

Improving the Law of Armed Conflict for the Protection of Cultural Heritage
Patty Gerstenblith
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Center for Ethics and the Rule of Law, University of Pennsylvania Law School
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I. Background

The historical background for the protection of cultural heritage and the evolution of international legal principles to accomplish this protection have been presented elsewhere¹ and is reviewed here only briefly. The first codification of the law of armed conflict, the Lieber Code, was drafted by Francis Lieber for the United States Army at the request of President Abraham Lincoln during the American Civil War. It contained provisions prohibiting the destruction of cultural sites and the pillage of cultural objects.² The first international legal instruments to protect cultural heritage³ were the 1899 and

Distinguished Research Professor and Director of the Center for Art, Museum and Cultural Heritage Law, DePaul University College of Law; Secretary of the U.S. Committee of the Blue Shield. © 2017 Patty Gerstenblith. No part of this paper may be quoted without prior written permission of the author.

¹ This paper is based, in part, on my article: *The Destruction of Cultural Heritage: A Crime against Property or a Crime against People?* 15 JOHN MARSHALL REV. INTELL. PROP. 336, 338-54 (2016), where more background on the development of the law of armed conflict and the protection of cultural heritage is presented. The development of international law to protect cultural property is treated in greater detail in my articles, *From Bamiyan to Baghdad: The Conduct of Warfare and the Preservation of Cultural Heritage at the Beginning of the Twenty-First Century*, 37 GEO. J. INT'L L. 245, 249-72 (2006); *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 CARDOZO PUBLIC LAW, POLICY & ETHICS JOURNAL 677, 677-91 (2009); *Beyond the 1954 Hague Convention*, in CULTURAL AWARENESS IN THE MILITARY: DEVELOPMENTS AND IMPLICATIONS FOR FUTURE HUMANITARIAN COOPERATION 83, 84-87 (Robert Albro and Bill Ivey eds. 2014). This subject has been treated by numerous other authors, including Cherif Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYR. J. INT'L L. & COM. 281 (1983); ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT (2006); KEVIN CHAMBERLAIN, WAR AND CULTURAL HERITAGE: A COMMENTARY ON THE HAGUE CONVENTION 1954 AND ITS TWO PROTOCOLS (2d ed. 2013); JIRÍ TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 3-36 (1996). Margaret Miles presents an excellent overview of the history of the plunder of art works during wartime in antiquity, MARGARET M. MILES, ART AS PLUNDER: THE ANCIENT ORIGINS OF DEBATE ABOUT CULTURAL PROPERTY (2008).

² See Articles 31, 34-36, Instructions for the Government of Armies of the United States in the Field (1863). The full text of the Lieber Code and other relevant international legal instruments may be found at: <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>. For an extensive history of the law of warfare predating the U.S. Civil War and the drafting of the Lieber Code, see JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012).

³ This paper uses the term "cultural heritage" as generally synonymous with the term "cultural property," as defined in Article 1 of the 1954 Hague Convention. However, this paper also recognizes that the term

1907 Hague Conventions on the Laws and Customs of War on Land and their annexed Regulations.⁴ These instruments establish the core obligations to protect cultural heritage during armed conflict: to avoid the targeting of cultural sites, with some limitations, and the pillage of cultural objects. The 1907 Convention also established a mechanism for the marking of protected sites with an emblem, although a particular symbol was not designated. The two early Hague Conventions remained the applicable international law throughout both World Wars and these provisions are now accepted as a part of customary international law.⁵

Following the end of the Second World War and the promulgation of the major international humanitarian law conventions, the Convention on the Prevention and Punishment of the Crime of Genocide and the 1949 Geneva Conventions, the international community turned to producing an instrument that addressed exclusively cultural property protection, a subject that was omitted from the Geneva Conventions.⁶ The result was the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its First Protocol.⁷ There are currently 128 States Parties to

cultural property is restricted to tangible property (both movable and immovable), while cultural heritage is understood to include the intangible, such as languages and traditional and religious practices, which are often tightly linked to the tangible, such as historic structures and cultural landscapes. The subject of intangible cultural heritage is not specifically treated, but the current conflicts in the Middle East and North Africa are also seeing the loss of intangible heritage on a par with the destruction of tangible heritage.

⁴ See Articles 23, 28 and 47 of the 1899 Convention Annex, Annex to Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, July 29, 1899, Regulations respecting the Laws and Customs of War on Land, and Articles 27 and 56 of the 1907 Convention, Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 Oct. 18, 1907.

⁵ See, e.g., Prosecutor v. Strugar, IT-01-42-T, Trial Chamber II Judgment, Jan. 31, 2005, at 106, available at <http://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf> (describing that Article 27 had become part of customary international law and was the basis for Article 3d of the Statute of the International Criminal Tribunal for the former Yugoslavia).

⁶ Cultural property protection appears in the 1977 Additional Protocols I and II to the Geneva Conventions (Articles 53 and 16, respectively).

⁷ 249 U.N.T.S. 240 (May 14, 1954). For more detailed description of the provisions of the Convention and the two protocols, see TOMAN, *supra* note 1; CHAMBERLAIN, *supra* note 1, and O'KEEFE, *supra* note 1. Other international conventions provide protection to cultural property, although this protection is fairly

the main Convention. The United States ratified the Convention in 2009 and the United Kingdom recently adopted the implementing legislation for the Convention and both its Protocols.⁸

The core provisions of the Convention, embodied in Articles 3 and 4, impose obligations of safeguarding and respect. Safeguarding refers to actions that should be taken during peacetime to protect cultural property in case of armed conflict. The obligation of respect refers to actions that a State Party should avoid. The most essential is the obligation to avoid targeting of cultural sites unless excused by imperative military necessity (Article 4 (1) and (2)). Another core obligation is to prevent the theft, vandalism and misappropriation of cultural property (Article 4(3)), a subject to which I shall later return.⁹ The First Protocol, also adopted in 1954, refers exclusively to the removal of cultural objects from occupied territory and the obligation by States Parties to return such objects.

Following the Balkan Wars of the 1990s, the Convention was updated in its Second Protocol of 1999.¹⁰ Some of the key provisions of the Second Protocol were

limited during armed conflict. These include the 1970 UNESCO Convention on the Means of Preventing and Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1972 UNESCO Convention on the World Cultural and Natural Heritage (which, among other provisions, creates the lists of World Heritage Sites and World Heritage Sites in Danger), the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects, and the 2001 UNESCO Convention on Underwater Cultural Heritage.

⁸ United Kingdom Cultural Property (Armed Conflicts) Act 2017 (c. 6). The UK's ratifications and the legislation will come into force three months after the UK's deposit of the instruments of ratification of the Convention and First Protocol and its instrument of accession to the Second Protocol.

⁹ Applicability of Article 4 of the Convention, which prohibits theft, vandalism and misappropriation of cultural objects, is open to interpretation. Nonetheless, it does not apply to trafficking. Other provisions worth noting are Article 5, which refers to conduct during military occupation, Article 7, which refers to the obligation to maintain within the military the necessary expertise to instill respect for cultural property, and Articles 16 and 17, which designate the "blue shield" as the international symbol for protected cultural property. The symbol of the blue shield now designates "Blue Shield International" and its constituent national committees.

¹⁰ For more discussion of the Second Protocol, see JIRÍ TOMAN, CULTURAL PROPERTY IN WAR: IMPROVEMENT IN PROTECTION (2009); NOUT VAN WOUDEBERG & LIESBETH LIJNZAAD (eds), PROTECTING CULTURAL PROPERTY IN ARMED CONFLICT: AN INSIGHT INTO THE 1999 SECOND PROTOCOL TO THE HAGUE

drafted to respond to criticisms of the main Convention outlined in the Boylan Report¹¹ and to difficulties that were recognized during the Balkan conflict of the early 1990s.¹² Two of the most serious problems in applying the 1954 Hague Convention to the Balkan conflict were, first, the question of treatment of conflicts that had not yet risen to the level of armed conflict, which is covered in Article 19 of the main Convention, and, second, lack of clarity as to each State Party's obligation to create a criminal offense under its domestic law.

The Second Protocol defines more narrowly the concept of military necessity by focusing on the question of whether a cultural site had become a military objective, delineates more specifically questions of universal jurisdiction, adopts the concepts of proportionality, distinction and feasibility (Articles 6 and 7), which appear in the Additional Protocols to the 1949 Geneva Conventions, and replaces the Convention's system of special protection (which had rarely been used) with a system of enhanced protection (Articles 10-13).¹³ Article 15 clarifies what constitutes a breach of the Second Protocol and the criminal responsibility of individuals, including "extending criminal responsibility to persons other than those who directly commit the act," for violations of the Second Protocol. Article 16 requires States that are party to the Protocol to establish criminal offenses under their domestic law and to extend jurisdiction to non-nationals for certain offenses. Article 22 tries to make a fine distinction between applying to non-international armed conflicts but not applying to "situations of internal disturbances and

CONVENTION OF 1954 FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (2010).

¹¹ Patrick J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)*, UNESCO Doc. CLT-93/WS/12 101 (1993).

¹² O'Keefe cites, in addition to the failure to protect cultural sites in the Balkans, failures during the Iran-Iraq war of the 1980s and during Iraq's invasion of Kuwait in 1991 as providing impetus for the creation of the Second Protocol. O'KEEFE, *supra* note 1, at 236-39.

¹³ O'KEEFE, *supra* note 1, at 263-64.

tensions.”

The final international instrument of relevance is the Rome Statute, which created the International Criminal Court.¹⁴ It is of limited applicability to the current Middle East conflicts because of lack of ratification. However, in 2016 the ICC prosecuted its first case, based on the destruction of shrines, tombs and a mosque in Timbuktu in Mali, where intentional destruction of cultural property was the sole offense charged.¹⁵

II. Areas of Proposed Law Reform

Just as the Balkan conflict laid bare many of the shortcomings of the main Convention and First Protocol, the current conflicts in the Middle East and North Africa, and particularly that in Syria, have revealed additional shortcomings. While it would be easy to propose a third protocol to the 1954 Hague Convention, this is not a practical solution. Among the major military powers, it took the United Kingdom more than sixty years to ratify these instruments and, while the United States moved slightly more quickly on the main Convention, it has failed to act on either of the Protocols.

Thus, although a new protocol is an option for the international community to pursue, it seems more beneficial to examine, in the meanwhile, provisions and other sources of law, the development of customary international law, and the adoption of legal instruments that do not require ratification but that are nonetheless standard setting. Such approaches could accommodate more expansive or flexible interpretations so that we would not have to await new legal instruments in order to learn and respond to the

¹⁴ Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183/9, 37 I.L.M. 999 (July 17, 1998), Article 8(2)(b)(ix) (applying to international armed conflict) and Article 8(2)(e)(iv)(applying to non-international armed conflict).

¹⁵ Case Information Sheet, Oct. 2016, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, available at <https://www.icc-cpi.int/mali/al-mahdi/documents/almahdieng.pdf>. The defendant pled guilty and was sentenced to nine years.

lessons of the current conflicts. This paper identifies preliminarily three areas that need additional legal attention.

While the Second World War and the Balkan conflicts of the 1990s saw widespread destruction of both movable and immovable cultural property, in many cases carried out intentionally, the current conflict in the Middle East, particularly that in Syria, has demonstrated some new facets to the destruction of cultural heritage. These include the apparent destruction of cultural heritage by the government of its own heritage, the intentional destruction of cultural heritage by the Islamic State of Iraq and the Levant (ISIL) presented as a *positive* for propaganda purposes, and the systematic looting and sale of cultural objects organized by ISIL for the purpose of providing funding for armed conflict and terrorism. Thus, despite the updating of the 1954 Hague Convention with the 1999 Second Protocol, the recent and ongoing conflicts, particularly in the Middle East, have demonstrated that this foundational legal instrument is still inadequate for achieving an effective response to the crises in cultural heritage protection. Some areas of particularly urgent needed reform are discussed.

1. Recognition that the large-scale and organized looting of archaeological sites is a form of targeted cultural heritage destruction

The widespread and systematic looting¹⁶ of cultural repositories and archaeological sites has become a distinctive feature of the conflict in Syria, one that has been extensively documented, primarily through the use of satellite imagery.¹⁷ Taken a

¹⁶ The term “looting” does not have a single legal definition. While these terms carry additional connotations, in this paper, “looting” refers to the illegal and unscientific recovery of archaeological objects from the ground. Theft is the illegal removal of cultural objects from collections, and trafficking refers to the illegal import, export and transfer of cultural objects.

¹⁷ The first group to use satellite imagery to study the looting was the Safeguarding the Heritage of Syria and Iraq (SHOSI), a consortium of the Smithsonian, the University of Pennsylvania Cultural Heritage Center and the American Association for the Advancement of Science. Salam al Quntar, *et al.*, *Responding to a Cultural Heritage Crisis: The Example of the Safeguarding the Heritage of Syria and Iraq Project*,

step further, we know that ISIL has organized the licensing of looting, thefts and trafficking of cultural objects as a means of funding the armed conflict itself.¹⁸ International law should recognize that such looting is an act of targeted hostility and intentional damage and destruction to cultural heritage as currently provided in legal instruments. As such, these acts should fall under Article 4(1) of the 1954 Hague Convention. The parameters of what constitutes intentional destruction to cultural heritage may be limited to circumstances where authorities permit and encourage such looting as official policy and the economic fruits of the looting are used to further armed conflict.

78:3 NEAR EASTERN ARCHAEOLOGY 154 (2015). It released two reports in the fall of 2014, documenting the damage and destruction at the six World Heritage Sites and at six of the twelve Tentative World Heritage Sites in Syria. Susan Wolfenbarger et al., *Ancient History, Modern Destruction: Assessing the Status of Syria's World Heritage Sites Using High-Resolution Satellite Imagery* (2014), available at <http://www.aaas.org/page/ancient-history-modern-destruction-assessing-current-status-syria-s-world-heritage-sites-using>; Susan Wolfenbarger et al., *Ancient History, Modern Destruction: Assessing the Status of Syria's Tentative World Heritage Sites Using High-Resolution Satellite Imagery*, (2014), available at <http://www.aaas.org/page/ancient-history-modern-destruction-assessing-status-syria-s-tentative-world-heritage-sites-7>. The Cultural Heritage Initiative of the American Schools of Oriental Research releases weekly reports on the status of cultural heritage in Syria. Jesse Casana, *Satellite Imagery-Based Analysis of Archaeological Looting in Syria*, 78:3 NEAR EASTERN ARCHAEOLOGY 142 (2015). For an index of these reports, see <http://www.asor-syrianheritage.org/index-weekly-reports/>. Still other groups tracking cultural heritage destruction in Syria include Heritage for Peace, <http://www.heritageforpeace.org/>, and the EAMENA Project (Endangered Archaeology in the Middle East & North Africa), <http://eamena.org/>. For a comprehensive review of responses to the current situation in the Middle East, see Salam Al Quntar and Brian I. Daniels, *Responses to the Destruction of Syrian Cultural Heritage: A Critical Review of Current Efforts*, 5 INT'L J. ISLAMIC ARCHITECTURE 381 (2016).

¹⁸ The only direct evidence of ISIL's revenue stream comes from a raid carried out by U.S. special forces on the compound of Abu Sayyaf, informally described as the chief financial officer of ISIL, in the spring of 2015. Information posted on the Department of State's website indicates the types of objects found in the compound, including coins, figurines and manuscripts. *ISIL Leader's Loot*, U.S. Department of State, Bureau of Educational and Cultural Affairs, <http://eca.state.gov/cultural-heritage-center/iraq-cultural-heritage-initiative/isil-leaders-loot>. Based on information obtained from this raid, U.S. government officials estimate that ISIL earned several million dollars during an approximate year from mid-2014 to mid-2015. Receipts found on Abu Sayyaf's hard drive indicate a tally of \$265,000 had been realized from the sale of antiquities. However, it is not known over how long a period of time these profits were gained or over how large a territory. Remarks of Andrew Keller, Deputy Assistant Secretary Bureau of Economic Affairs, U.S. Department of State, Sept. 29, 2015, available at <http://eca.state.gov/video/conflict-antiquities-panel-1-video/transcript>. More recently, Iraqi authorities discovered caches of Neo-Assyrian pottery and other artifacts in the homes of ISIL commanders in Mosul. Josie Ensor, *'Priceless' ancient artefacts found hidden in Isil commander's house in Mosul*, TELEGRAPH, Jan. 27, 2017, available at <http://www.telegraph.co.uk/news/2017/01/26/priceless-ancient-artifacts-found-hidden-isil-commanders-house/>.

The only explicit provision in the 1954 Hague Convention that prohibits pillage, theft, and vandalism of cultural objects is found in Article 4(3).¹⁹ Nonetheless, as O’Keefe points out, depending on local law, the taking of archaeological objects, that is, property belonging to another, may constitute misappropriation.²⁰ Syrian law vests ownership of movable archaeological objects in the State.²¹ Therefore, the taking of archaeological objects through the looting of sites would constitute theft or misappropriation and would therefore violate Article 4(3).

Article 9 of the Second Protocol specifically prohibits “(b) any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property” and “(c) any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence.” These

¹⁹ This provision is unclear, however, as to *who* should be prevented from engaging in the theft, pillage and vandalism. I have argued elsewhere that it is an obligation only to prevent one’s own troops from engaging in theft, vandalism and misappropriation of cultural property. Gerstenblith, *From Bamiyan to Baghdad*, *supra* note 1, at 309-11. Others, particularly Roger O’Keefe, believe that a military’s obligation extends to preventing others from engaging in theft. O’KEEFE, *supra* note 1, at 133. Regardless of one’s interpretation on this point, the looting of sites and repositories under ISIL authority would violate Article 4(3). Further support for this view of broader responsibility may be found in the earlier Hague Conventions and the 1949 Geneva Conventions, which impose an obligation to maintain the safety of the civilian population. Fourth Geneva Convention, Art. 53; 1907 Hague Convention, Art. 43 and 55. Particularly the last imposes an obligation on an occupying State to “safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.” While it may seem incongruous to consider the “capital” of archaeological sites, sites are not only a source of knowledge in which the whole world might share, they are also a source of sustainable economic benefit to the people of the nation where the sites are located. However, as with the 1954 Hague Convention First and Second Protocols, these apply in the context of occupation. Lostal also notes the lack of criminal provisions in international instruments concerning the wholesale looting of sites. Marina Lostal, *Syria’s World Cultural Heritage and Individual Criminal Responsibility*, 3 INT’L REV. L. 15 (2015), available at <http://dx.doi.org/10.5339/irl.2015.3>.

²⁰ O’KEEFE, *supra* note 1, at 134. On State ownership of archaeological artifacts, see *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), and *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd.*, Court of Appeal (Civil Division), EWCA Civ 1374 (2007).

²¹ Article 4 declares “[a]ll movable and immovable antiquities ... are considered public properties of the State” (with certain exceptions for immovable antiquities). Antiquities Law, Legislative Decree N. 222, October 26th 1963, as amended by Legislative Decree N. 295 (2/12/1969) and Law N. 1 (28/2/1999). Article 7 states: “It is prohibited to destroy, transform, and damage, both movable and immovable antiquities by writing on them, engraving them, or changing their features, or removing parts of them.” Antiquities are defined in Article 1 to include any remains that are more than 200 hundred years old. The General Directorate of Antiquities and Museums is charged in Article 2 with protecting antiquities. Article 30 prohibits the sale of State-owned antiquities. Article 42 prohibits the excavation of archaeological sites, even on privately owned land, without a properly issued license. Articles 56-68 set out penalties for violations of different provisions.

provisions are of little value here, given that Syria signed but has not ratified the Second Protocol, unless these provisions are considered to be customary international law or merely an explanation of the meaning of Article 4(3) of the main Convention.

We are witnessing here an unprecedented level of looting of archaeological sites carried out in an organized fashion and on an industrial scale and, in all likelihood, thefts from museums and other collections. The purpose of these depredations is not only for typical subsistence economic gain but within a very specific context of economic gain for the purpose of funding terrorism and armed conflict being perpetrated by organized entities in the case of ISIL and perhaps other rebel groups and the Assad regime as well. As such, when carried out on such a large scale and for the purpose of promoting armed conflict, the looting of archaeological sites should be characterized not only as a form of theft and misappropriation under Article 4(3) but also as an act of hostility directed against cultural property under Article 4(1).²² Thus, this should be actionable under the 1954 Hague Convention and other legal instruments as a form of targeted and intentional destruction of cultural sites, including provisions in Article 15(e) of the Second Protocol and Article 8(2)(b)(ix) and Article 8(2)(e)(iv) of the Rome Statute.

Part of the difficulty of envisioning the looting of archaeological sites as a war crime is the artificial dichotomy imposed on our thinking about cultural heritage destruction. In the past, while theft and pillage were carried out as a part of armed conflict and so was prohibited by the various legal instruments that form the law of armed conflict, looting of archaeological sites is considered a product of market demand. This dichotomy is an artificial construct that resulted from the separation of cultural

²² It should be noted that Article 4(1) is subject to the military necessity waiver of Article 4(2), whereas Article 4(3) is not.

heritage issues into two nearly distinct treaty regimes for protecting cultural heritage—one for regulating the law of armed conflict (or international humanitarian law) and the other for regulating trafficking (that is, the illegal transnational movement and smuggling of cultural objects). The latter is primarily dealt with through the 1970 UNESCO Convention²³ and the 1995 Unidroit Convention. Neither of these conventions, however, addresses the act of looting as a matter of international law, apparently leaving this issue to national domestic law. While the connection of pillage and theft to armed conflict was only too apparent and well documented during World War II, the international community lost sight of this close nexus in the crafting of the post-war international legal instruments. However, the current conflict in Syria reminds us of this nexus, as well as the necessity of uniting these two branches of cultural heritage law.

Looting can also be analogized, when accompanied with other discriminatory and genocidal actions, as an act of genocide when the proceeds from such thefts and looting are used to perpetuate the genocide itself,²⁴ as we see occurring now with minority religious and ethnic groups in the Middle East. The discriminatory destruction of religious structures and shrines belonging to these minority groups should be understood to indicate genocidal intent, as was concluded in some of the ICTY prosecutions for the Balkan conflict.²⁵ In particular, as Nersessian commented, the Trial Chamber noted “the

²³ Article 11 of the 1970 UNESCO Convention prohibits export and transfer of ownership of cultural objects “under compulsion arising ... from the occupation of a country by a foreign power.”

²⁴ One may look for parallels to the decisions of U.S. courts in *Simon v. Republic of Hungary*, 812 F.3d 127, 142-43 (D.C. Cir. 2016); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 675 (7th Cir. 2012); *de Csepel v. Republic of Hung.*, 2016 U.S. Dist. LEXIS 32111, Civ. 10-1261 (ESH) (D.D.C. 2016).

²⁵ Although not considered a war crime, a crime against humanity, or an act of genocide, cultural genocide was considered by the ICTY to “demonstrate a specific intent to destroy a protected group.” David Nersessian, *The Contour of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT’L L. J. 231, 266-67 (2002) (citing *Prosecutor v. Krstić*, Case No. ICTY-98-33-T, ¶ 480 (ICTY Trial Chamber Aug. 2, 2001); *Prosecutor v. Karadžić and Mladić*, Case Nos. ICTY-95-5-R61 and ICTY-95-18-R61, ¶¶ 94-95 (ICTY Trial Chamber, July 11, 1996).

destruction of Muslim religious institutions and libraries as examples evidencing genocidal intent toward Muslims.”²⁶ When the thefts are conducted in tandem with the discriminatory destruction of religious sites, perhaps these thefts may also be evidence of genocidal intent.

2. Greater recognition of the role of non-state actors:

Article 19 of the 1954 Hague Convention and Article 22(1) of the Second Protocol apply to armed conflicts not of an international character²⁷ that occur within the territory of a State Party. The conflict in Syria began with riots and disturbances, a situation that would not implicate international law. However, by the summer of 2012, the International Committee for the Red Cross had recognized that the situation had evolved into one of armed conflict,²⁸ thus triggering the applicability of some aspects of international law.

According to Article 19, “each party to the conflict shall be bound to apply, as a minimum, the provisions . . . which relate to respect for cultural property.” At this point, the conflict would likely be considered international in scope, but, for purposes of the applicability of Article 4, which embodies the obligation of respect, the characterization as either international or non-international would not affect these obligations. These

²⁶ *Id.*

²⁷ Armed conflicts not of an international character are defined in Article 1 of Protocol II to the 1949 Geneva Conventions as conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations” See also Laurie R. Blank and Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law and the Pragmatics of Conflict Recognition*, 46 VANDERBILT J. TRANSNAT’L L. 693, 741-42 (2013).

²⁸ Stephanie Nebehay, Exclusive: Red Cross Ruling Raises Questions of Syrian War Crimes, Reuters (July 15, 2012), available at: <http://www.reuters.com/article/2012/07/14/us-syria-crisis-icrc-idUSBRE86D09H20120714>.

obligations also apply equally to States and to non-State actors, such as ISIL.²⁹

However, there are some aspects of the 1954 Hague Convention and, more importantly, its protocols that seem limited in application to only States. For example, the First Protocol and Article 9 of the Second Protocol refer only to illegal removal of cultural objects from the territory of a State Party that is occupied by another State Party. These provisions therefore do not apply to areas occupied by non-state actors, as illustrated in the implementing legislation recently adopted by the United Kingdom as part of its ratification of the three instruments.³⁰ The definition of occupied territory is based on the 1899 and 1907 Hague Conventions and is considered to be a part of customary international law; it was therefore thought necessary to use this definition in order to make the UK legislation compliant with the rights of purchasers of such cultural objects.

With the taking and holding of territory in Syria and Iraq by ISIL or by the Taliban in Afghanistan, examples of non-state actors, these limitations demonstrate a serious gap in the legal protection for cultural sites and repositories and pose an

²⁹ Kevin Chamberlain points out that the use of the small letter “p” indicates that the provisions apply to all parties to the conflict, not only to those that are State Parties to the international instrument. CHAMBERLAIN, *supra* note 1, at 51.

³⁰ The UK legislation defines property as “[u]nlawfully exported cultural property” if –

- (a) it has been unlawfully exported from a territory which at the time was occupied by a state that was a party to the First or Second Protocol, or
- (b) it has been unlawfully exported from a territory which at the time—
 - (i) was territory of a state that was a party to the First or Second Protocol, and
 - (ii) was occupied by another state.

Cultural Property (Armed Conflicts) Bill, Article 16(1), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524872/FINAL_BILL.pdf. This means that either the occupying power must be a State (that is party to the relevant legal instruments) or that the occupied territory is that of a State (that is party to the relevant legal instruments) *and* is occupied by a State. Therefore, although Syria is a party to the First Protocol, illegal export of cultural property from its territory that is occupied by a non-state actor (i.e., ISIL) does not violate the First Protocol. Article 16(5) of the UK legislation cites Article 42 of the Regulations respecting the Laws and Customs of War on Land annexed to the Convention respecting the Laws and Customs of War on Land (Hague IV), 1907, for the definition of occupied territory. I want to thank Roger O’Keefe and Neil Brodie for discussing these points with me.

impediment to preventing the international trafficking of such stolen and looted artifacts. Although the provisions prohibiting looting and theft found in Article 4 of the main Convention bind non-state actors in non-international conflict, this taint of illegality does not follow the looted or stolen object into the international art market. This demonstrates a dichotomy between how conflict outside of Europe (and the West) is treated and the legal treatment accorded the effects of that conflict in the West. This dichotomy reflects an outdated understanding of how the art market works and, more importantly, reflects a time in international law when the European countries thought it necessary to deny the benefits of international law to regions that were colonized and therefore not considered to be “States”.³¹ International law has clearly evolved to bring non-international armed conflict and non-state actors within its purview. This expansion of international law to include non-international armed conflicts seems to necessitate a re-examination of the question of occupation of territory by non-state actors as well. The international law definition of occupied territory, or at least the applicability of the two Hague Convention Protocols, needs to evolve to meet current realities.

3. Development of a protocol for the reconstruction of cultural sites in post-conflict situations

The world community has watched in horror as major cultural sites were intentionally destroyed by ISIL and as ISIL posted youtube videos of their actions as a

³¹ Throughout the nineteenth and early twentieth centuries, the rules regarding disposition of cultural objects differed depending on whether two European powers or a European and a non-European power were involved. The evolving rules of warfare applied only to conflict among “civilized” nations and not to conflicts between the European nations and “uncivilized states and tribes.” ANA FILIPA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS 65 (2008). Non-state actors were often excluded from international humanitarian law and were viewed as common criminals under the domestic law of the States within which they operated. As Bassiouni describes, “non-state actors fight ‘in a twilight zone between lawful combatancy and common criminality.’” M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 725 (2008). However, non-state actors have gradually been brought within the limits of some aspects of international law and their status seems to continually evolve.

form of propaganda, both to attract fighters and to demonstrate the weakness of the West to prevent these actions. Western media paid particular attention to the Greco-Roman remains of Palmyra in Syria and the Neo-Assyrian sites of Nineveh, Nimrud and others in northern Iraq. These are all well-known sites, with Palmyra denominated a World Heritage Site. Similarly, the historic center of Aleppo, including its Umayyad mosque complex, was destroyed over a period of years as a casualty of the conflict.

The site of Palmyra was taken by ISIL in May 2015 and was recaptured by the forces of the Syrian Arab Republic, with the help of Russia, in March 2016. Between December 2016 and early March 2017, the ancient ruins were again under ISIL control. At Palmyra and elsewhere, foreign governments and non-governmental organizations have amassed to descend on these sites to begin reconstruction efforts as soon as the situation allows. Between the fall of 2016 and March 2017, Iraqi and U.S. forces gradually retook portions of Mosul and the Neo-Assyrian sites nearby.

While in both Syria and Iraq central governments exist to oversee and approve reconstruction projects, there may be disconnects between the central government and regional or local entities and populations.³² While the consent of proper government authorities is a necessary prerequisite to the carrying out of any reconstruction projects, I would like to suggest that this is not sufficient. We can anticipate that foreign governments, foundations and philanthropists on a global scale will contribute financially to these reconstruction projects.³³ Technical experts and their organizations will also be

³² This may be particularly the case in situations such as to that in Syria or Mali, where a central government has been challenged on a regional or local basis.

³³ The issue of the display outside of Syria of reconstructions of destroyed ruins, such as a replica of the arch that was displayed in London and New York, is not discussed here but has been controversial. See Patty Gerstenblith, *Technology and Cultural Heritage Preservation*, in *DISPLAY AT YOUR OWN RISK: AN EXPERIMENTAL EXHIBITION OF DIGITAL CULTURAL HERITAGE* (Andrea Wallace and Ronan Deazley eds 2016), available at <http://displayatyourownrisk.org/gerstenblith/>.

consulted, as well as intergovernmental organizations, such as UNESCO. If the rush to reconstruct Palmyra when it was initially recovered from ISIL control is any guide, we can anticipate the same occurring once the armed conflict is resolved. This process is beginning as Iraqi forces recover areas of the Mosul region from ISIL control. Often missing in these calculations is the voice of the local community, which lives among, benefits from, and has primary responsibility for caring for the local cultural heritage.

The heritage conservation community needs to develop a protocol or charter³⁴ for carrying out cultural heritage reconstruction work in post-conflict situations.³⁵ If done properly and inclusively, such reconstruction may become a means of reconciliation among formerly warring or conflicting factions. If done improperly, cultural heritage is likely to become a means of perpetuating conflict and division.

No such protocol currently exists, but one may draw on existing “soft law” and is needed to balance the interests of the world community, technical experts, governmental authorities, and local communities. Perhaps a consortium of non-governmental organizations should take this up with consultation of the various stakeholders. Such a protocol or charter would be one method of achieving greater involvement by local communities in the preservation of their heritage. An important element to be considered

³⁴ Examples of standard-setting charters include: the Venice Charter (establishing principles for architectural conservation and restoration), see Jukka Jokilehto, *The context of the Venice Charter (1964)*, 2 CONSERVATION AND MANAGEMENT OF ARCHAEOLOGICAL SITES 229 (1998), available at <http://orcp.hustoj.com/wp-content/uploads/2016/01/1964-The-context-of-the-Venice-Charter-1964.pdf>; the Nara Document on Authenticity (establishing principles for managing the intangible aspects of cultural heritage). For a comprehensive list of the charters and other documents produced by ICOMOS, see ICOMOS, International Charters for Conservation and Restoration, available at <http://www.icomos.org/charters/charters.pdf>. The Annex to the 2001 UNESO Convention on the Protection of the Underwater Cultural Heritage establishes best practices for the conduct of underwater excavation and exploration and is frequently followed by cultural heritage professionals, regardless of whether a particular State has ratified the Convention.

³⁵ For consideration of the role of cultural heritage in post-conflict situations, see Christina Luke, *Cultural sovereignty in the Balkans and Turkey: The politics of preservation and rehabilitation*, 13 J. SOCIAL ARCHAEOLOGY 350 (2013).

is the question of how much the recent destruction and other forms of trauma imposed on the local community should also be memorialized as part of the reconciliation process; consideration of the interests of the local community is crucial to achieving this goal.

It seems unlikely that a new international convention would receive widespread ratification at this time. Nonetheless, the international community should consider ways in which these reforms could be achieved without formation of a new convention. These avenues include broader interpretation of existing legal instruments, the promulgation of legal instruments that do not require ratification but are nonetheless standard setting, such as UNESCO Recommendations and Declarations, and the formulation of charters or protocols by non-governmental organizations that embody best practices for reconstruction of cultural heritage.