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AN ISSUE OF MONUMENTAL PROPORTIONS: THE
NECESSARY CHANGES TO BE MADE BEFORE INTERNATIONAL
CULTURAL HERITAGE LAWS WILL PROTECT IMMOVEABLE
CULTURAL PROPERTY

BY MATTHEW SMART*

INTRODUCTION

In a letter dated May 20, 1900, Gertrude Bell, a British explorer known as the “the Queen of the Desert,” described the view as she entered the Syrian city of Palmyra. She wrote,

As we drew near Palmyra, the hills were covered with the strangest buildings, great stone towers, 4 stories high, some more ruined and some less, standing together in groups or bordering the road. They are the famous Palmyrene tower tombs. At length we stood on the end of the col and looked over Palmyra. I wonder if the wide world presents a more singular landscape. It is a mass of columns, ranged into long avenues, grouped into temples, lying broken on the sand or pointing one long solitary finger to Heaven. Beyond them is the immense Temple of Baal; the modern town is built inside it and its rows of columns rise out of a mass of mud roofs. And beyond, all is the desert, sand and white stretches of salt and sand again, with the dust clouds whirling over it and the Euphrates 5 days away. It looks like the white skeleton of a town, standing knee deep in the blown sand.¹

The view seen and described by Gertrude Bell in 1900 no longer exists. In late August and early September of 2015, the Islamic State of Iraq and Greater Syria destroyed the Temple of Baal² and the ancient tower tombs as part of its ongoing campaign in Syria.³ The destruction of Palmyra is particularly noteworthy because of its location and role in history.

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1. Letter from Gertrude Bell to Her Parents (May 20, 1900) (on file with Gertrude Bell Archive). Use of the letter inspired by Stuart Jeffries, *ISIS's Destruction of Palmyra: 'The Heart Has Been Ripped Out of the City'*, GUARDIAN (Sept. 2, 2015), <http://www.theguardian.com/world/2015/sep/02/isis-destruction-of-palmyra-syria-heart-been-ripped-out-of-the-city>.

2. Also known as Ba'al or Bel.

3. *ISIL Blows up Ancient Tower Tombs in Syria's Palmyra*, AL JAZEERA ENG. (Sept. 4, 2015), <http://www.aljazeera.com/news/2015/09/isis-blows-ancient-tower-tombs-syria-palmyra-150904165833493.html>.

Palmyra sat on the edge of the Roman Empire and as a result, represented a meeting of the East and West. Palmyra offered insights into our collective past, while serving as an inspiration in a time when it seems impossible to bridge cross-cultural divides.

Although Palmyra and its ancient structures are unique, they are also representative of the role and importance of cultural heritage. Cultural heritage encompasses both moveable and immovable property and includes art and artifacts, monuments and historical buildings, and temples and churches. Despite its importance, cultural heritage has continually been the target of destruction during times of conflict throughout history. Before the current destruction in Syria, the world saw the destruction of the Giant Buddha statues in Afghanistan⁴ and the historical town of Dubrovnik in the former Yugoslavia,⁵ to name just a couple from recent history. These examples demonstrate that current international laws are unable to protect cultural heritage.

This Note offers multiple suggestions to improve the protection of immovable cultural heritage property during conflicts. The destruction of moveable cultural heritage property, while an important issue, is largely outside the scope of this Note. To begin, Part I offers a more precise definition of cultural heritage. Part II explores the current conflict in Syria that is resulting in the destruction of a significant amount of the country's immovable cultural property. Part III examines the historical evolution of international laws aimed at the protection of immovable cultural property during conflicts and its applicability to Syria. Finally, Part IV advances necessary changes to the current regime of international treaties to increase the protection to cultural heritage property. In addition, Part IV argues for the creation of a military force dedicated to protecting immovable cultural heritage property.

I. DEFINITION OF CULTURAL HERITAGE

Cultural heritage is an expansive category. Examples of cultural heritage property can be found in every country and corner of the globe. It takes the form of temples, pyramids, paintings, and manuscripts among many others. It would be nearly impossible to list or define every item that could fall under the definition of cultural heritage. As a result, all widely accepted

4. *Giant Buddha Statues 'Blown Up'*, BBC NEWS (Mar. 11, 2001), http://news.bbc.co.uk/2/hi/south_asia/1214384.stm.

5. Press Release, International Criminal Tribunal for the Former Yugoslavia, Full Contents of the Dubrovnik Indictment Made Public (Oct. 2, 2001) (on file with author) [hereinafter Dubrovnik Press Release].

definitions of cultural heritage are fittingly broad. Such definitions offer the greatest inclusion and the most expansive protection.

This Note adopts the definition of cultural heritage property found in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict:⁶

Cultural heritage property shall cover . . . 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.⁷

In short, the definition encompasses every piece of art, every monument, and every temple that plays a role in the heritage of any culture in the world.⁸

II. MODERN SYRIAN CONFLICT

Currently, the conflict in Syria is erasing the country's rich history by destroying both immovable and movable cultural property. The destruction in Syria is particularly potent because Syria is a melting pot of the world's cultures.⁹ Syria lies squarely in the middle of the cradle of civiliza-

6. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1, May 14, 1954, 249 U.N.T.S. 3511 [hereinafter 1954 Hague Convention]. The full unedited definition of cultural property from the 1954 Hague Convention is:

For the purpose of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:

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;

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 subparagraph (a);

Centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments".

For a more complete discussion of the 1954 Hague Convention see *infra* Part III.

7. 1954 Hague Convention, *supra* note 6, art. 1.

8. *Id.*

9. See THOMAS COLLELO, SYRIA: A COUNTRY STUDY 3–18 (1987) (Syria has been home to the Amorites, Canaanites, Phoenicians, Aramaeans, Assyrians, Babylonians, Persians, Greeks, Romans, Byzantines, Christians, Muslims, Jews, the Ottomans and through them the Turks, and Europeans during colonial times. It is the home of various languages including Aramaic—the language at use during the New Testament and still spoken today. It is the home of purple dye that became the color of royalty during the renaissance).

tion,¹⁰ and at various points in history the armies of Alexander the Great, Genghis Khan, Tamburlaine, and Saladin have both attacked and defended parts of Syria.¹¹ It has been home to Jews, Israelites, Canaanites, Phoenicians, Muslims, and Persians among others.¹² The remnants of those cultures can be found in cities such as Damascus and Aleppo, both of which are some of the culturally richest and oldest areas of the Middle East.¹³ Multiple locations throughout Syria are so culturally valuable that the United Nations Educational, Scientific and Cultural Organization (UNESCO) has designated six sites in Syria to the World Heritage List,¹⁴ with an additional twelve locations on the Tentative List waiting consideration for inclusion.¹⁵

A basic primer of the Syrian conflict is necessary to understand who is culpable for the ongoing destruction of Syria's cultural heritage property. In March of 2011, anti-government protests broke out as part of the larger Arab Spring movement sweeping through the Middle East.¹⁶ The government of President Bashar al-Assad attempted to forcibly suppress the dissent.¹⁷ Within a couple months, fighting between the government and the rebels¹⁸ evolved into a civil war.¹⁹ Both the government and the rebels have significant international support. The rebels have international allies including the United States, the United Kingdom, France, Qatar, Saudi Arabia,

10. John Dennehy, *Stealing from History: The Looting and Destruction of Iraqi and Syrian Heritage Concern Us All*, NATIONAL (Dec. 11, 2014), <http://www.thenational.ae/arts-lifestyle/the-review/stealing-from-history-the-looting-and-destruction-of-iraqi-and-syrian-heritage-concern-us-all>.

11. Patricia Cohen, *Syrian Conflict Imperils Historical Treasures*, N.Y. TIMES (Aug. 15, 2012), http://www.nytimes.com/2012/08/16/arts/design/syrian-conflict-imperils-historical-treasures.html?_r=0.

12. COLLELO, *supra* note 9, at 3–18.

13. These cities date back to at least 1400 B.C.E. and have flourished into modern times. *Id.* at 3.

14. *Properties Inscribed on the World Heritage List*, UNESCO, <http://whc.unesco.org/en/statesparties/sy> (last visited Oct. 27, 2015). The Tentative List is an inventory of those properties which each State Party intends to consider for nomination to the World Heritage List. This step is a condition precedent to consideration for the World Heritage List. As a point of comparison, the United States is home to twenty-three sites on the World Heritage List. *Properties Inscribed on the World Heritage List*, UNESCO, <http://whc.unesco.org/en/statesparties/us> (last visited Oct. 27, 2015). UNESCO added all six of Syria's World Heritage sites to the list of World Heritage in Danger, including the site of Palmyra and the city of Aleppo, in 2013. *List of World Heritage in Danger*, UNESCO, <http://whc.unesco.org/en/danger/> (last visited Oct. 26, 2015). "The List of World Heritage in Danger is designed to inform the international community of conditions which threaten the very characteristics for which a property was inscribed on the World Heritage List, and to encourage corrective action." *World Heritage in Danger*, UNESCO, <http://whc.unesco.org/en/158/> (last visited Oct. 31, 2015).

15. *Properties Inscribed on the World Heritage List*, *supra* note 14.

16. Dylan Matthews, *Syria: The Very, Very Basics*, WASH. POST (Aug. 29, 2013), <http://www.washingtonpost.com/news/wonkblog/wp/2013/08/29/syria-the-very-very-basics/>.

17. *Id.*

18. The Free Syrian Army represents the largest rebel group and they are joined by the Syrian Liberation Front, Syrian Islamic Front, Jabhat al-Nusra, and other independent groups. *Id.*

19. *Id.*

Turkey, and various Islamist groups, including al-Qaeda.²⁰ On the other hand, the government is openly supported by Russia, Iran, and Hezbollah.²¹ In addition, the Syrian government is supported by North Korea, Venezuela, Iraq, China, and Algeria.²²

Recognizing the instability in Syria created by the civil war, the Islamic State of Iraq and Greater Syria (ISIS) moved in. ISIS's mission is to create an Islamic emirate, a caliphate, straddling Iraq and Syria.²³ As ISIS gains territory, it implements a particularly rigid interpretation of Sharia Law²⁴ in an effort to create a society that mirrors the region's ancient past.²⁵ ISIS's main focus for a number of years was Iraq.²⁶ The exact moment when ISIS entered Syria is difficult to pinpoint; however, it is clear ISIS entered Syria at some point during 2013.²⁷ By January 2014, various rebel groups mounted an assault on ISIS in an effort to drive them from several cities.²⁸ This offensive had limited success. By later that summer, ISIS had captured significant territory previously held by the rebels.²⁹ Since its initial entry into Syria, ISIS continues to advance west destroying cultural heritage as it goes.

The government, the rebels, and ISIS are all responsible for the destruction of cultural heritage; however, the level of culpability is not the same for all three. Culpability depends on the type of destruction. In Syria, the types of destruction can be grouped into three broad categories: intentional destruction, destruction through looting, and destruction done in the course of military operations. Intentional destruction with no military necessity carries the highest level of culpability. Intentional destruction is largely attributed to ISIS, although the government may also be guilty of intentional destruction of cultural heritage. Destruction through looting is also an intentional act of destruction; as a result, it also carries with it a high level of culpability. It is well known that ISIS partially funds its cam-

20. *Id.*

21. *Id.*

22. *Id.*

23. *ISIS Fast Facts*, CNN (Oct. 14, 2015), <http://www.cnn.com/2014/08/08/world/ISIS-fast-facts/>.

24. More specifically, ISIS follows the Wahhabi movement of Sunni Islam. The "Wahhabi tradition embrac[es] the killing of those deemed unbelievers as essential to purifying the community of the faithful." For ISIS, violence is not a means to an end; it is an end in itself. David D. Kirkpatrick, *ISIS' Harsh Brand of Islam Is Rooted in Austere Saudi Creed*, N.Y. TIMES (Sept. 24, 2015), <http://www.nytimes.com/2014/09/25/world/middleeast/isis-abu-bakr-baghdadi-caliph-wahhabi.html>.

25. *ISIS Fast Facts*, *supra* note 23.

26. *Id.*

27. *Id.*

28. *Syria Iraq: The Islamic State Militant Group*, BBC NEWS (Aug. 2, 2014), <http://www.bbc.com/news/world-middle-east-24179084>.

29. *Id.*

paigns through looting.³⁰ However, ISIS is not alone in its looting. Individuals across Syria, both citizens and individuals from other countries, are also guilty of looting.³¹ Finally, all three groups have destructed cultural heritage in the course of military operations.³² This type of destruction carries a lower level of culpability under international law if the destruction was necessary to further imperative military objectives.³³ However, the exact culpability level will be a fact-specific inquiry.

A. *Intentional Destruction of Cultural Heritage*

The most recent examples of intentional destruction of cultural heritage are from Palmyra. Until recently, Palmyra suffered only minimum destruction; it is relatively remote and unlikely to suffer indirect damage from military attacks. However, by September 2015, ISIS destroyed the arch of Palmyra,³⁴ Temple of Bel, the tower tombs, and the Baal Shamin temple.³⁵ According to UNESCO, “Palmyra contains the monumental ruins of a great city that was one of the most important cultural centres of the ancient world.”³⁶ Irina Bokova, Director-General of UNESCO, described Palmyra in a press release condemning the extremists’ destruction of the Arch of Triumph in Palmyra when she stated that “Palmyra symbolizes everything that extremists abhor – cultural diversity, dialogue between cultures, the encounter of peoples of all origins in this caravan between Europe and Asia.”³⁷ From an aesthetic standpoint, Palmyra was an important melting pot of cultures where Greco-Roman techniques merged with local traditions and Persian influences.³⁸

30. Robert Fisk, *Isis Profits from Destruction of Antiquities by Selling Relics to Dealers – and Then Blowing up the Buildings They Come from to Conceal the Evidence of Looting*, INDEPENDENT (Sept. 3, 2015), <http://www.independent.co.uk/voices/isis-profits-from-destruction-of-antiquities-by-selling-relics-to-dealers-and-then-blowing-up-the-10483421.html>.

31. Alissa J. Rubin, *Among the Wounded in Syria’s War: Ancient History*, N.Y. TIMES (Mar. 7, 2014), http://www.nytimes.com/2014/03/08/world/middleeast/among-the-wounded-in-syrias-war-ancient-history.html?_r=0.

32. See, e.g., *id.*

33. See, e.g., 1954 Hague Convention, *supra* note 6, art. 4(2).

34. See *Syria Presidency Condemns Destruction of Palmyra’s Arch*, WORLD POST (Oct. 5, 2015), http://www.huffingtonpost.com/huff-wires/20151005/ml-syria-islamic-state-destroying-heritage/?utm_hp_ref=world&ir=world.

35. *ISIL Blows up Ancient Tower Tombs in Syria’s Palmyra*, *supra* note 3.

36. *Site of Palmyra*, UNESCO, <http://whc.unesco.org/en/list/23> (last visited Oct. 26, 2015).

37. *UNESCO Director-General Condemns the Destruction of the Arch of Triumph in Palmyra – “Extremists Are Terrified of History”*, UNESCO (Oct. 5, 2015), <http://whc.unesco.org/en/news/1351/>.

38. *Site of Palmyra*, *supra* note 36.

Each site that ISIS destroyed held an important place in history. Perhaps the most notable among them is the 2000 year old Temple of Bel.³⁹ The temple “was considered one of the Middle East’s most archaeologically precious buildings.”⁴⁰ Although the columns surrounding the site were not completely destroyed, the U.N. satellite program UNOSAT⁴¹ confirmed the complete destruction of the main building.⁴² Ross Burns, an adjunct professor of ancient history at Macquarie University in Sydney, Australia and author of multiple books on the history of Syria and archaeology, described the Temple of Bel as “the most important of the great temple sites of the Roman eastern provinces.”⁴³ The temple was a “symbol of polytheism,” and as a result it was a clear target for ISIS.⁴⁴ In addition, “[i]t is worth pointing out that earlier Muslims who have occupied Palmyra didn’t see fit to destroy it. Under the Umayyad caliphate that existed in the city in the 7th century AD, part of the temple of Bel was used as a mosque.”⁴⁵ By destroying buildings such as the Temple of Bel, ISIS is destroying not just pre-Islamic culture, but it is also destroying Islamic heritage, too.

This type of destruction is particularly heinous because it is destruction for destruction’s sake. In what appeared to be an acknowledgement of the importance of cultural heritage before ISIS destroyed Palmyra, Abu Laith al-Saoudy, the nom de guerre of the ISIS military commander in Palmyra, pledged not to damage the city’s historic buildings but only destroy statues in an interview on an anti-Assad radio station in May 2015.⁴⁶ He said, “Concerning the historic city, we will preserve it and it will not be harmed, God willing. What we will do is break the idols that the infidels used to worship. The historic buildings will not be touched and we will not bring bulldozers to destroy them like some people think.”⁴⁷ Despite this rhetoric, ISIS destroyed more than statues in Palmyra. Recently, President Assad chastised ISIS for its intentional destruction of the arch of Palmyra.

39. *ISIL Blows up Ancient Tower Tombs in Syria’s Palmyra*, *supra* note 3.

40. Rick Noack, *Before and After Images Show the Destruction of Palmyra’s Treasured Temple*, WASH. POST (Aug. 28, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/08/28/before-and-after-images-show-the-destruction-of-palmyras-treasured-temple/>.

41. UNOSAT is the United Nations Institute for Training and Research’s Operational Satellite Applications Program.

42. Noack, *supra* note 40.

43. Jeffries, *supra* note 1.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

The presidency stated that the ISIS “destruction of the arch is ‘revenge’ of the civilization that ‘disrupts . . . their darkness.’”⁴⁸ Irina Bokova also condemned the destruction and offered a possible explanation, “[t]his new destruction shows how extremists are terrified by history and culture – because understanding the past undermines and delegitimizes their claims – and embodies an expression of pure hatred and ignorance.”⁴⁹

B. Destruction of Cultural Property Through Military Use

The military occupation of ancient buildings is also damaging a significant amount of Syria’s cultural heritage. All sides of the conflict have used ancient sites and fortresses as military bases.⁵⁰ The ancient sites’ intrinsic military value makes them particularly desirable for occupation; however, their age makes them especially vulnerable to modern warfare and occupation.⁵¹ A prime example of the damage wrought by military occupation can be seen at the Crac des Chevaliers,⁵² “one of the world’s best-preserved Crusader castles.”⁵³ The castle sits atop a hill and was built between 1142 to 1271.⁵⁴ Rebels had been using the castle as a base while they attacked nearby villages.⁵⁵ In an effort to oust the rebels from the castle the government bombarded the castle for months.⁵⁶ The rebels managed to hold the castle for a number of years until it eventually was retaken by government forces.⁵⁷ Not only was the castle damaged by combat and bombardments, the various occupants’ presence increased the wear and tear on the structure.

48. *Syria Presidency Condemns Destruction of Palmyra’s Arch*, *supra* note 34.

49. *UNESCO Director-General Condemns the Destruction of the Arch of Triumph in Palmyra*, *supra* note 37.

50. Oliver Holmes, *Satellite Images Show 290 Heritage Sites in Syria Damaged by War: U.N.*, REUTERS (Dec. 23, 2014), <http://www.reuters.com/article/2014/12/23/us-mideast-crisis-syria-heritage-idUSKBN0K10DK20141223>.

51. C.J. Chivers, *Grave Robbers and War Steal Syria’s History*, N.Y. TIMES (Apr. 6, 2013), <http://www.nytimes.com/2013/04/07/world/middleeast/syrian-war-devastates-ancient-sites.html>.

52. An alternate spelling is: Krak des Chevaliers.

53. Anne Barnard, *Syrian War Takes Heavy Toll at a Crossroad of Cultures*, N.Y. TIMES (Apr. 16, 2014), <http://www.nytimes.com/2014/04/17/world/middleeast/syrian-war-takes-heavy-toll-at-a-crossroad-of-cultures.html>.

54. *See Syria Crusader Castle Damaged by Air Raids*, AL JAZEERA ENG. (July 13, 2013), <http://www.aljazeera.com/news/middleeast/2013/07/201371310630457364.html>.

55. Elahe Izadi, *War Has Damaged All but One of Syria’s World Heritage Sites, Satellite Images Show*, WASH. POST (Sept. 24, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/09/24/war-has-damaged-all-but-one-of-syrias-world-heritage-sites-satellite-images-show/>.

56. *Id.*

57. Barnard, *supra* note 53; Izadi, *supra* note 55.

Another site with intrinsic military value that has been occupied multiple times throughout the conflict is the Citadel of Aleppo. The city of Aleppo, a location of early conflict,⁵⁸ is widely considered the world's oldest continuously inhabited human settlement,⁵⁹ and as such, the entire walled city of Aleppo is a World Heritage Site.⁶⁰ At the center of Aleppo is the Citadel which dates back to the 10th century B.C.E.⁶¹ It is "one of the oldest and largest castles in the world."⁶² It contains remnants of mosques, baths, and a palace.⁶³ In addition, there are remains of Bronze Age freezes and a roman fortress beneath the Citadel.⁶⁴ Given its size and fortification, the Citadel in Aleppo has played an important strategic military role for millennia.⁶⁵ As a result, it was a prime target during the conflict. Assad's forces took up positions inside the Citadel within the ancient city of Aleppo and traded fire with the insurgents through the narrow openings originally created for archers.⁶⁶ This occupation subjected the Citadel to damage by shelling, bullets, and incidental wear and tear.

This destruction has not gone without attempted interventions by cultural heritage experts. However, the fighting is so intense and dangerous in all areas that leading cultural heritage property experts can do nothing but plead with both sides.⁶⁷ Unfortunately, the experts do not believe that their pleas will be heard or take precedence over any military operation.⁶⁸ Ed Husain, senior fellow for Middle Eastern studies at the Council on Foreign Relations, said, "A government that readily kills its own people cannot be expected to respect and preserve historical monuments, bricks and mortar. All is expendable for control of the country."⁶⁹

58. *Syria: Story of the Conflict*, BBC (Oct. 9, 2015), <http://www.bbc.com/news/world-middle-east-26116868>.

59. Cohen, *supra* note 11.

60. *Ancient City of Aleppo*, UNESCO, <http://whc.unesco.org/en/list/21> (last visited Oct. 26, 2015).

61. *Id.*

62. Holmes, *supra* note 50.

63. *Ancient City of Aleppo*, *supra* note 60.

64. Cohen, *supra* note 11.

65. *Id.*; Oliver Holmes, *Temple of Bel Damaged by Mortars as Syria Violence Hits Ancient Archeological Site in Palmyra*, HUFFINGTON POST (Apr. 3, 2013),

http://www.huffingtonpost.com/2013/04/03/temple-of-bel-damaged-syria_n_3005392.html ("The Old citadels, of which there are a large number, have an age-old function, which is really, really thick walls that protect you from the enemy.")

66. Cohen, *supra* note 11.

67. Chivers, *supra* note 51.

68. Cohen, *supra* note 11.

69. *Id.*

C. Destruction of Cultural Heritage Through Looting

Looting is the third category of destruction of cultural heritage property occurring in Syria. Experts suspect that part of ISIS's motivation in destroying immovable cultural property is to supply artifacts for the black market.⁷⁰ In addition, illegal digging for artifacts has accelerated during the conflict.⁷¹ Experts estimate that hundreds of archeological sites are at risk.⁷² Reports have emerged describing at least three hundred and fifty different places where illegal excavation has taken place at one site on the Euphrates River.⁷³ One report describes the use of jackhammers, which destroy everything in their wake especially when looters lack a clear idea of what they are after.⁷⁴ One of the cities hit hardest by looting is Mari which is over 3,000 years old and is widely considered to be the first urban civilization.⁷⁵

Many experts attribute the looting to three major parties: the warring factions, foreigners, and locals.⁷⁶ Among the warring factions, ISIS is arguably the worst offender. It is well established that ISIS traffics in millions of dollars worth of artifacts annually to partially fund its campaign.⁷⁷ Similarly culpable are the foreigners who come across the border to capitalize on the instability of war. Not only have foreigners brought heavy machinery, including jackhammers, to dig up artifacts, but they also often set up armed guards as look outs.⁷⁸ These armed guards pose a threat to anyone willing to intervene on behalf of the objects. Syrian residents are the third group looting Syria; however, the experts find little fault with them. Agnes Vokaer, the field director of the Belgian archaeological team at Apamea, one of the largest Roman and early Christian sites in Syria, expressed empathy instead of anger towards the Syrians stating that "[t]hese are poor people in crisis; one is worried for them."⁷⁹

70. Jeffries, *supra* note 1.

71. Barnard, *supra* note 53.

72. Chivers, *supra* note 51.

73. Rubin, *supra* note 31.

74. *Id.*

75. *Id.*

76. *Id.*; Joe Parkinson et al., *Syrian 'Monuments Men' Race to Protect Antiquities as Looting Bankrolls Terror*, WALL ST. J. (Feb. 10, 2015), <http://www.wsj.com/articles/syrian-monuments-men-race-to-protect-antiquities-as-looting-bankrolls-terror-1423615241> ("Senior Free Syrian Army fighters have long conceded to Western media that looting antiquities is an important source of funding.").

77. *Islamic State Makes Millions from Stolen Antiquities*, AL-MONITOR (Sept. 2, 2014), <http://www.al-monitor.com/pulse/security/2014/09/turkey-syria-iraq-isis-artifacts-smuggling.html>.

78. Rubin, *supra* note 31.

79. *Id.*; Parkinson et al., *supra* note 76 (finding refugees guilty of only selling "small items").

III. CULTURAL HERITAGE PROPERTY LAW

International laws that protect cultural heritage property are relatively recent developments despite consistent destruction of cultural heritage property traceable to ancient times. Currently, there is only one treaty protecting cultural heritage property in Syria: the 1954 Hague Convention.⁸⁰ Although the 1954 Hague Convention is the only treaty applicable to the Syrian conflict, the historic perspective is important to understand the evolution of the law.

A. Antiquity Through the 18th Century

Historically, success in wars relied on the subjugation of the conquered people,⁸¹ and to the victors went the spoils.⁸² Armies often depended on the destruction of the conquered population's religious and political centers to gain control of the conquered people. Despite this prevailing view, there were those who saw the importance of protecting cultural property even in ancient times. For example, the Greek Historian, Herodotus (ca. 484–430 B.C.E.), chastised the Persian king Xerxes for ordering the destruction of a “Babylonian rebellion through the destruction of its religious and cultural center.”⁸³ Herodotus described the destruction,

At the end of this successful campaign, [the] fortifications and ziggurat were demolished. Babylon's great estates carved, looted, and ravaged. As a supreme insult, an eighteen foot statue of the god Bel-Marduk, built almost of solid gold, was taken and melted into bullion. Babylon's theocratic monarchy

80. See *infra* note 129.

81. Examples of conquests and resulting subjugation can be seen in the Norman conquest of England, the Roman conquest of Britain, the Mauryan conquest of Afghanistan and the entire Indian subcontinent, the Spanish conquest of the Aztec Empire, etc.

82. The mantra “to the victor goes the spoils” can even be found in the bible: (10) When you march up to attack a city, make its people an offer of peace. (11) If they accept and open their gates, all the people in it shall be subject to forced labor and shall work for you. (12) If they refuse to make peace and they engage you in battle, lay siege to that city. (13) When the Lord your God delivers it into your hand, put to the sword all the men in it. (14) As for the women, the children, the livestock and everything else in the city, you may take these as plunder for yourselves. And you may use the plunder the Lord your God gives you from your enemies. (15) This is how you are to treat all the cities that are at a distance from you and do not belong to the nations nearby. (16) However, in the cities of the nations the Lord your God is giving you as an inheritance, do not leave alive anything that breathes. (17) Completely destroy[] them—the Hittites, Amorites, Canaanites, Perizzites, Hivites and Jebusites—as the Lord your God has commanded you. (18) Otherwise, they will teach you to follow all the detestable things they do in worshiping their gods, and you will sin against the Lord your God.

Deuteronomy 20:10–18 (New International Version (NIV)) (emphasis added).

83. Captain Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 227, 280 n.12 (1997).

was destroyed and the city lost its last vestige of independence.⁸⁴

Herodotus described the actions taken by Xerxes as a violation of Greek law of war.⁸⁵ Another example of ancient support of cultural heritage property is found in the second century B.C.E.⁸⁶ During the height of Roman conquests, the historian Polybius questioned excessive plundering after the Romans' siege of Syracuse.⁸⁷

The Romans, then, decided . . . to transfer all these objects to their own city and leave nothing behind. As to whether in doing so they acted rightly and in their own interest or the reverse, there is much to be said on both sides, but the more weighty arguments are in favor of their conduct having been wrong then and still being wrong. . . . At any rate these remarks will serve to teach all those who succeed to empire, that they should not strip cities under the idea that the misfortunes of others are an ornament to their own country.⁸⁸

These attitudes mark some of the first examples of documented respect for cultural property during armed conflict.

Unfortunately, the abovementioned views that deemed cultural property worthy of protection remained the minority view for hundreds of years. Even Hugo Grotius, the father of modern international law, supported the legal rights of victors to claim cultural heritage property prizes in his writings in the early and mid 17th century.⁸⁹ It was not until the next century when the Swiss jurist Emmerich de Vattel distinguished between cultural property and "other moveable property as legitimate war booty," that protection for cultural property began to be embraced as the majority view.⁹⁰ The greatest example of the shift in views is the reparation of art that followed Napoleon's defeat at Waterloo.⁹¹ Under the Second Treaty of

84. *Id.* (quoting HERODOTUS, THE PERSIAN WARS ch. VII, ¶ 7.8 (Francis Godolphin trans., Modern Library College ed. 1942).

85. *Id.*

86. See PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW: CASES AND MATERIALS 525 (2d ed. 2008).

87. *Id.*

88. *Id.* (This attitude is also echoed by Cicero in his prosecution of Gaius Verres, the governor of Sicily for excessive pillage of both private and public works of art in 70 B.C.E.).

89. *Id.*

90. *Id.*

Devastation and destructions and seizures motivated by 'hatred and passion' however are clearly unnecessary and wrong; doubly wrong, indeed, if they also destroy some of the common property of mankind – its inheritance from the past, or its means of subsistence and enrichment in the present.

GEOFFREY BEST, HUMANITY IN WARFARE 65 (1980) (explaining the view of Emmerich de Vattel, a legal expert from the mid 1700s whose theories laid the foundation for international law).

91. Kastenber, *supra* note 83 (At the signing of the Second Treaty of Paris, the British representative to the Congress of Vienna, Viscount Castereagh, had circulated a memorandum stating that the removal of artwork "was contrary to every principle of justice and to the usage of modern warfare.").

Paris, France was required to restore the works to their original States.⁹² This was the first large-scale restitution of art in recorded history.

B. Lieber Code

Despite these advances in the area of cultural property law, it was not until President Abraham Lincoln enlisted the help of a law professor from Columbia University, Francis Lieber, that the first codified rules of warfare acknowledging the importance of cultural heritage property were written.⁹³ General Order No. 100, Instructions for the Government of Armies of the United States in The Field, better known as the Lieber Code, was adopted in 1863.⁹⁴ It articulated the rules of engagement for the union army.⁹⁵ The Lieber Code included multiple sections on the protection of cultural property.⁹⁶ However, its primary focus was on moveable cultural property.⁹⁷ Potential justifications for this include the relative infancy of America and therefore, a discernible lack of monuments the government deemed worthy of protection. Alternatively, because the Lieber Code emerged in the midst of an internal conflict, it is quite possible that the drafter and enactors of the code believed that in a battle between Americans, monuments belonging to their shared history would be safe.

The Lieber Code took a balanced approach to the previously popular viewpoint “to the victors went the spoils.” Article 31 allows a “victorious army” to appropriate “all public money, seize[] all public movable property . . . and sequester[] for its own benefit or of that of its government all of the revenues of real property belonging to the hostile government or nation.”⁹⁸ However, the title to such property remained in abeyance until the conclusion of the conflict.⁹⁹ This rule only applied to public property.¹⁰⁰ Private property, on the other hand, could only be seized for military necessity.¹⁰¹ This distinction between private and public property is important

92. GERSTENBLITH, *supra* note 86, at 525 (However, it is estimated that only half of the property was ever returned).

93. *Id.* at 528.

94. *Id.*

95. *Id.*

96. See *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, INT’L COMM. RED CROSS (Apr. 24, 1963), <https://www.icrc.org/ihl/INTRO/110> [hereinafter Lieber Code] (focusing on art. 31, 34, 35, 36).

97. See, e.g., *id.* art. 22 (“The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.”).

98. *Id.* art. 31.

99. *Id.*

100. *Id.*

101. *Id.* art. 38.

because property belonging to churches, “establishments of education,” and “museums of fine art” was considered private property under the code.¹⁰² As private property, it could be removed only if removal could be done without injury and the “ultimate ownership [would] be settled by the ensuing treaty of peace.”¹⁰³ Moreover, Article 35 forbade a conquering army from wantonly destroying or injuring appropriated private property.¹⁰⁴

In other words, the victorious army could reap the benefits of most property, but it could not automatically transfer the title in the property. However, cultural heritage property remained protected. Ultimately, the Lieber Code offered a pragmatic approach that balanced the interest of the warring parties. And, despite not being binding international law, the Lieber Code was a turning point in the history of cultural property law and provided the foundation for all the following laws.

C. 1899 and 1907 Hague Conventions

The Lieber Code’s influence spread across Europe and can be seen in the Brussels Declaration and the Oxford Manual, both intergovernmental, nonbinding codifications of the rules of war.¹⁰⁵ The next major development occurred in 1899 when Czar Nicholas II of Russia sponsored at the Hague in the Netherlands a conference of twenty-four countries, better known as the 1899 Hague Convention.¹⁰⁶ The conference produced three treaties and three declarations. The second treaty, Convention (II) with respect to the Laws and Customs of War on Land, was the first binding international treaty that included multiple sections on the protection of cultural property.¹⁰⁷ Within the treaty there are multiple articles that offer protection to immoveable cultural property. For example, Article 25 prohibits “[t]he attack or bombardment of towns, villages, habitations or buildings which are not defended.”¹⁰⁸ This Article should, therefore, protect immoveable cultural heritage property so long as it is undefended. However, that protection is not unlimited. Article 23(g) qualifies, and arguably expands, an attacker’s ability to destroy property. Article 23(g) states that “it is especially prohibited . . . [t]o destroy or seize the enemy’s property,

102. *Id.* art. 34.

103. *Id.* art. 36.

104. *Id.*

105. See ROGER O’KEEFE, *THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT* 18–19 (2006).

106. GERSTENBLITH, *supra* note 86, at 528.

107. Convention (II) with Respect to the Laws and Customs of War on Land art. 23, 28, 47, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter 1899 Hague Convention].

108. *Id.* art. 25.

unless such destruction or seizure be imperatively demanded by the necessities of war.”¹⁰⁹ This Article is known as a military necessity exception. It allows the destruction of property only if and to the extent that is militarily necessary.¹¹⁰ So, if the destruction of an undefended building is a necessity of war, Article 23(g) will excuse its destruction even though it violates Article 25.¹¹¹

Article 27 also offers protection to cultural property. Article 27 states in relevant part, “In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purpose.”¹¹² Although this provision does not explicitly protect cultural heritage sites, it does protect them insofar as churches, “edifices devoted to . . . art,” or hospitals are cultural sites and to the extent they are not used for military purposes.¹¹³ Even if such property is used for military purposes, its destruction is governed by Article 23(g). In other words, it can only be destroyed if and to the extent such destruction is a military necessity.

Article 56, which governs occupation, is the only provision that offers explicit protection to historical monuments.¹¹⁴ The Article states that “[a]ll seizure of and destruction, or intentional damage done to [religious, charitable and educational institutions, and those of arts and science], *to historical monuments*, works of art or science, is prohibited, and should be made the subject of proceedings.”¹¹⁵ Again, any destruction of historical monuments is prohibited only to the extent that such destruction does not fit within the military exception of Article 23(g). Article 56 is also particularly important because it is the only provision that mentions any type of en-

109. *Id.* art. 23(g).

110. *See id.* The prevailing view of military necessity at the time is reflected in the text from L. Oppenheim, *International Law. A Treatise*:

All destruction of and damage to enemy property for the purpose of offence and defence is *necessary* destruction and damage, and therefore lawful. It is not only permissible to destroy and damage all kinds of property on the battlefield during battle, but also in preparation for battle or siege. To strengthen a defensive position a house may be destroyed or damaged. To cover the retreat of an army a village on the battlefield may be fired. The district around an enemy fortress held by a belligerent may be razed, and therefore, all private and public buildings . . . may be destroyed, and all bridges blown up within a certain area. If a farm, a village, or even a town is not to be abandoned but prepared for defence, it may be necessary to damage in many ways or entirely destroy private and public property.

O’KEEFE, *supra* note 105, at 23 n.109 (quoting L. OPPENHEIM, 2 INTERNATIONAL LAW: A TREATISE ¶ 150 (2d ed. 1912) (emphasis in original)).

111. *See* 1899 Hague Convention, *supra* note 107, art. 23(g), 25.

112. *Id.* art. 27.

113. *Id.*

114. *Id.* art. 56.

115. *Id.* (emphasis added).

forcement mechanism. The language “should be made the subject of proceedings” requires member States to prosecute destruction under Article 56 in their respective domestic courts.¹¹⁶ Although the 1899 Hague Convention is not widely recognized,¹¹⁷ it was a step in the right direction. Protection and recognition of cultural property finally evolved from theory and internal military orders into binding international law.

Eight years after the first Hague Convention, the 1907 Hague Convention was convened to expand upon the rules promulgated at the 1899 Hague Convention. The 1907 Hague Convention adopted many of the relevant provisions of the 1899 Hague Convention; for example, Article 23(g) and Article 56 are exactly the same in both documents.¹¹⁸ However, the 1907 Hague Convention added protection of historic monuments to Article 27.¹¹⁹ As a result, the 1907 Hague Convention protects immovable cultural property during both attacks through Article 27 and occupation through Article 56. Arguably the most important feature of the 1907 Hague Convention was the increased number of states that ratified the treaty. Forty-two countries participated and signed this new international treaty, nearly double the number that signed the 1899 treaty.¹²⁰ However, almost none of the middle eastern countries signed the treaty.

116. *Id.*

117. The ratifying parties of the 1899 Hague Convention are important given each country’s role in the upcoming world wars. In the following list the ratifying party is followed by ratifying year: Argentina (1907), Austria (1918), Belarus (1962), Belgium (1900), Bolivia (1907), Brazil (1907), Bulgaria (1900), Chile (1907), China (1907), Colombia (1907), Cuba (1907), Denmark (1900), Dominican Republic (1907), Ecuador (1907), El Salvador (1902), Fiji (1973), France (1900), Germany (1900), Greece (1901), Guatemala (1906), Haiti (1907), Honduras (1906), Hungary (1918), Islamic Republic of Iran (1900), Italy (1900), Japan (1900), Korea (1903), Luxembourg (1901), Mexico (1901), Montenegro (2007), Netherlands (1900), Nicaragua (1907), Norway (1907), Panama (1907), Paraguay (1907), Peru (1903), Portugal (1900), Romania (1900), Russian Federation (1900), Serbia (1901), South Africa (1978), Spain (1900), Sweden (1907), Switzerland (1907), Thailand (1900), Turkey (1907), Ukraine (2015), United Kingdom of Great Britain and Northern Ireland (1900), United States of America (1902), Uruguay (1906), Venezuela (1907). *Convention (II) with Respect to the Laws and Customs of War on Land. The Hague, 29 July 1899*, INT’L COMM. RED CROSS, https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=150 (last visited Oct. 26, 2015).

118. *Compare* Convention (IV) respecting the Laws and Customs of War on Land art. 23(g), 56, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention], *with* 1899 Hague Convention, *supra* note 107, art. 23(g), 56.

119. 1907 Hague Convention, *supra* note 118, art. 27 (“In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.”).

120. The ratifying parties of the 1907 Hague Convention are important given each country’s role in the upcoming world wars. In the following list the ratifying party is followed by ratifying year: Austria (1909), Belarus (1962), Belgium (1910), Bolivia (1909), Brazil (1914), China (1917), Cuba (1912), Denmark (1909), Dominican Republic (1958), El Salvador (1909), Ethiopia (1935), Fiji (1973), Finland

Despite the increased adoption of the 1907 Hague Convention, it, along with the 1899 Hague Convention, failed to protect cultural property when put to the test during World War I. Cultural property encountered a new enemy during World War I: aerial bombardment.¹²¹ This new technology made it possible to attack locations, targets, and buildings deep behind enemy lines. Fortunately, bombardment was still in its infancy during World War I thereby limiting the scope of its destruction.¹²² Nonetheless, immovable cultural property did not emerge from the war completely unscathed: the library at the University of Louvain in Belgium was burned and the Cathedral of Reims was severely damaged by aerial bombardment.¹²³

After the war, the world was presented with the opportunity to improve laws aimed at the protection of cultural property. In particular, laws addressing the new aerial technology would have proved useful in coming decades. However, no major multilateral treaties were created to address this new risk before the start of World War II.¹²⁴ The war saw widespread destruction of immovable cultural property. Notwithstanding that all major sovereign nations for both the Allies and Axis signed the 1907 Hague Convention, both sides of the conflict destroyed significant immovable and moveable cultural property.¹²⁵ The Germans razed monuments in the Soviet Union,¹²⁶ the British reduced multiple Germany cities to rubble through aerial blanket and firebombing,¹²⁷ and the Americans burned several Japanese cities to the ground.¹²⁸

(1918), Germany (1909), Guatemala (1911), Haiti (1910), Hungary (1909), Japan (1911), Liberia (1914), Luxembourg (1912), Mexico (1909), Netherlands (1909), Nicaragua (1909), Norway (1910), Palestine (2014), Panama (1911), Poland (1925), Portugal (1911), Romania (1912), Russian Federation (1909), South Africa (1978), Sweden (1909), Switzerland (1910), Thailand (1910), United Kingdom of Great Britain and Northern Ireland (1909), United States of America (1909). *Convention (IV) Respecting the Laws and Customs of War on Land. The Hague, 18 October 1907*, INT'L COMM. RED CROSS, https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=195 (last visited Oct. 26, 2015) [hereinafter 1907 Ratifying Parties].

121. See O'KEEFE, *supra* note 105, at 36–39.

122. *Id.* at 38.

123. GERSTENBLITH, *supra* note 86, at 529.

124. O'KEEFE, *supra* note 105, at 44.

125. See 1907 Ratifying Parties, *supra* note 120.

126. O'KEEFE, *supra* note 105, at 62.

127. *Id.* at 62, 68.

128. *Id.* at 69; however, all respect for cultural property was not lost. Italy's historic city of Rome was left largely unscathed because both sides of the conflict understood the cultural value of the city. *Id.* at 71.

D. 1954 Hague Convention

The widespread destruction that occurred during World War II was the catalyst the world needed to enact real change in the area of cultural property law. In 1954, forty-nine countries signed¹²⁹ the most extensive law geared exclusively to the protection of cultural heritage property, the Convention for the Protection of Cultural Property in the Event of Armed Conflict, commonly known as the 1954 Hague Convention (the “Convention”).¹³⁰ Although a significant number of countries signed the Convention, not all of the signing countries immediately ratified the treaty, most notably, the United States and Great Britain. Although both parties signed the original treaty at the convention, the United States did not ratify it until 2009¹³¹ and Great Britain has not ratified the treaty.¹³² Of particular importance to current events, the Syrian Arab Republic ratified the treaty in 1958 and Iraq ratified the treaty in 1967.¹³³

129. *See Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Oct. 26, 2015).

130. However, many more states have ratified the treaty who were not part of the original signing countries:

Albania (1960), Angola (2012), Argentina (1989), Armenia (1993), Australia (1984), Austria (1964), Azerbaijan (1993), Bahrain (2008), Bangladesh (2006), Barbados (2002), Belarus (1957), Belgium (1960), Benin (2012), Bolivia (2004), Bosnia and Herzegovina (1993), Botswana (2002), Brazil (1958), Bulgaria (1956), Burkina Faso (1969), Cambodia (1962), Cameroon (1961), Canada (1998), Chad (2008), Chile (2008), China (2000), Colombia (1998), Costa Rica (1998), Côte d’Ivoire (1980), Croatia (1992), Cuba (1957), Cyprus (1964), Czech Republic (1993), Democratic Republic of the Congo (1961), Denmark (2003), Dominican Republic (1960), Ecuador (1956) Egypt (1955), El Salvador (2001), Equatorial Guinea (2003), Eritrea (2004), Estonia (1995), Finland (1994), France (1957), Gabon (1961), Georgia (1992), Germany (1967), Ghana (1960), Greece (1981), Guatemala (1985), Guinea (1960), Holy See (1958), Honduras (2002), Hungary (1956), India (1958), Indonesia (1967), Iraq (1967), Islamic Republic of Iran (1959), Israel (1957), Italy (1958), Japan (2007), Jordan (1957), Kazakhstan (1997), Kuwait (1969), Kyrgyzstan (1995), Latvia (2003), Lebanon (1960), Libya (1957), Liechtenstein (1960), Lithuania (1998), Luxembourg (1961), Madagascar (1961), Malaysia (1960), Mali (1961), Mexico (1956), Monaco (1957), Mongolia (1964), Montenegro (2007), Morocco (1968), Myanmar (1956), Netherlands (1958), New Zealand (2008), Nicaragua (1959), Niger (1976), Nigeria (1961), Norway (1961), Pakistan (1959), Palestine (2012), Panama (2001), Paraguay (2004), Peru (1989), Poland (1956), Portugal (2000), Qatar (1973), Republic of Moldova (1999), Romania (1958), Russian Federation (1957), Rwanda (2000), San Marino (1956), Saudi Arabia (1971), Senegal (1987), Serbia (2001), Seychelles (2003), Slovakia (1993), Slovenia (1992), South Africa (2003), Spain (1960), Sri Lanka (2004), Sudan (1970), Sweden (1985), Switzerland (1962), Syrian Arab Republic (1958), Tajikistan (1992), Thailand (1958), The former Yugoslav Republic of Macedonia (1997), Tunisia (1981), Turkey (1965), Ukraine (1957), United Republic of Tanzania (1971), United States of America (2009), Uruguay (1999), Uzbekistan (1996), Venezuela (2005), Yemen (1970), Zimbabwe (1998). *Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954*, INT’L COMM. RED CROSS,

https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=410 (last visited Oct. 26, 2015) [hereinafter 1954 Hague Ratifying Parties].

131. S. Res. 106-1(A), 106th Cong. (1999) (enacted).

132. *See* 1954 Hague Ratifying Parties, *supra* note 130.

133. *See id.*

1. Jurisdiction

The Convention applies to two types of conflicts and dictates protective measures that apply in times of peace. Chapter VI lays out the scope of application of the Convention.¹³⁴ Within that Chapter, Article 18 indicates applicability of the statute in armed conflicts of an international character. Article 18(1) states, “Apart from the provisions which shall take effect in the time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.”¹³⁵ There are two important aspects to this provision. First, the provision makes it clear that the treaty applies in international armed conflict whether or not a legal state of war exists between the warring parties. Second, there must be at least one party on each side of the conflict before the Convention binds any of the parties involved. However, Article 18(3) qualifies that limitation. Article 18(3) states, “If one of the Powers in the conflict is not a party to the present Convention, the Powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations.”¹³⁶ The final sentence of Article 18(3) makes it clear that the Convention can be applied to non-parties “if the latter has declared that it accepts the provisions thereof and so long as it applies them.”¹³⁷

The Convention also applies to “conflicts not of an international character” through Article 19.¹³⁸ This application is qualified in Article 19(1) to only conflicts “occurring within the territory of one of the High Contracting Parties.”¹³⁹ While the scope of application to internal conflicts is limited by territory, the scope of application is not limited by parties. Article 19(1) continues by stating that “each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.”¹⁴⁰ In other words, all warring parties within the territory of a “High Contracting Party” are bound by the terms of the Convention. This is the first example of a treaty protecting cultural property that is enforceable against third parties.

Articles 18 and 19 are acutely relevant to the current conflict in Syria. Because Syria is a party to the Convention, the Convention has been in

134. *See generally* 1954 Hague Convention, *supra* note 6, ch. VI.

135. *Id.* art. 18(1).

136. *Id.* art. 18(3).

137. *Id.*

138. *Id.* art. 19.

139. *Id.* art. 19(1).

140. *Id.*

effect at all times during the conflict.¹⁴¹ First, Article 19 applied in Syrian conflict during the first few years when the conflict was a civil war, an internal conflict. Dating back to 2011, both the government and the rebels were bound by the terms of the convention under Article 19. Now, Article 18 likely governs application over the conflict because it has evolved into an international conflict through the participation of ISIS,¹⁴² the United States,¹⁴³ and Russia.¹⁴⁴

Determining whether the Convention applies to ISIS presents a challenging problem. If ISIS joined the conflict while it was an internal conflict they would be bound by the treaty under Article 19. However, if ISIS's participation in the conflict transforms it into an international conflict, it is less clear if the Convention would apply to them. Article 18 does not necessarily bind nonparties to the Convention without consent.¹⁴⁵ However, Article 18 might bind ISIS if they are allied with a State Party. As it currently stands, it appears that ISIS fights on its own side, for its own motivations, and without allies. Therefore, even under this potential interpretation of Article 18, ISIS would still not be bound by the Convention.¹⁴⁶ Conflicts such as this one, where there are three parties fighting for different sides, present the possibility that two parties may be bound by the Convention while the third may not be.

Not only is the Convention limited in applicability based on the type of conflict, it is also limited to certain types of property. The Convention introduced a new formula to determine exactly what property qualified for protection. In prior treaties, protection was extended to "buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected . . ." ¹⁴⁷ The Convention rejects this formulation and instead, introduces a single term of inclusion, "cultural property."¹⁴⁸ To help define this new term,

141. See 1954 Hague Ratifying Parties, *supra* note 130.

142. For a more extensive discussion of ISIS's participation in Syria see *supra* Part II.

143. *U.S. Bombs ISIS Foes in Syria*, CBS NEWS (Nov. 6, 2014), <http://www.cbsnews.com/news/us-bomb-al-qaeda-in-syria-and-widen-targets-against-isis/>.

144. Andrew Roth et al., *Russia Begins Airstrikes in Syria; U.S. Warns of New Concerns in Conflict*, WASH. POST (Sept. 30, 2015), https://www.washingtonpost.com/world/russias-legislature-authorizes-putin-to-use-military-force-in-syria/2015/09/30/f069f752-6749-11e5-9ef3-fde182507eac_story.html.

145. 1954 Hague Convention, *supra* note 6, art. 18.

146. If ISIS is not bound by the terms of the Convention, the only international law under which ISIS could potentially be prosecuted is customary international law.

147. 1907 Hague Convention, *supra* note 118, art. 27.

148. 1954 Hague Convention, *supra* note 6, art. 1.

Article 1 of the Convention provides a non-exhaustive list¹⁴⁹ of items that fall under the umbrella of cultural property. The definition covers both moveable and immovable property including “groups of buildings which, as a whole, are of historical or artistic interest,”¹⁵⁰ buildings that house cultural property,¹⁵¹ and “centres containing a large amount of cultural property.”¹⁵² The expansion of the definition of cultural property to include groups of buildings and “centres” of cultural property is arguably the largest addition to the definition of cultural property. The category “groups of buildings” was introduced by the Scandinavian countries at the Convention to cover a group of buildings that individually may not be worthy of protection but as a group are worth protecting, such as medieval villages.¹⁵³ Prior treaties had only contemplated protection for individual buildings.¹⁵⁴

It is uncontroverted that the buildings destroyed in Syria discussed above¹⁵⁵ are included in this definition of cultural property. For example, the Temple of Bel is “immovable property of great importance to the cultural heritage of every people.”¹⁵⁶ Not only was it part of the World Heritage Site of Palmyra¹⁵⁷ but on a more elemental level, it was a religious, architectural monument within the contemplation of Article 1(a) of the Convention.¹⁵⁸

2. Substantive Protection

The goal of the Convention is to protect cultural property during times of armed conflict. To achieve this goal, the Convention is separated into two parts: “General Provisions Regarding Protection” and “Special Protection.”¹⁵⁹ The General Provisions offer broad protection for cultural property.¹⁶⁰ Article 4(1) outlines the protections, stating,

The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and

149. The inclusion of the words “such as” in subsection (a) and (b) indicate that the enumerated list is not exhaustive and as a result property that does not appear may still be protected under the terms of the Convention. *Id.* art. 1(a), 1(b).

150. *Id.* art. 1(a).

151. *Id.* art. 1(b).

152. *Id.* art. 1(c).

153. O’KEEFE, *supra* note 105, at 102.

154. *See, e.g.*, 1907 Hague Convention, *supra* note 118, art. 27.

155. *See supra* Part II.

156. 1954 Hague Convention, *supra* note 6, art. 1(a).

157. *Site of Palmyra, supra* note 36.

158. *See* 1954 Hague Convention, *supra* note 6, art. 1(a).

159. *See id.* ch. 1, 2.

160. *See generally id.* ch. 1.

its immediate surroundings or of the appliance in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.¹⁶¹

However, the protections contemplated by the Convention are not limitless. Article 4(2) offers the familiar military necessity exception¹⁶² seen previously in Article 23(g) of the 1899 and 1907 Hague Conventions.¹⁶³ Similar to the earlier treaties, the Convention offers special rules for occupation in Article 5.¹⁶⁴ The rules for occupation offer similarly limited protections to the rules found in Article 4, complete with a military necessity exception.

The Special Protections offered by Chapter 2 are only nominally different from the General Protections. Article 9 attempts to “immun[ize]” cultural property under special protection from “hostility directed against such property;” however, it offers no additional mechanisms for protection.¹⁶⁵

Applying these Articles to the events in Syria, it is clear that violations have and continue to run rampant. If it is assumed that the Convention applies to ISIS, it is clear that ISIS’s intentional destruction of cultural heritage property is a violation of Article 4(1) and 5(1).¹⁶⁶ In addition, the government’s and the rebels’ use of cultural property for military purpose is contrary to Article 4(1).¹⁶⁷ However, their efforts to oust each other from the cultural property may be protected under Article 4(2) if and to the extent that it is a military necessity.¹⁶⁸

Once a violation of the Convention has been established, the remaining question is how to enforce the Convention against the offending party. Unfortunately, the Convention is largely devoid of an enforcement mechanism. Article 28, titled “Sanctions,” is the only enforcement mechanism in the treaty.¹⁶⁹ The Article places the responsibility for prosecution “within the framework of [each High Contracting Party’s] ordinary criminal jurisdiction.”¹⁷⁰ In other words, prosecution for violations is the responsibility

161. *Id.* art. 4(1).

162. *Id.* art. 4(2).

163. 1899 Hague Convention, *supra* note 107, art. 23(g); 1907 Hague Convention, *supra* note 118, art. 23(g).

164. 1954 Hague Convention, *supra* note 6, art. 5.

165. *Id.* art. 9.

166. *See id.* art. 4(1), 5(1).

167. *See id.* art. 4(1).

168. *See id.* art. 4(2).

169. *Id.* art. 28.

170. *Id.*

of each State Party and punishments may vary based on each Party's domestic laws. Nothing in the Convention grants jurisdiction to an international court to prosecute violations of the treaty.

This enforcement mechanism makes it almost impossible to prosecute and punish violations of the Conventions in conflicts such as the one in Syria. Applying Article 28 to the government, the rebels, or ISIS would require the application of Syrian law. The Antiquities Law offers protection to moveable and immovable cultural property.¹⁷¹ Every type of destruction discussed above¹⁷² is contemplated by the Syrian law. The intentional destruction of moveable and immovable property is covered by Article 7.¹⁷³ The use of immovable cultural property by the military is a violation of Article 26.¹⁷⁴ Article 25 prohibits the removal of parts of immovable cultural property and Chapter 3 governs the legalities of moveable cultural property.¹⁷⁵ Moreover, the law has penalties that largely comport with the punishment handed down by the Criminal Tribunal for the former Yugoslavia and therefore is in line with current international enforcement mechanisms.¹⁷⁶ For example, the destruction of immovable property is punishable by five to ten years imprisonment and a fine of 25,000 to 500,000 Syrian pounds.¹⁷⁷ However, it is unlikely that any prosecution under this law would take place for a number of years after the end of the conflict. Arguably, the prosecution for the destruction of cultural property is not going to be the immediate focus of the victorious party. In addition, the victorious party would likely be immunized from prosecution through political power and influence.

171. Antiquities Law, Legislative Decree N. 222 (1963) (amended 1999) (Syria) [hereinafter Syrian Antiquities Law] (English translation with all amendments available at http://portal.unesco.org/culture/fr/files/30606/11438206173Antiquities_Law.pdf/Antiquities%2BLaw.pdf).

172. *See supra* Part III.

173. Syrian Antiquities Law, *supra* note 171, art. 7.

174. *Id.* art. 26.

175. *Id.* art. 25, ch. 3.

176. *See infra* Part III, § G.

177. Syrian Antiquities Law, *supra* note 171, art. 58 (as amended by Law N. 1. art. 5 (1997)) (Syria). This is equivalent to roughly \$133.00 to \$2,670.00 based on an exchange rate of 1.00 USD = 188 SYP. *XE Currency Converter*, XE.COM, <http://www.xe.com/currencyconverter/convert/?Amount=1&From=USD&To=SYP#converter> (last visited Feb. 14. 2016) (US Dollar to Syrian Pound Conversion).

E. Additional Protocols to the 1954 Hague Convention

The 1954 Hague Convention has two additional protocols that were written to supplement the original Convention.¹⁷⁸ The First Protocol, written and released concurrently with the original Convention, deals exclusively with moveable cultural property.¹⁷⁹ The Second Protocol, on the other hand, strengthened and clarified many of the provisions of the main Convention that applied to both moveable and immovable cultural property.¹⁸⁰ The Second Protocol made advances in three areas. First, the Second Protocol introduced a specific definition of what constitutes military necessity and when the military necessity exception would relieve liability under the Convention.¹⁸¹ Article 6 makes it clear that cultural property may not be destroyed or used for military purposes if there is any other option available.¹⁸²

Second, the Protocol clarifies, but also potentially limits, the protections offered by the Convention to cultural property during internal conflicts.¹⁸³ Article 22(2) defines internal conflicts by precluding situations such as riots and “isolated and sporadic acts of violence.”¹⁸⁴ This definition makes it difficult to pinpoint exactly when sporadic acts of violence become a pattern of violence that rises to the level of conflict that would trigger the legal responsibility of the treaty. For example, it is difficult to pinpoint the moment the Syrian civil war transformed from sporadic acts of violence to the pattern of violence necessary to trigger the Protocol. This point is largely moot because Syria is not a party to the Second Protocol,¹⁸⁵ however, if the issue of when the civil war in Syria transformed into an internal conflict came before a court, a judge may find this section of the Second Protocol informative.

178. *See, e.g.*, Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict pmble, Mar. 26, 1999, 2253 U.N.T.S. 3511 [hereinafter Second Protocol].

179. *See generally* Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358 [hereinafter First Protocol]. Because the First Protocol did not address immovable cultural property, it is outside the scope of this Note.

180. *See* Second Protocol, *supra* note 178, pmble.

181. *Id.* art. 6.

182. *Id.*

183. *See id.* art. 22.

184. *Id.*

185. *Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict the Hague, 26 March 1999*, INT’L COMM. RED CROSS, https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=590 (last visited Oct. 26, 2015).

Third, Article 22(5) eliminates the ability of other ratifying countries to intervene in an internal conflict in the name of cultural property.¹⁸⁶ This provision respects the autonomy of member states; however, it runs against the internationalist view that cultural property is owned by the entire world, a perspective advanced by the preamble to the Convention.¹⁸⁷ This provision was likely necessary to ensure ratification from countries worried about interference in sovereign matters. However, it puts cultural property at risk because there is no mechanism to protect cultural property in the territory of non-parties.

Fourth and finally, a major advance of the Second Protocol was the addition of specific enforcement mechanisms. Article 15 lists acts that are “[s]erious violations of this Protocol.”¹⁸⁸ Under Article 15, “[a]ny person commits an offence within the meaning of this Protocol if that person intentionally”¹⁸⁹ commits any of the following acts:

- (a) making cultural property under enhanced protection¹⁹⁰ the object of attack;
- (b) using cultural property under enhanced protection or its immediate surrounding 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.¹⁹¹

In addition, Article 16 lists three mechanisms that each party is requested to enact to gain jurisdiction over an individual who violates the Protocol or the Convention: “(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.”¹⁹² Importantly, neither of these Articles grants jurisdiction to an international court to pros-

186. Second Protocol, *supra* note 178, art. 22(5).

187. 1954 Hague Convention, *supra* note 6, pmble.

188.. Second Protocol, *supra* note 178, art. 15.

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

190. Enhanced protection was the Second Protocol’s answer to the Special Protection section of the original Convention. Other than these offenses and the general jurisdiction attached to destruction of cultural property that is entitled to enhanced protection, there is little difference between it and the original Convention.

191. Second Protocol, *supra* note 178, art. 15(1).

192. *Id.* art. 16.

ecute violations. Instead, both Articles require each ratifying party to enact “legislative measures to establish its jurisdiction”¹⁹³ and “measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in [Article 15].”¹⁹⁴ In short, violations of the Convention are still exclusively prosecuted and punished in each individual ratifying party according to domestic law. As a result, the 1954 Hague Convention and the Second Protocol do little to increase protection of cultural property in conflicts such as the one in Syria for the reasons mentioned above.¹⁹⁵

F. *The Rome Statute*

The final, and most recently enacted, multilateral treaty that offers protection for immoveable cultural property is the Rome Statute of the International Criminal Court (the “Rome Statute”). Enacted by the U.N., Article 8 of the Rome Statute, entitled “War Crimes,” creates individual criminal liability¹⁹⁶ answerable to the International Criminal Court (the “ICC”) in the Hague for the destruction of cultural property.¹⁹⁷

1. Jurisdiction

As a threshold matter, the Rome Statute is a statute with limited jurisdiction. As a result, necessary requirements must be met before the ICC can act. Article 12 dictates that jurisdiction can only be exercised over conduct perpetrated within the territory of a State Party¹⁹⁸ or over an individual who is a citizen of a State Party.¹⁹⁹ Once the preconditions for jurisdiction are met, there are three ways for the ICC to initiate investigation that may lead to prosecution under Article 13. First, a State Party can refer one or more alleged crimes to the Prosecutor.²⁰⁰ Second, the Security Council can refer a situation to the Prosecutor.²⁰¹ This option is particularly important because the Security Council is not bound by the preconditions to jurisdiction from Article 12. In other words, the Security Council can refer situations occurring outside the territory of a State Party involving actors that

193. *Id.*

194. *Id.* art. 15(2).

195. *See supra* Part III, §§ D, E.

196. Rome Statute of the International Criminal Court art. 25, July 7, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute]; *see also id.* art. 27 (stating that “[t]his Statute shall apply equally to all persons without any distinction based on official capacity.”).

197. *Id.* art. 1.

198. *Id.* art. 12(2)(a).

199. *Id.* art. 12(2)(b).

200. *Id.* art. 13(a).

201. *Id.* art. 13(b).

are not citizens of State Parties. Third and finally, the Prosecutor can initiate investigations into situations on his or her own authority subject to limitations found in Article 15.²⁰²

The ICC can acquire jurisdiction in Syria in a limited number of circumstances. Syria has not ratified the Rome Statute²⁰³; as a result, the prerequisites to jurisdiction from Article 12 cannot be met. The ICC does not have *carte blanche* jurisdiction over either the acts occurring within Syria's territory or Syrian citizens. The court does, however, have jurisdiction over citizens of State Parties who participate in the Syrian conflict and in doing so, violate the Rome Statute. For example, if a British citizen or French citizen traveled to Syria to join the conflict and subsequently violated the Rome Statute, the ICC would have jurisdiction over those individuals and an investigation could be initiated under the procedures in Article 13.²⁰⁴ Finally, the ICC could acquire widespread jurisdiction over the Syrian conflict if the Security Council referred the conflict to the court. However, a referral from the Security Council is unlikely at best.

The Security Council is unlikely to act or if it does it will be in a highly constrained manner. The Security Council is made of up two types of members: permanent members and non-permanent.²⁰⁵ The permanent members are vested with the power to veto substantive resolutions.²⁰⁶ This is particularly important because the permanent members are divided on their support in the Syrian conflict. The government represented by Assad is openly supported by Russia and implicitly supported by China.²⁰⁷ On the other hand, the United States, the United Kingdom, and France all support the anti-government rebels.²⁰⁸ These divided alliances would lead to gridlock in the Council. The only possible referral that would come out of the Security Council is one limited to the actions of ISIS.²⁰⁹ Although this op-

202. *Id.* art. 13(c).

203. *The State Parties to the Rome Statute*, INT'L CRIMINAL COURT, http://www.icc-pci.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#U (last visited Oct. 26, 2015).

204. See Rome Statute, *supra* note 196, art. 12, 13.

205. U.N. Charter art. 23(1).

206. *Id.* art. 27. Although the veto is explicitly mentioned in the charter, however, section (3) requires an affirmative vote of nine members including "the concurring votes of the permanent members." Without an affirmative vote by all five permanent members, substantive resolutions cannot pass and as a result, each of the five permanent members have the power to veto any resolution. *Id.*

207. Matthews, *supra* note 16.

208. *Id.*

209. Mark Jerstein, *What an Honest UN Security Council Referral of ISIS to the ICC Would Look Like*, JUST. IN CONFLICT (Apr. 9, 2015), <http://justiceinconflict.org/2015/04/09/heres-a-un-security-council-referral-of-isis-to-the-icc/>.

tion would not provide jurisdiction for the entire Syrian conflict, it would go a long way to prosecute the destruction of cultural property.

Another alternative has been advanced to gain jurisdiction over parts of ISIS, albeit not in Syria. Recently, there have been calls for Iraq to ratify the Rome Statute.²¹⁰ An Iraqi ratification would extend jurisdiction over ISIS only within the territory of Iraq. However, the ICC's jurisdiction would be limited under Article 11. Specifically, "[i]f a State becomes a Party to this Statute . . . the Court may exercise its jurisdiction only with respect to *crimes committed after the entry into force* of this Statute for that State . . ."²¹¹ The ICC would accordingly be able to exercise jurisdiction over ISIS in Iraq only for violations that happen after Iraq ratified the Statute. Any acts occurring before ratification would be outside the jurisdiction of the ICC. As a result, this option offers less prosecutorial power than a reference by the Security Council that would not have a temporal limitation. However, any power to prosecute ISIS is an improvement.

2. Substantive Law

Once jurisdiction is obtained, the first step towards prosecution is a determination as to the type of conflict during which the violation occurred. The structure of the Rome Statute is similar to its predecessors; it classifies conflicts as either international conflicts or "conflicts not of an international character."²¹² However, as far as the protection of cultural property is concerned, the difference is largely inconsequential because the laws protecting cultural property are exactly the same for both international and non-international conflicts.²¹³ Nevertheless, Article 8(2)(f) defines an internal conflict as a "protracted armed conflict between governmental authorities and organized armed groups or between such groups."²¹⁴ This definition comports with the definition of non-international conflict offered by the Second Protocol to the 1954 Hague Convention.²¹⁵

The coverage of the Rome Statute is similar to the preceding statutes. One major addition, however, is a list of elements to accompany each offense. Although these elements are not binding on the courts, they do offer

210. Judit Neurink, *Iraq Urged to Join ICC to Bring ISIS Leaders to Justice*, RUDAW (Mar. 30, 2015), <http://rudaw.net/english/kurdistan/300420151>.

211. Rome Statute, *supra* note 196, art. 11 (emphasis added).

212. *Id.* art. 8(2)(e).

213. *Compare id.* art. 8(2)(b)(ix), with *id.* art. 8(2)(e)(iv).

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

215. *See* Second Protocol, *supra* note 178, art. 22(1) (defining an internal conflict as an "event of an armed conflict not of an international character occurring within the territory of one of the Parties.").

important guidance.²¹⁶ For example, the elements of the destruction of cultural property listed in Article 8(2)(b)(ix)²¹⁷ are:

1. The perpetrator directed an attack.
2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.²¹⁸

Element 1 requires only the intention to destroy cultural property and not the property's actual destruction for a violation of this Article of the Rome Statute.²¹⁹ This is a major expansion of protection offered by the Rome Statute because it is the first instance of an international treaty that has recognized attempted destruction of cultural property as a crime.

In addition to providing elements of each crime, the Rome Statute also lists punishments for violations of the treaty provisions in Article 77.²²⁰ Under Article 77, the court "may impose" a prison sentence on "a person convicted of a crime" under Article 5.²²¹ The length of the prison sentence is largely up to the court to decide based on the gravity of the offense.²²² The maximum prison sentence available to the ICC is life imprisonment.²²³

216. Rome Statute, *supra* note 196, art. 9(1) ("Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, and 8.")

217. *Id.* art. 8(2)(b)(ix) ("Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives . . .").

218. Assembly of States Parties to the Rome Statute of the International Criminal Court, Elements of Crimes art. 8(2)(b)(ix), U.N. Doc. PCNICC/2000/1/Add/2 (June 30, 2000), <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

219. *Id.*

220. *See* Rome Statute, *supra* note 196, art. 77(1)–(2).

221. *Id.* art. 77(1).

222. *See id.*

223. *Id.* art. 77(1)(b).

In addition to imprisonment, the court can also impose fines and require the forfeiture of property or assets derived from the crime.²²⁴

G. International Criminal Tribunals

After the conclusion of a conflict, an international criminal tribunal may be formed to try war criminals from the conflict. International criminal tribunals are courts of limited jurisdiction established to try individuals accused of war crimes. International criminal tribunals are traditionally organized and authorized by the U.N.²²⁵ For example, the International Criminal Tribunal for the Former Yugoslavia (the ICTY) proceeded under the authority of the Chapter VII of the United Nations' charter.²²⁶

The ICTY was formed in response to the violence and destruction exacted during the civil war in the former Yugoslavia.²²⁷ The court was charged with prosecuting all war crimes perpetrated during the civil war that led to the downfall of Yugoslavia.²²⁸ The U.N.'s Security Council established the ICTY and adopted the Statute of the ICTY on May 25, 1993 through resolution 827.²²⁹

Article 3 of the Statute of the ICTY provides the law that offers protection to cultural property.²³⁰ The relevant section states:

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

224. *Id.* art. 77(2).

225. *Statute of the International Criminal Tribunal for Rwanda, 8 November 1994*, INT'L COMM. RED CROSS, <https://www.icrc.org/ihl/INTRO/565?OpenDocument> (last visited Dec. 30, 2015) ("[a]cting under Chapter VII of the Charter of the United Nations . . ."); RESIDUAL SPECIAL COURT FOR SIERRA LEONE, STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE (2000), <http://www.rscsl.org/Documents/scsl-statute.pdf> ("Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315"). The Nuremberg trials, however, were held under the authority of the Allied forces of World War II. *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945*, INT'L COMM. RED CROSS, <https://www.icrc.org/ihl/INTRO/350?OpenDocument> (last visited Dec. 30, 2015) ("Now therefore the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics . . . acting in the interest of all the United Nations and by their representatives duly authorized thereto have concluded this agreement.") This is likely due to the infancy of the United Nations.

226. U. N., UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1 (1993) ("Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations . . .").

227. *Id.*

228. *Id.* art. 1.

229. S.C. Res. 827, ¶ 2 (May 25, 1993).

230. UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL, *supra* note 226, art. 3.

* * *

(d) Wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

* * *

(e) seizure of, destruction or willful damages done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; plunder of public and private property.²³¹

Article 24 limits the possible penalties for violations to imprisonment.²³² “In determining the terms of imprisonment, the [court] shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.”²³³

The most notable cases involving the destruction of cultural property coming from the ICTY involve the destruction of the city of Dubrovnik. An indictment confirmed on February 27, 2001 laid out the allegations against four members of the Yugoslav Peoples’ Army (JNA): Pavle Strugar, Miodrag Jokic, Milan Zec, and Vladimir Kovacevic.²³⁴ The four men were charged with “systematically plundering public, commercial and private property in the areas surrounding Dubrovnik of which they subsequently gained control and systematically destroyed public, commercial and religious buildings, as well as private dwellings” in addition to “killing and wounding numerous civilians in and around the city of Dubrovnik through acts of unlawful shelling.”²³⁵

UNESCO added the Old Town region of Dubrovnik to the World Heritage List in 1979.²³⁶ Every building in the Old Town region, including its walls, could be properly characterized as cultural property.²³⁷ In the course of the shelling of Dubrovnik, 563 of the city’s 824 buildings in the Old Town region of the city were hit by projectiles,²³⁸ and nine buildings were completely destroyed by fire.²³⁹ UNESCO estimated that the “cost for restoring the public and private buildings, religious buildings, streets,

231. *Id.* art. 3.

232. *Id.* art. 24(1).

233. *Id.*

234. Dubrovnik Press Release, *supra* note 5.

235. *Id.*

236. INT’L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, CASE INFORMATION SHEET: PAVLE STRUGAR, 5 (2009).

237. *Id.*

238. Dubrovnik Press Release, *supra* note 5.

239. *Id.*

squares, and fountains, ramparts, gates, and bridges at 9,657,578 US dollars.”²⁴⁰

After a trial, the tribunal found Pavle Strugar guilty of violating the ICTY Statute Article 3(d).²⁴¹ Although the court found no evidence of intentional destruction of cultural property, it also found that there was no evidence that the military confined its attack to Croatian military targets.²⁴² Instead, the court found that the JNA fired extensively, deliberately, and indiscriminately at Dubrovnik, directing the full force of the attack at Dubrovnik, including Old Town.²⁴³ Furthermore, the court found that there was no military objective in the immediate vicinity to Dubrovnik or Old Town that would have allowed the attack under a military necessity exception.²⁴⁴

Despite the vast destruction of the Old Town of Dubrovnik, Strugar was only sentenced to seven and one-half years in prison and was granted early release before he served his entire sentence.²⁴⁵ Similarly, Jokic was sentenced to seven years in prison for his involvement in the attack on Dubrovnik, but he was also granted early release before he fulfilled his entire sentence.²⁴⁶ The charges against Zec were withdrawn²⁴⁷ and Kovacevic was never tried due to mental incompetency.²⁴⁸ The criminal tribunal had the power to hand down sentences for prison terms up to and including life in prison.²⁴⁹ Taking the extent of the destruction of Dubrovnik into account, it is clear that the sentences given to Strugar and Jokic were disproportional to the destruction. The sentences are likely to have little or no deterrence effect in the future to those who would destroy cultural heritage property.

International tribunal experts have drafted a statute to potentially govern any subsequently created Syrian tribunal: The Chautauqua Blueprint for A Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity

240. *Id.*

241. INT’L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *supra* note 236, at 4.

242. *Id.*

243. *Id.*

244. *Id.* at 5.

245. *Id.* at 1.

246. INT’L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, CASE INFORMATION SHEET: MIODRAG JOKIC, 1 (1991).

247. Press Release, Int’l Criminal Tribunal for the Former Yugoslavia, Valadmir Kovacevic Transferred to the ICTY, ICTY Press Release CT/P.I.S./793e (Oct. 23, 2003).

248. INT’L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, CASE INFORMATION SHEET: VLADIMIR KOVACEVIC, 2–3 (2011).

249. *See, e.g.*, Press Release, Int’l Criminal Tribunal for the Former Yugoslavia, Life Imprisonment for Milan Lukic Confirmed, Sredoje Lukic’s Sentence Reduced, ICTY Press Release MS/CS/PR1537e (Dec. 4, 2012) [hereinafter Life Imprisonment Press Release].

Crimes.²⁵⁰ Article 20 of the Chautauqua Blueprint entitled “War Crimes” finds a strong influence from the Rome Statute.²⁵¹ In fact, all provisions applicable to cultural heritage property are exactly the same.²⁵² Article 28, titled “Penalties,” however, goes a step further than the punishments contemplated by the Rome Statute by including the possibility of the death penalty.²⁵³ Article 29 goes on to state that punishments shall be served in Syrian prisons and eliminates the ability of the Syrian government to “pardon or mitigate any sentence issued by the Tribunal.”²⁵⁴ While a criminal tribunal is likely the only resolution that will bring at least some of the perpetrators to justice, it will likely not effectively punish individuals in such a way to deter future destruction of cultural heritage property.

IV. NECESSARY CHANGES TO PROTECT CULTURAL PROPERTY

As demonstrated above, international law has achieved limited success at preventing the destruction of cultural property or punishing those responsible. This failure can be seen in the current destruction in Syria. Therefore, alterations to the current laws protecting cultural heritage property are necessary. However, altering the current laws will only work if there is a way to enforce them. To address this concern, a military force that specializes in the protection of cultural heritage property should be created.

A. Alterations of the Laws

A major issue in the protection of cultural heritage property is the lack of effective enforcement mechanisms. Of the abovementioned treaties, only the Rome Statute has an effective, albeit limited, enforcement mechanism answerable to an international criminal court.²⁵⁵ Ineffective enforcement is really an issue in three parts. First, jurisdictional limitations make it difficult to impossible to prosecute individuals who are currently destroying cultural property. Second, the military necessity exception found in every treaty offers a loophole for individuals who destroy cultural property to

250. See generally INST. FOR NAT’L SEC. & COUNTERTERRORISM – SYRACUSE UNIV., THE CHAUTAUQUA BLUEPRINT FOR A STATUTE FOR A SYRIAN EXTRAORDINARY TRIBUNAL TO PROSECUTE ATROCITY CRIMES (2013), <http://insct.syr.edu/wp-content/uploads/2013/09/Chautauqua-Blueprint1.pdf> [hereinafter CHAUTAUQUA BLUEPRINT].

251. See *id.* art. 20.

252. Compare *id.*, with Rome Statute, *supra* note 196, art. 8.

253. CHAUTAUQUA BLUEPRINT, *supra* note 250, art. 28.

254. *Id.* art. 29.

255. Rome Statute, *supra* note 196, art. 77.

potentially escape prosecution. Third, even if after a party is prosecuted and found guilty of destroying cultural property, the punishment is disproportionate to the crime and offers little to no deterrent value for future offenses.

1. Jurisdiction

The inability to acquire jurisdiction over individuals who destroy cultural property makes it impossible to prosecute their crimes in an international arena. International law only has power through consent. Therefore, unless a country ratifies a treaty, the treaty has limited or no power over that country or its citizens. There are two possible solutions to that jurisdictional issue. First, more countries should ratify the aforementioned treaties. Second, an independent forum that has broad jurisdiction should be developed.

Currently, the majority of ratifying countries of treaties for the protection of cultural property are source countries or smaller states.²⁵⁶ Source countries have the most cultural property within their borders and, given their size, the fewest resources available to protect it. As a result, the bulk of the responsibility for protecting the property and prosecuting those who destroy it will fall to countries that are economically wealthier. The wealthier countries do not have a lot to gain by ratifying these treaties beyond the benefit to the larger population. Countries traditionally enter into treaties when there is a possibility of a quid pro quo.²⁵⁷ In other words, they would enter into the treaty if it actually means increased protection of their cultural property. Without reciprocity, it may be economically unwise for large countries to ratify these treaties. However, any economic cost should be balanced against the value of the protected cultural property that may be lost as a result of inaction. Under an internationalist view, cultural heritage property belongs to the world and it is therefore, the responsibility of the world to protect it. Thus, developed nations such as the United States are the ones that need to step up and ratify these treaties.

Increased exposure of cultural heritage property issues may increase the pressure on legislatures to ratify treaties for the protection of cultural property. Recently, cultural property issues went mainstream with the re-

256. See, e.g., 1954 Hague Ratifying Parties, *supra* note 130.

257. Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT'L L. 213, 227–28 (2007).

lease of *The Monuments Men*.²⁵⁸ Francesco Bandarin, Assistant Director-General for Culture at UNESCO, issued a statement: “I would like to thank Hollywood for bringing this issue to global attention because sometimes Hollywood is more powerful than all the U.N. system put together.”²⁵⁹ While it is unrealistic to expect Hollywood to continuously release movies centered on cultural property, increased exposure by the mainstream media could have a similar effect. Social marketing²⁶⁰ campaigns have been successful at advancing social causes²⁶¹ and would be a useful resource for advancing social pressures on countries to ratify treaties for the protection of cultural heritage. Regardless of the way it is achieved, political pressure is likely the only thing that will increase ratification rates of the cultural heritage treaties.

As an alternative to additional ratification, treaties should be enacted through a different forum that would automatically bind more countries. Had the Rome Statute been enacted as an amendment to the United Nations Charter it would be binding on all State Parties to the United Nations. More specifically, the Rome Statute would be enforceable against 192²⁶² out of 195 countries in the world.²⁶³ As currently enacted, the Rome Statute is only enforceable against 123 countries.²⁶⁴ The United States and Syria are

258. Michelle Nichols, *United Nations Thanks Hollywood Amid Fight to Save Syria's Heritage*, REUTERS (Feb. 5, 2014), <http://www.reuters.com/article/2014/02/05/us-syria-crISIS-un-hollywood-idUSBREA1422720140205>.

259. *Id.*

260. Philip Kotler & Gerald Zaltman, *Social Marketing: An Approach to Planned Social Change*, 35 J. MARKETING 5 (1971) (“Social marketing is the design, implementation, and control of programs calculated to influence the acceptability of social ideas and involving consideration of product, pricing, communication, distribution, and marketing research.”).

261. *Id.* (For example, “Smokey the Bear,” “Keep America Beautiful,” “Join the Peace Corps,” “Buy Bonds,” and “Go to College.”).

262. *See United Nations Member States*, U.N., <http://www.un.org/en/members/> (last visited Oct. 26, 2015).

263. *Independent States in the World*, U.S. DEP’T OF STATE, <http://www.state.gov/s/inr/rls/4250.htm> (last visited Oct. 26, 2015) (The United States government does not recognize Taiwan as a sovereign nation).

264. *See The States Parties to the Rome Statute*, INT’L CRIMINAL COURT, [www.icc-cpi.int/en_menus/asp/states parties/Pages/the states parties to the rome statute.aspx#U](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#U) (last visited Oct. 26, 2015). 123 countries are State parties:

Afghanistan, Albania, Andorra, Antigua and Barbuda, Argentina, Australia, Austria, Bangladesh, Barbados, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Canada, Cape Verde, Central African Republic, Chad, Chile, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Cote d’Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Estonia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guyana, Honduras, Hungary, Iceland, Ireland, Italy, Japan, Jordan, Kenya, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Maldives, Mali, Malta, Marshall Islands, Mauritius, Mexico, Mongolia, Montenegro, Namibia, Nauru, Netherlands, New Zealand, Niger, Nigeria, Norway, Palestine, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea,

currently not parties to the Rome Statute.²⁶⁵ If the United Nations enacted the Rome Statute it would look more similar to the Statute of the International Court of Justice and the Rome Statute would be a more integral part of the United Nations.²⁶⁶ Effectively, the International Crime Court (the “ICC”) would become the criminal judicial arm of the United Nations.²⁶⁷ Nearly universal jurisdiction through the Rome Statute would allow for early investigation and prosecution of individuals who commit war crimes. The ICC would take the place of reactionary criminal tribunals that deal with war crimes after the war has subsided. Instead, the ICC may be able to prosecute crimes early in a conflict, perhaps preventing future crimes. Near universal jurisdiction would have given the ICC jurisdiction to prosecute the destruction of cultural property in Syria in addition to all the other war crimes potentially being perpetrated.

2. Military Necessity Exception

The military necessity exception in every treaty presents an issue for enforcement. The military necessity exception allows States to avoid the spirit of the governing instrument by complying with the literal meaning of the words. In Syria, a significant amount of destruction was done to ancient sites that were originally built for their military advantages.²⁶⁸ All sides are likely to invoke the military necessity exception if ever tried for their destruction of cultural heritage. As a result, a court will need to determine whether such actions were necessary and proportional to that necessity.²⁶⁹ One major failure of the Chatauqua Blueprint is its failure to fully address the military necessity exception.²⁷⁰ More specifically, there are no provisions that criminalize the use of a cultural site for a military purpose. Applied to the current Syrian conflict, the rebel occupation of the Citadel for military purposes would not be actionable under the Chatauqua Blueprint. Additionally, the government’s military efforts to regain the Citadel would only be actionable to the extent it was not a military necessity. The Chatau-

Republic of Moldova, Romania, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Suriname, Sweden, Switzerland, Tajikistan, The Former Yugoslav Republic of Macedonia, Timor-Leste, Trinidad and Tobago, Tunisia, Uganda, United Kingdom, United Republic of Tanzania, Uruguay, Vanuatu, Venezuela, Zambia.

265. *See id.*

266. *See Statute of the International Court of Justice*, INT’L COURT OF JUSTICE, <http://www.icj-cij.org/documents/?p1=4&p2=2> (last visited Oct. 26, 2015).

267. *See id.*

268. For specific discussion see *supra* Part II.

269. *See CHAUTAUQUA BLUEPRINT*, *supra* note 250, art. 20(a)(4).

270. *See generally id.*

qua Blueprint all but immunizes both sides' destruction of cultural property. Although the military necessity exception is necessary to gain widespread ratification, the exception needs to be limited. Ex post investigations into the motivations of warring parties may prove difficult but they will be important to limit the reach of the military necessity exception in Syria.

3. Punishment

The third hurdle standing in the way of bringing responsible parties to justice is the lack of proportional punishments. A recent example of disproportionate punishment for the destruction of cultural heritage property comes from the trial of Pavle Strugar and Miodrag Jokic of the Yugoslav Peoples' Army. In those cases, the maximum sentence the tribunal could render was life imprisonment.²⁷¹ However, the longest prison sentence the court handed down was seven and one-half years in prison.²⁷² It is unclear exactly what motivated the judge to give comparatively lenient sentences, but it is clear that eight years in prison is not likely to have any deterrent value to prevent the destruction of cultural heritage in the future. The old town of Dubrovnik was a World Heritage Site.²⁷³

Another example of disproportional punishments for the destruction of cultural property comes from the Permanent Military Tribunal at Metz, set up after World War II.²⁷⁴ Karl Lingensfelder was a German who was charged with the destruction of public monuments and pillage.²⁷⁵ It was shown during trial that in May 1941, Lingensfelder "used four horses to pull down the monument erected by the inhabitants to fellow citizens who died during the war of 1914-1918, destroyed the marble slabs bearing the names of the dead, and broke the statue of Joan of Arc" in Arry, France.²⁷⁶ Lingensfelder confessed to the charges.²⁷⁷ In doing so, he "admitted that the order given him by [a German officer] was made without threats and that he was under no obligation to render account of its execution."²⁷⁸ The court sentenced Lingensfelder to one year in prison, "while admitting extenuating circumstances."²⁷⁹ Like the punishments handed down at the ICTY, this

271. See Life Imprisonment Press Release, *supra* note 249.

272. INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *supra* note 236, at 4.

273. *Old City of Dubrovnik*, UNESCO, <http://whc.unesco.org/en/list/95> (last visited Oct. 26, 2015).

274. U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 67-68 (1949) (Case No. 51 Trial of Karl Lingensfelder).

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

sentence offers little to no deterrent effect to prevent destruction in the future.

A more extreme punishment was given to Alfred Rosenberg. Rosenberg was tried during the Nuremberg trials after World War II.²⁸⁰ He was held “responsible for a system of organised plunder of both public and private property throughout the invaded countries of Europe” during World War II.²⁸¹ Rosenberg’s own reports indicated that his system of plundering was responsible for taking “more than 21,903 art objects, including famous paintings and museum pieces.”²⁸² Rosenberg was sentenced to the most extreme punishment for his crimes: he was hanged in 1946.²⁸³ This punishment represents the other end of the spectrum and arguably serves the greatest deterrent that punishment can offer to prevent the destruction of cultural heritage property in the future.

In the case of Syria, distributing effective punishments will be difficult. The Chatauqua Blueprint contemplates punishments ranging from prison to capital punishment.²⁸⁴ However, the above mentioned criminal tribunal decisions will likely influence the tribunal’s judges. Although those cases are not binding on any criminal tribunal that is formed to prosecute war crimes in Syria, the tribunal judges will likely look to past cases to find historic support for any sentences they issue. Thus, judges will need to break with precedents from recent past in order to issue more severe punishments. The creation of a more specific framework of punishment would allow for more proportional punishments, without relying on the discretion of individual judges.

B. Cultural Heritage Force

Treaties are useful in theory, but they require enforcement to be effective. Prior to the Rome Statute, all the treaties protecting cultural heritage placed the duty to enforce on each individual contracting party.²⁸⁵ As a result, the burden of enforcing the treaties primarily fell to the economic and military powers of the world. Understandably these countries are pre-occupied with a variety of other issues, and therefore, acting as a police power in the name of cultural property is not a high priority. When cultural property is most at risk during armed conflicts, considerations such as

280. O’KEEFE, *supra* note 105, at 88.

281. *Id.* at 88–89.

282. *Id.* at 89.

283. *Id.*

284. CHAUTAUQUA BLUEPRINT, *supra* note 250, art. 28.

285. *See* 1954 Hague Convention, *supra* note 6, art. 28.

money, military lives, and political clout required for intervention on behalf of cultural property often outweigh the perceived importance or value of the cultural property. Without other potential incentives, intervention to protect cultural property is often ignored. A solution to this problem would be to create an international military force charged with the protection of cultural property, thereby removing the responsibility for enforcement from the individual contracting parties and placing it in the hands of this specialized force.

1. Supervisor of Forces

Such a force could be created and controlled through multiple different entities. The most obvious option would be for the Security Council to control such a force. A cultural heritage protection force would easily fit within Chapter VII, Article 43 of the U.N. Charter, which vests the Security Council with the ability to call upon an armed force provided by the Member Countries when it is “necessary for the purpose of maintaining international peace and security.”²⁸⁶

This cultural property protection force could operate similarly to the the current U.N. Peacekeeping Force. The deployment of U.N. Peacekeeping operations is determined by the Security Council.²⁸⁷ Similarly, the Security Council would determine when and where to deploy a cultural protection force. However, the focus of the two forces would be different. The U.N. Peacekeeping Force focuses on peace by supplying “security and . . . political and peace building support to help countries make the difficult, early transition from conflict to peace.”²⁸⁸ On the other hand, the primary focus of the cultural property protection force would be protection. That is not to say that there would not or could not be overlap between the two forces. For example, the two forces could coexist and help each other to defuse pre-conflict tensions or assist countries in preparation for impending conflict. However, the difference between the two focuses would be most evident during a conflict. During a conflict, a cultural property protection force would have a high likelihood of engagement in combat. This type of participation in a conflict is outside the allowable conduct of the current Peacekeeping Forces.²⁸⁹ This higher likelihood of engagement in

286. U.N. Charter art. 43(1).

287. *Forming a New Operation*, U.N., <http://www.un.org/en/peacekeeping/operations/newoperation.shtml> (last visited Dec. 30, 2015).

288. *What is Peacekeeping*, U.N., <http://www.un.org/en/peacekeeping/operations/peacekeeping.shtml> (last visited Feb. 26, 2015).

289. *See Principles of UN Peacekeeping*, U.N., <http://www.un.org/en/peacekeeping/operations/principles.shtml> (last visited Feb. 26, 2015).

combat would make it highly unlikely that this new force would be regularly deployed by the Security Council. As discussed above, the political divide in the Security Council would make it unlikely that a force would be deployed if it would engage in combat with any of the permanent members' allies.²⁹⁰

Another option would be to amend the 1954 Hague Convention and require each State Party to create a special division of their armed forces dedicated specifically to the protection of cultural heritage property. Such an Article might read:

The High Contracting Parties undertake to create and train in time of peace a force dedicated to the protection of cultural property. In the event of an armed conflict of an international character involving a High Contracting Party, the force shall be deployed and shall be responsible for the protection of cultural property. Priority shall be given to cultural property in immediate danger followed by cultural property granted Special Protection under Chapter II. Subsequent priority shall be decided by UNESCO.

In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties the Party shall be bound to deploy the force dedicated to the protection of cultural property and protect cultural property within its territory following the priority described in the above paragraph.

While this option has a higher likelihood of actual deployment of the force, it does not account for the destruction of cultural property in the event of an internal conflict not occurring within a Party's territory.

The disadvantages of the two options suggest that the adoption of *both* will lead to the highest likelihood of success. Where one option fails the other may be successful. More specifically, a Security Council force would have the ability to intervene in internal conflicts. In addition, Security Council intervention is more likely in internal conflicts given the limited number of participating parties. On the other hand, individual state forces would protect cultural heritage property in international conflicts where the Security Council's loyalties are likely to be divided.

2. Advantages to Specialized Forces

One of the most important features of the specialized cultural protection force will be its training. A cultural property protection force would know how to appropriately protect cultural sites without harming them. Historically, military campaigns aimed at protecting cultural property have exacted more harm than protection. For example, in 2003 the United States

290. See *supra* Part III, § F(1).

invaded Iraq and occupied Babylon with at least a partial intention of protecting the site.²⁹¹ However, by creating a military base, including functioning roads and a helipad, the United States exacted substantial damage on the site that has cost \$800,000 to restore.²⁹² The military's well-meaning intentions may have led to more harm than good for ancient Babylon.

Training military forces to protect cultural heritage is a readily available option. There are organizations currently training individuals on protecting cultural heritage during times of conflict. Organizations including the University of Pennsylvania's Cultural Heritage Center, the International Council on Monuments and Sites, and Heritage for Peace, a network of volunteers and activists based in Spain, have been holding workshops to train Syrian archaeologists, curators, and activists in "first aid for objects and sites."²⁹³ A recent workshop in Turkey, near the Syrian border, taught Syrians who could safely cross the border emergency conservation techniques such as wrapping mosaics in Tyvek before burying or sandbagging them.²⁹⁴ Brian Daniels, director of research at the University of Pennsylvania's Cultural Heritage Center in Philadelphia says, "All we can do is stabilize, conceal, and give some training in conservation and emergency restoration. We're talking about how you secure objects and collections when things are falling apart around you."²⁹⁵ However, if there were a force dedicated to the protection of cultural property the training would be proactive. The force would know how to intervene at an early point in the conflict where real efforts could be made to prevent destruction.

3. Scope of Protection

A cultural heritage protection force would need to tailor its focus specifically to each conflict. In conflicts, such as the one in Syria where both moveable and immovable property are at risk, a cultural heritage protection force would need to limit its scope of protection. It would need to de-

291. Nada Bakri, *Six Years After U.S. Troop's Arrival in Iraq, Ruins of Babylon Await Restoration*, WASH. POST (July 29, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/28/AR2009072802835.html>; see *Ancient City of Babylon Destroyed by US Base*, AL ARABIYA NEWS (May 23, 2008), <http://www.alarabiya.net/articles/2008/05/23/50297.html>.

292. Rory McCarthy et al., *Babylon Wrecked by War*, GUARDIAN (Jan. 15, 2005), <http://www.theguardian.com/world/2005/jan/15/iraq.arts1>; Bakri, *supra* note 291; *Ancient City of Babylon Destroyed by US Base*, *supra* note 291.

293. Andrew Curry, *Archeologists Train "Monuments Men" to Save Syria's Past*, NAT'L GEOGRAPHIC (Sept. 3, 2014), <http://news.nationalgeographic.com/news/2014/09/140903-syria-antiquities-looting-culture-heritage-archaeology/>.

294. *Id.*

295. *Id.*

cide what good it could feasibly do and where that line needs to be drawn. For example, it is unlikely that any force would be able pursue all cases of looting and protect all monuments or historical sites in the course of a conflict. Some demarcation must be made as to what crimes fall within the scope of a force and what crimes should be left to current protection and enforcement mechanisms.

In conflicts where all cultural heritage is at risk, the protection of immoveable cultural property should fall within the duties of a cultural property protection force while protection of moveable property should remain in the hands of the individual states. First, immoveable cultural property is likely more vulnerable than moveable property during conflicts. Moveable property can be relocated to safe locations, while immoveable property, like a historic town center, cannot. In fact, there are multiple examples of relocating moveable cultural property during conflicts. For example, the British relocated the contents of the National Gallery and the Victoria and Albert Museum during the German bombings of World War II.²⁹⁶ Additionally, Syria took steps to empty its museums into secure locations in an effort to protect the contents.²⁹⁷ However, buildings such as the Citadel in the ancient city of Aleppo cannot be moved and are therefore, vulnerable to destruction. It is also important to point out that the protection of immoveable cultural property would lead to the enhanced protection of moveable property. For example, setting up a garrison at the historic site of Palmyra would have both a direct and indirect effect. One direct effect would be the additional protection of the site including the ancient Roman architecture. Additionally, a garrison would have the indirect effect of preventing interference with the site through looting. In terms of allocation of resources, being able to protect both types of cultural property through one action is desirable.

Finally, moveable cultural property is subject to protections beyond those offered by the law. More specifically, market forces offer moveable cultural property more protection than immoveable property. During times of conflict artifacts are removed and resold on the black market, as is currently happening in Syria. Natives and foreigners are digging up artifacts to be sold on the black market for a profit.²⁹⁸ Moreover, ISIS is participating in the black market exchange of artifacts and using the proceeds to fund its

296. O'KEEFE, *supra* note 105, at 86.

297. Suleiman Al-Khalidi, *Syrian Violence Threatens Ancient Treasures*, REUTERS (Feb. 20, 2013), <http://www.reuters.com/article/2013/02/20/uk-syria-crISIS-antiquities-idUSLNE91J01C20130220>.

298. See Rubin, *supra* note 31. For a more complete treatment of this issue see *supra* Part II, § 3.

campaign.²⁹⁹ Because the value of the artifacts is derived from their resale potential, it is therefore in the best interest of the trafficking parties to maintain the integrity of the objects. Destruction or damage to the objects would damage their resale value.

Immoveable property, on the other hand, does not enjoy that type of protection. In fact, it is often the opposite for immoveable property. Monuments and buildings can be dismantled and sold for parts. Therefore, the market forces incentivize the destruction of immoveable property. However, there is one economic force that offers limited protection to cultural property: a monument's value as a tourist attraction. Prior to the conflict's beginning in 2011, cultural tourism was a mainstay of the Syrian economy.³⁰⁰ John Russell, a State Department consultant who helps countries protect their archaeological treasures, says, "It's important that we preserve as much as possible of this economic asset for Syrians in the future."³⁰¹ However, this economic incentive requires the warring parties to look beyond the current conflict, and it would likely be outweighed by immediate military advantages that could be gained at the expense of destruction of immoveable sites.

Although looting is an undesirable side effect of conflict, a more heavily regulated regime³⁰² would likely do little to protect moveable art and artifacts. The most effective looters are those who are able to maintain the integrity of the items. The less damaged an item is the higher a price it will fetch on the resale market. Therefore, market forces incentivize the preservation of cultural property even though the property is removed from the country of origin. On the other hand, immoveable cultural property finds its value in its history, heritage, beauty, and location. Monuments hold no resale value in their original, undestroyed state. There is no black market for buildings such as the Citadel in Aleppo. There is, however, potential profit to be made by selling pieces or fragments of monuments. As a result, there is no market incentive to preserve immoveable cultural property. Without such an incentive, immoveable cultural property may fall at the hands of those who value the profit that can be found in dissecting immoveable property. Thus, during a conflict such as the one in Syria, a coal-

299. *Islamic State Makes Millions from Stolen Antiquities*, *supra* note 77.

300. *See, e.g.*, Jeffries, *supra* note 1.

301. Curry, *supra* note 293.

302. Currently, there are multiple international laws aimed at protecting moveable cultural property. *See, e.g.*, First Protocol, *supra* note 179; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 11806; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 2421 U.N.T.S. 43718.

tion force should focus primarily on protecting immoveable cultural property.

CONCLUSION

International laws have failed to protect Syria's cultural heritage property, and after the destruction has subsided, Syria will be left to answer whether its sense of a shared and diverse past can be reclaimed in this or the next generation. Archaeologists and others believe that if there are no artifacts or monuments to show Syrians their shared past, the task will be much harder.³⁰³ However, hope exists. Irina Bokova has stated that “[d]espite criminal relentlessness, violent extremists will never be able to erase history, nor silence the memory of . . . site[s] that embod[y] the unity and identity of the Syrian people.”³⁰⁴ “Neither bombs nor jackhammers can erase this great culture from the memory of the world. Nothing can ever stifle human creativity - despite the obstacles and fanaticism, this energy will come back stronger than before, buildings and sites will be rehabilitated, and some will be rebuilt, and culture will find its place because it embodies the vitality of societies.”³⁰⁵

Perhaps some good can come of the destruction in Syria. The destruction in Syria may be the catalyst the world needs to enact real change similar to the way World War II spurred the enactment of the 1954 Hague Convention—the most far-reaching legislation to date. But change does not happen on its own. Therefore, we must follow the advice of Irina Bokova and “share further knowledge of the significance of . . . heritage in museums, in schools, in the media” after each new destruction of cultural heritage property.³⁰⁶ Because cultural heritage property belongs to the entire world, with every piece of cultural property that gets destroyed, the world loses a piece of its history. It therefore falls to all of us including “religious leaders, intellectuals, [and] young people, to stand up against the manipulation of religion, to respond to the false arguments of extremists in all media”³⁰⁷ and to defend cultural heritage property across the world by enacting meaningful change.

303. Curry, *supra* note 293.

304. *UNESCO Director-General Condemns the Destruction of the Arch of Triumph in Palmyra*, *supra* note 37.

305. *Irina Bokova Condemns Latest Destruction of Cultural Property from the Site of Palmyra in Syria*, UNESCO (Mar. 7, 2015), http://www.unesco.org/new/en/media-services/single-view/news/irina_bokova_condemns_latest_destruction_of_cultural_property_from_the_site_of_palmyra_in_syria/#.Vi0H5hCrQ1g.

306. *UNESCO Director-General Condemns the Destruction of the Arch of Triumph in Palmyra*, *supra* note 37.

307. *Irina Bokova Condemns Latest Destruction of Cultural Property from the Site of Palmyra in Syria*, *supra* note 305.