networks to come into contact with the final buyers . . . they want to have a one-to-one relationship with the collectors.”²⁵⁷

The difference between the blood diamonds and blood antiquities campaign is the target audience. Despite the advertising campaigns, diamonds are neither rare nor particularly unique. The average conscious consumer is content to buy a bracelet or a necklace at a local store as long as they are assured that they are buying a conflict-free diamond. The consumers in the antiquities market, on the other hand, can be both unsophisticated and sophisticated players, with multiple dealers, collections, and, at times, with actual knowledge of the provenance of the artifact they are about to buy. It is the educated consumers that should think twice before directly or indirectly assisting extremists in achieving their goals by acquiring antiquities that may come from conflict zones.

D. *Use of Past Strategies to Combat the Illicit Antiquities Trade*

It is possible to draw a parallel to, and perhaps learn from past efforts to combat the illegal trafficking of items that finance violence. For example, the Kimberley Process Certification Scheme (KPCS) can be considered in order to find a solution such as common sourcing and sales standards.

KPCS was established as a response to blood diamonds. This certification scheme, established in 2003 by UN Security Resolution

255. *Id.* at 734–35.

256. See Stephennie Mulder, *The Blood Antiquities Funding ISIL*, AL JAZEERA (Nov. 12, 2014), <http://www.aljazeera.com/indepth/opinion/2014/11/blood-antiquities-funding-isil-2014119113948461658.html> [<https://perma.cc/G6FB-WK4L>] (archived Sept. 19, 2016); see generally Vlasic Opinion, *supra* note 12.

257. Vlasic & Turku, *supra* note 11.

1459,²⁵⁸ imposes requirements on UN Member States to certify shipments of newly unearthed diamonds as “conflict-free.” In order to prevent conflict diamonds from entering the legitimate stream of commerce, destination states must enact legislation and institutions to adhere to such standards. According to this scheme, only diamonds with a Kimberly Process certificate are allowed to enter international trade.

Yet the Kimberly Process has not been as successful as the international community had hoped. One major critique is its weak tracking system.²⁵⁹ Fair Trade International (FTI), on the other hand, has worked a little differently and perhaps better than the KPCS. One interesting element of FTI is its independent certifier who checks compliance with fair trade standards both at the producer level and trader level.²⁶⁰ While the FTI and KPCS are designed to monitor very different trades, it is possible to learn from their failures and successes as the international community seeks a platform to combat looting of cultural property in Iraq and Syria.

E. Global Stakeholder Engagement Group via WEF or OECD

Looted antiquities are not only being used to finance terrorism but their destruction is also causing irreparable damage to our collective heritage. It is important to acknowledge that law enforcement alone cannot stop the trafficking of looted antiquities from war zones; it is those who are directly involved in the antiquities trade that are the best-placed to ensure that blood antiquities do not enter the stream of legal commerce.

Governments, industry actors, academics, and related stakeholders should come together to find a common solution to this global problem. First, a high-level multi-stakeholder group (HMG) meeting, perhaps via the World Economic Forum (WEF) or the Organization for Economic Co-operation and Development (OECD)—building off its work with the sourcing of conflict minerals²⁶¹—could emphasize their support and commitment to respond to UN Resolution

258. *About, KIMBERLY PROCESS*, <https://www.kimberleyprocess.com/en/about> (last visited Oct. 3, 2016) [<https://perma.cc/K8XX-BA9Q>] (archived Oct. 3, 2016).

259. *Id.*

260. *Certifying Fairtrade, FAIRTRADE INT’L*, <http://www.fairtrade.net/certifying-fairtrade.html> (last visited Nov. 5, 2015) [<https://perma.cc/9XUV-ZC8D>] (archived Sept. 19, 2016).

261. *See generally* OECD, *OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS* (3rd ed. 2016) (“This Guidance is intended to serve as a common reference for all suppliers and other stakeholders in the mineral supply chain . . . in order to clarify expectations concerning the nature of responsible supply chain management of minerals from conflict-affected and high-risk areas.”).

2199, which calls on states to take “appropriate steps” to prevent the trade in cultural property from Iraq and Syria.²⁶²

Second, representatives of the HMG, or its Expert Group could meet on the sidelines of various global events hosted by state governments, international organizations, foundations, or industry or academic conferences to collaborate and develop a tangible solution. Examples of possible voluntary agreements include a certification process similar to the KPCS for the sale of antiquities from conflict zones, better knowledge of items at risk, and increased due diligence efforts. It is important that attempts to create cohesion in responding to the trafficking of cultural property include various constituencies, so that they have an ownership stake in the best common solutions.

Finally, assuming that the Expert Group successfully generates good will and an agreed upon solution, there would need to be an effort to present the solution at the Annual Meeting of the WEF in Davos, Switzerland (or a similar meeting of the OECD). The WEF might be particularly useful because Davos is arguably the most important high-level platform for a private-public cooperation in the world. In this forum (or an OECD meeting), the parties could launch an “Initiative Against Blood Antiquities” (IABA) or a “Blood Antiquities Initiative” (BAI), as determined by the constituencies.

Regardless of the actual final outcome or solution, it is important that the private sector is involved in any new platform for tackling the trafficking of cultural property from conflict zones. Other scholars also advocate the creation of a public-private partnership. Brigadier General (ret.) Russell D. Howard proposes that “a public-private initiative that involves governments, museums, collectors, and archaeologists should be launched to help eliminate the purchase, transfer, and sale of illicit antiquities, and to recommend further policy actions to reduce such activity.”²⁶³ Indeed, much can be learned from other global initiatives to combat illicit or questionably-sourced goods, ranging from blood diamonds to conflict minerals to animal parts to coffee and clothes. In an ideal world, experts focused on blood antiquities will adopt the best of all these ideas into practical solutions that bring diverse parties together.

262. S.C. Res. 2199, ¶¶ 15–17 (Feb. 12, 2015); see *Unanimously Adopting Resolution 2199 (2015), Security Council Condemns Trade with Al-Qaida Associated Groups, Threatens Further Targeted Sanctions*, UNITED NATIONS (Feb. 12, 2015), <http://www.un.org/press/en/2015/sc11775.doc.htm> [<https://perma.cc/AW9G-L2L8>] (archived Sept. 19, 2016).

263. Howard et al., *supra* note 10, at 14, 17–18.

VII. CONCLUSION

The unprecedented cultural eradication in Iraq and Syria seeks to create a unidimensional society that is intolerant and rigid. Once a society has been reduced to a sole identifying factor, namely strict adherence to a narrowly interpreted religion, there can be no more discussion, debate, or discourse, for they would all be against the word of God. To avoid this result, it is imperative that cultural memory—and, by definition, its art and history—survives.

The loss of history is not just a loss for Syria and Iraq but also a loss for humanity at large, for memory is one of our most valuable treasures: it is our essence. The various international agreements, conventions, case law, and domestic efforts in various parts of the world show a strong concern for preservation of cultural heritage. Yet, prosecution alone is not the answer to this complex problem. Until the issue of trafficking of looted artifacts can be tackled by legitimate governments, both in source states and market states, there needs to be a platform to curb the demand side of the market. The WEF or the OECD could serve as a medium to facilitate cooperation between governments, law enforcement, collectors, and the antiquities-related industry, engaging all actors in multi-stakeholder collaborative effort to improve standards and safeguards on looted antiquities from Iraq, Syria, and beyond. Responsible actors in the antiquities market should agree to common sourcing, due diligence, and sales standards, further limiting the incentive to plunder and sell blood antiquities.

It is important that lawmakers pay attention to antiquities that have been taken out (either by a legal custodian, an owner, or a private citizen) of a war zone and are now hidden. What happens to them if they are not allowed to be sold or moved? Lawmakers need to discuss creative ideas for the legal standing of items that were taken out of a war zone for protection from ISIS or other violent actors in the region. Perhaps an anonymous amnesty program—similar to one that was designed in Belgium to help with the repatriation of dinosaur fossils from Mongolia—needs to be discussed because the likelihood that priceless antiquities will be destroyed or remain hidden indefinitely is high.

Destruction of history has become a tactic of war, destroying states and nations. Yet art and beauty are the soul's "weapons in the fight for self-preservation."²⁶⁴ Art is a testament to human power to transcend time, race, religion, gender, and nationality. Any future efforts to rebuild and reconcile society in conflict zones will have to include discussions of glorious pasts and rich history. It is important that all those involved in the industry understand the responsibility they have to the people of Iraq and Syria and to society as a whole.

264. VIKTOR E. FRANKL, *MAN'S SEARCH FOR MEANING* 68 (1963) (recounting his fight for survival in a Nazi concentration camp. Among other things, he claims that art, beauty (nature), and humor gave him the strength to endure when all hope was lost).