

**TERRORISTS AND ANTIQUITIES:  
LESSONS FROM THE DESTRUCTION OF THE  
BAMIYAN BUDDHAS, CURRENT ISIS  
AGGRESSION, AND A PROPOSED FRAMEWORK  
FOR CULTURAL PROPERTY CRIMES<sup>♦</sup>**

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## INTRODUCTION

In 2001 the Taliban destroyed the Buddhas of Bamiyan—exquisite structures carved into the cliffs of the Bamiyan Valley in central Afghanistan. These statues were the largest Buddha carvings in the world and had resounding international acclaim.<sup>1</sup> Even after their destruction, the World Heritage Committee placed their location on the World Heritage List.<sup>2</sup> However, the Taliban faced no charges for their destructive acts, while the international community balked at the flaws in the outdated international criminal law system. Today, the international community is newly horrified by the opportunistic plundering and flagrantly abusive acts of ISIS.<sup>3</sup> Recent atrocities build upon the violent destruction of the Bamiyan Buddhas and demonstrate that the Taliban’s intentional destruction of cultural property was not an isolated event.<sup>4</sup>

While western civilization has long tried to develop frameworks to protect cultural property,<sup>5</sup> existing protections do not address calculated looting to fund illicit activities, nor do they address the modern reality that this profitable practice funds terrorist groups. Similarly, these frameworks fail to encompass a solution for quasi-state actors<sup>6</sup> who

<sup>1</sup> Stephanie Hegarty, *Bamiyan Buddhas: Should they be rebuilt?*, BBC NEWS (Aug. 12, 2012), <http://www.bbc.com/news/magazine-18991066>.

<sup>2</sup> Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT’L L. 619, 651 (2003).

<sup>3</sup> For the sake of consistency, this Note uses the acronym ISIS (Islamic State of Iraq and Syria) to refer to the terrorist group that is also known as ISIL, IS, SIC or Da’ish. *See generally* M.R., *The many names of ISIS*, THE ECONOMIST (Sept. 28, 2014, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2014/09/economist-explains-19>; *see also infra* Part I.B for a more thorough description of ISIS’ treatment of cultural property.

<sup>4</sup> *See infra* Part IV.B.

<sup>5</sup> *See infra* Part II.A–C.

<sup>6</sup> This Note uses the term quasi-state actor to refer to a group functioning in a governmental capacity, despite the fact that it may lack actual authority or recognition as a government within the international community. The examples expounded in this Note include both the Taliban as well as ISIS. Both of these groups are designated terrorist organizations by the United States government. *See Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Feb. 21, 2016). While a fuller discussion of these groups is beyond the scope of this Note, it is important to acknowledge that the salient features of both the Taliban and ISIS include their regional control and provision of some governmental services, as opposed to non-controlling terrorist actors, such as Al Qaeda. *See infra* note 161. The Treasury Department’s David Cohen notes that ISIS “act[s] as if they’re a real state.” Russell Berman, *The World’s Wealthiest Terrorists*, THE ATLANTIC (Oct. 23, 2014, 5:26 PM), <http://www.theatlantic.com/international/archive/2014/10/isis-oil-money-ransom-smuggling/381862/>. For example, ISIS has to expend money to provide basic government

intentionally destroy a nation's cultural property in times other than international armed conflict.<sup>7</sup> Destruction and looting of cultural property are both reprehensible because both acts deny various groups and individuals the right to participate in their cultural heritage. Cultural property is inextricably linked to the human condition and must be protected to foster a cooperative international environment, as it creates a tangible part of our collective history.<sup>8</sup>

This Note proposes a criminal framework for addressing cultural property crimes in times that technically fall outside of war but nonetheless constitute purposeful destruction of the property at the hands of those in power. This criminal framework urges the International Criminal Court ("ICC") to prosecute quasi-state actors for war crimes and impose criminal liability on groups that intentionally destroy cultural property and loot antiquities to fund illicit activities. Both intentional destruction of cultural property and antiquities looting should be viewed as war crimes because such actions are offensive, persecutory per se, and are responsible for funding conduct, such as terrorism, that may further perpetuate criminal activity in violation of international law.<sup>9</sup>

Part I of this Note defines cultural property and its importance. This section also discusses the link between cultural property looting and profits that fund terrorism. Part II provides an overview of the current international framework, noting the strengths and weaknesses of selected provisions. Part III demonstrates how the current framework is largely inapplicable to modern threats using the Taliban's destruction of the Bamiyan Buddhas in 2001 as an example. Part IV then suggests that certain cultural property crimes should be adjudicated as war crimes: both intentional destruction of cultural property by a quasi-state actor *and* opportunistic trafficking of cultural property to fund terrorist regimes fall into this category. This section advances additional conceptual suggestions for why these cultural property crimes should be considered war crimes and notes that harms against cultural property go beyond the remedies available within property law and thus, should be addressed by a high-level international forum. Finally, Part V proposes a new framework to combat cultural property crimes. This section recruits key considerations that arose in the International Criminal Tribunal for the former Yugoslavia ("ICTY"), such as the norms of customary international law.<sup>10</sup> Further, this section also addresses why

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services in the areas over which it asserts control. *Id.*

<sup>7</sup> See *infra* Part II.A–C.

<sup>8</sup> See *infra* Part I.A.

<sup>9</sup> See *infra* Part I.B.

<sup>10</sup> Customary international law generally "refers to international obligations arising from established state practice, as opposed to obligations arising from formal written international treaties." *Customary International Law*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/>

the ICC should have jurisdiction over these crimes—the offenses are international in scope and the ICC has jurisdictional competence to adjudicate in cases of war crimes.<sup>11</sup>

## I. CULTURAL PROPERTY IN THE MODERN ERA

### A. *The Continued Importance of Cultural Property*

One way to define cultural property is a “movable or immovable property of great importance to the cultural heritage of every people . . . .”<sup>12</sup> These objects are important, as the correlation between cultural property and social identity has been underscored throughout history.<sup>13</sup> The last half-century endured several examples of conflicts that have threatened cultural property.<sup>14</sup> However, it is clear that “no lessons have been learned about prevention and practical solutions,”<sup>15</sup> which is especially troubling as cultural property issues have become increasingly complex.

Cultural property is important for three primary reasons: it has special value that is important to a community’s sense of identity, respect for cultural property stems from age-old laws of war and customary procedures, and destruction of cultural property violates an individual’s right to participate in his or her own cultural past and shared heritage.<sup>16</sup> Further, respecting the products of past civilizations

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customary\_international\_law (last visited Feb. 21, 2016). Essentially this body of law “results from a general and consistent practice of states that they follow from a sense of legal obligation.”  
*Id.*

<sup>11</sup> Beyond this, the ICC is a fair venue and has established strong procedural protections for the accused. *See infra* Part V.B–C.

<sup>12</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, art. 1(a), May 14, 1954,

249 U.N.T.S. 240 [hereinafter Hague Convention]. Cultural property can include:  
monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.

*Id.* This broad definition includes objects such as antiquities.

<sup>13</sup> *See* CRIME IN THE ART AND ANTIQUITIES WORLD: ILLEGAL TRAFFICKING IN CULTURAL PROPERTY 24 (Stefano Manacorda & Duncan Chappell eds., 2011). *Cf. infra* note 44 (noting that looting was incidental to traditional warfare). As such, cultural property may be held in higher regard today than it has been in the past.

<sup>14</sup> Such as military bombardments in World War II, neglect for upkeep of cultural sites during the Cold War, conflicts in the former Yugoslavia, and various current events in Syria, Iraq, Libya, Mali and beyond; *see also* UNESCO Strengthens Action to Safeguard Cultural Heritage Under Attack, UNESCO (Aug. 12, 2014, 12:00 AM), <http://whc.unesco.org/en/news/1176>.

<sup>15</sup> Joris D. Kila, *Inactive, Reactive, or Pro-Active? Cultural Property Crimes in the Context of Contemporary Armed Conflicts*, 1 J. OF E. MEDITERRANEAN ARCHEOLOGY & HERITAGE STUD. 319, 321 (2013).

<sup>16</sup> Mark Kersten, *Prosecuting Crimes Against Cultural Property in Northern Mali: Why it Matters*, JUSTICE IN CONFLICT (Aug. 21, 2012), <http://justiceinconflict.org/2012/08/21/prosecuting-crimes-against-cultural-property-in-northern-mali-why-it-matters/>.

speaks to current tolerance: culture and people are inextricably intertwined such that the choice between protecting lives and protecting cultural dignity go hand in hand.<sup>17</sup>

### B. *The Link Between Cultural Property and Profits that Fund Terrorism*

Antiquities<sup>18</sup> represent an ancient form of cultural property and their trafficking is an incredibly lucrative, illicit trade.<sup>19</sup> Interpol estimates place smuggling and exportation of antiquities into the top five organized criminal activities worldwide.<sup>20</sup> While it is difficult to generate a precise number on the market given its covert nature, some sources estimate that up to five billion Euros worth of antiquities are illicitly traded each year.<sup>21</sup> The lack of procedural safeguards in the antiquities market, such as those like title recordation that exist to benefit other industries, further complicates the valuation problem.<sup>22</sup>

<sup>17</sup> See Jennifer Otterson Mollick, *The Fate of Cultural Property in Wartime: Why it Matters and What Should Be Done*, CARNEGIE COUNCIL (Sept. 17, 2013), [http://www.carnegiecouncil.org/publications/ethics\\_online/0085](http://www.carnegiecouncil.org/publications/ethics_online/0085); but cf. Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations* 10 (U. Chi. Law Sch. Pub. Law & Legal Theory Working Paper No. 141, 2006), <http://www.law.uchicago.edu/files/files/141.pdf> (arguing that cultural property “is valuable to the extent that people care about it, and are willing to pay to consume or enjoy it” and that if a population has a strong desire to retain cultural property, they can always purchase it back, as they have no “moral right to possession.”). However, Posner disregards the cultural importance of these objects and the insight they are able to provide us about our own, collective past. *Id.* Consider, for example, the value in museum and cultural displays as well as in the field of archeology.

<sup>18</sup> Antiquities are a prime example of cultural property and are generally thought to include various objects, architectural structures, or works of art from long ago. See generally *Antiquity*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/antiquity> (last visited Feb 21, 2016).

<sup>19</sup> See Heather Pringle, *New Evidence Ties Illegal Antiquities Trade to Terrorism, Violent Crime*, NAT'L GEOGRAPHIC (June 13, 2014), <http://news.nationalgeographic.com/news/2014/06/140613-looting-antiquities-archaeology-cambodia-trafficking-culture/>.

<sup>20</sup> *Several Theories Justify Our Need to Respect and Safeguard Cultural Property*, CTR. FOR ENVTL. MGMT. OF MIL. LANDS, COLO. ST. UNIV., <http://www.cemml.colostate.edu/cultural/09476/chp03afghenl.html> (last visited Feb. 21, 2016).

<sup>21</sup> BLOOD ANTIQUITIES (Journeyman Pictures 2009). Other estimates value antiquities trafficking annually at seven billion dollars. See also Bill Briggs, *How Terrorists Tap a Black Market Fueled by Stolen Antiquities*, NBC NEWS (June 23, 2014, 4:58 AM), <http://www.nbcnews.com/storyline/iraq-turmoil/how-terrorists-tap-black-market-fueled-stolen-antiquities-n137016>.

<sup>22</sup> For example, “[r]eal estate titles and deeds at least require a name . . . [b]anks must report all transactions of \$10,000 or more . . . [but t]he art market lacks these safeguards.” Patricia Cohen, *Valuable as Art, but Priceless as a Tool to Launder Money*, N.Y. TIMES (May 12, 2013), <http://www.nytimes.com/2013/05/13/arts/design/art-proves-attractive-refuge-for-money-launderers.html>. Additionally, “the licit trade in antiquities uses the illicit trade for its infrastructure,” thereby making it nearly impossible to differentiate between the two. Kimberly L. Alderman, *Honor Amongst Thieves: Organized Crime and the Illicit Antiquities Trade*, 45 IND. L. REV. 601, 626 (2012). For example:

criminal groups depend on one another to keep the antiquities trade functioning: pull any rung of the ladder out – the excavators, the middlemen, the traffickers, or the retailers – and the system will not function . . . [a]ny actor who participates in the antiquities trade is contributing to the larger system that enables and perpetuates organized crime.

While the industry is remunerative, it also poses less risk than the narcotics or arms trade.<sup>23</sup>

Modern problems in the antiquities trafficking world are exacerbated by the fact that the black market has been linked to financially supporting terrorist networks.<sup>24</sup> While there seems to be a disconnect between antiquities and terrorists' acts, terrorists began to realize the lucrative nature of the unregulated market and their ability to make a profit.<sup>25</sup> As looting is a crime of opportunity, it is often a response to civil unrest and can lead to the proliferation of other illicit activities.<sup>26</sup> Those involved in the smuggling process may, for example, pay a direct safety tax to a group in power to "avoid trouble on [the] road."<sup>27</sup> Furthermore, governmental officers are often involved in the process: corrupt customs officers enable traffickers to move their stolen antiquities across borders, either on roads or at airport checkpoints.<sup>28</sup> From there, the objects are exported to other countries, where upwards of eighty percent of antiquities on the market lack sufficient evidence to establish that they were purchased lawfully.<sup>29</sup>

Links between the antiquities industry and terrorist funding have begun to resonate with those who previously thought about cultural property crimes as "just white noise . . ."<sup>30</sup> While cynics downplay the importance of cultural heritage looting and destruction, "people who buy antiquities . . . should know that they run the risk of funding an illicit market that may also support terrorism."<sup>31</sup> For example, the modern terror tactics of groups like ISIS and the Taliban highlight how quasi-state actors have a peculiar relationship with cultural property. On the one hand, these groups see cultural property as a potentially

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*Id.*

<sup>23</sup> See Peter Campbell, *How Crime, Corruption, and Murder Are Hidden in the Elusive Black Market Stages of Antiquities Trafficking*, UNIV. OF SOUTHAMPTON ARCHEOLOGY BLOGS (July 4, 2013), <http://blog.soton.ac.uk/archaeology/blog/2013/07/antiquities-trafficking/>.

<sup>24</sup> See Amr Al-Azm et al., *ISIS' Antiquities Sideline*, N.Y. TIMES (Sept. 2, 2014), <http://www.nytimes.com/2014/09/03/opinion/isis-antiquities-sideline.html>; see also Matthew Bogdanos, *Opinion: Illegal Antiquities Trade Funds Terrorism*, CNN WORLD (July 7, 2011, 7:28 AM), <http://www.cnn.com/2011/WORLD/meast/07/07/iraq.looting.bogdanos/>; Frances Martel, *Experts: ISIS Destroying Ancient Archaeological Sites to Sell Artifacts on Black Market*, BREITBART (Sept. 21, 2014), <http://www.breitbart.com/national-security/2014/09/21/experts-isis-destroying-ancient-archaeological-sites-to-sell-artifacts-on-black-market/>.

<sup>25</sup> Bogdanos, *supra* note 24.

<sup>26</sup> "In culturally-rich societies, looting is often the first response to civil unrest or armed conflict; it's a crime of opportunity that, if left unchecked, leads to more widespread forms of criminality and chaos; halting this activity is not only a treaty obligation, it restores order . . . ." *Several Theories Justify Our Need to Respect and Safeguard Cultural Property*, *supra* note 20.

<sup>27</sup> Campbell, *supra* note 23.

<sup>28</sup> Alderman, *supra* note 22, at 617. For example, the Afghan Transit Trade Agreement allows for goods to leave the country with a low level of oversight. Campbell, *supra* note 23.

<sup>29</sup> See Amy Bitterman, *Settling Cultural Property Disputes*, 19 VILL. SPORTS & ENT. L.J. 1, 4-5 (2012).

<sup>30</sup> Bogdanos, *supra* note 24.

<sup>31</sup> Briggs, *supra* note 21.

valuable commodity to be pillaged and sold, allowing for continued financial support.<sup>32</sup> On the other hand, the social value of some cultural property poses a potential threat to ideological extremist groups.<sup>33</sup>

ISIS has looted and destroyed the rich cultural property of Iraq and Syria since the summer of 2014.<sup>34</sup> Considering that the antiquities trade “is almost limitless in a land so rich with ancient objects . . . [this richness allows] the Islamic State [of Iraq and Syria] to continue waging war on civilization for far longer than they could afford without said trade.”<sup>35</sup> Similarly, estimates place ISIS’ antiquities profits at roughly \$36 million.<sup>36</sup> Similar to the Taliban, ISIS has imposed an Islamic khums tax, requiring civilians to pay ISIS a percentage of the value of artifacts they find in the ground.<sup>37</sup> While the group benefits from the tax it levies,<sup>38</sup> it also profits from the sale of antiquities that have been looted from Iraq and Syria’s sites of cultural importance.<sup>39</sup> ISIS uses these sales to continue financing its various operations, and estimates as of June 2014 purport that ISIS is the wealthiest terrorist organization in the world.<sup>40</sup>

How does the international community begin to formulate a solution that tackles one of the core components of terrorist groups’ profit networks? The international community needs to craft a viable framework that addresses cultural property crimes on a global scale.<sup>41</sup>

<sup>32</sup> See, e.g., Al-Azm et al., *supra* note 24. ISIS has imposed a khums tax:

according to which Muslims are required to pay the state treasury a percentage of the value of any goods or treasure recovered from the ground . . . [t]he amount . . . varies by region and the type of object recovered. In ISIS-controlled areas at the periphery of Aleppo Province in Syria, the khums is 20 percent. In the Raqqa region, the levy can reach up to 50 percent or even higher if the finds are from the Islamic period (beginning in the early-to-mid-seventh century) or made of precious metals like gold.

<sup>33</sup> See *infra* notes 91–92 and accompanying text (discussing iconoclasm); see also Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT’L L. 183 (2003).

<sup>34</sup> Deborah Lehr & Peter Herdrich, *Trading Treasure for Weapons: ISIS Campaign of Terror Strikes at Culture*, HUFFINGTON POST (Sept. 10, 2014, 9:30 AM), [http://www.huffingtonpost.com/deborah-lehr/trading-treasure-for-weap\\_b\\_5794902.html](http://www.huffingtonpost.com/deborah-lehr/trading-treasure-for-weap_b_5794902.html); Eleanor Robson, *Fears Grow for Safety of Iraq’s Cultural Heritage Under ISIS*, THE CONVERSATION (July 10, 2014, 10:19 AM), <http://theconversation.com/fears-grow-for-safety-of-iraqs-cultural-heritage-under-isis-29016>.

<sup>35</sup> Martel, *supra* note 24.

<sup>36</sup> Lehr & Herdrich, *supra* note 34.

<sup>37</sup> See *supra* note 32; see also William G. Pearlstein, *White Paper: A Proposal to Reform U.S. Law and Policy Relating to the International Exchange of Cultural Property*, 32 CARDOZO ARTS & ENT. L.J. 561, 567 (2014) (noting that nations have control of artifacts found in or underneath the ground).

<sup>38</sup> Al-Azm et al., *supra* note 24.

<sup>39</sup> See Kate Fitz Gibbon, *A Bridge Too Far – Using IS to End the Trade in Art*, COMM. FOR CULTURAL POL’Y (Sept. 5, 2014), <http://committeeforculturalpolicy.org/a-bridge-too-far-using-is-to-end-the-trade-in-art/>.

<sup>40</sup> Kathleen Caulderwood, *How ISIS Pillages, Traffics And Sells Ancient Artifacts On Global Black Market*, INT’L BUS. TIMES (June 18, 2014, 2:48 PM), <http://www.ibtimes.com/how-isis-pillages-traffics-sells-ancient-artifacts-global-black-market-1605044>.

<sup>41</sup> For example, the United States and the United Kingdom are important actors in the antiquities

Other suggestions relating to asset freezing, cracking down on racketeering, and money laundering are not viable in parts of the Middle East because most of the revenue is domestic and situated within an almost exclusively cash-based economy.<sup>42</sup> This economic reality makes it difficult to cut off financing to certain groups.<sup>43</sup> Accordingly, there must be a more robust, comprehensive framework for cultural property protection to begin to address the issues at the international level.

## II. A HISTORICAL OVERVIEW OF THE CURRENT FRAMEWORK

### A. *The 1954 Hague Convention and Subsequent Protocols*

Since the second half of the twentieth century, the international community has attempted to create meaningful treaties and protocols to protect cultural property. Prior to World War II, it was widely accepted that cultural property could be destroyed or stolen during war.<sup>44</sup> However, widespread looting and plundering occurred at high levels during Hitler's reign: these actions were taken as part of a systematic plan "to annihilate the Jews [and] to destroy *their* cultural heritage."<sup>45</sup> The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was signed in 1954 in response to the destruction that occurred during the World War II era and was the first treaty to attempt to define cultural property.<sup>46</sup>

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market, so limiting access to cultural property coming from regions of conflict would have a powerful impact. Lehr & Herdrich, *supra* note 34. However, an important question remains: "Can you prevent ISIS from taking assets? Not really, because they're sitting on a lot of assets already . . ." Nour Malas & Maria Abi-Habib, *Islamic State Economy Runs on Extortion, Oil Piracy in Syria, Iraq*, WALL ST. J. (Aug. 28, 2014, 3:48 PM), [http://www.wsj.com/article\\_email/islamic-state-fills-coffers-from-illicit-economy-in-syria-iraq-1409175458-1MyQjAxMTA1MDEwMzExNDMyWj](http://www.wsj.com/article_email/islamic-state-fills-coffers-from-illicit-economy-in-syria-iraq-1409175458-1MyQjAxMTA1MDEwMzExNDMyWj) (quoting an unnamed, Western counterterrorism official).

<sup>42</sup> See Malas & Abi-Habib, *supra* note 41.

<sup>43</sup> See *id.*

<sup>44</sup> Wangkeo, *supra* note 33, at 195 (noting that "[c]onquerors were entitled to war booty. . .").

<sup>45</sup> *Id.* (emphasis added).

<sup>46</sup> See Kathleen Anderson, *The International Theft and Illegal Export of Cultural Property*, 8 NEW ENG. J. INT'L & COMP. L. 411, 417 (2002). The Convention defined the term cultural property as:

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



The First and Second Protocols to the Convention, introduced in 1954 and 1999 respectively, further develop the framework outlined in the Convention.<sup>47</sup> The more influential of the two, the Second Protocol, sought to address the weaknesses of the original Convention. For example, the Second Protocol solicits some protection for cultural property during internal conflicts.<sup>48</sup> It further seeks to enhance preservation under its Article 10, which states that cultural property will receive heightened protection if it meets specified conditions,<sup>49</sup> and describes more serious violations in Article 15.<sup>50</sup> States who are parties to the Second Protocol are obligated to enforce laws that make these violations criminal offenses with proportional punishment.<sup>51</sup> Furthermore, the Second Protocol outlines criminal liability for any individual who intentionally violates the Convention.<sup>52</sup> Finally, the Second Protocol established a registry, the International Registry of Cultural Property, where member states generate a list of various monuments, buildings, and other immobile examples of cultural

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*See* Hague Convention, *supra* note 12, at art. 1(a)–(c).

<sup>47</sup> The First Protocol contains three parts that focus predominantly on repatriation of cultural property and related legal issues, such as safekeeping. *See* Kruti J. Patel, Note, *Culture Wars: Protection of Cultural Monuments in a Human Rights Context*, 11 CHI-KENT J. INT'L & COMP. L. 1, at 7 (2011).

<sup>48</sup> For example, Article 16 sets forth jurisdiction in cases “a. when such an offence is committed in the territory of that State; b. when the alleged offender is a national of that State; c. in the case of offences set forth in Article 15 sub-paragraphs (a) to (c), when the alleged offender is present in its territory.” Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999, art. 16, Mar. 26, 1999, 2253 U.N.T.S. 212 [hereinafter Second Protocol].

<sup>49</sup> The three conditions that must be satisfied for enhanced protection are:

- a. it is cultural heritage of the greatest importance for humanity; b. it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection; c. it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.

*Id.* at art. 10.

<sup>50</sup> Article 15 states that a person who commits any of the mentioned acts “commits an offence within the meaning of this Protocol.” The term “act” includes: using cultural property that has received advanced protection to further military action, extensively destroying cultural property protected under the Convention and the Protocol, as well as stealing and pillaging or vandalizing cultural property that has been protected by the Convention. *Id.* at art. 15.

<sup>51</sup> *Id.* at art. 15(2). The five serious violations that must be criminalized include:

- a. [M]aking cultural property under enhanced protection the object of attack; b. using cultural property under enhanced protection or its immediate surroundings in support of military action; c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; d. making cultural property protected under the Convention and this Protocol the object of attack; e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

*Id.* at art. 15(1).

<sup>52</sup> *See* Carl E. Bruch, *All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict*, 25 VT. L. REV. 695, 712 (2001).

property that they deem to be especially valuable.<sup>53</sup> Items on this list will be given a “Special Protection” status such that they may not be used for military gains or as military shields in times of conflict.<sup>54</sup>

Unfortunately, the 1954 Hague Convention is widely considered a failure.<sup>55</sup> For example, the Convention has not been universally adopted,<sup>56</sup> with even fewer countries ratifying the Second Protocol.<sup>57</sup> While Article 19 of the Convention requires states involved in internal conflicts to abide by the Convention’s provisions for respecting cultural property, the Convention lacks a definition of internal armed conflict.<sup>58</sup> This lack of definition further complicates when, or if, the Convention’s provisions apply in times of peace.<sup>59</sup> The Second Protocol wholly ignores several relevant situations: while it applies to armed conflicts and some internal conflicts,<sup>60</sup> neither the original Convention nor the subsequent protocols extend to extra-warfare destruction of cultural property at the hands of quasi-state actors.<sup>61</sup> Further, Article 16(1) requires that a sovereign allow for its national courts to have jurisdiction over the offences of Article 15.<sup>62</sup> Yet without an international body or court to prosecute, a state is unlikely to self-prosecute, especially in scenarios involving extremist groups who try to justify their actions based on religious beliefs.

### B. 1972 UNESCO Convention

The 1972 UNESCO Convention Concerning the Protection of the World’s Cultural and Natural Heritage was the “first multi-national legislation recognizing and attempting to remedy through international cooperation the problem of the looting of cultural artifacts.”<sup>63</sup> The

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<sup>53</sup> See Ashlyn Milligan, *Targeting Cultural Property: The Role of International Law*, 19 J. PUB. & INT’L AFF. 91, 94 (2008).

<sup>54</sup> *Id.*

<sup>55</sup> “Even putting aside the debacle in Iraq (which is not governed by the convention because the U.S. is not a party), the destruction of cultural property has been a feature of dozens of wars and civil conflicts over the last fifty years.” Posner, *supra* note 17, at 2.

<sup>56</sup> As of 2004, only 114 nations had ratified the Hague Convention. See Posner, *supra* note 17, at 3.

<sup>57</sup> Only 37 states ratified the Second Protocol. *Id.* This presents potential jurisdictional issues as only those states that have ratified the Convention or one of its Protocols are subject to the limitations therein.

<sup>58</sup> See Milligan, *supra* note 53, at 94.

<sup>59</sup> The Convention distinguishes between types of conflicts, noting that “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence” do not constitute armed conflicts and are excluded from the Protocol. Bruch, *supra* note 52, at 706; see also Second Protocol, *supra* note 48, at art. 1.

<sup>60</sup> See Roger O’Keefe, *Protection of Cultural Property Under International Criminal Law*, 11 MELBOURNE J. INT’L L. 339, 370–71 (2010).

<sup>61</sup> Patel, *supra* note 47, at 8.

<sup>62</sup> See O’Keefe, *supra* note 60, at 38.

<sup>63</sup> Pearlstein, *supra* note 37, at 564; see also Gao Sheng, *International Protection of Cultural Property: Some Preliminary Issues and the Role of International Conventions*, 12 SING. Y.B. INT’L L. & CONTRIBUTORS 57, 63 (2008).

Convention provided for the protection of cultural property and extended this protection to times of peace, and not just times of conflict.<sup>64</sup> Essentially, the treaty embodies notions of public law such that it requires member states to take preventative measures.<sup>65</sup> The Convention not only obligates states to enact national legislation to protect cultural property and prevent illicit export; but it also requires its members to enact legislation to prevent the import of illegally exported cultural property and to prohibit exportation without licensing.<sup>66</sup>

Ninety-one countries are members of the Convention.<sup>67</sup> Participating members may only import cultural property when the country of origin has consented to the property's removal.<sup>68</sup> However, the Convention's narrow focus targets mostly movable cultural property,<sup>69</sup> and excludes from protection immobile structures "that are often the target of hostility during cultural conflicts."<sup>70</sup> Accordingly, the Convention does not fully encompass the problems facing cultural property today. Also problematic is the fact that the Convention is not self-executing absent a state enacting national legislation.<sup>71</sup> For example, the United States ratified the UNESCO Convention in 1972, but Congress did not pass necessary legislation to implement it on a national level until 1983.<sup>72</sup> This casts doubt upon the effectiveness of the Convention, as states face no consequences for failing to pass legislation or else may further decide to implement the relevant policy changes at their own convenience. Other notable flaws of the Convention include its lack of provisions for any private remedies<sup>73</sup> and its inapplicability to cultural property that was removed from the country of origin prior to the Convention's enactment.<sup>74</sup> While the main implementation problem stems from the fact that the Convention is not self-executing, this problem is inherent in other conventions as well: what makes the UNESCO Convention particularly difficult to work

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<sup>64</sup> See Anderson, *supra* note 46.

<sup>65</sup> Sheng, *supra* note 63, at 63 (noting that preventative measures involve "setting up an inventory of important public or private cultural property, promoting the establishment and development of institutions to ensure the protection of cultural property, establishing ethical guidelines for collectors and curators, and taking educational measures to stimulate and develop respect for the cultural heritage of all States.").

<sup>66</sup> See generally Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151 [hereinafter UNESCO Convention]; see also Sheng, *supra* note 63, at 63.

<sup>67</sup> As of December 1999. Anderson, *supra* note 46, at 418.

<sup>68</sup> *Id.*

<sup>69</sup> Patel, *supra* note 47, at 9.

<sup>70</sup> *Id.*

<sup>71</sup> See Joseph P. Fishman, *Locating the International Interest in Intranational Cultural Property Dispute*, 35 YALE J. INT'L L. 347, 366 (2010).

<sup>72</sup> Anderson, *supra* note 46, at 420; see also Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613 (1994).

<sup>73</sup> See Sheng, *supra* note 63, at 64.

<sup>74</sup> *Id.*

with is the low number of nations that have ratified the Convention.<sup>75</sup>

### C. *The Rome Statute*

The Rome Statute is an important international treaty for allocating individual responsibility in the realm of international crimes, including cultural property crimes.<sup>76</sup> Chiefly, the Rome Statute established the ICC.<sup>77</sup> One hundred and twenty-three countries are parties to the Statute,<sup>78</sup> and those states accept the ICC's jurisdiction for the crimes enumerated in the Statute.<sup>79</sup> For example, Article 8 provides that cultural property destruction is a war crime<sup>80</sup> when it encompasses "[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly . . ."<sup>81</sup> Under Article 7(1)(h) if there is an element of persecution (be it political, ethnic, or religious), then the act may amount to a crime against humanity.<sup>82</sup> Further, Articles 8(2)(b)(ix) and 8(2)(e)(iv) provide jurisdiction over war crimes, including "[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes [as well as] historic monuments."<sup>83</sup> While the Rome Statute is an advancement compared to older conventions, its application is limited because it only applies to states that have ratified

<sup>75</sup> See *supra* note 67 and accompanying text.

<sup>76</sup> Joris D. Kila & Christopher V. Herndon, *Military Involvement in Cultural Property Protection: An Overview*, 74 JOINT FORCE Q. 116, 117 (2014).

<sup>77</sup> See generally ICC: INTERNATIONAL CRIMINAL COURT, [http://www.icc-cpi.int/en\\_menus/icc/Pages/default.aspx](http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx) (last visited Feb. 21, 2016).

<sup>78</sup> *The State Parties to the Rome Statute*, INT'L CRIM. CT, [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Feb. 21, 2016).

<sup>79</sup> See *infra* note 191; see also *Understanding the International Criminal Court*, INT'L CRIM. CT 4, <http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>. The ICC also may exercise jurisdiction with respect to perpetrators who are nationals of party states or where the crimes occurred within a party state. *Id.* Further, nations that have not signed the Statute are welcome to voluntarily accept the Court's jurisdiction. *Id.*

<sup>80</sup> A war crime includes grave breaches of the Geneva Conventions and includes acts such as killing, torture, causing serious bodily injury, destruction of property not justified by military needs and hostage taking. Rome Statute of the International Criminal Court, art. 8(2)(a), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Further:

[t]he Geneva Conventions and their Additional Protocols are [international treaties that are] at the core of international humanitarian law . . . [t]hey specifically protect people who are not taking part in the hostilities (civilians, health workers and aid workers) and those who are no longer participating in the hostilities . . . [t]hey contain stringent rules to deal with what are known as 'grave breaches.' Those responsible for grave breaches must be sought, tried or extradited, whatever nationality they may hold.

*The Geneva Conventions of 1949 and their Additional Protocols*, INT'L COMM. OF THE RED CROSS (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>.

<sup>81</sup> Rome Statute, *supra* note 80, at art. 8(2)(a)(iv).

<sup>82</sup> See O'Keefe, *supra* note 60, at 44; see also *infra* Part V.B.

<sup>83</sup> Rome Statute *supra* note 80, at art. 8(2); see also O'Keefe, *supra* note 60, at 7.

it.<sup>84</sup>

### III. PROBLEMS APPLYING INTERNATIONAL TREATIES AND REGULATIONS TODAY

#### A. *Internal Threats: Quasi-State Actors as Destroyers of Cultural Property*

Since many of the seminal treaties and protocols were created in the wake of World War II, “none of them anticipated the role of states in destroying *their own* cultural heritage.”<sup>85</sup> Historically, threats to cultural property stemmed from external sources.<sup>86</sup> Thus, the international community lacks a meaningful framework that fully captures the internal threats to cultural property that exist today.<sup>87</sup> Nation states often enter into treaties when they have a vested interest,<sup>88</sup> yet this calculus further complicates dealings with quasi-state actors like the Taliban and ISIS because they concurrently compete for legitimate statehood.

While there is reluctance to become involved in the internal affairs of countries,<sup>89</sup> the international community should ideally undertake a collaborative effort to decide which properties are of universal importance and constitute our shared cultural heritage as a global community.<sup>90</sup> Other criteria for determining whether a state’s

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<sup>84</sup> Moreover, those who do not sign the treaty would merely not be subject to its jurisdiction. For example, China, India, Russia, the United States, as well as many Islamic states, have not ratified the Statute and thus the ICC would not be able to exercise jurisdiction over those nations. Payam Akhavan, *The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability*, 97 AM. J. INT’L L. 712, 714 (2003). Also, to quell the fears of overstepping, the ICC was meant to be a court of last resort when a state was reluctant or incapable to genuinely carry out a full investigation and prosecution. *Understanding the International Criminal Court*, *supra* note 79, at 1. The sovereign state, however, continues to remain primarily responsible for such prosecution, where feasible. *Id.* at 4.

<sup>85</sup> Wangkeo, *supra* note 33, at 197 (emphasis added).

<sup>86</sup> *See id.*

<sup>87</sup> *See, e.g., infra* Part IV.B (discussing how ISIS operates as an internal threat).

<sup>88</sup> *See* Posner, *supra* note 17, at 13. For example, countries with strong militaries, such as the United States, prefer not to have “constraints on military discretion,” whereas countries that have antiquities to protect will adopt the treaties more readily. *Id.*

<sup>89</sup> Bruch, *supra* note 52, at 708.

<sup>90</sup> A global approach would be ideal because “the ‘common heritage of mankind’ threatens state sovereignty, [so] the class of properties subject to interference should be appropriately narrow. Such a rule would be better for preservation in the long run because it prevents a chilling effect.” Wangkeo, *supra* note 33, at 267. But also, getting the global community to reach any consensus in the cultural property debate is an exercise in line drawing. For example, if American soldiers knock over a statue of Saddam Hussein in Baghdad’s central square, it is less clear that such act will be considered a “belligerent attack on a foreign nation’s cultural property in the absence of any military necessity . . . .” Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L. J. 781, 825 (2005) (arguing that the aforementioned act likely violates international law). Similarly, “[w]e rarely hear protest over the destruction of Communist monuments because actors probably believe that the meaning behind them does not merit protection even though they may have historical value.” Wangkeo, *supra* note 33, at 266. Moreover, the Universal Declaration of

destruction of cultural property should be deemed objectionable include whether the state's destructive conduct is an act of iconoclasm<sup>91</sup> and whether the destructive act constitutes a breach of international law.<sup>92</sup> The previously discussed treaties place minimal emphasis on internal armed conflict, despite changes in recent history demonstrating that internal armed conflicts have "become the norm, rather than the exception."<sup>93</sup> Consequently, it is critical to provide a framework that reflects this modern reality.

### B. *Destruction of the Bamiyan Buddhas as an Illustrative Example*

Afghanistan is a country marked by internal conflict, divided between the Sunni Muslim majority<sup>94</sup> and the Shia minority.<sup>95</sup> When the Taliban took control of Afghanistan, it implemented strict Sharia law<sup>96</sup> and established Islamic courts to enforce such law. Additionally, Afghanistan is strategically located such that it has a wealth of cultural property: some movable, some immovable. The Buddhas of Bamiyan were a well-known example of immovable cultural property, as two statues of Buddhas were carved into the cliffs in the Bamiyan Valley.<sup>97</sup> This central valley has a rich history: the Silk Road passed through the

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Human Rights specifically provides that symbols that stand for slavery and torture shall not be worthy of protection such that "badges of American slavery, Nazism, Apartheid, or Communism would not be protected under this proposed norm even though they may be historically significant." *Id.* at 272; see also G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>91</sup> "Iconoclasm is the destruction of icons due to the belief that the images are imbued with an unacceptable symbolic significance." Wangkeo, *supra* note 33, at 192. The practice can also be described as "cultural destruction causing (or aimed at) historical obliteration leading to damage or eradication of identities." Kila, *supra* note 15, at 325. Iconoclasm has been an age-old practice that has occurred worldwide, typically when images are deemed offensive for religious purposes:

[a]s early as 391 AD, the Roman Emperor Theodosius ordered the demolition of the Temple of Serapis in Alexandria, to obliterate the last refuge of non-Christians. In 1992, Hindu extremists were intent on the destruction of the sixteenth-century Babri Mosque. In more recent times, the Balkan wars have offered the desolate spectacle of the devastation of Bosnia's mosques. Extensive looting and forced transfers of cultural objects have accompanied almost every war. Aerial bombardments during the Second World War and in the hundred-plus armed conflicts that have plagued humanity since 1945 have contributed to the destruction and disappearance of much cultural heritage of great importance for countries of origin and for humanity as a whole.

Francioni & Lenzerini, *supra* note 2, at 620 (footnotes omitted). The list is not exclusive, as iconoclasm is not endemic to one region, religion, or political doctrine.

<sup>92</sup> See Wangkeo, *supra* note 33, at 273 (arguing that to meet this criteria the act would have to violate human rights standards or go against international customs of conduct).

<sup>93</sup> Bruch, *supra* note 52, at 720.

<sup>94</sup> Sunnis constitute about 84% of the Afghani population. UN Reports, *The Taliban May No Longer Control Afghanistan, But Their Persecution of Religious Minorities Will Forever Remain a Stain on Global History*, 18 N.Y.L. SCH. J. HUM. RTS. 527, 527 (2002).

<sup>95</sup> Roughly fifteen percent. *Id.* Shia is one of the two main sects of Islam. See *Shia*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/shia> (last visited Feb. 21, 2016).

<sup>96</sup> Sharia law is a set of Islamic laws that are derived from the Quran. It is generally used to connote a moral code and religious law. See Wangkeo, *supra* note 33, at 245.

<sup>97</sup> See Hegarty, *supra* note 1.

region and the Valley was historically the site of several Buddhist monasteries.<sup>98</sup> Even before their destruction, the World Heritage Committee recognized the potential threat the Taliban posed to Afghan cultural property, and specifically provided protection for the Buddhas.<sup>99</sup>

In March 2001, the Taliban destroyed the Buddhas after Taliban leader Mullah Mohammed Omar issued an official proclamation that the statues were idolatrous.<sup>100</sup> The destruction was planned in detail<sup>101</sup> and the violent process itself was well documented.<sup>102</sup> Even though the destruction was not related to a “military objective,”<sup>103</sup> the detailed preparations and meticulous documentation support the idea that the “intended audience for this communiqué was neither divine nor local but *global* . . . .”<sup>104</sup> After the destruction of the statues was complete, Omar stated that “Muslims should be proud of smashing idols . . . [i]t has given praise to God that we have destroyed them.”<sup>105</sup> However, it is important to note that Afghanistan does not have a Buddhist population, so while the statues remained a major tourist attraction, they were not worshipped.<sup>106</sup> Even still, the Taliban claimed “the threat of idol

<sup>98</sup> W.L. Rathje, *Why the Taliban are destroying Buddhas*, USA TODAY (Mar. 22, 2001, 3:54 PM), <http://usatoday30.usatoday.com/news/science/archaeology/2001-03-22-afghan-buddhas.htm>.

<sup>99</sup> “[T]he United Nations General Assembly adopted a resolution (UN Resolution) expressing concern over the fate of the Bamiyan Buddhas and called for immediate action by the Taliban to prevent their destruction.” Corrine Brenner, *Cultural Property Law: Reflecting on the Bamiyan Buddhas’ Destruction*, 29 SUFFOLK TRANSNAT’L L. REV. 237, 254 (2006). The Resolution stated that the General Assembly:

- 1) Strongly calls upon the Taliban to abide by their previous commitments to protect the cultural heritage of Afghanistan from all acts of vandalism, damage and theft;
- 2) Strongly urges the Taliban to review their edict of 26 February 2001 and stop its implementation;
- 3) Also strongly urges the Taliban to take immediate action to prevent the further destruction of the irreplaceable relics, monuments or artifacts of the cultural heritage of Afghanistan;
- 4) Calls upon Member States to help, through appropriate technical measures, to safeguard the sculptures, including, if necessary, their temporary relocation or removal from public view.

G.A. Res. 55/243, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/234, *The Destruction of Relics and Monuments in Afghanistan* (May 1, 2001).

<sup>100</sup> See Wangkeo, *supra* note 33, at 245; Rory McCarthy, *Taliban Order All Statues Destroyed*, THE GUARDIAN (Feb. 27, 2001, 1:30 PM), <http://www.theguardian.com/world/2001/feb/27/afghanistan.rorymccarthy> (quoting Omar as saying “[b]ecause God is one God and these statues are there to be worshipped and that is wrong . . . [t]hey should be destroyed so that they are not worshipped now or in the future.”).

<sup>101</sup> Francioni & Lenzerini, *supra* note 2, at 620.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Finbarr Barry Flood, *Between Cult and Culture: Bamiyan, Islamic Iconoclasm, and the Museum*, 84 THE ART BULLETIN 641, 651 (2002) (emphasis added).

<sup>105</sup> Ishaan Tharoor, *Timbuktu’s Destruction: Why Islamists Are Wrecking Mali’s Cultural Heritage*, TIME (July 2, 2012), <http://world.time.com/2012/07/02/timbuktus-destruction-why-islamists-are-wrecking-malis-cultural-heritage/>.

<sup>106</sup> Luke Harding, *How the Buddha Got His Wounds*, THE GUARDIAN (Mar. 2, 2001, 9:19 PM), <http://www.theguardian.com/books/2001/mar/03/books.guardianreview2>.

worship was real because visitors had been known to pray before such statues before . . . .”<sup>107</sup>

*C. How the Current Framework Failed in the Case of the Bamiyan Buddhas*

The Buddhas’ destruction highlights three principal limitations to international law by exposing the flaws of not requiring states to protect cultural property when the destruction takes place outside an armed conflict.<sup>108</sup> First, the international community refused to recognize the Taliban as the legitimate government of Afghanistan,<sup>109</sup> thus immunizing the organization from international legal obligations. Because “[i]nternational law operates from a baseline presumption that the state holds sovereign authority over property within its own territory,”<sup>110</sup> the question of what to do with national property has generally been thought of as an internal decision that should be left to the sovereign.<sup>111</sup> Second, the existing international treaties fail to capture the situation, either because they do not apply beyond times of international conflict, or because they posit a wholly unworkable framework for *immovable* cultural property. Third, no international law or treaty provides full protection to cultural property that is purposefully destroyed by a quasi-state actor intentionally seeking to destroy the cultural property.<sup>112</sup>

Beginning with the first limitation of the current framework, one of the most salient issues concerning the Taliban revolves around the unsettled question of statehood. The Taliban’s international standing was unclear because a “state” is generally considered “a politically organized body of people usually occupying a definite territory.”<sup>113</sup> On its face, this definition does not exclude a group like the Taliban, especially considering the group’s extensive regional power. For example, at the time the Buddhas were destroyed, the Taliban controlled upwards of ninety percent of the Afghan territory.<sup>114</sup> However, despite the extent of the Taliban’s control, the international community refused

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<sup>107</sup> Wangkeo, *supra* note 33, at 251.

<sup>108</sup> Milligan, *supra* note 53, at 101.

<sup>109</sup> See *infra* notes 120–122 and accompanying text.

<sup>110</sup> Fishman, *supra* note 71, at 353.

<sup>111</sup> *Id.*

<sup>112</sup> See Milligan, *supra* note 53, at 101.

<sup>113</sup> *State*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/state> (last visited Feb. 21, 2016).

<sup>114</sup> See Francioni & Lenzerini, *supra* note 2, at 622; see also Major Dana M. Hollywood, *Redemption Deferred: Military Commissions in the War on Terror and the Charge of Providing Material Support for Terrorism*, 36 HASTINGS INT’L & COMP. L. REV 1, 45 (2013) (noting that since the question remains as to whether the Taliban was a valid state at the time of the Buddhas’ destruction, some have concluded that the nation “was without the attributes of statehood necessary to continue as a party to the Geneva Conventions . . . .”).



to recognize the Taliban as the nation's acting government.<sup>115</sup> The United Nations has further declined to recognize the Taliban's legitimacy five times.<sup>116</sup> Pakistan, as one of the only states recognizing its legitimacy, twice requested the Taliban to not destroy the Buddhas, but to no avail.<sup>117</sup> Because the Taliban was widely considered to be a non-legitimate state actor, the international framework for cultural property protection did not apply to its actions.

Further, the composition of the Taliban's members was also problematic for initiating prosecution and deciding which actors should be held liable. Much of their power is comprised of "volunteers, irregulars, and civilians . . . drafted into the armed forces by force."<sup>118</sup> While a framework for prosecution is never easy to craft, a proposition to capture groups like the Taliban is especially difficult.

As to the second limitation, there is a question as to which, if any, of the aforementioned treaties and protocols would apply and, if so, in what capacity? Many of the international treaties did not apply to the situation, either because the treaty in question only afforded protection in times of international armed conflict, or because Afghanistan was not a signatory to the relevant treaty. For example, Afghanistan was neither a signatory to the Hague Convention nor to either of its two Protocols.<sup>119</sup> However, even if Afghanistan signed the Hague Convention or its subsequent Protocols, that Convention only provides a framework for external cultural property threats, and fails to provide solutions for when a government actor wreaks havoc on its own cultural property.<sup>120</sup> Further, since the Buddhas were destroyed in a time of peace, there was technically insufficient unrest to trigger the application of the Protocols.<sup>121</sup>

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<sup>115</sup> With the exception of Pakistan, Saudi Arabia and the United Arab Emirates. Francioni & Lenzerini, *supra* note 2, at 622. The former president in power, Mr. Burhanuddin Rabbani, continued to be recognized as the Afghan president. *Id.*

<sup>116</sup> Wangkeo, *supra* note 33, at 256.

<sup>117</sup> *Id.* at 249.

<sup>118</sup> Francioni & Lenzerini, *supra* note 2, at 649. While the membership makeup complicates liability issues, it is important to remember that many nations have compulsory service requirements. The United States, for example, used to draft soldiers into the army and many nations still do. See generally *Field Listing: Military Service Age and Obligation*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2024.html> (last visited Jan. 21, 2015).

<sup>119</sup> Milligan, *supra* note 53, at 100–01. If it had been, "we could now be taking some action against the Taliban . . . [u]nfortunately, we can't expect to get at the Taliban and others acting like that if they are not a party to the Hague Convention." *Cultural Heritage and International Law: A Conversation with Lyndel Prott*, THE GETTY CONSERVATION INST. (Summer 2001), [http://www.getty.edu/conservation/publications\\_resources/newsletters/16\\_2/dialogue.html](http://www.getty.edu/conservation/publications_resources/newsletters/16_2/dialogue.html) (quoting Lyndel Prott, the director of UNESCO's Division of Cultural Heritage).

<sup>120</sup> Patel, *supra* note 47, at 18. Also, it is the duty of the signatory to enact national legislation.

<sup>121</sup> *Id.* (noting that at the time of the Buddhas' destruction the region was free of hostilities and so the destruction cannot be said to fall within wartime). Posner, *supra* note 17, at 7 also notes that the Taliban purposefully destroyed its own cultural property "for ideological and political reasons

Although Afghanistan was not a signatory to the Hague Convention, it was a party to the 1972 UNESCO World Heritage Convention.<sup>122</sup> Thus, the destruction of the Buddhas breached the duties that Afghanistan assumed when it became a member to that Convention.<sup>123</sup> However, while the Convention's cultural property protections apply in times of peace, the protections do not provide a framework for immovable cultural property.<sup>124</sup>

The first and second limitations beg the question as to whether a quasi-state actor would be covered by the aforementioned conventions and protocols. Even if a comprehensive framework existed that could be used to prosecute behaviors like the Taliban's destructive acts, jurisdictional problems arise because no international court or forum had jurisdiction over the crimes when the Buddhas were destroyed.<sup>125</sup> While it is true that "[e]very state should be able to prosecute such crimes within the framework of its own national criminal jurisdiction and law,"<sup>126</sup> it is unlikely that a group such as the Taliban would self-prosecute.<sup>127</sup> Accordingly, the Bamiyan Buddhas example highlights both the need for a relevant international framework that will capture various cultural property crimes committed by quasi-state actors, and for a competent court to adjudicate.<sup>128</sup>

#### IV. CULTURAL PROPERTY CRIMES CONSTITUTE WAR CRIMES

##### A. *Further Conceptual Suggestions that Demonstrate Why Certain Cultural Property Crimes Should be Considered War Crimes*

In addition to the bases of the international treaties described previously, further reasoning supports the assertion that destruction of cultural property amounts to a war crime. Issues concerning cultural property have traditionally been conceptualized as pertaining to, and governed by, property law.<sup>129</sup> Nevertheless, when "trying to interpret the concept of cultural property, we ignore at our peril what lawyers, at least, know: property is an institution, created largely by laws which are

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... [and he urges that f]oreign states cannot, as a practical matter, intervene."

<sup>122</sup> Brenner, *supra* note 99, at 259.

<sup>123</sup> Francioni & Lenzerini, *supra* note 2, at 631.

<sup>124</sup> *See* Patel, *supra* note 47, at 9.

<sup>125</sup> *See* Francioni & Lenzerini, *supra* note 2, at 645–46.

<sup>126</sup> *Id.* at 646.

<sup>127</sup> There are a plethora of reasons for this, but primarily because they had no obligation to do so, as evidenced by the lack of treaty signing, as well as not implementing relevant national laws.

<sup>128</sup> *See infra* Part V.B–C.

<sup>129</sup> Property law spans the "principles, policies and rules by which disputes over property are to be resolved . . . [it] deals with the relationships between and among members of a society with respect to 'things' . . . [which] may be tangible . . . or they may be intangible. . . ." *Property Law*, ENCYC. BRITANNICA, <http://www.britannica.com/EBchecked/topic/479032/property-law> (last visited Feb. 21, 2016).

best designed by thinking about how they can serve the human interests of those whose behavior they govern.”<sup>130</sup> Divergent international laws and ideals<sup>131</sup> surrounding property are confusing and lead to contradicting litigation outcomes and legal ramifications.<sup>132</sup> One way to partially remedy this confusion is to standardize property law on an international scale.<sup>133</sup> For example, “[t]he lack of uniformity in national property laws are an art thief’s greatest ally”<sup>134</sup> because, by securing good title for stolen property, the thief is then able to sell in places that “favor bona fide purchasers over original owners.”<sup>135</sup> Also, if an antiquities seller, such as a private dealer or auction house, deals in cultural property that has been illegally exported, there is no bilateral or international agreement to regulate export laws. As such, the transaction may not be illegal.<sup>136</sup>

Even if the variety of international legal traditions and judicial rulings concerning cultural property under principles of property law could reach a consensus, there are still inherent problems analyzing cultural property as merely a property issue. The concept of cultural property—properties that are important enough to specific peoples or nations that care should be taken to preserve them—implies a sense of ownership that diverges from property law: an ownership that is not completely vested in the current owner but rather seeks to include a vague notion of future generations and distinct groups (i.e. of a particular political, ethnic, or religious group). As such, human rights law would provide further protections for cultural property because cultural property relates to peoples’ social values. First, the “human rights regime is one of the mechanisms that has proven to be extremely

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<sup>130</sup> KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* 130 (2006).

<sup>131</sup> For example, *jus abutendi* is a Roman and civil law concept that allows for the destruction of one’s property, which has historically been an important right of ownership. Strahilevitz, *supra* note 90, at 785–90.

<sup>132</sup> See Katherine D. Vitale, Note, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 NOTRE DAME L. REV. 1835, 1858 (2009).

<sup>133</sup> See Anderson, *supra* note 46, at 430. For example, civil codes (unlike the common law) typically provide for protection for bona fide property purchasers and consequently the original owner loses title to the object when it is sold to another purchaser. *See generally id.*

<sup>134</sup> *Id.* at 414.

<sup>135</sup> Sarah S. Conley, *International Art Theft*, 13 WIS. INT’L L.J. 493, 495 (noting that Switzerland is one such example of a place where the national laws allow for sale of stolen property); *see also* Karen Theresa Burke, *International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?*, 13 LOY. L.A. INT’L & COMP. L. REV. 427, 442–47 (1990) (discussing the role of the Uniform Commercial Code and the sale of goods, as relating to cultural property).

<sup>136</sup> *See* Alderman, *supra* note 22, at 618. For example, in Belgium there is no law that requires an art dealer to prove that the object he is selling came into Belgium via “legitimate channels.” *Id.* at 619. Often times, the art dealer makes a profit, knowing full well that he is selling illicit cultural property. *Id.* For example, one dealer in Belgium remarked: “It is obvious that if a piece comes from Afghanistan, it has been stolen.” BLOOD ANTIQUITIES, *supra* note 21.

effective in creating individual responsibility directly . . . .”<sup>137</sup> For example, the prosecution in the ICTY<sup>138</sup> embraced the human rights schema: the Tribunal had jurisdiction to prosecute individuals who deliberately attacked cultural property “because the destruction was committed with discriminatory intent [so] it amounted to an attack on a people’s religious identity, and thus constituted a crime against humanity.”<sup>139</sup> To the benefit of cultural property, the holdings in the Tribunal obscure “the distinction between crimes against people and crimes against property, ultimately stating that such crimes may violate *human rights*.”<sup>140</sup>

Second, incorporating human rights law into the conceptualization of cultural property would be beneficial insofar as it would provide encouragement for “leaders to ensure that their actions do not lead to the destruction of cultural sites . . . .”<sup>141</sup> This also factors in the human elements relating to cultural property and “conforms to basic values of humanitarianism and multiculturalism.”<sup>142</sup> Furthermore, viewing cultural property as intertwined with human rights will better allow for international laws and customs to apply in a less controversial manner: once the international community regards cultural property as something inherent to a group’s identity, the desire to protect these objects will be enhanced.<sup>143</sup>

It may also be helpful to conceptualize cultural property, when illicitly looted, as a conflict commodity.<sup>144</sup> For actors at the buying end of the cultural property looting scheme, it may be difficult to recognize the dark side of the industry they support. For example, the United States has several national laws to prosecute cultural property crimes.<sup>145</sup>

<sup>137</sup> Patel, *supra* note 47, at 21. This is an important consideration when taking into account who is desirable to prosecute. See *infra* Part III.C.

<sup>138</sup> See *infra* Part V.D.

<sup>139</sup> Patel, *supra* note 47.

<sup>140</sup> *Id.* (emphasis added).

<sup>141</sup> *Id.* at 22.

<sup>142</sup> See P. Ishwara Bhat, *Protection Of Cultural Property Under International Humanitarian Law: Some Emerging Trends*, 1 ISIL Y.B. OF INT’L HUMANITARIAN & REFUGEE L. 47 (2001).

<sup>143</sup> Property, on the other hand, is something typically seen as fungible and replaceable, albeit valuable.

<sup>144</sup> See generally *The Kimberley Process*, GLOBAL WITNESS, <http://www.globalwitness.org/campaigns/conflict/conflict-diamonds/kimberley-process> (last visited Feb. 21, 2016). As such, “conflict commodities” have seen relative success in reduced trafficking when an organized tracking system has been put in place. This process is an import-export certification plan in which participating nations must ensure that any conflict commodity (such as a “blood diamond”) originating from within their borders will not provide financial support to an insurgent group. *Id.* At the very least, implementing tracking systems have the ability to raise awareness.

<sup>145</sup> While a fuller discussion of U.S. laws is beyond the scope of this Note, it is worth mentioning two statutes that have important consequences for cultural property that arrives on U.S. soil. First, the Convention on Cultural Property Implementation Act (“CPIA”) makes it illegal to import or sell cultural property that was illegally removed from any country that is also a member of the 1972 UNESCO Convention. See generally Raymond Fisman & Shang-Jin Wei, *The Smuggling of Art, and the Art of Smuggling: Uncovering the Illicit Trade in Cultural Property and Antiquities*

Even still, does the threat of replevin<sup>146</sup> effectively deter individuals from purchasing antiquities that could be directly linked to terrorist financing?<sup>147</sup> Accordingly, the global community has made recent attempts to combat the financing of terrorism.<sup>148</sup> In 1999, the International Convention for the Suppression of Financing Terrorism sought to cut off funding for terrorists.<sup>149</sup> After the attacks on September 11, 2001, the UN Security Council created Resolution 1373, which criminalized activities related to terrorist financing.<sup>150</sup> Because Resolution 1373 “was adopted under Chapter VII of the Charter of the United Nations, it applies to all states regardless [of] whether they have ratified the Financing Convention.”<sup>151</sup>

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(National Bureau of Economic Research, Working Paper No. 13446, 2007), <http://www.nber.org/papers/w13446.pdf>. Second, the United States National Stolen Property Act (“NSPA”) criminalizes the actions of one who “transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud.” 18 U.S.C. § 2314 (2013). The NSPA, unlike the CPIA, allows for criminal prosecution and has been applied to antiquity smuggling in the past several years: an antiquity that makes its way to the United States after having been illegally excavated and exported could form the basis for a criminal proceeding. See Fisman & Wei, *supra*.

<sup>146</sup> Replevin is “the recovery by a person of goods or chattels claimed to be wrongfully taken or detained upon the person’s giving security to try the matter in court and return the goods if defeated in the action.” See *Replevin*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/replevin> (last visited Feb. 21, 2016).

<sup>147</sup> While beyond the scope of this Note, it is interesting to consider that “[i]f the market is itself both criminal and organized, then the individuals participating in each stage of the progression from source to market are also criminal and organized to some degree . . . .” Jessica Dietzler, *On ‘Organized Crime’ in the Illicit Antiquities Trade: Moving Beyond the Definitional Debate*, 16 TRENDS ORGAN. CRIM. 329, 338 (2013). Dietzler also notes that the illicit antiquities trade exploits local looters who are impoverished as well as exploits the world’s cultural heritage. See *generally id.* Further, some scholars argue that imprisonment is the only appropriate remedy for criminal prosecution, as fines and forfeiture of the objects are inadequate. O’Keefe, *supra* note 60, at 38.

<sup>148</sup> See *generally* Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT’L L. 315, 332 (2003).

<sup>149</sup> *Id.* at 323–24. The Convention put forth an offense relating to terrorist financing. The offense is when an actor:

directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/54/49 (Vol. I), International Convention for the Suppression of the Financing of Terrorism (1999).

<sup>150</sup> Bantekas, *supra* note 148, at 325–26.

<sup>151</sup> Mark A. Drumbl, *Transnational Terrorist Financing: Criminal and Civil Perspectives*, 9 GERMAN L.J. 933, 936 (2008).

### B. *The Taliban and ISIS*

Like antiquities looting, iconoclasm has a long history<sup>152</sup> and continues to threaten cultural property because “the social issues driving iconoclasm keep recurring.”<sup>153</sup> But, is iconoclasm just an excuse for modern extremists to persecute others under the guise of religious piety or another self-serving reason? While the Taliban declared religious motives as the rationale behind the destruction of the Buddhas of Bamiyan, numerous other Muslim groups and individuals repudiated the destruction and asserted that Islam did not require all non-Muslim works to be destroyed.<sup>154</sup> Further, several “Taliban officials made numerous comments implying that they would have never destroyed the monuments if foreign governments had recognized the Taliban.”<sup>155</sup>

Beyond the sheer publicity of their destructive acts, the Taliban’s iconoclasm impinges upon the ability of various groups to enjoy their respective cultural property.<sup>156</sup> Furthermore, the destruction of the Buddhas was not an isolated act, but rather was “the peak of a systematic plan . . . for the eradication of ancient Afghan cultural heritage in its entirety.”<sup>157</sup> Today, it is clear that iconoclastic acts violate human rights: these underlying sentiments and rationales for the destruction of cultural property are no longer valid.<sup>158</sup> The destruction of the Buddhas of Bamiyan embodied a brazen abhorrence toward different cultural groups that raises concerns of more extreme, discriminatory behavior in the future.<sup>159</sup>

Regardless of the Taliban’s status within the international community, the group’s actions and extent of control allowed it to function as a pseudo-government. Because Afghanistan was a party to the Geneva Conventions,<sup>160</sup> customary international law applies to the

<sup>152</sup> See *supra* note 91.

<sup>153</sup> Wangkeo, *supra* note 33, at 192.

<sup>154</sup> For example, the Organization of the Islamic Conference sent “its most prominent Muslim clerics [to Afghanistan] who informed the Taliban that its interpretation of Islam was wrong.” Wangkeo, *supra* note 33, at 249. Further, Iran requested that the Taliban not “defame Islam by indulging in such activities” and Egypt thought that destroying the Buddhas would “cast a poor light on Islam.” *Id.* at 260.

<sup>155</sup> *Id.* at 256; see *supra* Part III.B.

<sup>156</sup> For example, various groups may include Buddhists residing outside of Afghanistan, travelers who felt a sense of attachment to the statues, art historians and archeologists.

<sup>157</sup> Francioni & Lenzerini, *supra* note 2, at 627. Further, when the:

[D]estruction is associated with the intent to discriminate or annihilate another religion and its forms of cultural expression, the act then amounts to a crime of persecution . . . it also amounts to an attack on the very identity of the targeted people and religion, and thus on the dignity and fundamental rights of its members.

*Id.* at 650.

<sup>158</sup> See Wangkeo, *supra* note 33, at 265.

<sup>159</sup> See *id.* at 259.

<sup>160</sup> See *supra* note 80 (briefly describing the Geneva Conventions). Further, “Afghanistan did sign the Geneva Conventions on August 12, 1949, and it ratified the Conventions on September 26 [sic], 1956. As such, Afghanis may be covered by the Conventions.” *Pre-Geneva Conventions*

Taliban as a quasi-state actor.<sup>161</sup> This application is important because “[c]ustomary international law plays a significant role in the law of war.”<sup>162</sup> For example, offenses that contravene the Geneva Conventions are considered to be “grave breaches” and also amount to war crimes.<sup>163</sup> Furthermore, customary international law also recognizes that individuals can commit war crimes and civilians can be just as culpable as soldiers.<sup>164</sup> The international community would be better positioned to prosecute the Taliban under the offense of a war crime by embracing customary international law.

The Buddhas were not the last example of impressive cultural property to be destroyed. Further, the Taliban was not the last quasi-state actor to commit cultural property crimes. ISIS, unfortunately, embodies many similar characteristics: the group seeks to function as a pseudo-government,<sup>165</sup> all the while wholly disrespecting the cultural property of the regions it controls. ISIS is currently engaged in the intentional destruction of cultural property in addition to targeted looting for profit: what ISIS cannot pillage, it earmarks to destroy.<sup>166</sup> As ISIS gained control over portions of Iraq and Syria during the summer months of 2014, the group issued special commands to destroy Shia graves, shrines, and relics.<sup>167</sup> Further, ISIS engaged in a systematic destruction of Iraqi cultural property, demolishing ancient shrines and places of religious importance.<sup>168</sup> ISIS has also looted the valuables from within places of worship and has burned various religious scripts.<sup>169</sup> What is especially troubling about these destructive acts is the targeted religious sentiment: ISIS’ actions are deliberate acts of iconoclasm.<sup>170</sup>

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*and the Law of War*, THE HERITAGE FOUND., <http://www.heritage.org/research/projects/enemy-detention/armed-conflict-and-the-geneva-conventions> (last visited Feb. 21, 2016).

<sup>161</sup> “Al Qaeda’s attacks on various military and civilian locations around the world categorize them as a terrorist organization. The Taliban ruled Afghanistan as a theocratic government until the U.S. invasion in 2001. The key difference being that the Taliban acted as a State, and al Qaeda did not.” Noman Goheer, *The Unilateral Creation of International Law During the “War on Terror”*: *Murder by an Unprivileged Belligerent is Not a War Crime*, 10 N.Y. CITY L. REV. 533, 543 (2007).

<sup>162</sup> *Id.* at 535.

<sup>163</sup> *Id.* at 541.

<sup>164</sup> *Id.* at 542.

<sup>165</sup> See Berman, *supra* note 6.

<sup>166</sup> Immobile examples of cultural property, such as buildings, are “seen as heretic by the terrorists and typically marked for destruction.” Martel, *supra* note 24.

<sup>167</sup> Robson, *supra* note 34.

<sup>168</sup> See, e.g., *id.*

<sup>169</sup> See Khalid al-Taie, *Iraq’s Archaeological Treasures at Risk of Destruction by ISIL*, AL-SHORFA (Aug. 15, 2014), [http://al-shorfa.com/en\\_GB/articles/meii/features/2014/08/15/feature-01](http://al-shorfa.com/en_GB/articles/meii/features/2014/08/15/feature-01). For example, Mr. Qais Hussein Rashid, head of the Iraqi Museums Department, said that ISIS has been “cutting these reliefs [of Assyrian King Ashurnasirpal II, in the city of Kalhu] into small parts and selling them . . . [t]hey don’t need to excavate. They just need a chain saw to cut the king’s head or legs if they want.” Martel, *supra* note 24.

<sup>170</sup> See Fitz Gibbon, *supra* note 39.

## V. A PROPOSED FRAMEWORK TO COMBAT MODERN REALITIES

A. *Cultural Property Crimes Should be Criminally and Internationally Adjudicated*

Given the significance of cultural property crimes for groups like ISIS and the Taliban, it is reasonable to warrant some liability under criminal law. Civil actions are not effective because the punishment, if any, is significantly lower than criminal liability insofar as the risk is essentially limited to the cultural property's monetary value.<sup>171</sup> The way to ensure compliance is via an international criminal offense that can be publicly adjudicated in a court like the ICC.<sup>172</sup> In addition, “[o]nly through international criminal prosecution can the international community effectively address the problem of *transnational* organized crime.”<sup>173</sup>

Individuals need to be held responsible for their actions when they violate domestic and/or standardized international law.<sup>174</sup> There are benefits to having a universal, internationally applicable legal standard—for example, there are a variety of penalties for relevant crimes<sup>175</sup> that are inconsistent across jurisdictions.<sup>176</sup> Establishing a uniform standard would alleviate this disparity. Beyond that, cultural property crimes encompass truly global concerns: while some nations have taken steps to address the problem, it is important to note that

<sup>171</sup> “[C]ivil actions do not carry sufficiently meaningful punishment because possessors of looted artifacts face the possibility of losing only the artifacts’ monetary value, and the amount of money that market participants have at stake is relatively small.” Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT’L L. 169, 180 (2007).

<sup>172</sup> Various laws at the national level that have dabbled in criminal law have seen some successes. For example, in 2003 the United Kingdom implemented a statute that reversed the burden of proof in criminal prosecutions for Iraqi cultural property removed after August 1990. *Id.* at 187. There is “evidence from market statistics that this criminal provision is depressing the London market in Mesopotamian cylinder seals.” *Id.*

<sup>173</sup> Jennifer M. Smith, Note, *An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity*, 97 GEO. L.J. 1111, 1121 (2009) (emphasis added).

<sup>174</sup> “To have an effective system of cultural property protection it is necessary that individuals be held liable for actions that violate international law, rather than simply relying on states to create domestic law criminalizing the destruction of cultural property.” Patel, *supra* note 47, at 20–21. Furthermore, “[c]ustomary international law recognises individual criminal responsibility for the unlawful plunder of public or private property, including cultural property . . . .” O’Keefe, *supra* note 60, at 18.

<sup>175</sup> Examples of relevant crimes include trafficking, looting, and intentional destruction.

<sup>176</sup> By way of illustration, in Syria an individual convicted of looting may face up to fifteen years in jail. *See*

Emma Cunliffe, *Damage to the Soul: Syria’s Cultural Heritage in Conflict*, GLOBAL HERITAGE FUND, 11 (May 16, 2012), [http://ghn.globalheritagefund.com/uploads/documents/document\\_2107.pdf](http://ghn.globalheritagefund.com/uploads/documents/document_2107.pdf). Cf. Emily Harris, *6 Arrested for Looting Antiquities From Israel’s ‘Cave of The Skulls’*, NPR (Dec. 7, 2014, 7:34 PM), <http://www.npr.org/blogs/thetwo-way/2014/12/07/369198542/6-arrested-for-looting-antiquities-from-israels-cave-of-the-skulls> (noting that looters would face a five year prison sentence as a maximum punishment, but that the director of the Antiquities Authority’s Southern Region Prevention Unit “expects much shorter sentences.”).



“[a]lthough antiquities crime crosses national borders, law enforcement does not, making effective prosecution and prevention particularly difficult.”<sup>177</sup> Accordingly, the most effective means would address these issues at the international level because global cooperation is needed for sustained success.

#### B. *The ICC Should Prosecute Cultural Property Crimes as War Crimes*

Before the twentieth century, war was thought to be the main procedure for resolving international disputes.<sup>178</sup> Now, however, many international actors recognize the need for a highly functional international court that will have jurisdiction over such disputes and related acts of aggression.<sup>179</sup> Indeed, “[o]ne of the fundamental prerequisites of a world community functioning under a regime of law and not of arbitrary power is the possession of a court of plenary jurisdiction.”<sup>180</sup> In this regard, the ICC is a promising approach to treating criminal international problems.<sup>181</sup> Furthermore, enforcing international customary law is a compelling state interest.<sup>182</sup> For an international framework to be effective, it must be viewed as legitimate, which requires trials to be considered just and politically adequate.<sup>183</sup> At the very least, “criminal prosecutions for political atrocities [may] have beneficial effects, in the form of deterrence and democratization.”<sup>184</sup>

The creation of the ICC was in part a reaction to the horrible criminal acts committed in the last century, particularly during the World War II era.<sup>185</sup> Violence through the 1990s, such as conflicts in

<sup>177</sup> Alderman, *supra* note 22, at 626.

<sup>178</sup> Maura A. Bleichert, *The Effectiveness of Voluntary Jurisdiction in the ICJ: El Salvador v. Honduras, A Case in Point*, 16 FORDHAM INT’L L.J. 799, 802 (1992).

<sup>179</sup> The fact that many nation states accepted the jurisdiction and became a party to the Rome Statute, which established the ICC, would suggest that those states recognize the benefit of an institution like the ICC. Cf. Mark D. Kielsgard, *War on the International Criminal Court*, 8 N.Y. CITY L. REV. 1 (2005) (noting how the United States has not consented to the jurisdiction of the Court, despite its role in negotiating the original treaty).

<sup>180</sup> Wallace McClure, *World Rule of Law: the Jurisdiction of the International Court of Justice*, 1960 DUKE L.J. 56 (1960).

<sup>181</sup> Moreover, the ICC “is a cause for celebration . . . [as] the ICC is first and foremost a monument to humankind’s gradual renunciation of atrocities as an instrument of statecraft.” Akhavan, *supra* note 84, at 713. Further, other scholars have also suggested that the ICC could prosecute actors that are responsible for the destruction of cultural property. See Milligan, *supra* note 53, at 104 (noting that ICC has the ability to prosecute war crimes so it could prosecute those who intentionally destroy cultural property).

<sup>182</sup> “To the extent that states obey international law, they do so because such compliance is seen as cheap and as consonant with the state’s preconceived interests. As Jack Goldsmith and Eric Posner put it: ‘International law emerges from states’ pursuit of self-interested policies on the international stage.’” Devin O. Pendas, *War Crimes Trials: Between Justice and Politics*, 49 TULSA L. REV. 557, 560 (2013) (quoting JACK L. GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 13 (2006)).

<sup>183</sup> Pendas, *supra* note 182, at 561.

<sup>184</sup> *Id.* at 559.

<sup>185</sup> See Milligan, *supra* note 53, at 92.

the former Yugoslavia, Rwanda and elsewhere, reconfirmed the need for a permanent, international court to address war crimes and crimes against humanity. Since its creation, the ICC has established jurisdiction over the states that signed the Rome Statute.<sup>186</sup> The court's jurisdiction, however, is time restricted: it may only respond to events that occurred after July 1, 2002.<sup>187</sup> What is beneficial about the court's jurisdiction, however, is that it has the ability to prosecute individuals: those who have allegedly committed a crime outlined within the Rome Statute may be brought before the ICC.<sup>188</sup> This is of particular importance in prosecuting terrorist groups that threaten or coerce individuals into participation;<sup>189</sup> those in positions of power may have responsibility imputed to them for crimes committed by their subordinates.<sup>190</sup>

The crimes over which the ICC has already established jurisdiction include genocide, war crimes, crimes against humanity, and the crime of aggression.<sup>191</sup> For purposes of the court's jurisdiction, war crimes include "grave breaches" of the Geneva Conventions<sup>192</sup> as well as other extreme violations of the laws and customs of war.<sup>193</sup> Article 8 of the Rome Statute advances a list of acts that constitute war crimes, including property destruction not justified by military necessity,<sup>194</sup> as well as violations of the laws and customs of war,<sup>195</sup> which further

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<sup>186</sup> "The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other state." Rome Statute, *supra* note 80, at art. 4.

<sup>187</sup> See *Understanding the International Criminal Court*, *supra* note 79. The purposeful destruction of the Buddhas faces two substantial hurdles in respect to the jurisdiction of the ICC: the statues were destroyed prior to July 1, 2002 and Afghanistan was not a signatory to the Rome Statute.

<sup>188</sup> *Id.*

<sup>189</sup> As such, it may be beneficial to only prosecute select members, since there is limited immunity for persons in positions of power: for example, "[n]o one is exempt from prosecution because of his or her current functions or because of the position he or she held at the time the crimes concerned were committed." *Id.* at 5. This way, a head of state or government leader is not exempt. *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 13–14. Genocide includes killing or seriously injuring a group "with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . ." *Id.* at 13. War crimes include actions like murder, hostage taking, civilian attacks, pillaging, rape and other "grave breaches of the Geneva Conventions and other serious violations of the laws and customs applicable in international armed conflicts . . . when they are committed as part of a plan or policy or on a large scale." *Id.* at 14. Crimes against humanity include acts like murder, torture, rape and enslavement "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack . . ." *Id.* at 13. The crime of aggression will include "invasion, military occupation, and annexation by the use of force, blockage of the ports or coasts" when the acts are used "by a State against the sovereignty, territorial integrity or political independence of another State." *Id.* at 14.

<sup>192</sup> See *id.*

<sup>193</sup> See *id.*

<sup>194</sup> Rome Statute, *supra* note 80, at art. 8(2)(a)(iv).

<sup>195</sup> *Id.* at art. 8(2)(b).

includes pillage.<sup>196</sup> Article 8(e) proposes that “serious violations of the laws and customs applicable in armed conflicts *not* of an international character”<sup>197</sup> encompass direct attacks against religious buildings and historic monuments<sup>198</sup> as well as seizure or destruction of an adversary’s property that is not “imperatively demanded by the necessities of the conflict.”<sup>199</sup> While Article 8(e) is limited in application,<sup>200</sup> it would apply to quasi-state actors who engage in purposeful destruction of cultural property without a military objective as well as pillaging to further fund illicit activities. As such, these destructive acts constitute war crimes and may be prosecuted by the ICC.

### *C. Beyond the Jurisdictional Hurdle, the ICC is a Fair Venue*

The ICC is a fair tribunal with provisions of justice that are important when expounding an international criminal framework. For example, the ICC has strong standards in place for upholding the rights of the accused. There is a presumption of innocence until proven guilty beyond a reasonable doubt.<sup>201</sup> Furthermore, the accused have a right to a public and impartial hearing that is not unduly delayed, and also a right to be defended by counsel.<sup>202</sup> In addition to these values, judges are unable to order the death penalty<sup>203</sup> and the maximum prison sentence is thirty years.<sup>204</sup> Any party has the ability to appeal a decision.<sup>205</sup>

Furthermore, universal jurisdiction is optimal because these crimes impact the global community. While it has been “suggested that universal jurisdiction over crimes under international law was inconsistent with state sovereignty, [this assertion overlooks how] such crimes were crimes against the entire international community, not just against the victims in a particular state.”<sup>206</sup> For example, cultural property crimes have been linked to corruption, money laundering, prostitution, drug smuggling and endangering wildlife, further

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<sup>196</sup> *Id.* at art. 8(2)(b)(xvi).

<sup>197</sup> *Id.* at art. 8(2)(e) (emphasis added).

<sup>198</sup> *Id.* at art. 8(2)(e)(iv).

<sup>199</sup> *Id.* at art. 8(2)(e)(xii).

<sup>200</sup> It:

[D]oes not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups.

*Id.* at art. 8(2)(f).

<sup>201</sup> *Understanding the International Criminal Court*, *supra* note 79, at 23.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 31.

<sup>204</sup> With the ability to impose life imprisonment in only the most extreme cases. *Id.*

<sup>205</sup> *Id.* at 32.

<sup>206</sup> *Universal Jurisdiction: Strengthening This Essential Tool of International Justice*, AMNESTY INT’L (Oct. 9, 2012), <https://www.amnesty.org/en/documents/IOR53/020/2012/en/> (positing that these states “were acting as agents of the international community.”).

demonstrating that it is not a “victimless crime.”<sup>207</sup> While no treaty, law, or forum will ever be completely uncontroversial, there are compelling reasons to embrace the power of the ICC and incorporate a humanitarian perspective into future offenses.

Furthermore, it must be noted that not every act of destruction or opportunistic pillage by a quasi-state actor will constitute a cultural property crime that would amount to a war crime.<sup>208</sup> The decision to prosecute should ultimately be reserved for the most egregious of cases and will likewise constitute a political decision.<sup>209</sup> However, it is necessary to stress the significance of cultural property crimes and recognize that the international community should, and could, have a viable method for coping with such atrocities.

#### D. *An Ad Hoc Military Tribunal as a Precursor to the ICC*

Past international frameworks addressing cultural property have mostly focused on cooperative treaties that create a regulatory scheme for imports and exports in an effort to combat looting and illicit trafficking. Some of the more modern, influential treatments of cultural property crimes stem from ad hoc military tribunals, which “served as laboratories within which abstract, post-Nuremberg conceptions of justice took shape and became reality.”<sup>210</sup> Historically, military tribunals were granted jurisdiction over war crimes and many of those war crime definitions included a broad definition of cultural property. For example, the Charter of the International Military Tribunal at Nuremberg<sup>211</sup> provided for jurisdiction over war crimes such as “plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”<sup>212</sup> The Charter stated that the unlawful destruction of cultural property was a war crime.<sup>213</sup> However, the end of the Holocaust era did not signify an

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<sup>207</sup> See Pringle, *supra* note 19.

<sup>208</sup> Some factors to consider may include whether the group is deemed a foreign terrorist organization, the rationale for the destruction, if there exists persecutory intent, as well as the religious or social undertones that fuel the destructive act or acts.

<sup>209</sup> While beyond the scope of this Note, the international community may also want to consider extending liability to secondary actors, like unscrupulous antiquity dealers. Groups like the Taliban and ISIS commit other serious crimes and they are unlikely to stop because an additional count of a cultural property crime will be added to the indictment. As such, extending liability to other actors may help alleviate some of the issues raised within this Note.

<sup>210</sup> Akhavan, *supra* note 84, at 713.

<sup>211</sup> The International Military Tribunal was an ad hoc military tribunal court formed by the Allied governments in 1942. The Tribunal is well known for its trials prosecuting Nazi war crimes. See generally *International Military Tribunal at Nuremberg*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007069> (last updated Aug. 18, 2015).

<sup>212</sup> Charter of the International Military Tribunal, art. 6(b), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT].

<sup>213</sup> See O’Keefe, *supra* note 60, at 42 (noting that the destructive acts constituted war crimes but also were considered crimes against humanity).

end to acute threats against cultural property.<sup>214</sup>

Similarly, the ICTY is an ad hoc court created by the Security Council of the United Nations to redress the crimes that occurred during the conflicts in the Balkans region in the 1990s. The primary purpose of the ICTY is to hold trials for criminal perpetrators. To date, it has charged upwards of 160 individuals, ranging from heads of state to military leaders and prime ministers.<sup>215</sup> Lessons from the ICTY have the potential to shape prospective frameworks for addressing cultural property crimes in a meaningful way. First, the ICTY noted that cultural property destruction in the former Yugoslavia was similar to the Nazi's targeted destruction of Jewish art and artifacts.<sup>216</sup> Thus, the Statute of the ICTY allowed the Tribunal to adjudicate actions that violate customs of war, including the "seizure . . . destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science."<sup>217</sup> Several defendants<sup>218</sup> before the Tribunal were indicted and found guilty of crimes against cultural property.<sup>219</sup> The Tribunal held that their destructive actions amounted to persecution, constituting crimes against humanity.<sup>220</sup> Additionally, it is important to note that the ICTY had jurisdiction to prosecute individual actors who committed the crimes during a conflict that was regional and yet international in scope.<sup>221</sup> While those violations occurred in a time of armed conflict, the conflict was localized such that the same principles can be extended to a quasi-

<sup>214</sup> See *supra* Part I.A–B.

<sup>215</sup> See generally *About the ICTY*, ICTY, <http://www.icty.org/sections/AbouttheICTY> (last visited Sept. 13, 2015).

<sup>216</sup> For instance:

[T]he destruction of cultural property in the former Yugoslavia in the early 1990s was a form of cultural aggression that was akin to the Nazi's plan for the creation of a pure Germanic empire in that the Serbian expulsion of non-Serbs was a form of ethnic cleaning supported by the destruction of cultural property. The destruction of cultural property in the former Yugoslavia was not simply due to collateral damage.

Andrea Cuning, *The Safeguarding of Cultural Property in Times of War & Peace*, 11 TULSA J. COMP. & INT'L L. 211, 230 (2003).

<sup>217</sup> Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 3(d), May 25, 1993, 32 I.L.M. 1192, [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf) [hereinafter ICTY Statute].

<sup>218</sup> For example, Dario Kordić and Mario Čerkez were both prominent political figures in the Bosnian Croat community who made strategic military decisions and were indicted on counts relating to crimes against humanity and violations of customs of war. See generally THE HAGUE JUSTICE PORTAL, <http://www.haguejusticeportal.net> (last visited Sept. 13, 2015).

<sup>219</sup> Kordić and Čerkez were found guilty of destruction of cultural property when they deliberately attacked ancient mosques. These acts were seen as discriminatory in nature and were comparable to an assault against religious identity. These acts were also viewed as crimes against humanity. See Francioni & Lenzerini, *supra* note 2, at 636–37.

<sup>220</sup> *Id.* at 637.

<sup>221</sup> Brenner, *supra* note 99, at 267. Further, "[i]nternational law and tribunals have paid particular attention to the individuals who have been the principal architects and implementers." Bruch, *supra* note 52, at 730; see also TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992).

state actor's destruction for iconoclastic reasons<sup>222</sup> or ruthless pillaging that funds illicit activities, even if that occurs outside an international conflict or civil war.

The ICTY recognized "norms that create bilateral obligations of reciprocal character, binding upon individual states inter se, and norms that create international obligations owed to all states in the public interest."<sup>223</sup> As such, cultural property crimes can be considered *crimina juris gentium*<sup>224</sup> given their global nature and ramifications. What is unique about this type of crime is also its target: broadly speaking, the victim of cultural property crimes is humanity, as opposed to an individual or defined group.<sup>225</sup>

#### *E. Incorporating ICTY Propositions into a Criminal War Crimes Offense in the ICC*

Several of the ICTY's guiding principles should be incorporated into the ICC to support the prosecution of cultural property crimes. As such, many of the ICTY's favorable principles would become part of a more permanent and wide-reaching forum. In the ICTY, for example, "customary humanitarian law [was] central to its authority to punish."<sup>226</sup> The Appeals Chamber of the ICTY commented that "[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict."<sup>227</sup> Relatedly, the ICTY Appeals Chamber held that the Tribunal could only

<sup>222</sup> See Wangkeo, *supra* note 33, at 271.

<sup>223</sup> Francioni & Lenzerini, *supra* note 2, at 634 (emphasis omitted).

<sup>224</sup> *Crimina juris gentium* are crimes that occur when "individuals are responsible of certain serious crimes that, by their very nature, affect the international community as a whole, since no human group can tolerate them . . . [these are] crimes against the peace and the security of mankind, which include crimes of war and crimes against humanity." Francioni & Lenzerini, *supra* note 2, at 644. Further:

[T]he Statute of the ICTY places the destruction of buildings dedicated to religion, or of historical and artistic monuments among war crimes (that are part of the broader concept of *crimina juris gentium*) . . . [and] when an act of destruction of cultural heritage is perpetrated with a discriminatory intent, as in the case of the Bamiyan Buddhas, it amounts to an act of persecution included in the concept of crimes against humanity, which is also part of the broader concept of *crimina juris gentium*.

*Id.* at 644–45.

<sup>225</sup> "[E]ven though the victim of the offence at issue is to be understood broadly as a 'people,' rather than any particular individual, the offence can be said to involve grave consequences for the victim." Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 232 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005) (holding the accused liable and sentencing him to eight years in prison for various international crimes, including destruction of places dedicated to religion, art and science).

<sup>226</sup> Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 821 (2005).

<sup>227</sup> Prosecutor v. Tadić, Case No. IT-94-I-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 141 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter Tadić]. This should logically extend to war crimes as well, since both types of international crimes are encompassed within the jurisdictional reach of the ICC and both types of crimes victimize the global community.

prosecute violations of the laws and customs of war, which are offenses that either violate customary law or a relevant treaty.<sup>228</sup> Accordingly, Article 3 of the ICTY Statute provided for violation of the laws of customs of war, specifically referring to cultural property.<sup>229</sup> Article 3 also applies to both international and non-international conflicts<sup>230</sup> and its list is not exhaustive.<sup>231</sup> Thus, the rulings within the Tribunal would capture instances like opportunistic pillage and intentional destruction at the hands of quasi-state actors, and should be extended accordingly.

The means by which the ICTY approached prosecution of cultural property crimes is important because:

it blurred the traditional distinction between crimes against persons and crimes against property . . . . [by] equat[ing] a crime against property to a grave breach of the Geneva Conventions . . . . [and d]ue to the nature of the conflict in the former Yugoslavia, religious symbols constituted the main targets of attacks on cultural property.<sup>232</sup>

The Trial Chamber used a variety of factors to establish the discriminatory intent underlying the attacks. For example, the village of Ahmići lacked strategic importance in the conflict but was culturally significant because many important Muslim figures were from Ahmići.<sup>233</sup> This was considered a key factor and was used to bolster prosecution as an example of when destruction of cultural property could rise to the level of persecution.<sup>234</sup> This recognition highlights how a systematic, cultural property crime may also be seen as a form of

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<sup>228</sup> See Meron, *supra* note 226, at 831. This was decided in Tadić. See *supra* text accompanying note 227. See generally John Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders*, INT'L COMM. OF THE RED CROSS (Sept. 30, 1998), <https://www.icrc.org/eng/resources/documents/misc/57jpg6.htm>.

<sup>229</sup> For example, there is a charge of “destruction or wilful damage done to institutions dedicated to religion . . . .” ICTY Statute, *supra* note 217, at art. 3; see also Hiram Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1, 6 (2001).

<sup>230</sup> *Id.* at 4 (noting that “the *Tadić Jurisdiction Decision* held that it ‘applies from the initiation of . . . armed conflict and extends beyond the cessation of hostilities . . . .’ in the case of international armed conflict, or ‘a peaceful settlement is achieved,’ in the case of non-international armed conflict.”); see also Tadić, *supra* note 227, at ¶ 70.

<sup>231</sup> “Such violations shall include but not be limited to . . . .” ICTY Statute, *supra* note 217, at art. 3.

<sup>232</sup> Abtahi, *supra* note 229, at 31.

<sup>233</sup> *Id.* at 26–27.

<sup>234</sup> “The methods of attack and the scale of the crimes committed against the Muslim population or the edifices symbolising their culture sufficed to establish beyond reasonable doubt that the attack was aimed at the Muslim civilian population.” Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 425 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>; see also Abtahi, *supra* note 229, at 27.

persecution.<sup>235</sup>

Customary international law primarily involves prohibiting acts that the general public would already deem criminal.<sup>236</sup> Thus, the inherent “fairness” of prosecution turns on whether the accused could reasonably have known that his or her conduct was criminal at the time of commission.<sup>237</sup> If this holds true, the prosecution of the criminal acts is less likely to be considered a retroactive application of the law.<sup>238</sup> What the ICTY reaffirmed for the international community was that private actors and quasi-state actors are capable of committing war crimes and crimes against humanity. The ICTY also confirmed that tribunals need to expand into permanent forums for international prosecution because belligerents in power can be perpetrators.<sup>239</sup>

#### CONCLUSION

Nothing can be done to bring back the Buddhas of Bamiyan. Nevertheless, the international community must act to deter similar events in the future and ensure that past transgressions are properly considered. Cultural property has been admired for centuries, and its social importance is no less significant today. As the search for solutions to cultural property-related issues becomes increasingly complex,<sup>240</sup> the global community must recognize that updates need to be made to the international criminal law framework. Furthermore, it is necessary to reassess how we view cultural property. Since the antiquated international framework does not effectively apply to modern realities, we should have a forward-looking approach where states should be incentivized to enact deterrence measures and the most abhorrent examples of international destruction and strategic looting for illicit profit rise to the level of war crimes. Previously, military tribunals

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<sup>235</sup> Abtahi, *supra* note 231 at 1–2. Furthermore, the linkages between cultural property destruction as akin to ethnic cleansing provides a standard by which to assess criminal mens rea. Since ethnic cleansing is a targeted action with discriminatory intent, it is persecutory in nature. Also “persecution requires a mental element specific to crimes against humanity in addition to the required criminal intent.” *Id.* at 24.

<sup>236</sup> Examples of such acts include murder, rape and torture.

<sup>237</sup> *Id.* This idea of inherent “fairness” is interesting because:

[C]ustomary humanitarian law for the most part prohibits acts that everyone would assume to be criminal anyway . . . customary law can provide a safe basis for a conviction, but only if genuine care is taken to determine that the legal principle was firmly established as custom at the time of the offense so that the offender could have identified the rule he was expected to obey.

Meron, *supra* note 226, at 821.

<sup>238</sup> *See id.* at 830.

<sup>239</sup> For example, in the conflict in the former Yugoslavia, paramilitary groups as well as factions like the Bosnian Serb army were responsible for much of the violence that occurred. *See* Smith, *supra* note 173, at 1126–27; *see also* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW 274 (2d rev. ed. 1999).

<sup>240</sup> Problems related to cultural property become increasingly complex due to issues such as repatriation, terrorist financing, and national patrimony laws.



adjudicated similar matters and incorporated notions of persecution and international customary law into their sources of jurisdiction and punishment, extending liability for such actions beyond times of international war. In addition, the landscape of the international community has been significantly altered since the relevant treaties and protocols were established.<sup>241</sup> Namely, the ICC was created, and it is an optimal venue to prosecute cultural property crimes as war crimes.

The Taliban's intentional destruction was not the last display of shameless demolition. Current events in the Middle East and beyond demonstrate that the problem is cyclical and is capable of commission on a large scale. While the artistic nature of cultural property is important, these objects are also symbols of cultural histories and ideals that deserve respect. The global community should consider what civilization leaves behind and continue to preserve such objects for future generations, either so they may learn about us or else learn from our mistakes. As a tribute to the international framework that grew out of the World War II era, it is never too soon to be reminded that history repeats itself, and that "[w]herever they burn books they will also, in the end, burn human beings."<sup>242</sup>

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<sup>241</sup> See *supra* Part II.C; see also *supra* Part V.B.

<sup>242</sup> Heinrich Heine, *Almansor: A Tragedy*, in THE YALE BOOK OF QUOTATIONS 349 (Fred R. Shapiro ed., 2006). This famous quote, by German poet Heinrich Heine, has been associated with the book burnings in Berlin in the early 1930s and for foreshadowing the widespread killings during the Holocaust. The quote also resonates in the antiquities destruction scheme, as it relates artifacts of humanity to the preservation of humanity itself.

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