

When Cultural Property Becomes a Tool of Warfare: Law, Politics, and International Security

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Abstract

Cultural property has increasingly become a target and a means of war used by extremists. The persistent cultural destruction and looting in the Middle East by ISIS is a new feature in the pathology of a radical group's behaviour toward cultural property. ISIS has both profited from the sale of antiquities and has used the destruction of cultural property as a means to dismantle the existence of nations and states. Prosecuting those who seek to sell antiquities to help finance terrorism should be part of the short-term security agenda. At the same time, future efforts for national reconciliation and peace-building will have to include narratives of a proud and rich past. As such, protection of cultural property is an important element for the long-term security in the region and beyond.

French translation

Les biens culturels sont devenus de plus en plus un objectif et un moyen de guerre utilisé par les extrémistes. La destruction et le pillage culturels persistants au Moyen-Orient par ISIS est une nouvelle caractéristique de la pathologie du comportement d'un groupe radical envers les biens culturels. ISIS a profité de la vente des antiquités et a utilisé la destruction des biens culturels comme un moyen de démanteler l'existence des nations et des États. La poursuite de ceux qui cherchent à vendre des antiquités pour aider à financer le terrorisme devrait faire partie du programme de sécurité à court terme. En même temps, les efforts futurs pour la réconciliation nationale et la consolidation de la paix devront inclure des récits d'un passé fier et riche. En tant que telle, la protection des biens culturels est un élément important pour la sécurité à long terme dans la région et dans le monde.

Spanish translation

Los extremistas han convertido el patrimonio cultural en un objetivo cada vez más frecuente de sus ataques y en un arma de guerra. La continuada destrucción y expoliación del patrimonio cultural en Oriente Próximo por parte del Estado Islámico es una novedad en la patología del comportamiento de los grupos extremistas con respecto al patrimonio cultural. En este artículo se postula que los ataques al patrimonio cultural deberían formar parte del orden del día de los planes seguridad tanto a corto como a largo plazo. El Estado Islámico se ha enriquecido con la venta de antigüedades y ha utilizado la destrucción del patrimonio cultural como un medio para acabar con la existencia de naciones y estados, por eso, la persecución de aquellos que quieren utilizar la venta de antigüedades para financiar el terrorismo debería formar parte de los planes de seguridad a corto plazo. Al mismo tiempo, los futuros esfuerzos de reconciliación nacional y consolidación de la paz deberían tener en

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consideración el rico y orgulloso pasado de los países afectados. Además, la protección del patrimonio cultural en sí mismo es un elemento importante para la seguridad a largo plazo dentro y fuera de la región.

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1. Introduction

Cultural property has increasingly become a target and a means of war used by extremists. The persistent cultural destruction and looting in the Middle East by the so-called Islamic State of Iraq and Syria (also known as ISIS, ISIL, the Islamic State, and Da'esh) has prompted wide condemnation and outrage throughout the world. Yet the destruction and theft of cultural property during war is not new, for civilizations have been the victims of cultural theft and destruction throughout history. However, ISIS' re-invented use of cultural property as part of their warfare is a new feature in the pathology of a radical group's behavior toward cultural property.

While other actors in the region have actively looted historical sites to finance their battles, ISIS is the most notorious because it has institutionalized such plunder and destruction. This article analyzes the theft and destruction of cultural property in conflict zones as a form of warfare, and argues that protection of cultural property should be part of the short-term and long-term international security agenda. First, this article discusses theoretical conceptualizations of cultural property. Second, it highlights the link between the destruction of cultural property and its use as a weapon of war and a means to finance it. Finally, it highlights existing international law provisions to protect cultural property and proposes new measures to safeguard it.

2. Framing cultural property in the scholarship

The idea that cultural property deserves a special treatment in property law is well established in the scholarship.¹ However, there are differences on how scholars view cultural heritage and cultural property, such as whether it belongs to a person, a group/nation, or humanity as a whole, or whether it should be freely traded or strictly regulated.

a. Cultural heritage or cultural property?

There is little consensus as to the boundaries between “cultural property” and “cultural heritage”, and many scholars use these two terms interchangeably.² In theory, cultural heritage embodies a form of community in its manifestation and usage, while the term cultural property lends itself to a more formal ownership discourse. “Heritage creates a perception of something handed down; something to be cared for and cherished. These cultural manifestations have come down to us from the past; they are our legacy from our ancestors.”³ Similarly, cultural heritage is inherited to safeguard and pass on to future generations.⁴ Indeed, “[t]he real sense of heritage [...] is not so much in the possession of [an object], but in the act of passing on and receiving memories and knowledge.”⁵ The real

¹ See Eric A Posner, “The International Protection of Cultural Property: Some Skeptical Observations” (2006) Chicago Public Law & Leg Theory Working Paper No 141 1 at 11, online: <<http://www.law.uchicago.edu/academics/publiclaw/index.html>>.

² See Roger O’Keefe, “The Meaning of ‘Cultural Property’ Under the 1954 Hague Convention” (1999) 46 *Netherlands Intl L Rev* 26; Janet Blake notes that “[t]here exists a difficulty of interpretation of the core concepts of ‘Cultural heritage’ (or ‘cultural property’) and ‘cultural heritage of mankind’ and as yet no generally agreed definition of the content of these terms appears to exist.” Janet Blake, “On Defining the Cultural Heritage” (2000) 49 *Intl & Comp L Q* 61 at 62–63; Tatiana Flessas, “Cultural Property Defined, and Redefined as Nietzschean Aphorism” (2003) 24:3 *Cardozo L Rev* 1067 at 1070–73; Manlio Frigo, “Cultural Property v. Cultural Heritage: A ‘Battle of Concepts’ in International Law?” (2004) 86:854 *Intl Rev Red Cross* 367 at 369.

³ Lyndel Prott & Patrick J O’Keefe, “‘Cultural Heritage’ or ‘Cultural Property?’” (1992) 1 *Intl J Cultural Prop* 307 at 311; see also Derek Fincham, “The Distinctiveness of Property and Heritage” (2011) 115 *Penn St L Rev* 641 at 654.

⁴ Blake, *supra* note 2, at 83.

⁵ Laurajane Smith, *Uses of Heritage* (New York: Routledge, 2006) at 2.

grief of losing one's heritage comes from "the loss of the opportunity to pass it on, and the role it plays as both prop and prompt in the stories" about one's heritage.⁶

Cultural property, on the other hand, has a more narrow definition and can be described as a "sub-group"⁷ to cultural heritage which is "capable of encompassing this [within its] much broader range of possible elements, including the intangibles."⁸ Indeed, cultural property may be limited in scope, as it can prove "inadequate and inappropriate for the range of matters covered by the concept of [...] 'cultural heritage'."⁹ However, the notion of "tangible" versus "intangible" heritage can be questioned because "[h]eritage only becomes 'heritage' when it becomes recognizable within a particular set of cultural or social values, which are themselves 'intangible'."¹⁰ Any object, building, or place becomes tangible heritage when constituents, law, and polity assign a value to it.¹¹ The object itself possesses no inherent value that makes it cultural heritage; its purported value is a social construction. Indeed, tangible cultural heritage "can only be understood and interpreted through the intangible."¹² Some claim that all heritage can be conceptualized as intangible,¹³ not only because it is a social construction, but also because of its impact on society's memory and knowledge.

Different international instruments use both the term cultural property and cultural heritage. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was the first international instrument to use the term "cultural property."¹⁴ The 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property¹⁵ also used this term and highlighted the fact that cultural property is important to a state, because it expresses the "collective genius of nationals of the State concerned."¹⁶ While the International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects notably highlights the use of the term "cultural objects" over "cultural property,"¹⁷ the latter remains widely used in the scholarship.¹⁸

The term "cultural heritage" is also used in various international agreements. The best known instrument that used this term is the 1972 Convention concerning the

⁶ *Ibid.*

⁷ Frigo, *supra* note 2, at 369.

⁸ Blake, *supra* note 2, at 67.

⁹ Prott & O'Keefe, *supra* note 3, at 319.

¹⁰ Laurajane Smith & Natsuko Akagawa, *Intangible Heritage* (New York: Routledge, 2009) at 6.

¹¹ *Ibid.*

¹² Dawson Munjeri, "Tangible and intangible heritage: from difference to convergence" (2004) 56:1–2 *Museum International* at 13.

¹³ Smith, *supra* note 5.

¹⁴ *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, 249 UNTS 240 (entered into force 13 March 1956) [1954 *Hague Convention*].

¹⁵ *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 14 November 1970, 823 UNTS 231, 10 ILM 289 (entered into force 9 May 1972) [1970 *UNESCO Convention*].

¹⁶ *Ibid.*, art 4(a).

¹⁷ *Convention on the International Return of Stolen or Illegally Exported Cultural Objects*, UNIDROIT, 24 June 1995, 34 ILM 1322 [1995 *UNIDROIT Convention*].

¹⁸ Frigo, *supra* note 2 at 368.

Protection of the World Cultural and Natural Heritage,¹⁹ which followed the 1970 UNESCO Convention.²⁰ This Convention established the World Heritage Committee²¹ which manages the World Heritage List.²² Some critical observers of this List note that UNESCO is a project of cultural legitimization, thus recognizing, authorizing, validating, and universalizing certain cultural expressions as “heritage.”²³ By producing a list of world heritage, “[e]verything on the list, whatever its previous context, is now placed in a relationship with other masterpieces.”²⁴ Thus the list becomes a new context for all masterpieces in it. Two other examples of the use of heritage include, the 1992 European Convention on the Protection of the Archaeological Heritage,²⁵ and the 1985 Convention for the Protection of the Architectural Heritage of Europe.²⁶

b. Cultural property: national or cosmopolitan good?

The terms “cultural property” and “cultural heritage” are not always compatible because “[i]n the same breath we commend national patrimony, regional and ethnic legacies, and a global heritage shared and sheltered in common.”²⁷ Indeed, “[a]ided and abetted by multiculturalism and the recognition of difference, cultural property has popularized a logic that tends to forcefully align ‘cultures’ with particular groups.”²⁸ John Henry Merryman, who strongly supports the idea of cultural property as a cosmopolitan good able to be shared by the international community, lamented the fact that during the 1970s and 1980s, “the dialogue about cultural property [...] bec[a]me one-sided. Retentive nationalism [was] strongly and confidently represented and supportively received wherever international cultural property policy [was] made.”²⁹ Indeed he clearly argues in favor of cultural internationalism, which he equates with “preservation, integrity and distribution/access.”³⁰

Scholars have debated the idea of cultural property and whether it belongs to society as a whole or a particular group. The 1954 Hague Convention has some overlapping

¹⁹ *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, UST 37 art 1 (entered into force 17 December, 1975) [1972 UNESCO Convention]; other recent, international instruments that use the term “heritage” include the *Convention for the Protection of Underwater Cultural Heritage*, Gen Con Res 2001, UNESCO, 31st Sess, 31 C./Res 15 (2001) at 50; *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 Oct 2003, 2368 UNTS 3 (entered into force 20 April 2006, UNESCO); *Declaration Concerning the Intentional Destruction of Cultural Heritage*, Gen Con 2003, UNESCO, 32nd Sess, 32 C./Res 15 (2003).

²⁰ *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO, Nov. 14, 1970, 823 U.N.T.S. 231 [Preventing Illicit Import, Export and Transfer of Ownership].

²¹ 1972 UNESCO Convention, *supra* note 19, art 8.

²² *Ibid*, art 11(2).

²³ Smith, *supra* note 5 at 111.

²⁴ Barbera Kirshenblatt-Gimblett, “Intangible heritage as metacultural production” (2004) 56 *Museum International* at 57.

²⁵ *European Convention on the Protection of the Archaeological Heritage (Revised)*, 16 Jan 1992, 1966 UNTS 305 at art 1 (entered into force 25 May 1995).

²⁶ *Convention for the Protection of the Architectural Heritage of Europe*, 3 Oct 1985, 1496 UNTS 147, 25 ILM 380 at art 1 (entered into force 14 March 1988).

²⁷ David Lowenthal, *The Heritage Crusade and the Spoils of History* (Cambridge: Cambridge University Press, 1998) at 227.

²⁸ Naomi Mezey, “The Paradoxes of Cultural Property” (2007) 107 *Colum L Rev* 2004 at 2005.

²⁹ John Henry Merryman, “Two Ways of Thinking About Cultural Property” (1986) 80:4 *Am J Intl L* 831 at 850. In discussing the Hague 1954 and UNESCO 1970 conventions, Merryman distinguishes the meaning of the term ‘protect’ in each of them. He interprets the Hague 1954 to state that cultural property transcends national borders, meaning that humanity, not nations, is the party in interest. By contrast, the UNESCO 1970 is about national retention of cultural property and protection against removal. Thus, the later was instrumental in the move for “repatriation”, that is, the return of cultural objects to the country of origin. These different emphases characterize two ways of thinking about cultural property, which he distinguishes as “cultural internationalism” and “cultural nationalism.”

³⁰ *Ibid* at 853.

tones on whether culture belongs to humanity as a whole or to a particular group of people. Specifically, it states that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.”³¹ Indeed, some argue that the idea of cultural property has conflicting elements, namely “culture” and “property.”³² The first element, “culture”, is a product of a group of people³³ and it signifies their values, history, and worldview. More importantly, culture can be potentially conceptualized as an intangible good. The idea of “property”, on the other hand, has material value attached to an individual rights-based legal principle.³⁴ The idea of a specific group of people owning cultural property indefinitely has been challenged by those who argue that property can be possessed, alienated, controlled and fixed by its owner, while culture cannot.³⁵ Moreover, “cultural property claims tend to fix culture, which if anything is unfixed, dynamic, and unstable.”³⁶ For some, this rigid conceptualization of cultural property in theory and practice “has so colonized the idea of culture that there is not much culture left in cultural property.”³⁷ Therefore, they advocate for a dynamic conceptualization of cultural property which “requires asking about the power, appropriation, and negotiation between groups” thus moving “away from fixing and preserving cultures and peoples and toward an interesting set of questions that flow from cultural change and contact.”³⁸ Other scholars also support the idea of a “living culture” and the need to safeguard a mutable heritage, without freezing or fossilizing it.³⁹

Within the spectrum of cultural property and property rights debate, some scholars, such as Eric Posner, believe that cultural property would be better served if we strip it of any significance and deregulate the market. He advocates that most cultural property should be viewed/treated like regular property, which would in turn decrease its trade in the black market.⁴⁰ Yet objects embody culture⁴¹ and do carry a significant meaning. By stripping cultural property of its cultural significance, the object “would be merely property, more or less beautiful or rare and more or less valuable on the basis of that beauty or rarity only.”⁴² In conceptualizing cultural property as simply property the scholarship runs the danger of stripping it from context and impeding upon larger issues of group identity.⁴³ The two are not mutually exclusive and the concept of cultural property should integrate both its

³¹ *Supra* note 14.

³² Patty Gerstenblith, “Identity and Cultural Property: The Protection of Cultural Property in the United States” (1995) 75 B U L Rev 559 at 567.

³³ *Ibid* at 561–62, 566.

³⁴ *Ibid* at 567.

³⁵ *Supra* note 28.

³⁶ *Ibid*.

³⁷ *Ibid*.

³⁸ *Ibid* at 2006.

³⁹ See Peter JM Nas, “Masterpieces of Oral and Intangible Culture: Reflections on the UNESCO World Heritage List” (2002) 43:1 Current Anthropology 139 at 140; Jean-Loup Amselle, “Intangible Heritage and Contemporary African Art” (2004) 56:1-2 Museum International 84 at 89; Lourdes Arizpe “Intangible Cultural Heritage, Diversity and Coherence” (2004) 56:1-2 Museum International 130 at 131.

⁴⁰ Posner, *supra* note 1 at 11.

⁴¹ See John Henry Merryman, “‘Protection’ of the Cultural ‘Heritage?’” (1990) 38:1 Am J Comp L 513.

⁴² Roger W Mastalir, “A Proposal for Protecting the ‘Cultural’ and ‘Property’ Aspects of Cultural Property under International Law” (1992) 16 Fordham Intl LJ 1033 at 1039.

⁴³ See Kristen A Carpenter, Sonia K Katyal & Angela R Riley, “In Defense of Property” (2008) 118 Yale LJ 1022 at 1046.

“humanness and its thingness”⁴⁴ because this concept reflects “intellectual and social forces.”⁴⁵

Cultural property often is used to legitimize or delegitimize interests. The idea that history is necessary for national identity is well established in the international relations literature.⁴⁶ However, there are questions on whether such historical pasts are real or invented. For example, Eric Hobsbawm coined the phrase “invented traditions” to allude to the fact that stories used to build nations may be fabricated.⁴⁷ Yet it is imperative to understand that whether or not the past is factually true or has added fabrications, once a particular group of people subscribes to it and accepts it as true, it has profound significance and meaning.⁴⁸ More importantly, when historical sites, objects, sculptures, buildings, paintings, and symbols corroborate with such historical accounts, cultural property has heightened significance. The very idea of identity is a narrative/discourse that is spatially and temporally articulated through collective understanding of what unites a group of people. The study of a society’s art, history, and culture facilitates this process.⁴⁹

3. Cultural property looted and destroyed as a component of warfare

Whether we take the classic view of property law focusing on the predictability and certainty of protecting the individual owner’s rights of exclusion and alienation primarily for wealth-maximization purposes or the more fluid approach to cultural ownership, scholars/policymakers across the spectrum would condemn its theft and destruction. The recent strategic destruction and theft of cultural property in Iraq and Syria further validates the fact that cultural property is important to the survival of a nation, and it is precisely why it is being attacked. In an attempt to destroy the state, the people, and their history, ISIS has systemically attacked religious (Christian, Shia, and Sunni significance) and other pre-Islamic sites, looted these sites to finance its reign of terror and destroyed them for propaganda value and attention.⁵⁰

⁴⁴ Craig Anthony Arnold, “The Reconstitution of Property: Property as a Web of Interests” (2002) 266 Harv Envtl L Rev 281 at 284.

⁴⁵ *Ibid* at 289.

⁴⁶ See Anthony D Smith, *Myths and Memories of the Nation* (Oxford: Oxford University Press, 1999); Benedict R O’G Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London; Verso, 3rd. 2006).

⁴⁷ Eric Hobsbawm, “Introduction: Inventing Traditions” in Eric Hobsbawm & Terence Ranger, eds, *The Invention of Tradition* (New York: Cambridge University Press, 1992) 1 at 13–14.

⁴⁸ For example, the Albanians are the descendants of the ancient Illyrians. See Miranda Vickers, *The Albanians: a Modern History* (London: I.B. Tauris, 1995); Miranda Vickers, *Between Serb and Albanian: A History of Kosovo* (New York: Columbia University Press, 1998); Neritan Ceka, *The Illyrians to the Albanians*, 2nd ed (Tirana: Migjeni, 2013) (all providing archeological and historical evidence supporting this claim); Serbian scholars question this assertion, acknowledging that such inquiry is irrelevant to the cohesion of contemporary Albanian identity and its acceptance of the Illyrian theory. The same can be said for the Serbian claim that Kosovo is the cradle of their civilization, dating back to the 13th century. See Dušan T Bataković, *Serbia’s Kosovo Drama: A Historical Perspective* (Belgrade: Čigoja Štampa, 2012) at 21, 17.

⁴⁹ Paul M Bator, “An Essay on the International Trade in Art” (1981) 34:2 Stan L Rev 275 at 295.

⁵⁰ Sarah Almkhtar, “The Strategy Behind the Islamic State’s Destruction of Ancient Sites”, *New York Times* (28 March 2016), online: <www.nytimes.com/interactive/2015/06/29/world/middleeast/isis-historic-sites-control.html>.

Indeed, extremist groups that are looting and destroying cultural property/heritage in war zones are exercising what they see as their divine right to destroy other cultures.⁵¹ They are using both the tangible (title, exclusion, alienability, commodification, and commensurability) and intangible (national/ethnic identity, heritage, religion, and tradition) aspects of cultural property to both finance and disseminate their worldview. The theft and destruction of cultural property during war is not new, but ISIS' organized and institutionalized attacks on cultural property deserve a critical observation.

a. Theft of cultural property to finance terrorism

Historical sites are not only being destroyed for ideological purposes but also to raise money for terrorist activities. Despite the fact that other groups are also involved, ISIS is the most notorious actor in this activity because it has institutionalized the process. An investigative article by The Wall Street Journal reports that trafficking in antiquities was ISIS' "second-largest source of finance after oil" in 2015.⁵² The estimates on the value of this enterprise are said to be between a few million⁵³ to hundreds of millions⁵⁴ of dollars.

Regional reports support the claim that ISIS has profited from trafficking of antiquities. In 2014, Iraq officials claimed that ISIS had taken millions from the al-Nabuk region.⁵⁵ The United Nation Security Council's (UNSC) Al Qaeda Analytical Support and Sanctions Monitoring Team also stated that ISIS' involvement in trafficking of antiquities "has become more systematic and organized."⁵⁶

Specifically, ISIS began issuing licenses for plundering sometime in 2014-2015. Its Natural Resources department (*Diman al-Rikaz*) had an Antiquities Division Unit designed to search known archeological sites, explore new sites and sell looted antiquities. When the United States (US) Special Forces raided Abu Sayyaf's compound (ISIS' chief financial

⁵¹ In September 2015, Ahmad Al Faqi Al Mahdi (a member of Ansar Dine, a branch of Al Qaeda in Mali) was arrested pursuant to an ICC warrant for destroying cultural and religious sites in Mali. See *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Decision on the Confirmation of Charges (24 March 2016) at para 18 (International Criminal Court), online: <www.icc-cpi.int>; see also Mark Kersten, "Prosecuting the Destruction of Shrines at the ICC—A Clash of Civilizations?" (4 March 2016), *Justice in Conflict* (blog), online: <justiceinconflict.org/2016/03/04/> (one of his defense attorneys argues that "[f]undamentalism is a political plan or project and . . . a political project that is not a crime . . . [Al Mahdi was] seeking the means to allow his conception of good over evil to prevail . . . We're talking about two visions of the world that are in contradiction"); see also Geoffrey York, "ICC trial on destruction of Timbuktu shrines debates meaning of Islam", *The Globe and Mail* (1 March 2016), online: <www.theglobeandmail.com/news/world/icc-trial-on-destruction-of-timbuktu-shrines-debatesmeaning-of-islam/article28989152/>.

⁵² Joe Parkinson, Ayla Albayrak & Duncan Mavin, "Syrian 'Monuments Men' Race to Protect Antiquities as Looting Bankrolls Terror", *The Wall Street Journal* (10 February 2015) online: <www.wsj.com/articles/syrian-monuments-men-race-to-protect-antiquities-as-looting-bankrolls-terror-1423615241>; See also "Terrorist Financing and the Islamic State," testimony of Matthew Levitt, Director, Stein Program on Counterterrorism and Intelligence, Washington Institute for Near East Policy, to the House Committee on Financial Services, November 13, 2014, online: <<https://www.washingtoninstitute.org/uploads/Documents/testimony/LevittTestimony20141113.pdf>>.

⁵³ Andrew Keller, "Documenting ISIL's Antiquities Trafficking: The Looting and Destruction of Iraqi and Syrian Cultural Heritage: What We Know and What Can Be Done" (2015 Economic and Business Affairs Remarks delivered at the Metropolitan Museum of Art, New York, 29 September 2015), online: <www.state.gov/e/eb/rls/rm/2015/247610.htm> [*Documenting ISIL*]. ("The U.S. government assesses that ISIL has probably earned several million dollars from antiquities sales since mid-2014, but the precise amount is unknown.")

⁵⁴ UNSC, V Churkin, *Letter dated 31 March 2016 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council: Smuggling of antiquities by the international terrorist organization Islamic State in Iraq and the Levant*, UN Doc S/2016/298, 31 March 2016 at 2 [*Russian Letter to the UN*]. ("The profit derived by the Islamists from the illicit trade in antiquities and archaeological treasures is estimated at US\$150-200 million per year.")

⁵⁵ Martin Chulov, "How an Arrest in Iraq Revealed Isis's \$2bn Jihadist Network", *The Guardian* (15 June 2014), online: <<http://www.theguardian.com/world/2014/jun/15/iraq-isis-arrest-jihadists-wealth-power>>. It should be noted that archaeologists familiar with this region dispute the accuracy of this claim.

⁵⁶ Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaeda and associated individuals and entities, *The Islamic State in Iraq and the Levant and the Al-Nusra Front for the People of the Levant: Report and Recommendations Submitted Pursuant to Resolution 2170*, UNSCOR, 69th Sess, UN Doc S/2014/815 (2014).

officer), they found actual artifacts in his possession. Given that the artifacts were intact and had been carefully photographed, the US Department of State believes they were for sale.⁵⁷ The Russian authorities also agree with this claim, stating that antiquities are “offered to collectors from various countries, generally through Internet auction sites such as eBay and specialized online stores... [ISIS is] exploiting the potential of social media more and more frequently so as to cut out the middleman and sell artefacts directly to buyers.”⁵⁸ Officials involved in counterterrorism state that “[ISIS] is now selling looted antiquities worth millions of pounds directly to western collectors.”⁵⁹

Moreover, ISIS did not only collect a 20% tariff on looted antiquities,⁶⁰ but it also exercised control over the trade by providing authorizations to ensure maximum profit.⁶¹ Only certain individuals were allowed to excavate or supervise the excavation of historical sites. ISIS also detained and punished anyone searching for antiquities without the proper Diwan of Natural Resources stamped permit. If someone attempted to remove artifacts without a proper stamped permit, ISIS is known to have confiscated and destroyed such contraband antiquities.⁶² For example, in July 2015, ISIS released images of its militants destroying statues looted from Palmyra without proper ISIS authorization. The alleged smuggler was publicly whipped in order to warn others of the consequences of operating without ISIS approval.⁶³

b. Cultural property and propaganda warfare

ISIS’ visual representations of their ideology, atrocities and destruction have portrayed their worldview and highlighted the relationship between terror and cultural cleansing. Images have been a critical element of propaganda, recruiting, advertising, and other purported objectives. Doctored with the right visual effects, sounds, and lighting, these videos and images were packaged to create an emotional impact. This ideological frame of reality has served as a medium to facilitate/enable a controlled/structured form of transmitting ISIS’ worldview. Such cognitive frames appear to encumber categories of meaning about life and death, god, state, and nation. Their function and utility are calibrated to portray a measured amount of horror, pain, and suffering blended with their ideological message and utopia. “Photographs really are experience captured, and the camera is the ideal arm of consciousness in its acquisitive mood. ...[They create] a [...] relation to the world that feels like knowledge—and, therefore, like power.”⁶⁴ Therefore, armed with the enough social media savviness, ISIS is promulgating its ideology by exercising power over the image captured.

⁵⁷ *Documenting ISIL*, *supra* note 53.

⁵⁸ *Russian Letter to the UN*, *supra* note 54 at 2.

⁵⁹ Oliver Moody, “ISIS Fills War Chest by Selling Looted Antiquities to the West”, *The Times* (17 December 2014), online: <<http://www.thetimes.co.uk/tto/news/world/middleeast/article4299572.ece>>.

⁶⁰ *United States of America v. One Gold Ring with Carved Gemstone, An Asset of ISIL Discovered on Electronic Media of Abu Sayyaf, President of ISIL Antiquities Department et al.* (16-cv-02442-TFH) at para 15.

⁶¹ *Ibid* at paras 12–13.

⁶² *Ibid* at para 13; “Islamic State militants ‘destroy Palmyra statues’”, *BBC* (2 July 2015), online: <<http://www.bbc.com/news/world-middle-east-33369701>>; US, Terrorist Financing: Kidnapping, Antiquities Trafficking, and Private Donations: Hearing Before the House of Foreign Relations Subcommittee on Terrorism, Non-proliferation and Trade, 114 Cong (Washington DC: US Government Printing Office, 2015) (Michael D Danti).

⁶³ Gianluca Mezzofiore, “ISIS: Islamic State Militants Publicly Destroy Smuggled Palmyran Statues”, *International Business Times* (2 July 2015), online: <<http://www.ibtimes.co.uk/isis-islamic-state-militants-publicly-destroy-smuggled-palmyran-statues-1509038>>.

⁶⁴ Susan Sontag, *On Photography*, 4th ed (New York: Farrar, Strauss and Giroux, 1973) at 3–4.

Due to the fact that there is no inside/outside demarcation of identity – as ISIS soldiers are a blend of local/foreign fighters and the local population are mostly fellow Muslims – the quest to create an identity within their realm of operation foments a need to find enemy targets within the local population and its culture/heritage. Interestingly, the large majority of ISIS’ cultural attacks have been against Islamic sites.⁶⁵ Elements that epitomize diversity represent a way to introduce that much needed delineation between us/ them in order to create cohesiveness within ISIS’ domain. In defining themselves by what they fight against, extremists make possible the otherwise paradoxical deployment of death and destruction within their controlled areas.

c. Attacks on cultural property as an intent to annihilate religious diversity

The violent acts toward cultural diversity and cultural property show new features in the pathology of a radical group’s behavior toward them. The demolition of cultural property is not linked to a military objective but rather inspired by sheer will to eradicate historical manifestations of religious or spiritual expression that do not correspond to the extreme religious views of the Taliban, ISIS, Al-Qaeda, or others. Unlike traditional warfare, where damage to cultural heritage affects the enemy’s property, here these cultural terrorist acts are partly conducted by locals themselves.⁶⁶ More importantly, the destruction of cultural heritage by these radical groups is not a collateral effect of armed conflict, but rather a carefully planned and documented process of destruction, often timed for the greatest propaganda value.⁶⁷

In recent history, one of the first terrorist groups that destroyed cultural property for religious propaganda purposes was the Taliban. In March 2001, the international community watched in dismay as the Taliban in Afghanistan destroyed the Buddhas of Bamiyan, built in 507-554 CE, in an attempt to crack down on “un-Islamic” segments of Afghan society.⁶⁸ Mullah Mohammad Omar, a Taliban militia leader, explained the destruction as follows: “Based on the verdict of the clergymen and the decision of the supreme court of the Islamic emirate all the statues around Afghanistan must be destroyed [...] Because God is one God and these statues are there to be worshipped and that is wrong. They should be destroyed so that they are not worshipped now or in the future.” Sadly, Mullah Omar's order was only one amongst a long line of such decrees implemented by the Taliban at the time.⁶⁹ According to the Online Center of Afghan Studies, the destruction of the two Buddhas was not an isolated incident, but a carefully planned

⁶⁵ Kristin Romey, “ISIS Destruction of Ancient Sites Hits Mostly Muslim Targets”, *National Geographic* (2 July 2015) online: <<http://news.nationalgeographic.com/2015/07/150702-ISIS-Palmyra-destruction-salafism-sunni-shiite-sufi-Islamic-State/>>.

⁶⁶ Extremist uprisings in this region unfortunately have found a somewhat sympathetic audience in some areas. Visiting the front lines between the Iraqi military and the Islamic State (IS), Elliot Ackerman notes that ISIS is effective in regions with a Sunni Arab majority because “[i]n these places...the population rises up with the militants, fighting alongside them.” See Elliot Ackerman, “Eight Men, and One Gun, on the Iraqi Front”, *The New Yorker* (17 November 2014), online: <<http://www.newyorker.com/news/news-desk/eight-men-one-gun-front>>. Other groups involved in the trafficking and/or looting of antiquities in various capacities and degrees are: Al-Nusra Front for the People of the Levant (an Al Qaeda affiliate in Syria), the Bashar Al-Assad regime, Hesbollah, and most non-state actors involved in the Syrian conflict. See US House of Representatives Committee on Financial Services, Preventing Cultural Genocide: Countering the Plunder and Sale of Priceless Cultural Antiquities by ISIS (19 April 2016) online: <http://financialservices.house.gov/uploadedfiles/041916_tf_supplemental_hearing_memo.pdf>.

⁶⁷ See Francesco Francioni & Federico Lenzerini, “The Destruction of the Buddhas of Bamiyan and International Law” (2003) 14:4 EJIL 619 at 621 (explaining Taliban’s orchestrated destruction of the Buddhas of Bamiyan as a form of defiance against the international community and their morals). [Francioni & Lenzerini, “The Destruction of the Buddhas”]

⁶⁸ “Bamiyan destroyed by Taliban”, *BBC News* (12 November 2001), online: <http://news.bbc.co.uk/2/hi/south_asia/1654085.stm>.

⁶⁹ Rory McCarthy, “Taliban Orders All Statues Destroyed”, *The Guardian* (27 February 2011), online: <<http://www.theguardian.com/world/2001/feb/27/afghanistan.rorymccarthy>>.

systematic move to eradicate ancient Afghan cultural heritage in its entirety.⁷⁰ Interestingly, the Taliban has not only destroyed cultural property but might have profited from it. In 2010, the Counter Terrorism Center at West Point also noted that United Arab Emirates-based businessmen “who smuggle precious stone, sculptures, and other historic artifacts” contributed to Haqqani Network and paid dues to the Taliban “to avoid trouble on the road.”⁷¹

Similar to the Taliban’s destruction of pre-Islamic heritage in Afghanistan, ISIS also systematically destroyed and looted historical sites within their self-styled caliphate, which spanned across Iraq-Syria border.⁷² In 2014, ISIS militants demolished a revered Muslim/Christian/Jewish shrine, which is thought to be the burial place of the prophet Younis, or Jonah in Mosul, Iraq.⁷³ This site is mentioned in the Hebrew and Christian Bible and Qur’an, and the mosque itself was built on an archaeological site dating back to the 8th century BCE.⁷⁴ ISIS militants destroyed the mosque because, to them, it “had become a place for apostasy, not prayer.”⁷⁵ Unfortunately, the Tomb of Jonah was not just a sacred place for people of different faiths, but also a symbol of tolerance and shared traditions.⁷⁶ In their perverse reality, extremists perceived this symbol of tolerance as a threat to their “new world order.”

In trying to establish its ultraconservative faith, ISIS has destroyed cultural artifacts including Sunni, Shia and Sufi sites. Although ISIS claims to adhere to the Sunni branch of Islam, they have destroyed multiple Sunni shrines, targeting any place they deem “un-Islamic.”⁷⁷ Indeed, Michael D Danti asserts that “[ISIS] primary target is [...] the ‘near enemy,’ [which is] anyone other than Salafist Sunni Muslims.”⁷⁸ This list of religious sites that have been destroyed since ISIS’ rise is long but these are a few highlights: Imam Dur Shrine in Salah-e-Din built in the 11th century CE and considered as one of the emblematic representations of Islamic architecture of its time;⁷⁹ Mosul’s 1,800-year-old church; the Green Church in Tikrit, one of the oldest Christian churches in the Middle East; and the

⁷⁰ Francesco Francioni & Federico Lenzerini, “The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq”, in *Art and Cultural Heritage: Law, Policy and Practice*, Barbara T. Hoffman ed. (Cambridge: Cambridge University Press 2006) at 32; Francioni & Lenzerini, “The Destruction of the Buddhas”, *supra* note 67 at 619.

⁷¹ Gretchen Peters, *Crime and Insurgency in Tribal Afghanistan and Pakistan*, ed. by Don Rassler (West Point: Harmony Program, 2010) at 36–37.

⁷² Different military forces are engaging ISIS in the battlefield. The situation is very fluid, and it is difficult to estimate what ISIS controls at this given time. However, during 2014–2015, ISIS did control large territories in Iraq and Syria, including UNESCO World Heritage and other registered archeological sites. See “IS ‘loses more than a quarter of its territory’ in Syria and Iraq”, *BBC* (9 October 2016) online: <http://www.bbc.com/news/world-middle-east-37588882>; “6 out of 6: ALL of Syria’s UNESCO Heritage Sites damaged or destroyed during civil war”, *Reuters* (15 March 2015) online: <<https://www.rt.com/news/335619-syria-unesco-heritage-damage/>>.

⁷³ Dana Ford and Mohammed Tawfeeq, “Extremists destroy Jonah’s tomb, officials say”, *CNN* (25 July 2014) <http://www.cnn.com/2014/07/24/world/iraq-violence/>; “Isis blows up shrine in Iraqi city of Mosul”, *BBC* (25 July 2014) online: <<http://www.bbc.com/news/world-middle-east-28485029>>.

⁷⁴ “ISIS Militants Blow Up Jonah’s Tomb”, *The Guardian* (14 July 2014), online: <<http://www.theguardian.com/world/2014/jul/24/isis-militants-blow-up-jonah-tomb>>.

⁷⁵ *Ibid.*

⁷⁶ Justin Moyer, “After Leveling Iraq’s Tomb of Jonah, the Islamic State Could Destroy ‘Anything in the Bible’”, *The Washington Post* (25 July 2014), online: <<https://www.washingtonpost.com/news/morning-mix/wp/2014/07/25/after-leveling-iraqs-tomb-of-jonah-the-islamic-state-could-destroy-anything-in-the-bible/>>.

⁷⁷ Yasmine Hafiz, “ISIS Destroys Jonah’s Tomb in Mosul, Iraq, as Militant Violence Continues”, *Huffington Post* (25 July 2014), online: <http://www.huffingtonpost.com/2014/07/25/isis-jonah-tomb_n_5620520.html>.

⁷⁸ Kristin Romey, “Why ISIS Hates Archaeology and Blew Up Ancient Iraqi Palace”, *National Geographic* (14 April 2015), online: <<http://news.nationalgeographic.com/2015/04/150414-why-islamic-state-destroyed-assyrian-palace-nimrud-iraq-video-isis-isil-archaeology/>>.

⁷⁹ “Iraq: condemning destruction of shrine, UNESCO urges end to ‘cultural cleansing’”, *UN News Centre* (28 October 2014) online: <<http://www.un.org/apps/news/story.asp?NewsID=49187#.WHsNDbYrjE4>>.

mosque of Al Arbain—a historic site for Iraq’s Shia Muslim minority.⁸⁰ They also replaced the crosses on Mosul’s Syrian Orthodox cathedral with black flags.⁸¹

d. Attacks on cultural property as an intent to destroy national identity

In its own magazine, *Dabiq*, ISIS publicized the destruction of historical/religious sites as part of their plan to destroy the “nationalist agenda” they deem that the cultural heritage signifies.⁸² This magazine highlights ISIS’ view on culture and national pride, in that “[t]he kuffār [unbelievers] had unearthed these statues and ruins in recent generations and attempted to portray them as part of a cultural heritage and identity that the Muslims of Iraq should embrace and be proud of.”⁸³ While its propaganda may attempt to portray the destruction of antiquities as part of ISIS’ strict adherence to religious ideology, it may in fact be a simple tool to advertise, capture international headlines, show their dominance, thus appealing to young recruits, and create shock value.⁸⁴ Unfortunately, the region is considered the “center of the world for every great empire recorded in human history...[We are witnessing] successive generations of history all in one place, all being destroyed at once.”⁸⁵ Camouflaging its distorted worldview with religious scriptures, ISIS is not only destroying multiple layers of history; it is doing so with intent to erase these peoples’ identities. Indeed, just before destroying the Northwest Palace at Nimrud, constructed in the ninth century BCE by the Assyrian King Ashurnasirpal II, an ISIS militants said: “Whenever we take control of a piece of land, we remove the symbols of polytheism and spread monotheism in it.”⁸⁶

Cultural objects are the basis of cultural memory, in that “the monument expresses the profound psychology of generations.”⁸⁷ By destroying history, culture, and memory, ISIS is attempting “to erase the identity”⁸⁸ of the people in the region. The extremist Sunni militant group is conducting a systemic “cultural cleansing”⁸⁹ through its destruction of churches, shrines, historical buildings, and ancient manuscripts in areas it controls, as well as plundering historical sites to sell artifacts abroad.

In trying to establish its ultraconservative faith and a new order that adheres blindly to such rule, ISIS has destroyed some of the historical jewels of the region. ISIS has destroyed temples, tombs, and statues in Nimrud, Hatra, and Palmyra, among many other

⁸⁰ Madeleine Grant, “Head of UNESCO Accuses ISIS of Trying to ‘Delete’ Civilizations”, *Newsweek* (14 November 2014), online: <<http://www.newsweek.com/head-unesco-compares-isis-methods-nazis-brands-destruction-archeological-sites-284456>>.

⁸¹ Lucy Westcott, “ISIS Destroys Mosques and Shrines in Iraq”, *Newsweek* (8 July 2014), online: <<http://www.newsweek.com/isis-destroys-shiite-mosques-and-shrines-iraq-257683>>.

⁸² David Roberts, “Why IS Militants Destroy Ancient Sites”, *BBC News* (1 September 2015), online: <<http://www.bbc.com/news/world-middle-east-34112593>>.

⁸³ Romey, *supra* note 78.

⁸⁴ Roberts, *supra* note 82.

⁸⁵ Graham Bowley, “Antiquities Lost, Casualties of War; In Syria and Iraq, Trying to Protect a Heritage at Risk”, *The New York Times* (3 October 2014), online: <<http://www.nytimes.com>> (quoting Candida Moss, professor of New Testament and early Christianity at the University of Notre Dame).

⁸⁶ Romey, *supra* note 78,

⁸⁷ Pierre de Lagarde, *La mémoire des Pierres* (Paris: Albin Michel, 1979) at 11.

⁸⁸ Grant, *supra* note 80.

⁸⁹ “Director-General of UNESCO Irina Bokova condemns the destruction of the Imam Dur Shrine in Iraq”, *UNESCO* (27 October 2014), online: <<http://en.unesco.org/news>>.

sites.⁹⁰ One could argue that extremists are employing “a kind of cultural cleansing that undermines the morale of the communities they invade,”⁹¹ attempting to instill fear and obedience, thus breaking the will to resist.

Questions can be raised as to whether the pre-Islamic Roman Era ruins of Palmyra⁹² or the Assyrian city of Nimrud have anything in common with the predominantly Arab population that inhabits the region today.⁹³ Similarly, do the great Buddhas of Bamiyan represent the Afghani heritage as a whole or in part? Or do these historical sites partly represent the heritage of some people who lived there once in the past? There may be questions as to the degree to which “other people’s heritage”⁹⁴ is also part of the heritage of inhabitants today. One example from Syria may shed some light as to the connection between locals and these historical sites. Khalid Al-Asaad, a Syrian bespectacled octogenarian,⁹⁵ and a retired chief of antiquities for Palmyra was tortured for weeks by ISIS to reveal the city’s hidden treasures. When he refused to reveal information that could damage the ancient site he had dedicated his life to studying and exploring, he was gruesomely murdered and hung in a public place.⁹⁶ He had named his daughter Zenobia after Palmyra’s ancient queen.⁹⁷ Al-Asaad may or may not have been a direct descendent of the Assyrians, but he spent his life studying the history of Palmyra, and gave his life to protect it. These sites are part of the cultural landscape⁹⁸ of the Syrians today.

4. Legal framing of the intentional destruction of cultural property during armed conflict

What is happening in Syria and Iraq is often referred to as a “cultural cleansing”⁹⁹— but can it also be considered cultural genocide? US Secretary of State, John Kerry, remarked

⁹⁰ Andrew Curry, “Here Are the Ancient Sites ISIS Has Damaged and Destroyed”, *National Geographic* (1 September 2015), online: <<http://news.nationalgeographic.com>>.

⁹¹ Moody, *supra* note 59.

⁹² Department of Ancient Near Eastern Art. “Palmyra,” in *Heilbrunn Timeline of Art History* (New York: The Metropolitan Museum of Art, October 2000) online: <http://www.metmuseum.org/toah/hd/palm/hd_palm.htm>; see also Michael D Danti et al, *Special Report on the Importance of Palmyra* (ASOR Cultural Heritage Initiatives, 2005) online: <<http://www.asor-syrianheritage.org>>.

⁹³ See Hannibal Travis, “The Cultural and Intellectual Property Interests of the Indigenous Peoples of Turkey and Iraq” (2009) 15 *Tex Wesleyan L Rev* 601; Eyal Zisser, “Who’s Afraid of Syrian Nationalism? National and State Identity in Syria” (2006) 42:2 *Middle Eastern Studies* 179 at 184 (claiming that governments attempted to legitimize the Syrian state based on pre-Islamic past, but this “was ineffective, as it lacked relevance for most of the population, which had adopted an Arab identity”).

⁹⁴ Derek Gillman, *The Idea of Cultural Heritage*, revised ed (New York: Cambridge University Press, 2010) at 12.

⁹⁵ One of the reasons why Al-Asaad is described this way in the media is because he was gruesomely beheaded and his glasses were still on his face after the fact.

⁹⁶ Ben Hubbard, “Syrian Expert Who Shielded Palmyra Antiquities Meets a Grisly Death at ISIS’ Hands”, *New York Times* (19 August 2015), online: <<http://www.nytimes.com>>.

⁹⁷ His daughter Zenobia Al-Asaad said: “When I was a little girl, I remember sitting in the car with him, driving from our home in the modern part of Palmyra over to the ancient sites. . . . [T]he way he talked about Palmyra made me love the city even more, because I know he loved it. He would explain what some of these things once were - this was a temple, this was a tomb, this city was the place where Zenobia was from, who I’m named after. . . . Palmyra the ancient city will always be a part of me.” Kanishk Tharoor and Maryam Maruf “Museum of Lost Objects: The Temple of Bel”, *BBC* (1 March 2016), online: <<http://www.bbc.com>>.

⁹⁸ *Ibid.* Syrian archeologist Salam al-Kuntar explains that Palmyra is not a remote place of the past but deeply ingrained in Syrian human history. The cultural landscape of the city is part of the narrative of who Palmyrians are today. The archeologist explains: “I have a special love for Palmyra because the Temple of Bel is where my mother was born. . . . I hear many stories about the building, how people used the space, how children played around, including my mum. So that’s what it means to me. This is the meaning of heritage – it’s not only architecture or artefacts that are representing history, it’s these memories and ancestral connection to the place.”

⁹⁹ See “Director-General Irina Bokova firmly condemns the destruction of Palmyra’s ancient Baalshamin, Syria”, *UNESCO* (24 August 2015), online: <<http://en.unesco.org/news>>; “UNESCO calls for mobilization to stop ‘cultural cleansing’ in Iraq”, *UNESCO* (27 February 2015), online : <<http://whc.unesco.org>>.

on whether acts committed by ISIS amount to genocide. He noted: “Daesh is responsible for genocide against groups in areas under its control, including Yazidis, Christians, and Shia Muslims... Daesh has made a systematic effort to destroy the cultural heritage of ancient communities – destroying Armenian, Syrian Orthodox, and Roman Catholic churches; blowing up monasteries and the tombs of prophets; desecrating cemeteries... [the] United States recognizes and confirms the despicable nature of the crimes that have been committed against them.”¹⁰⁰ Similarly, comparing ISIS to the Nazis, the Secretary General of UNESCO noted: “This is a way to destroy identity. You deprive [people] of their culture, you deprive them of their history, their heritage, and that is why it goes hand in hand with genocide.”¹⁰¹

a. Cultural genocide or cultural cleansing?

In order to examine the question of “cultural cleansing” versus “cultural genocide”, it is important to review the literature and legal documents. Raphael Lemkin noted that genocide is “a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, [...] and the destruction of [...] dignity”.¹⁰²

David Nersessian builds on this definition and claims that “[c]ultural genocide extends beyond attacks upon the physical and/or biological elements of a group and seeks to eliminate its wider institutions [...] Elements of cultural genocide are manifested when artistic, literary, and cultural activities are restricted or outlawed and when national treasures, libraries, archives, museums, artifacts, and art galleries are destroyed or confiscated.”¹⁰³ He notes that when cultural genocide is accompanied by physical and biological genocide, “historical records of the group’s self-definition [are] also destroyed.”¹⁰⁴

Although the term “cultural genocide” is used both in the media and academia, the existing international body of law does not recognize this term when referring to acts of hostility against and plunder of cultural property.¹⁰⁵ The United Nations (UN) recognized genocide as a crime under general international law in the General Assembly Resolution 96 (I) of 11 December 1946.¹⁰⁶ Article I of the *Convention on the Prevention and Punishment of the Crime of Genocide* adopted in 1948, also recognizes that genocide is a crime under international law “whether committed in time of peace or in time of war”.¹⁰⁷ The

¹⁰⁰ Secretary of State, Media Release, “Secretary of State John Kerry: Remarks on Daesh” (17 March 2016), online: US Department of State <<http://www.state.gov>>.

¹⁰¹ Grant, *supra* note 80.

¹⁰² Raphaël Lemkin, *Axis Rule in Occupied Europe: Law of Occupation, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for International Peace Vision of International Law, 1944) at 79.

¹⁰³ David Nersessian, “Rethinking Cultural Genocide Under International Law” 2:12 Human Rights Dialogue: Cultural Rights (Spring 2005), online: <<http://www.carnegiecouncil.org>>.

¹⁰⁴ David Nersessian, *Genocide and Political Groups* (Oxford: Oxford University Press, 2010) at 30.

¹⁰⁵ For a substantive discussion of relevant international criminal law, protection of cultural property during armed conflict, and historical background of different conventions see Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict* (New York: Cambridge University Press, 2006) ; Roger O’Keefe, “Protection of Cultural Property Under International Criminal Law” (2010) 11 Melbourne J of Intl L 339.

¹⁰⁶ *The Crime of Genocide*, GA Res 96 (I), UNGAOR, 1st sess, UN Doc A/RES/96(I) (1946).

¹⁰⁷ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UN TS 277, art I (entered into force 12 January 1951).

Convention prohibits physical and biological genocide, but makes no mention of cultural genocide. Specifically, article II of the *Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)* defines the crime as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”¹⁰⁸

Interestingly, draft versions of the *Genocide Convention* had encompassed the concept of “cultural genocide”. The earliest draft included a provision for “[s]ystematic destruction of historical or religious monuments or their diversion to alien uses’ and ‘destruction or dispers[ion] of documents and objects of historical, artistic, or religious value and of objects used in religious worship”.¹⁰⁹ Another version mentioned “[d]estroying ... libraries, museums, schools, historical monuments, places of worship and other cultural institutions and objects of the group’ with the intent to destroy the culture of that group.”¹¹⁰ However the Sixth Committee of the General Assembly omitted the term “cultural genocide” from the final text.¹¹¹ The parties viewed cultural and biological genocide as conceptually different. Notably, the representatives of Denmark remarked that it was disproportionate and illogical to include “in the same convention both mass murders in gas chambers and the closing of libraries.”¹¹²

This idea of cultural genocide was again discussed and rejected during the in the *Draft Code of Crimes against the Peace and Security of Mankind*.¹¹³ Specifically:

As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word 'destruction', which must be taken only in its material sense, its physical or biological sense. It is true that the 1947 draft Convention prepared by the Secretary-General and the 1948 draft prepared by the *Ad Hoc* Committee on Genocide contained provisions on 'cultural genocide' ... However, the text of the Convention, as prepared by the Sixth Committee and adopted by the General Assembly, did not include the concept of 'cultural genocide' contained in the two drafts and simply listed acts which come within the category of 'physical' or 'biological' genocide. The first three subparagraphs of the present article list

¹⁰⁸ *Ibid*, art 2.

¹⁰⁹ *Draft Convention on the Crime of Genocide*, OHCHR, UN Doc E/447 (1947) at art I(II)(3)(e) [*Draft Genocide Convention*].

¹¹⁰ Ad Hoc Committee on Genocide, *Report of the Committee and draft Convention Drawn Up by the Committee*, UNESCO, 1948, UN Doc E/794 at art III (2) [*Report on the Draft Genocide Convention*].

¹¹¹ UNGAOR, 3rd Sess, 83rd Mtg, A/C6/SR 83 (1948) at 206.

¹¹² *Ibid* at 198–99.

¹¹³ International Law Commission, *Report on the Forty-Eighth Session*, UNGAOR, 51st Sess, Supp No. 10, UN Doc A/51/10 (1996) at 46-7.

acts of 'physical genocide', while the last two list acts of 'biological genocide'.¹¹⁴

The text adopted by the International Law Commission at its forty-eighth session in 1996,¹¹⁵ article 4(2) of the *International Criminal Tribunal for the former Yugoslavia (ICTY) Statute*, and article 6 of the *Rome Statute* all adopted the same definition as article II of the *Genocide Convention*. The question of cultural genocide was again discussed and rejected by the ICTY. In *Prosecutor v Krstić*, the Trial Chamber held that “customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group”.¹¹⁶ Meaning that acts aimed to destroy the cultural aspects of a particular group in order to annihilate their identifying elements (religion, language, literature, works of art, historical monuments etc.) do not fall under the definition of genocide.¹¹⁷

Yet the Tribunal noted that: “[W]here there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.”¹¹⁸

The Appeals Chamber affirmed the Trial Chambers’ decision noting that it had “correctly identified the governing legal principle”.¹¹⁹ Yet, Judge Shahabuddeen, wrote in his partial dissenting opinion that there is a need to be cautious when it comes to culture and intent to destroy a group. Specifically: “It is established that the mere destruction of the culture of a group is not genocide: none of the methods listed in article 4(2) of the Statute need be employed. But there is also need for care. The destruction of culture may serve evidentially to confirm an intent, to be gathered from other circumstances, to destroy the group as such. In this case, the razing of the principal mosque confirms an intent to destroy the Srebrenica part of the Bosnian Muslim group.”¹²⁰

The term cultural genocide was rejected by the International Court of Justice (ICJ) in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*:

The Court takes note of the submission of the Applicant that the destruction of such [cultural] heritage was “an essential part of the policy of ethnic purification” and was “an attempt to wipe out the traces of [the] very existence” of the Bosnian Muslims. However, in the Court’s view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Prosecutor v Krstić*, IT-98-33-T, Judgment (2 August 2001) at para 580 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <www.icty.org>.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Prosecutor v Krstić*, IT-98-33-A, Judgment (19 August 2005) at para 26 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <www.icty.org>.

¹²⁰ *Ibid* at Part VII, para 53.

about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention [...] The ICTY took a similar view in the *Krstić* case, finding that even in customary law, 'despite recent developments', the definition of acts of genocide is limited to those seeking the physical or biological destruction of a group. The Court concludes that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention.¹²¹

Yet the ICJ endorsed the observation in *Krstić*, in that, when simultaneous physical or biological destructions are combined with attacks on cultural property of the targeted group, such acts could be construed as evidence of an intent to physically destroy the group.¹²²

Despite the fact that attacking a group in effigy is most likely intended to attack the group itself and its existence, the law establishes a clear demarcation between biological and physical genocide and cultural genocide. Surreptitiously, the terms “cultural cleansing” and “cultural genocide” may have become intertwined in the media, but such terms do not have an equivalent in the law. In light of the linear trajectory of the discussion on whether or not acts against cultural heritage constitute genocide, it seems that the principle that they do not is set for the time being.

However, these crimes against cultural property that are specifically committed to destroy group identity can be tried as a crime against humanity—persecution.¹²³ In *Blaškić*, the Trial Chamber argued that the crime of persecution as defined in Article 5(h) of the ICTY Statute “encompasses not only bodily and mental harm and infringements upon individual freedom but also acts which appear less serious, such as those targeting property, so long as the victimized persons were specially selected on grounds linked to their belonging to a particular community.”¹²⁴ Deliberate attacks on cultural property “when perpetrated with the requisite discriminatory intent, amounts to an attack on the very [...] identity of a people. As such, it manifests a nearly pure expression of the notion of ‘crimes against humanity’, for all of humanity is indeed injured by the destruction of a unique ... culture and its concomitant cultural objects [...] which] may amount to an act of persecution.”¹²⁵

The idea that discriminatory destruction of, or extensive damage to cultural property can amount to a crime against humanity was re-affirmed more recently in

¹²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep 43 at 185.

¹²² *Ibid* at 186.

¹²³ *Prosecutor v Tadić*, IT-94-1-T, Judgment (7 May 1997) at para 713 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <www.icty.org>; Note that most of ISIS' acts against cultural property are also war crimes; Rome Statute of the International Criminal Court, UN Doc. No. A/CONF. 183/9, at art 5 (h) (July 17, 1998).

¹²⁴ *Prosecutor v Blaškić*, IT-95-14-T, Judgment (3 March 2000) at para 233 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <www.icty.org>.

¹²⁵ *Prosecutor v Kordić*, IT-95-14/2-T, Judgment (26 February 2001) at para 207 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <www.icty.org>.

Karadžić.¹²⁶ The Trial Chamber held that destruction of property can constitute a crime against humanity, depending “on the nature and the extent of the destruction and if committed with discriminatory intent.”¹²⁷ Acts against cultural property “can be of equal gravity to other crimes”¹²⁸ listed under Article 5 of the ICTY Statute, which include: murder; extermination; enslavement; deportation; imprisonment; torture; rape; and other inhumane acts. Due to the discriminatory intent of ISIS’ acts in Syria and Iraq, such attacks should be tried as crimes against humanity and not simply as war crimes.

b. New resolutions and case law targeting the destruction and theft of cultural property and the security agenda

Although the destruction of cultural property in Iraq and Syria may not be recognized as cultural genocide under the current international law, other legal provisions indicate that ISIS has committed war crimes. The destruction of cultural heritage in these war zones is not accidental, but rather a deliberate act of war. In May 2015, the UN General Assembly unanimously adopted a resolution *Saving the Cultural Heritage of Iraq*, which “affirms that attacks intentionally directed against buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments, may amount to war crimes.”¹²⁹ Furthermore, the resolution “stresses the importance of holding accountable perpetrators” who directly attack cultural property.¹³⁰

The eradication of cultural property has also been framed as a security concern by the UN Security Council Resolution 2249 (2015) which noted that such an act “constitutes a global and unprecedented threat to international peace and security.”¹³¹ Moreover, the UN Security Council adopted Resolution 2199, condemning trade with terrorist groups and calling on “all Member States [to] take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011”¹³² Similarly, the UN Security Resolution 2347, lists preventive steps and calls on Member states to take measures to “prevent and counter the illicit trade and trafficking in cultural property.”¹³³

These resolutions aimed at stopping the looting and destruction of cultural property in conflict zones, help create a basis for a stronger policing and possible prosecution of the perpetrators. Other recent progress in the fight against those who attack cultural property includes the International Criminal Court’s (ICC) prosecution of Ahmad Al Mahdi Al Faqi for war crimes allegedly committed in Timbaktu, Mali in the summer of 2012. He was accused of “intentionally directing attacks against buildings dedicated to religion and

¹²⁶ *Prosecutor v Karadžić*, IT-95-5/18-T, Public redacted Judgment (24 March 2016) at para 207 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <www.icty.org>.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Saving the Cultural Heritage of Iraq*, GA Res 69/281, UNGAOR, 69th Sess, UN Doc A/RES/69/281, (2015) at art 5 [*UNGA Res 69/281*].

¹³⁰ *Ibid* at art 6.

¹³¹ United Nations, Press Release, SC/12132, “Security Council ‘Unequivocally’ condemns ISIL terrorist attacks, unanimously adopting text that determines extremist group poses ‘unprecedented’ threat” (20 November 2015), online: UN Meetings Coverage and Press Releases <www.un.org/press>.

¹³² United Nations, Press Release, SC/11775, “Unanimously adopting resolution 2199 (2015), Security Council Condemns Trade with Al-Qaida Associated Groups, Threatens further targeted sanctions” (12 February 2015), online: UN Meetings Coverage and Press Releases <www.un.org/press>.

¹³³ *Maintenance of International Peace and Security*, S/Res/2347, UNSC, 2017 at para 8.

historical monuments.”¹³⁴ At the time Al Mahdi was a member of an al-Qaeda-affiliated group, Ansar Eddine that took over northern Mali in 2012. Soon thereafter, the so-called Islamic Court of Timbuktu ordered the destruction of various cultural property sites and objects. Al Mahdi was accused of directing the attacks against nine mausoleums and a mosque.¹³⁵ Given that these attacks were part of a religious ideology, the Prosecutor explained that: “this case is not about determining who was right or wrong from a religious point of view. The bottom line is that the attacked monuments had a religious use and had an historic nature. To intentionally direct an attack against such monument is a war crime under the Rome Statute, regardless of the judgment by other people on the religious practices by the inhabitants of Timbuktu.”¹³⁶

On March 24, 2015, the Prosecutor issued a statement following admission of guilt by Al Mahdi. In an unprecedented speedy and efficient manner, the ICC was able to bring to justice the perpetrator of such wanton destruction of cultural property. The Prosecutor noted that Al Mahdi’s case “represents a further step towards the realisation of tangible justice for atrocity crimes in Mali. In addition to the ends of justice [...] this judicial development will contribute to peace, stability and reconciliation in Mali.”¹³⁷ In September 2016, he was convicted “of the war crime of attacking protected objects as a co-perpetrator under Articles 8(2)(e)(iv) and 25(3)(a) of the Statute [and sentenced] to nine years of imprisonment.”¹³⁸

The case against Al Mahdi highlights the gravity of acts against cultural property. In fact this is the first case before the ICC where the acts against cultural property constitute the only charges, thus highlighting the fact that such acts are grave enough to deserve the full attention of the ICC. As discussed earlier, the academia and ICTY’s observation in *Krstić* support the idea that cultural heritage embodies a people’s identity. Ultimately an attack on cultural property when combined with other systemic biological attacks on the population itself, can be construed as intent to annihilate that specific group of people. By successfully prosecuting Al Mahdi’s case, the ICC is showing to other extremists that orchestrated attacks on cultural property do not go unpunished.

The theft and destruction of cultural property has been rightly framed as a security issue by both the international and national institutions. In addition, to the UN Security Council Resolution 2249 (2015), framing the issue as part of the global agenda for peace and security, the US has identified the trafficking of cultural property from war zones as a terrorist offense. Specifically, in August 2015, the FBI warned Americans that trafficking in cultural property from Iraq and Syria can be prosecuted under 18 USC §2339A which prohibits material support to terrorism.¹³⁹ The European Council has also condemned ISIS’ deliberate destruction of cultural property and has adopted the European Union regional

¹³⁴ International Criminal Court, Press Release, ICC-CPI-20150926-PR1154, “Situation in Mali: Ahmad Al Faqi Al Mahdi surrendered to the ICC on charges of war crimes regarding the destruction of historical and religious monuments in Timbuktu” (25 September 2015), online: ICC-CPI <www.icc-cpi.int>.

¹³⁵ *Ibid.*

¹³⁶ Fatou Bensouda, Address (Statement delivered at the Opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi, 1 March 2016), online: ICC-CPI <www.icc-cpi.int>.

¹³⁷ Fatou Bensouda, Address (Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following admission of guilt by the accused in Mali war crime case: “An important step for the victims, and another first for the ICC”, 24 March 2016), online: ICC-CPI <www.icc-cpi.int>.

¹³⁸ Al Mahdi (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016).

¹³⁹ Federal Bureau of Investigation, Press Release, “ISIL and Antiquities Trafficking: FBI Warns Dealers, Collectors About Terrorist Loot” (26 August 2015), online: FBI <www.fbi.gov/news/stories/2015/august/isil-and-antiquities-trafficking>.

strategy for Syria and Iraq and ISIL/Da'esh threat.¹⁴⁰ These efforts show that the international community is working to combat its negative effects.

5. Conclusion

Framing the attacks on cultural property as part of the security agenda may be a relatively new approach, but perhaps efficient and expeditious in the fight against such acts. The fact that ISIS has profited from the sale of antiquities makes it imperative that national and international institutions create a framework for tackling this issue and prosecuting those who buy and sell looted antiquities from war zones. Prosecuting those who facilitate such trade, and implicitly/explicitly help finance terrorism should be part of the short-term security agenda. Whether ISIS has earned a few millions or hundreds of millions from the sale of Iraq and Syria's cultural property, the exact sum may not be of existential importance. Terrorist attacks on civilian population are inexpensive to execute; for example, the November 2015, Paris attacks cost less than \$10,000.¹⁴¹ Any amount of money, no matter how small or large, can be used to harm humanity. Framing the issue of antiquities trafficking as part of the agenda for peace and security may catalyze the more efficient response in the domestic realm, as it was the case of the US.

The protection of cultural property is important for the long-term security agenda because history and culture are important ingredients in nation building. Future efforts for national reconciliation will have to include narratives of a proud and rich past. Such ideas have already been discussed in official international forums. For example, the UN General Assembly resolution *Saving the Cultural Heritage of Iraq* affirmed that protecting "cultural diversity and pluralism as well as freedom of religion and belief [is essential] for achieving peace, stability, reconciliation and social cohesion."¹⁴² The Prosecutor in the Mali case also acknowledged that prosecuting crimes against property might help foster peace, stability, and reconciliation. The US Assistant Secretary of State Ann Richard expressed a similar idea, noting that preservation of cultural heritage in conflict zones is critical to reconstruction, reconciliation, and re-building of civil society because it is "a source of pride and self-definition for their present and future."¹⁴³ Moreover, she highlighted the fact that protecting cultural objects serves to "support a nation's efforts to restore its national identity. Citizens of all ethnicities, faiths, backgrounds, and economic stations can feel the pride and sense of national unity that comes with that."¹⁴⁴

The preservation of national identity is important to any future efforts to bring together the divided people of Iraq and Syria. ISIS is using the tangibles and intangibles of cultural property in their overall strategy for war. It is profiting from the sale of antiquities and it is using it for ideological purposes both to destroy the other and to build itself. Protecting cultural property in these war zones should be part of the platform for peace and security in the region and beyond. Culture is essential to the survival of a society and integral to its renewal.

¹⁴⁰ Council of the European Union, Press Release, ST 7267 2015 INIT "Council conclusions on the EU Regional Strategy for Syria and Iraq as well as the ISIL/Da'esh threat" (16 March 2015), online: European Council of the European Union <<http://www.consilium.europa.eu/en/press/>>.

¹⁴¹ Robert Windrem, "Terror on a Shoestring: Paris Attacks Likely Cost \$10,000 or Less", *NBC News* (18 November 2005), online: NBC News <www.nbcnews.com>.

¹⁴² UNGA Res 69/281, *supra* note 129.

¹⁴³ Anne C Richard, Address (Remarks delivered at the Launch of the International Council of Museums' *Emergency Red List of Syrian Cultural Objects at Risk*, 25 September 2013), online: USDS <www.state.gov/j/prm/releases/remarks>.

¹⁴⁴ *Ibid.*