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Attacks Against Cultural Heritage as a Crime Against Humanity

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ATTACKS AGAINST CULTURAL HERITAGE AS A CRIME AGAINST HUMANITY

*Yaron Gottlieb*¹

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ABSTRACT

The Draft Convention on Crimes against Humanity is a welcome initiative. To ensure that the Convention will reflect developments under international law since the 1990's, it is suggested to reconsider the Draft Convention's methodology of relying exclusively on the definition of crimes against humanity under the Rome Statute of the International Criminal Court. It is therefore proposed to view the Rome Statute's list of crimes as a benchmark for negotiations rather than as the ultimate text defining what constitutes crimes against humanity.

In that context, the article advocates for introducing in the Draft Convention a new crime against humanity addressing widespread or systematic attacks against cultural heritage. Such attacks have unfortunately become a rampant phenomenon in both times of war and peace. In recent decades, a significant evolution in this field has taken place, including in the discourse equating heritage with humanity and heritage destruction with attacks against humankind; the jurisprudence of international tribunals; and the role exercised by bodies such as the Security Council in support of heritage protection. Notwithstanding those developments, the legal framework governing atrocity crimes has not evolved in a commensurate manner. Consequently, certain legal gaps persist and the expressive value of counter-messaging large-scale campaigns of destruction has not been fully explored.

The article begins with a brief overview of the contemporary international criminal law regime governing attacks against cultural heritage. It continues by identifying the main legal gaps as well as additional considerations that support the introduction of a distinct crime against humanity in the Draft Convention's list of crime. The article then defines the proposed new crime and analyzes the crime's elements including a definition of cultural heritage for the purpose of the Draft Convention.

I. INTRODUCTION

In 2001, the Taliban stunned the international community by destroying the Bamiyan Buddhas,² two monumental statues carved into the cliffs of the Bamiyan valley in Afghanistan around the 5th century.³

2. Ahmed Rashid, *After 1,700 Years, Buddhas Fall to Taliban Dynamite*, TELEGRAPH (Mar. 12, 2001), <https://www.telegraph.co.uk/news/worldnews/asia/afghanistan/1326063/After-1700-years-Buddhas-fall-to-Taliban-dynamite.html> [<https://perma.cc/VD6D-3LWJ>].

3. *Id.*

This abominable act was part of a widespread Taliban-led campaign of destruction of important cultural relics, a phenomenon often referred to as iconoclasm.⁴

Statements, declarations, and resolutions adopted following the destruction highlighted the impact of such acts on humankind and the international community as a whole.⁵ Similar reactions followed the attacks carried out by terrorist organizations such as ISIS and Ansar Dine.⁶ Thus, for example, in the context of the Al Mahdi case before the International Criminal Court (ICC), which addressed destruction by Ansar Dine of cultural heritage in Timbuktu, Mali, the ICC Prosecutor noted that “[T]he destruction of religious and historical World Heritage sites in Timbuktu appears to have shocked the conscience of humanity,”⁷ and the Court stated that the destruction of international cultural heritage “is an irreplaceable loss that negates humanity.”⁸

Notwithstanding the evolution in the discourse equating heritage with humanity and heritage destruction with attacks against humankind, the legal framework governing atrocity crimes has not evolved in a commensurate manner. Under international criminal law (ICL), destruction of cultural heritage has remained within the confines of traditional categories, notably as a war crime, as a form of the crime

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4. Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT’L L. 183, 192 (2003) (defining iconoclasm as the “destruction of icons due to the belief that the images are imbued with an unacceptable symbolic significance”).
 5. Cf. UNESCO, Resolution on the Protection of the Cultural Heritage of Afghanistan, Doc. No. WHC-01/CONF.208/23, at 12 (Oct. 30–31, 2001) (adopted by the General Assembly of State Parties to the World Heritage Convention at its thirteenth session) (condemning the willful destruction of the cultural heritage by the Taliban as “crime[s] against the common heritage of humanity”). See also Wangkeo, *supra* note 4; Roger O’Keefe, *World Cultural Heritage: Obligations to the International Community as a Whole?*, 53 Int’l Comp. L. Q. 189, 200, n. 76 (noting that the United States Secretary of State, Colin Powell, decryed the demolition of the Buddhas as “a crime against humankind”).
 6. See, e.g., Anissa Barrak, *Ahmad Al Faqi Al Mahdi: “I Plead Guilty”*, UNESCO COURIER, at 18 (Oct.–Dec. 2017).
 7. Int’l Crim. Ct., Office of the Prosecutor, *Situation in Mali, Article 53(1) Report*, ¶ 157 (Jan. 16, 2013), https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf [<https://perma.cc/8BHC-ZKPJ>].
 8. Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-236, Reparations Order, ¶ 22 (Aug. 17, 2017), available at https://www.icc-cpi.int/CourtRecords/CR2017_05117.PDF [<https://perma.cc/KFU7-AGTA>].

against humanity of persecution, or an indicator of a genocidal act.⁹ Consequently, certain legal gaps persist, for instance where acts of destruction committed during peacetime do not target an identifiable group and hence do not amount to the crime of persecution.

Moreover, the current legal regime is based on a conservative paradigm viewing crimes against cultural heritage as crimes against property,¹⁰ whereas a more nuanced approach would place such crimes at the intersection between crimes against property and crimes against people. Existing law also fails to reflect recent developments such as the interventions of the United Nations Security Council (UNSC) in support of heritage protection, and it ignores the expressive value of counter-messaging the iconoclasm phenomenon.¹¹

Criminalization has therefore lagged behind the rhetoric and has failed to recognize attacks against cultural heritage as an independent crime with severe impact on the international community, indeed as a crime against humanity.

The negotiations of the Draft Convention on Crimes against Humanity¹² serve as an opportunity to close the gap. To that end, this article proposes to reconsider the Draft Convention's methodology of relying exclusively on the definition of crimes against humanity under the Rome Statute of the ICC,¹³ and to view the Rome Statute's list of crimes as only a benchmark for negotiations. It further suggests introducing a new crime against humanity dedicated to attacks against cultural heritage.

The article begins with a brief overview of the contemporary ICL regime governing attacks against cultural heritage. It continues by identifying the main legal gaps and additional considerations that support the recognition of such attacks as a stand-alone crime against humanity. The article then defines the proposed new crime and analyzes the crime's elements including a definition of cultural heritage for the purpose of the Draft Convention.

II. The contemporary international criminal law regime governing attacks against cultural heritage

9. See Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, 15 J. MARSHALL R. INTELL. PROP. L. 336, 346 (2016).

10. *Id.* at 381.

11. See *UN Security Council Adopts Historic Resolution for the Protection of Heritage*, UNESCO (Mar. 24, 2017), <https://en.unesco.org/news/security-council-adopts-historic-resolution-protection-heritage> [<https://perma.cc/8QQR-ZCSP>].

12. Int'l Law Comm'n, Rep. on the Work of its Seventy-Fourth Session, U.N. Doc. A/74/10, at 11–140 (2019) [hereinafter Draft Convention].

13. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

Under ICL, accountability for crimes affecting cultural heritage¹⁴ is chiefly provided for under the respective rubrics of war crimes and crimes against humanity.¹⁵ Whereas the former category provides ‘direct protection’ by explicitly criminalizing conducts targeting cultural heritage,¹⁶ the latter provides only ‘indirect protection’¹⁷ as currently no crime against humanity mentions cultural heritage. Under the third rubric of ICL, namely that of genocide, “cultural genocide” is not, by itself, recognized as falling within the crime’s definition under the Genocide Convention¹⁸ or the statutes of international tribunals.¹⁹

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14. Different conventions and other legal instruments use the terms “cultural property,” “cultural heritage,” or, in some cases, both. It appears that the term “cultural property” is more legalistic, and is usually associated with tangible property, whereas “cultural heritage” is more encompassing and includes also intangible heritage. It was noted that the word “heritage” “has come to be preferred because it implies that the object should be cherished and preserved.” See Wangkeo, *supra* note 4, at 188; see also Lyndel V. Prott & Patrick J. O’Keefe, ‘*Cultural Heritage*’ or ‘*Cultural Property*’?, 1 INT’L J. OF CULTURAL PROPERTY 307, 312 (1992) (concluding that it is time for law and lawyers to recognize that the term “cultural heritage” has rightfully superseded that of “cultural property”). The approach that opts for the use of the term “cultural heritage” is also reflected in the more recent conventions adopted under the auspices of UNESCO, namely those governing underwater cultural heritage (2001), intangible cultural heritage (2003), and the diversity of cultural expressions (2005). For the purpose of this article, the preferred term would be “cultural heritage,” though the term “cultural property” will be occasionally used, in particular where conventions which use this term are referenced.
 15. Roger O’Keefe, *Protection of Cultural Property Under International Criminal Law*, 11 MELBOURNE J. INT’L L. 339, 341 (2010) [hereinafter O’Keefe, *Protection of Cultural Property*].
 16. See Hiram Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1, 10–28 (2001) (discussing the differences between “direct” and “indirect” protection).
 17. See *id.*
 18. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, U.N. G.A. Res. 260, U.N. GAOR, 3d Sess., 179th plen. mtg. at 174, U.N. Doc. A/810 (1948).
 19. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) (pointing out that “where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group”); O’Keefe, *Protection of Cultural Property*, *supra* note 15, at 388–89..

A. *Attacks Against Cultural Heritage as War Crimes*

Attacks against cultural heritage in the context of an armed conflict (be it of an international or non-international character) are considered as a serious violation of international humanitarian law (IHL) and fall within the jurisdiction of some international tribunals.²⁰ The seriousness of the crime has been recognized by the ICTY²¹ and more recently by the ICC in the Al-Mahdi case.²²

Notably, while cultural heritage may enjoy the general protection provided to civilian property under IHL, it has been recognized that during an armed conflict, cultural heritage is also granted an additional layer of protection.²³ Within the category of protected cultural heritage, certain designated heritage enjoy ‘special protection’ or ‘enhanced protection’ during an armed conflict,²⁴ though it appears that even the

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20. See, e.g., Rome Statute, *supra* note 13, art. 8, ¶ 2; *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, art. 3, Int’l Crim. Trib. for the Former Yugoslavia (Sept. 2009), available at https://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf [<https://perma.cc/75HM-CPQF>] [hereinafter ICTY Statute].
21. See Abtahi, *supra* note 16; see Theodor Meron, *The Protection of the Cultural Property in the Event of an Armed Conflict Within the Case-Law of the International Criminal Tribunal for the Former Yugoslavia*, Remarks at the UNESCO Symposium On The 50th Anniversary Of The 1954 Convention For The Protection Of Cultural Property In The Event Of Armed Conflict (May 14, 2004); Serge Brammertz et al., *Attacks Against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY*, 14 J. INT’L CRIM. JUST. 1143 (2016).
22. See Press Release, International Criminal Court, Office of the Prosecutor, ICC Office of the Prosecutor and UNESCO Sign Letter of Intent to Strengthen Cooperation on the Protection of Cultural Heritage (Nov. 6, 2017), available at https://www.icc-cpi.int/Pages/item.aspx?name=171106_OTP_Unesco [<https://perma.cc/34FH-23ZG>].
23. Cf. Prosecutor v. Kordic, Case No. IT-95-14/2-A, Judgment, ¶ 89–90 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); Meron, *supra* note 21, at 5 (describing the choice of the ICTY to address attacks against cultural property through Art. 3(d) of the ICTY Statute rather than Art. 2(d), which concerns extensive destruction and appropriation of general civilian property, and noting that this preference of the Tribunal “may, therefore, be viewed as a welcome development from the standpoint of safeguarding cultural property, because it affords that property a higher degree of protection”); Brammertz et al., *supra* note 21, at 1152–53 (explaining that “Article 3(d) ICTY Statute is a more specific crime addressing attacks against cultural property as a subset of civilian objects, reflecting the recognition that cultural property has significance additional to other civilian objects”).
24. See The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Convention]; The Second Protocol to the Hague Convention for the

more elevated level of protection does not grant absolute immunity from an attack.²⁵

B. Attacks Against Cultural Property as a Crime Against Humanity of Persecution

The Nuremberg Charter and the ensuing trials, where German Nazis were convicted for plunder, are considered the first true international enforcement of protection of cultural property.²⁶ The International Military Tribunal (IMT) at Nuremberg held that the unlawful destruction and plunder of cultural property amounted not only to war crimes but also to crimes against humanity.²⁷

protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999 [hereinafter 1999 Protocol].

25. Under existing IHL, all types of cultural heritage – including sites of the greatest importance to humanity, would be subject to the military necessity doctrine and hence would not enjoy absolute immunity in the context of an armed conflict. Both the “special protection” regime of the 1954 Convention and the “enhanced protection” regime of its 1999 Protocol enable parties to an armed conflict to invoke the military necessity exception, though subject to stricter conditions. *See* 1954 Convention, *supra* note 24, art. 11; 1999 Protocol, *supra* note 24, art. 13. With regard to the negotiations over the latter, some Parties to the Convention expressed the view that a small number of cultural properties, due to their exceptional value, should remain untouched in any circumstances; this view, however, was not favored by the majority. *See* ROGER O’KEEFE, *THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT* 271 (2006). Under the 1977 Additional Protocols to the 1949 Geneva Conventions, the provisions relevant to the protection of cultural heritage do not make a reference to any waiver of immunity; however, these provisions are stated to be without prejudice to the 1954 Convention. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 53, June 8, 1977, 1125 UNTS 3 (entered into force Dec. 7, 1978); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 16, June 8, 1977, 1125 UNTS 609 (entered into force Dec. 7, 1978). As noted by the ICTY Trial Chamber, “this suggests that in these respects, the Additional Protocols may not have affected the operation of the waiver provision of the Hague Convention of 1954 in cases where military necessity imperatively requires waiver.” *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Chamber Judgment, ¶ 309 (Jan. 31, 2005); *see also* Brammertz et al., *supra* note 21, at 1156–57.
26. *See* M. CHERIF BASSIOUNI & JAMES A. R. NAFZIGER, *PROTECTION OF CULTURAL PROPERTY, INTERNATIONAL CRIMINAL LAW I* 949, 954 (M. Cherif Bassiouni ed., 2nd ed. 1999).
27. *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. OF INT’L. L. 172, 249 (1947); *see also* O’Keefe, *Protection of Cultural Property*, *supra* note 15, at 380.

The ICTY, in a series of decisions, has concluded that destruction of or extensive damage to cultural heritage, when perpetrated with discriminatory intent, can, as a matter of customary international law, amount to the crime against humanity of persecution under Article 5(h) of the ICTY Statute.²⁸

Though the ICC has not yet rendered a similar decision, it is worth noting that the crime of persecution under the Rome Statute and the Draft Convention is broader than that of the ICTY Statute.²⁹ It also covers persecution on cultural grounds as well as other grounds that are universally recognized as impermissible under international law.³⁰ In principle, it appears that acts against cultural heritage akin to those which served as a basis for prosecution before the ICTY would likely be considered as persecution also under the Rome Statute and similarly under the Draft Convention.³¹

III. THE MAIN LEGAL GAPS

A. *Destruction of Cultural Heritage During Peacetime*

Notwithstanding the significant developments in relation to the protection of cultural heritage during peacetime,³² aspects of enforcement and criminal sanctions have been relatively less developed in comparison to the legal regime governing wartime illegal activities. Whereas IHL conventions and statutes of international tribunals explicitly provide for individual criminal responsibility for attacks against cultural heritage during an armed conflict,³³ there is currently no international treaty that criminalizes similar acts committed outside the scope of an armed conflict. Only two of the main conventions that apply in peacetime, namely the 1970 Convention and the 2001 Underwater Cultural Heritage Convention, make a general reference to

28. See generally, O'Keefe, *Protection of Cultural Property*, *supra* note 15; Brammertz et al., *supra* note 21, at 1160–70.

29. See generally, O'Keefe, *Protection of Cultural Property*, *supra* note 15; Brammertz et al., *supra* note 21; see also Draft Convention, *supra* note 12, at 12.

30. Rome Statute, *supra* note 13, art. 7(1)(h); Draft Convention, *supra* note 12, at 12.

31. But note some differences between the ICTY Statute, on the one hand, and the Rome Statute and the Draft Convention, on the other, notably the required link under the Rome Statute between the crime of persecution and other crimes within the jurisdiction of the ICC, mentioned in the following section. See THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 375–76 (Cassese et al. eds., 2002).

32. See discussion *infra* Section IV(E)(1).

33. 1999 Protocol, *supra* note 24, art. 15; Rome Statute, *supra* note 13, art. 8(2)(b)(ix); ICTY Statute, *supra* note 20, art. 3(d).

the imposition of sanctions for violations of the conventions.³⁴ Currently, no convention details the offences to be incorporated under national law in a manner similar to the one provided for under the 1999 Protocol.³⁵ The 2017 Council of Europe Convention on Offences relating to Cultural Property aimed at addressing this gap by listing offences to be incorporated in national legislation.³⁶ However, as of today, the Convention is yet to enter into force.³⁷

Under customary international law, crimes against humanity are banned whether they are committed in times of war or peace.³⁸ Considering that damage to cultural heritage can be deliberately inflicted without constituting a military attack, viewing destruction of cultural heritage as a crime against humanity would significantly contribute to bridging this gap by providing ‘direct protection’³⁹ to cultural heritage in a manner similar to the protection provided under IHL.⁴⁰ It will ensure a consistent criminalization approach,⁴¹ prevent

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34. See Convention on the Means Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 8, 10, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 Convention] (requiring State Parties to impose penalties or administrative sanctions on persons responsible for certain violations of the Convention); Convention of the Protection of the Underwater Cultural Heritage art 17, Nov. 2, 2001, U.N.T.S. 2562.
35. 1999 Protocol, *supra* note 24, art. 15.
36. Council of Europe Convention on Offences relating to Cultural Property art. 3–16, May, 19, 2017, 19 E.T.S. 221 [hereinafter Nicosia Convention].
37. *Id.*
38. THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 31, at 356; Draft Convention, *supra* note 12, at 13.
39. See Int’l Law Comm’n, Rep. on Crimes Against Humanity Sixty-Seventh Session, U.N. Doc. A/CN.4/680, at 6 (Feb. 17, 2015) (“While some treaties address offences, such as State-sponsored torture or enforced disappearance of persons, which under certain conditions might also constitute crimes against humanity, those treaties do not address crimes against humanity as such.”).
40. See generally 1999 Protocol, *supra* note 24.
41. See Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?* 15 J. MARSHALL REV. INTELL. PROP. L. 336, 390 (2016) (“The failure in the past to recognize this obligation to protect cultural heritage was largely the result of the bifurcation of the treatment of cultural heritage between the law of armed conflict treaties and those that deal with peacetime threats. This false dichotomy needs to be superseded.”). See also Michael A. Newton & Michael P. Scharf, *Terrorism and Crimes Against Humanity*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 262–78 (Leila Nadya Sadat, ed., 2011) (arguing that expanding the corpus of crimes against

impunity for acts such as the destruction of the Bamiyan Buddhas, and align ICL with the customary norm concerning the protection of cultural heritage.⁴²

B. Legal Challenges in Invoking the Crime of Persecution

Despite the ICTY's wealth of jurisprudence addressing attacks against cultural heritage as a form of persecution, invoking this crime as a basis for prosecution requires surmounting legal hurdles. First, under both the Draft Convention and the Rome Statute, the acts of persecution must have been committed in connection to another crime against humanity, genocide or war crime.⁴³ Thus, there is no jurisdiction to prosecute persecution *per se*.⁴⁴ It has been argued that, in practical terms, the requirement should not prove unduly restrictive, since a review of historical acts of persecution shows that this crime is inevitably accompanied by such inhumane acts.⁴⁵ However, while that argument may be accurate in cases of crimes such as murder or torture, it appears to be less persuasive in reference to destruction of cultural heritage.⁴⁶ A systematic and deliberate destruction of sites of unique cultural value, conducted by a government outside the scope of an armed conflict, may not necessarily be in conjunction with any other serious international crime, thus these acts may go unpunished.

In addition, the ICTY determined that the *mens rea* element of the crime of persecution is higher than the one required for ordinary crimes against humanity, although lower than the one required for genocide.⁴⁷ If this approach is adopted by the ICC or by a court applying the Draft Convention (once adopted and entered into force), the already elevated threshold for prosecuting crimes against humanity will be higher still.

humanity to include terrorism could provide a harmonized legal framework applicable both in times of armed conflict and peace).

42. See discussion *infra* Section IV(E)(1).
43. Rome Statute, *supra* note 13, art. 7(1)(h); Draft Convention, *supra* note 12, art. 2(1)(h).
44. It is not necessary, however, to demonstrate that the connecting crime was committed on a widespread or systematic basis: any instance of another criminal act under the Rome Statute will suffice, even if it does not amount to a crime against humanity in its own right. See Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43, 53–55 (1999).
45. *Id.* at 55.
46. See generally, *id.*
47. See Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgement, ¶ 636, (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000); Abtahi, *supra* note 16, at 28.

Most importantly, by its very definition persecution targets an identifiable group or collectivity.⁴⁸ However, iconoclastic acts target cultural relics due to the message they convey (in the eyes of the perpetrator) and often in defiance of values respected by the international community, not necessarily with an intent to affect any particular group which cherishes the icons for religious or other reasons.⁴⁹

Indeed, there is little evidence to suggest that the three prime examples of large scale acts of iconoclasm committed in the past 20 years by terrorist groups--namely by the Taliban in Afghanistan, the Islamic State in Syria and Iraq, and Ansar Dine in Mali--were intended to target an identifiable group or collectivity as such.⁵⁰

For example, when Ansar Dine took over Timbuktu, its leaders reportedly announced that "not a single mausoleum will remain in Timbuktu", explaining that "Allah doesn't like it".⁵¹ As later described by Al Mahdi in an interview conducted following his conviction by the ICC, the mission of the Ansar Dine group which he was heading was to combat all acts that, in the group's view, contravened the precepts of Islam.⁵² As he explained, the group considered the mausoleums of Timbuktu to be the incarnation of such acts of heresy.⁵³

Though those acts of destruction undoubtedly affected the local community of Timbuktu, as was also recognized by the ICC in the Al Mahdi Reparations Order, it does not appear that the acts were conducted with the discriminatory intent to target the local community

48. The crime, as defined under both the Rome Statute and the Draft Convention, concerns "Persecution against any identifiable group or collectivity." The term "persecution" is defined under the Rome Statute and the Draft Convention as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." Rome Statute, *supra* note 13, art. 7(2)(g); Draft Convention, *supra* note 12, art. 2(2)(g).
49. See Filipa Vrdoljak, *The Criminalisation of the International Destruction of Cultural Heritage*, in FORGING A SOCIO-LEGAL APPROACH TO ENVIRONMENTAL HARMS (Tiffany Bergin & Emanuela Orlando eds., 2017) ("Often the monuments, sites and shrines are not directly related to the cultural and religious practices of present-day inhabitants; instead, they are evidence of the multi-layered history and diversity of these sites. It is this cultural and religious diversity which the perpetrators find abhorrent and seek to expunge through such acts.").
50. *Id.*
51. *Timbuktu Mausoleums 'Destroyed,'* BBC (Dec. 23, 2012), <https://www.bbc.com/news/world-africa-20833010> [<https://perma.cc/2Z5S-AU2G>].
52. See Ahmad Al Faqi Al Mahdi: "I plead guilty," UNESCO, <https://en.unesco.org/courier/2017-october-december/ahmad-al-faqi-al-mahdi-i-plead-guilty> [<https://perma.cc/ARB7-QXQE>].
53. *Id.*

or the broader population of Mali as such, namely as a form of persecution committed against these identifiable groups. Unsurprisingly, the prosecution in the Al Mahdi case decided early on to abandon the investigation of crimes against humanity, stating that the information available does not provide a reasonable basis to believe that crimes against humanity under Article 7 have been committed in the Situation in Mali.⁵⁴ It is unlikely that the ICC-OTP's decision derived from a conclusion that the acts themselves were not severe enough – after all, the ICTY recognized similar acts, sometimes against less known heritage,⁵⁵ as amounting to persecution. Rather, it seems that the decision was based on the conclusion that the specific elements of the crime of persecution (or that of the crime of “other inhuman acts” as mentioned below) have not been met.⁵⁶

C. *Legal Challenges in Invoking the Crime of “other inhuman acts of similar character”*

An alternative route for prosecuting perpetrators for crimes against humanity under the Rome Statute or the Draft Convention is found in the provision which criminalizes “other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”⁵⁷ This residual provision can potentially provide a solution to the problems discussed in reference to the crime of persecution such as the required connection to other crimes or the need to prove a discriminatory intent.

Nonetheless, invoking this crime is not without difficulties. The crime's vagueness and open-ended nature will require interpretation by

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54. Office of the Prosecutor, Int'l Crim. Ct., *Situation in Mali: Article 53(1) Report*, ¶ 58, (Jan. 16, 2013), available at https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf [<https://perma.cc/2RLL-6Q79>]. But see Sebastian A. Green Martinez, *Destruction of Cultural Heritage in Northern Mali*, 13 J. INT'L CRIM. JUST. 1073, 1074 (2015) (criticizing the ICC-OTP's decision not to prosecute Al Hahdi for the crime of persecution).
55. The ICTY's recognition that destruction against cultural heritage may amount to persecution was often based on widespread attacks against religious and cultural institutions that were not inscribed on any list of heritage of great importance and arguably would not have met the criteria for such inscription. In comparison, most sites in Timbuktu were inscribed on the World Heritage list at the time they were attacked. See generally, *World Heritage List*, UNESCO <https://whc.unesco.org/en/list/> [<https://perma.cc/FPC6-7PN3>].
56. Rome Statute, *supra* note 13, art. 7(2)(g); Draft Convention, *supra* note 12, at 13.
57. Rome Statute, *supra* note 13, art. 7(1)(k); Draft Convention, *supra* note 12, art. 2(1)(k).

courts on a case-by-case basis,⁵⁸ and in that context might invite defense arguments on violation of fundamental principles of criminal law such as *nullum crimen, nulla poena sine lege* and the prohibition of *ex post facto* law.⁵⁹

To counter the arguments, it may be recalled that the crime of “other inhuman acts” has been a recognized crime against humanity since its incorporation into the Nuremberg Charter,⁶⁰ and that confiscation, pillage and plunder of property were considered by the IMT as “other inhuman acts”.⁶¹ However, the convictions by the IMT focused on acts committed against a specific population⁶² (the Jewish one), and can therefore be viewed as a form of persecution against an identifiable group, even if this was not pronounced as such in the IMT’s judgements.

It is also noteworthy that the residual crime speaks of ‘acts of a similar character’: Considering that all other crimes enumerated under Article 2 of the Draft Convention concern acts *directly* targeting human persons and often focus on a specific group of victims (e.g. a racial or ethnic group), crimes concerning cultural heritage, which impact the international community as a whole, might not be considered as ‘acts of similar character’.⁶³ The combination of the above arguments entails that courts might be reluctant to accept a sufficiently broad

58. Both the ICTY and the ICTR stressed that the decision whether the alleged perpetrator’s conduct rose to the level of inhumane acts should be determined on a case-by-case basis. *See* Prosecutor v. Kayishema, Case No. ICTR 95-1-T, Judgment, ¶ 151 (Int’l Crim. Trib. for Rwanda May 21, 1999); Prosecutor v. Kordic, Case No. IT-95-14/2-A, Judgment, ¶ 117 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

59. *See* Mohammed Saif-Alden Wattad, *The Rome Statute and Captain Planet: What Lies between ‘Climate against Humanity’ and the ‘Natural Environment?’*, 19 FORDHAM ENVTL. L. REV. 265, 269 (2009) (suggesting not to criminalize environmental wrongs by means of interpreting Article 7(1)(k) of the Rome Statute in light of this principle). *See also* Newton & Scharf, *supra* note 41, at 275–76; Rome Statute, *supra* note 13, at art. 22(2) (“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”).

60. Newton & Scharf, *supra* note 41, at 276

61. Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L. J. 171, 201 (1997).

62. *See generally, id.*

63. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgement, ¶ 564–66, (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) (pointing out the difficulties in interpreting Article 7(1)(k) of the ICTY Statute in light of the application of the *ejusdem generis* rule of interpretation, according to which a general expression would cover actions similar to those specifically provided for)..

interpretation that recognizes attacks against cultural heritage as falling within the scope of Article 1(k).⁶⁴ The aforementioned decision of the ICC-OTP not to prosecute Al Mahdi for crimes against humanity despite the recognition of the gravity of the crimes, supports the conclusion that this provision does not serve as an ideal legal basis for prosecution of serious crimes committed against cultural heritage.⁶⁵

D. Addressing State Responsibility

One of the gaps derived from the absence of a global treaty on crimes against humanity is that of state responsibility, because the definition of crimes against humanity is uncertain and no compromissory clause exists to permit litigation before the International Court of Justice (or elsewhere) regarding their commission.⁶⁶

This shortcoming is evident in the context of crimes committed against cultural heritage: few legal instruments governing the protection of cultural heritage make an explicit reference to state responsibility⁶⁷ or contain a settlement of dispute clause similar to Article IX of the Genocide Convention.⁶⁸ Consequently, there have been few cases that addressed state responsibility in relation to attacks against cultural heritage,⁶⁹ and the International Court of Justice (ICJ)

64. Draft Convention, *supra* note 12, art. 2(1)(k).

65. Martinez, *supra* note 54, at 1074.

66. See Leila Nadya Sadat, *A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity*, 16 J. INT'L CRIM. JUST. 683, 685 (2018).

67. *Contra* 1999 Protocol, *supra* note 24, art. 38 (“No provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation.”); UNESCO Res. 32 C/Res. 1517, at § VI (Oct. 17, 2003) [hereinafter 2003 UNESCO Declaration] (“A State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization, bears the responsibility for such destruction, to the extent provided for by international law.”).

68. *Contra* Underwater Cultural Heritage, *supra* note 35, at art. 25; U.N. Educ., Sci. & Cultural Org. [UNESCO], Convention on the Protection and Promotion of the Diversity of Cultural Expressions, preamble (Oct. 20, 2005), <https://en.unesco.org/creativity/sites/creativity/files/passeport-convention2005-web2.pdf> [<https://perma.cc/K44B-48W4>] [hereinafter Cultural Diversity Convention].

69. A noteworthy exception is the case of “the Stela of Matara,” where a Claims Commission adjudicated a dispute between Eritrea and Ethiopia. The case concerned the destruction of an obelisk that is perhaps about

has not been utilized for cases of heritage destruction which were previously recognized by international criminal tribunals (e.g. the attacks against Dubrovnik addressed by the ICTY) in a manner similar to the cases it adjudicated in relation to genocidal acts.⁷⁰

This deficiency as well as the one identified in the previous section, namely the relative lack of criminal sanctions in the conventions governing protection of cultural heritage during peacetime, can perhaps be explained by the fact that cultural heritage conventions and other instruments often focus on the creation of mechanisms to promote cultural heritage, for example through the World Heritage List of the 1972 Convention Concerning Protection of World Cultural Property and Natural Heritage,⁷¹ rather than on addressing criminal or state-sponsored illegal activity. Be that as it may, this weakness in the legal regime may expose cultural heritage to acts of destruction that may go unpunished and perpetuate impunity of perpetrators and lack of accountability of states.

IV. BEYOND THE LEGAL GAPS: THE CASE FOR RECOGNIZING ATTACKS AGAINST CULTURAL HERITAGE AS A CRIME AGAINST HUMANITY

The previous section identified a number of shortcomings under the contemporary international legal framework governing protection of cultural heritage including under the rubric of crimes against humanity. But beyond the need to address those legal gaps, there are additional convincing reasons to introduce, in the Draft Convention, a distinct crime against humanity related to attacks against cultural heritage.

Indeed, the mere fact that unlawful conduct can be covered under existing criminal offences has not prevented the development of ICL through the recognition that such a conduct deserves its own definition as a crime. For example, heinous genocidal acts committed during WWII were prosecuted under the rubrics of war crimes and crimes

2,500 years old and was of great historical and cultural value for Eritrea. The destruction was carried out by the Ethiopian armed forces that occupied part of Eritrea during the war between the countries. See J. Romesh Weeramantry, *Prisoners of War (Eritrea v. Ethiopia), Eritrea's Claim 17/Ethiopia's Claim 4, Partial Awards: Central Front (Eritrea v. Ethiopia), Eritrea's Claims 2, 4, 6, 7, 8 & 22/Ethiopia's Claim 2, Partial Awards*, 99 AM. J. INT'L L. 465, 465–72 (2005).

70. See generally Marko Milanović, *State Responsibility for Genocide: A Follow-Up*, 18 EUR. J. INT'L L. 669 (2007).

71. UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage art.17, Nov. 16, 1972, 1037 U.N.T.S. 151, 27 U.S.T. 37 (entered into force Dec. 17, 1975) [hereinafter 1972 Convention].

against humanity as defined under the Nuremberg Charter.⁷² The main culprits were punished with the most severe penalties.⁷³ Thus, from a strict legal perspective, there was no normative gap. Yet, following the war, the United Nations General Assembly [UNGA] passed a resolution recognizing genocide as a separate international crime,⁷⁴ and the Genocide Convention was adopted shortly afterwards.⁷⁵ Notwithstanding the fact that genocidal acts could be punished using other legal formulas, genocide was introduced as a new term and as a distinct crime, *inter alia* to convey the notion of “never again”.⁷⁶

In the same vein and as already noted,⁷⁷ attacks against cultural heritage committed during armed conflicts are punishable under the general offences governing attacks against civilian property.⁷⁸ Nonetheless, IHL and corresponding ICL norms were developed to specifically address attacks against cultural heritage during armed conflicts, thereby underscoring the gravity of the criminal act.⁷⁹

In the context of the Draft Convention, the following points are worth noting upon considering a proposal to introduce a new crime related to cultural heritage.

A. *Aligning the Law with the Rhetoric*

One of the main features of crimes against humanity is their impact not just upon the immediate victims but also on all humanity.⁸⁰ In that regard, the repercussions of cultural heritage destruction to humanity and the international community as a whole was recognized as early as 1954, when the following statement was incorporated in the preamble of the 1954 Hague Convention: “Being convinced that damage to cultural property belonging to any people whatsoever means damage to

72. William A. Schabas, *Origins of the Genocide Convention: From Nuremberg to Paris*, 40 CASE W. RES. J. INT’L L. 35, 40–43 (2007).

73. *See generally, id.*

74. G.A. Res. 1st Sess., 55th plen. Mtg. at 96, U.N. Doc. A/RES/96 (Dec. 11, 1946).

75. *See* Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 18, at 277.

76. *See* Mark A. Drumbl, *Sixtieth Anniversary of the Genocide Convention: The Power of a Word*, 40 STUD. TRANSNAT’L LEGAL POL’Y 97, 114–16 (2009) (discussing the expressive value in introducing the crime of genocide).

77. *See* discussion *infra* Section II.

78. 1972 Convention, *supra* note 71, art. 4.

79. Rome Statute, *supra* note 13, art. 8(2)(b)(ix) and 8(2)(e)(iv).

80. Sean D. Murphy (Special Rapporteur on Crimes Against Humanity), *First Rep. on Crimes Against Humanity*, U.N. Doc. A/CN.4/680, at 12 (Feb. 17, 2015).

the cultural heritage *of all mankind*.”⁸¹ In relation to that statement, the Special Rapporteur in the Field of Cultural Rights noted that “[W]hile specific aspects of heritage may have particular resonance for and connections to particular human groups, all of humanity has a link to such objects, which represent the “cultural heritage of all [hu]mankind,” to paraphrase the words of the 1954 Hague Convention.”⁸² The 1972 Convention also emphasized the importance of cultural heritage to humankind.⁸³

Similar statements were made on various occasions. Thus, for example, the 2003 UNESCO Declaration recalled “the tragic destruction of the Buddhas of Bamiyan that affected the international community as a whole,”⁸⁴ and defined ‘intentional destruction’ for the purpose of the Declaration as an act intended to destroy cultural heritage “in a manner which constitutes a violation of international law or an *unjustifiable offence to the principles of humanity and dictates of public conscience*.”⁸⁵ In the ICTY Jokic case, the Trial Chamber noted that “[T]he shelling attack on the Old Town [of Dubrovnik] was an attack not only against the history and heritage of the region, but also against the cultural heritage of humankind.”⁸⁶ In the Al Mahdi case, the ICC Prosecutor stated that “[T]he loss was not locally confined. The magnitude of the loss of such irreplaceable physical embodiment

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81. 1954 Convention, *supra* note 24, preamble (emphasis added).
 82. Karima Bennouna (Special Rapporteur in the Field of Cultural Rights), Remarks at the Human Rights Council Session 31, Panel: “Destruction of Cultural Heritage: Contextualizing the Human Rights Aspect with a View to Prevention or Mitigation,” 1–2 (Feb. 29, 2016) *available at* <https://studylib.net/doc/17689335/human-rights-council-session-31> [<https://perma.cc/9Q4U-J7VK>].
 83. *Cf.* 1972 Convention, *supra* note 71, at preamble (“*Considering* that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world. [. . .] *Considering* that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole.”).
 84. 2003 UNESCO Declaration, *supra* note 67, preamble.
 85. *Id.* § II(2) (defining “intentional destruction” as “an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience, in the latter case in so far as such acts are not already governed by fundamental principles of international law”) (emphasis added).
 86. Prosecutor v. Jokić, Case No. IT-01-42/1-S, Trial Chamber Judgment and Sentence, ¶ 51 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004), *available at* https://www.icty.org/x/cases/miodrag_jokic/tjug/en/jok-sj040318e.pdf [<https://perma.cc/HGK5-69DZ>].

of history and culture was felt by the whole of humanity, and at the expense of future generations.”⁸⁷ In its Judgement, the ICC Trial Chamber echoed this statement by noting that all the sites (but one) were UNESCO World Heritage sites and, as such, their attack appears to be of particular gravity as their destruction does not only affect the inhabitants of Timbuktu, but also people throughout Mali and the international community.⁸⁸ The Court maintained this approach in its Reparations Order, noting that “[T]he destruction of cultural heritage erases part of the heritage of all humankind.”⁸⁹ In the 2011 Preah Vihear Case before the ICJ, Judge Cañado Trindade explained that “the ultimate *titulaires* of the right to the safeguard and preservation of their cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole”.⁹⁰

The various statements all reflect an undisputable notion that links cultural heritage and humanity. Indeed, humanity comprises more than the sum of human beings, and is unique by the culture it has developed. Heritage bonds peoples and serves as the basis for the development of societies around the world.⁹¹ As was simply put by Gita Sahgal, the human rights activist, “heritage is humanity.”⁹²

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87. *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Following Admission of Guilt by the Accused in Mali War Crime Case: “An Important Step for the Victims, and Another First for the ICC,”* INT’L CRIM. CT. (Mar. 24 2016), available at <https://www.icc-cpi.int/Pages/item.aspx?name=160324-otp-stat-al-Mahdi> [<https://perma.cc/774Q-8K38>].
88. Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Judgment and Sentence, ¶ 80 (Sept. 27, 2016).
89. Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-236, Reparations Order, ¶ 53 (Aug. 17, 2017).
90. Request for Interpretation of the Judgement of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Camb. v. Thai.), Separate Opinion of Judge Cañado Trindade, 2013 I.C.J. Reports 567, ¶ 114 (Nov. 11).
91. See Rome Statute, *supra* note 13, at preamble (“[State Parties to the Statute...] Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage . . .”).
92. Rep. of the Special Rapporteur in the Field of Cultural Rights, ¶ 48, U.N. Doc. A/HRC/31/59, (Feb. 3, 2016) [hereinafter Rep. of the Special Rapporteur in the Field of Cultural Rights]. The Special Rapporteur reiterated this quote on March 10, 2016 in her Statement at the 31st session of the Human Rights Council, adding that “[Heritage] is a record of the genius of human beings, that which we leave behind for the next generations to mark our path through this world, and quite simply irreplaceable even in a digital world.” *Karima Bennoune: Cultural Heritage is a Human Rights Issue*, UNESCO (Oct. 25, 2016), <https://en.unesco.org/news/karima-bennoune-cultural-heritage-human-rights-issue> [<https://perma.cc/E2AC-NHYB>].

Attacks against cultural heritage are therefore attacks against the very foundations of humanity.⁹³ In essence and by their definition they constitute crimes against humanity and therefore fall within the scope of the Draft Convention, which aims at protecting ‘humanity’ and not only ‘humans’. Inclusion of a dedicated crime concerning cultural heritage in the Draft Convention would therefore enable bridging the gap between the law and the long-standing rhetoric which has equated heritage with humanity.

B. Counter-Messaging the “Bamiyanization Phenomenon”

Iconoclasm is unfortunately not a new phenomenon.⁹⁴ However, in the past 20 years, the international community has witnessed a new wave of deliberate destruction, combined with media campaigns of terrorist groups which spread the images as part of their strategy.⁹⁵ The Taliban’s “success” in destroying the Bamiyan Buddhas has been replicated by ISIS in Palmyra and Ansar Dine in Timbuktu.⁹⁶ As stated by the Special Rapporteur in the Field of Cultural Rights, “[T]his represents a form of cultural warfare being used against populations, and humanity as a whole.”⁹⁷

Putting crimes against cultural heritage on par with other serious crimes would therefore be timely as it will convey an important counter-message to those who intend to engage in iconoclasm. Similar reasoning

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93. See Prosecutor v. Kordic and Cerkez, Case No. IT-94-14/2-T, Judgment, ¶ 207 (Int’l Crim. Trib. for the Former Yugoslavia, Feb. 26, 2001), https://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf [<https://perma.cc/7Y7K-7CTK>] (holding that destruction of institutions dedicated to religion “amounts to an attack on the very religious 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 religious culture and its concomitant cultural objects”).
94. See George Fitzherbert, *Icon Smashing - The Precedents*, BBC NEWS (Mar. 10, 2001) http://news.bbc.co.uk/2/hi/south_asia/1211067.stm [<https://perma.cc/V5GA-SW73>]; see also Bennoune, *supra* note 84, at 3 (“Unfortunately, there is a long human history of such acts in all regions of the world, whether in wars, revolutions or waves of repression.”).
95. Nasir Behzad & Daud Qarizadah, *The Man who Helped Blow up the Bamiyan Buddhas*, BBC NEWS (Mar. 12, 2015), <https://www.bbc.com/news/world-asia-31813681> [<https://perma.cc/58AN-EGE3>]; Benjamin Isakhan & Jose Antonio Gonzales Zarandona, *Erasing History: Why Islamic State is Blowing up Ancient Artefacts*, THE CONVERSATION (Jun. 4, 2017, 4:23 PM), <https://theconversation.com/erasing-history-why-islamic-state-is-blowing-up-ancient-artefacts-78667> [<https://perma.cc/UW7H-QHUA>].
96. *Id.*
97. Rep. of the Special Rapporteur in the Field of Cultural Rights, *supra* note 94, ¶ 67. The Special Rapporteur reiterated this statement on February 29, 2016, at her speech before the Human Rights Council. *Id.*

was invoked in instances where the international community decided to restore – to the extent possible – cultural heritage damaged or destroyed.⁹⁸ Thus, for example, at the occasion of restoring the Mostar Bridge, UNESCO stated: “The old Bridge was destroyed for its symbolic value. It is for the same reason that UNESCO promised to rebuild it.”⁹⁹ Similarly, in reference to the Bamiyan Buddhas, a UNESCO representative said: “The world should set an example to show extremists that today there are possibilities to reconstruct, and there is the will to reconstruct, such edifices after they are destroyed.”¹⁰⁰

The communicative and pedagogical aspect of punishment has been recognized as a key element of ICL.¹⁰¹ From an expressivist perspective, punishment strengthens faith in the rule of law among the general public and can impede the early indoctrination phases of future perpetrators.¹⁰² This aspect is particularly pertinent to confronting the radicalization and indoctrination campaigns characterizing terrorist groups such as ISIS.¹⁰³

Criminalization and providing a legal framework for international cooperation by including a specific crime against humanity in the Draft Convention would thus add a crucial dimension to the efforts of the

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98. Rob Smith, *3D-Printing is Helping to Restore the World's Destroyed Heritage Sites*, WORLD ECONOMIC FORUM (Apr. 24, 2018), <https://www.weforum.org/agenda/2018/04/3d-modelling-is-helping-to-restore-the-worlds-destroyed-heritage-sites/> [https://perma.cc/ZQ4V-UCK4].
99. See Press Release, UNESCO, Inauguration of the Mostar Bridge (Jul. 16, 2004), available at http://portal.unesco.org/en/ev.php-URL_ID=21743&URL_DO=DO_TOPIC&URL_SECTION=201.html [https://perma.cc/YBB4-FYRZ].
100. Unlike the Mostar Bridge, the restoration of the Buddhas has been met with significant challenges which, to this date, prevent the restoration. See Babak Dehghanpisheh, *Rebuilding the Bamiyan Buddhas*, NBC NEWS (Dec. 31, 2001, 6:39 AM), <http://www.nbcnews.com/id/3067334/t/rebuilding-bamiyan-buddhas/#.XQ-ZGsx7mP8> [https://perma.cc/N6CA-DCWT].
101. See Drumbl, *supra* note 76, at 114–15. For a discussion on the symbolic function of ICL see Marina Aksenova, *Conceptualizing Terrorism: International Offence or Domestic Governance Tool*, 20 J. CONFLICT & SEC. L. 277, 296 (2015) (“The symbolic function of international criminal law refers to its mission of creating a space for shared, immutable values of the international community through the administration of exemplary justice.”).
102. *Id.*
103. Much has been written about ISIS’s methods of recruitment and indoctrination. For an analysis of this phenomenon from a social science perspective, see Trevor Hawkins, “A Theoretical Analysis of ISIS Indoctrination and Recruitment,” *Capstone Projects and Master’s Theses* (2016), available at https://digitalcommons.csumb.edu/caps_thes_all/7 [https://perma.cc/7NMC-A4QJ].

international community to combat iconoclasm and, more generally, to advance important goals of ICL.

C. *The Preventative Angle*

One of the main objectives of the Draft Convention is the prevention of crimes against humanity.¹⁰⁴ This aspect is particularly important with regard to cultural heritage, which is distinguishable from other forms of property by its irreplaceable character. Various conventions, resolutions, and court decisions have highlighted this unique characteristic of cultural heritage. For example, the 1970 Convention requires State Parties to take measures to the extent feasible to prevent “*irremediable* injury to the cultural heritage” of a requesting State.¹⁰⁵ The preamble of the 1972 Convention speaks about the importance of “safeguarding this unique and *irreplaceable* property, to whatever people it may belong.”¹⁰⁶ The UNGA Resolution adopted after the destruction of the Bamiyan Buddhas noted that “the destruction of the statues in Afghanistan, in particular of the unique Buddhist sculptures in Bamiyan, would be an *irreparable* loss for humanity as a whole.”¹⁰⁷ In the ICTY Jokić case, which concerned the attack against the old town of Dubrovnik, a UNESCO Heritage Site, the Court noted that “Restoration of buildings of this kind, when possible, can never return the buildings to their state prior to the attack because a certain amount of original, historically authentic, material will have been destroyed, thus affecting the inherent value of the buildings.”¹⁰⁸ Similarly, in the Al Mahdi case, the Court stated: “Because of their purpose and symbolism, most cultural property and cultural heritage are unique and of sentimental value. As a result, they

104. Draft Convention, *supra* note 12, at 26 (“The present draft articles have two overall objectives: the prevention and the punishment of crimes against humanity.”). Though the title of the Draft Convention does not mention the term “prevention”—in comparison to the Genocide Convention—the preventative angle is emphasized throughout the Draft Convention. See *id.* at preamble (“*Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”); *id.* art. 1 (“The present draft articles apply to the prevention and punishment of crimes against humanity”); *id.* art. 4. See also Sadat, *supra* note 66, at 700 (“A core pillar of the Initiative’s work on crimes against humanity concerned the potential preventive dimension of a new treaty.”).

105. 1970 Convention, *supra* note 35, art. 9 (emphasis added).

106. 1972 Convention, *supra* note 71, preamble (emphasis added).

107. G.A. Res. 55/243, preamble (May 1, 2001) (emphasis added).

108. Prosecutor v. Jokić, Case No. IT-01-42/1-S, Trial Chamber Judgment and Sentence, ¶ 52 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004).

are not fungible or readily replaceable. The destruction of international cultural heritage... is an irreplaceable loss that negates humanity.”¹⁰⁹

The importance of preserving unique cultural heritage led the drafters of conventions in this domain to focus on preventative measures that State Parties must take to protect cultural heritage. For example, to safeguard cultural heritage against the foreseeable effects of an armed conflict, the 1999 Protocol provides that State Parties shall take, as appropriate, preparatory measures such as the preparation of inventories and the preparation for the removal of movable cultural property or the provision for adequate *in situ* protection of such property.¹¹⁰ The 1970 Convention, which, as indicated by its title, centers on prevention of illicit trafficking of cultural property, prescribes for measures such as creating national services with qualified staff, passing laws and regulations governing import, export and transfer of ownership of cultural property, and establishing and keeping up to date a list of important cultural property which should not be exported.¹¹¹

The inclusion in the Draft Convention of a specific crime against humanity in relation to attacks against cultural heritage therefore corresponds to the preventative approach reflected in other conventions governing protection of cultural heritage as well as the preventative aspect of the Draft Convention. It can complement the efforts to prevent irreparable damage to cultural heritage and consequently to humanity.

D. *The Rome Statute as a Benchmark*

One possible argument against the inclusion of a distinct crime related to cultural heritage is the decision to rely on the Rome Statute as the sole and definitive basis for the substantive law of the Draft Convention. From the outset, the Draft Convention intended to track the Rome Statute’s definition of crimes against humanity, building upon the “Rome consensus.”¹¹² The current draft reflects this approach: The preamble recalls “the definition of crimes against humanity as set forth in article 7 of the Rome Statute of the International Criminal Court”,¹¹³ and art. 2 of the Draft Convention (“Definition of Crimes against Humanity”) is taken almost verbatim from the Rome Statute.¹¹⁴

109. Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-236, Reparations Order, ¶ 22 (Aug. 17, 2017).

110. 1999 Protocol, *supra* note 36, art. 5.

111. 1970 Convention, *supra* note 35, art. 5.

112. Sadat, *supra* note 66, at 696.

113. Draft Convention, *supra* note 12, at 11.

114. Int’l Law Comm’n, Statement of the Chair of the Drafting Committee, *Crimes Against Humanity*, at 6 (May 22, 2019), https://legal.un.org/ilc/documentation/english/statements/2019_dc_ch

This approach undoubtedly has merits, including practical ones: It avoids the need for lengthy negotiations over the substantive law, thus focusing on aspects of international cooperation (extradition, MLA requests, etc.) relevant for combating the crimes listed under art. 2 of the Draft Convention.¹¹⁵

Yet, this position deserves reconsideration. A legislative methodology which is based on maintaining the scope and language of previous texts for the sake of consensus can create legal challenges for courts applying the law.¹¹⁶ For example, the war crimes introduced in relation to attacks against cultural heritage were based on the Hague Convention of 1907 on the Laws and Customs of Wars on Land¹¹⁷ and consequently have a number of inherent shortcomings.¹¹⁸ In the Al Mahdi case, while no doubt arose with regard to his role in destroying cultural heritage, the conviction was criticized for not meeting all legal requirements defined under the Rome Statute.¹¹⁹

airman_statement_cah.pdf [https://perma.cc/TY2W-PGEE] (“The text adopted on first reading essentially reproduced Article 7 of the Rome Statute in three consecutive paragraphs, except for three non-substantive changes, following a general agreement in the Commission that the definition of crimes against humanity contained in the Rome Statute should not be modified by the Commission in the context of the work on this topic.”).

115. For a discussion of the various reasons that may support the use of the definition of the crimes as provided under the Rome Statute, see Darry Robinson, *The Draft Convention on Crimes Against Humanity: What to Do with the Definition?* (Queen’s Univ., Legal Research Paper No. 2015-013, 2014), <https://ssrn.com/abstract=2531530> [https://perma.cc/6J69-9UA4], in *ON THE DRAFT CRIMES AGAINST HUMANITY CONVENTION* 103, 103–33 (Morten Bergsmo & Song Tianying eds., FICHL Publication Series No. 18, 2014).
116. An example from a different domain is the definition of maritime piracy in Article 101 of United Nations Convention on the Law of the Sea, which merely duplicated previous texts and was criticized even before the Convention entered into force. See Samuel Pyeatt Menefee, *The New “Jamaica Discipline”: Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT’L L. 127, 128 (1990) (“Ironically, these piracy articles [in UNCLOS] perpetuate defects in response to maritime violence which . . . could enable that ‘business’ to thrive.”).
117. Convention Respecting the Laws and Customs of War and Land Convention art. 27, Oct. 18, 1907, T.S. No. 539 [hereinafter 1907 Convention].
118. See generally Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC*, 23 PENN ST. INT’L L. REV. 857 (2005).
119. See William Schabas, *Al Mahdi Has Been Convicted of a Crime He Did Not Commit*, 49 CASE W. RES. J. INT’L L. 75, 101 (2017).

It is evident that the Rome Statute did not intend to create stagnation of ICL. Article 10 provides that “Nothing in this Part [Part II: Jurisdiction, Admissibility and Applicable Law] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”¹²⁰ Article 7, which governs crimes against humanity, starts with the phrase ‘*for the purpose of this Statute*’, which entails that the definition of the crimes is “plainly intended *only* to be applicable before the International Criminal Court.”¹²¹ In relation to this provision it was also noted that it “represents both a ‘codification’ and a ‘progressive development of international law’ within the meaning of article 13 of the UN Charter.”¹²²

Interestingly, the drafters of the Draft Convention did not consider themselves bound by the text of the Rome Statute when addressing aspects other than the definition of the crimes.¹²³ For example, they opted for a broader approach on accountability by introducing a requirement that States take measures, where appropriate, to establish the liability of legal persons.¹²⁴ This welcome approach was adopted despite the drafters’ recognition that criminal liability of legal persons is still unknown in many States, that many conventions do not include this form of liability, and that this approach deviates from the statutes of most international criminal tribunals.¹²⁵

Importantly, the negotiations over the Draft Convention should not ignore the changes in the landscape on the international level since the negotiations of the Rome Statute in the 1990’s. Specifically with regard to cultural heritage and as will be elaborated below, there have been significant developments in recent decades which justify elevating the level of protection granted to cultural heritage and viewing widespread or systematic attacks against cultural heritage as crimes against humanity. In conclusion, Article 7 of the Rome Statute should serve as

120. Rome Statute, *supra* note 13, art. 10.

121. See THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 159 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016) (emphasis in the original text).

122. *Id.* at 155. See also Wattad, *supra* note 59, at 275–76 (explaining why the existing list of crimes under the Rome Statute is not a closed list and arguing that “. . . criminal theory is a living institute. A particular crime’s definition, scope and substance change over time. The history of the evolution of the core crime is a living testimony on how the meanings of ‘war crime’ and ‘crimes against humanity’ for example, have been the subject of serious changes and development throughout history”).

123. Draft Convention, *supra* note 12, at 22–23.

124. *Id.* at 14.

125. *Id.* at 73–75.

a benchmark for the Draft Convention, not as the ultimate text defining what constitutes crimes against humanity.

E. Developments in the Past 20 Years in Relation to the Protection of Cultural Heritage

The norms governing protection of cultural heritage has significantly developed since the 1990's, when the Rome Statute was negotiated. There is little doubt today that attacks against cultural heritage may entail individual criminal responsibility¹²⁶ and that the governing rules also apply to non-state actors.¹²⁷ The following developments are particularly noteworthy.

1. Attacks Against Cultural Property as Violation of Customary International Law

It is by now firmly established that deliberate attacks against cultural heritage of great importance to humankind constitute a violation of customary international law,¹²⁸ indeed of a norm of an *erga omnes* character.¹²⁹ Iconoclasm of the type seen in Afghanistan, Syria,

126. See Prosecutor v. Ahmad Al Faqi Al Madhi, ICC--01/12-01/15, Reparations Order (Aug. 17, 2017); Prosecutor v. Enver Hadzihasanovic and Amir Kubura, Case No. IT-01-47-AR73.3, Decision on Interlocutory Appeal, ¶ 44 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 11, 2005); *UNESCO Declaration on the Destruction of Cultural Heritage*, *supra* note 86, art. 7 ("States should take all appropriate measures, in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed, acts of intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization.").

127. See G.A. Res. A/HRC/RES/33/20, preamble (Oct. 6, 2016) ("*Recognizing* also that addressing the destruction of tangible and intangible cultural heritage needs to be holistic, encompassing all regions, contemplating both prevention and accountability, focusing on acts by State and non-State actors in both conflict and non-conflict situations, and terrorist acts"); Gerstenblith, *supra* note 41, at 383 (referring to the 2003 UNESCO Declaration and noting that it applies to destruction committed by the governing authority within its own territory, as was the case with the Taliban in Afghanistan).

128. Cf. Rep. of the Special Rapporteur in the Field of Cultural Rights, *supra* note 92, ¶ 59 (concurring with experts that "'the prohibition of acts of deliberate destruction of cultural heritage of major value for humanity' rises to the level of customary international law and is a norm which is supported by 'a general *opinio juris*.'").

129. See Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT'L L. 619, 633–34 (2003) (arguing that "[t]he first of these customary norms lies in the principle according to which cultural heritage constitutes part of the general interest of the international community as a whole. This principle

Iraq, and Mali has been strongly condemned by numerous states, attesting to their *opinio juris* in relation to such illegitimate acts.¹³⁰ Under IHL, the conclusion regarding the status of this norm is reinforced by the inclusion in the Rome Statute of attacks against certain types of cultural heritage as war crimes subject to the ICC's jurisdiction as well as the wealth of ICTY's jurisprudence. The norm applies to both international and non-international armed conflicts.¹³¹

The norm against the peacetime destruction of cultural property has also evolved considerably. The 1972 Convention and the Intangible Heritage Convention, which created (respectively) the World Heritage List and the List of the Intangible Cultural Heritage of Humanity, and which impose on Member States the duty to safeguard cultural heritage present in their territories,¹³² have by now practically universal membership.¹³³ The 2003 UNESCO Declaration, adopted unanimously

has its theoretical foundation in the concept of *erga omnes* obligations . . .”).

130. See Filippo Ristoldo, *Attacks Against Cultural Property as a Weapon of War*, 34 STUDENT PAPER SERIES 2, 9 (2016); Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT'L L. 1209, 1219 (2004) (discussing that an *opinio juris* regarding the unlawful character of destruction of cultural heritage also in peace time is emerging).
131. Rome Statute, *supra* note 13, art. 8(2)(b)(ix), 8(2)(e)(iv) (stating that deliberate attacks against buildings dedicated to religion, education, art, science or charitable purposes and historic monuments are criminalized under the Rome Statute in both sections of international and non-international armed conflicts); 1954 Convention, *supra* note 24, art. 19 (applying the Convention to “conflicts not of an international character”; 1999 Protocol, *supra* note 24, art. 22 (applying the Protocol to “armed conflicts not of an international character”; Prosecutor v. Strugar, Case No. IT-01-42-T, Trial Chamber Judgment, ¶ 230 (Jan. 31, 2005) (concluding that Article 3(d) of the ICTY Statute, which criminalizes “seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science,” is “a rule of international humanitarian law which not only reflects customary international law but is applicable to both international and non-international armed conflicts”).
132. 1972 Convention, *supra* note 71, art. 4; UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage art. 11, (Oct. 17, 2003), available at http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html [https://perma.cc/8FL2-CTG5] [hereinafter Intangible Heritage Convention].
133. See UNESCO, *States Parties Ratification Status*, <https://whc.unesco.org/en/statesparties/> [https://perma.cc/85LY-4WQK] (stating there are 193 parties to the 1972 Convention); UNESCO, *The 2003 Convention Reaches 175 State Parties*, <https://ich.unesco.org/en/news/the-2003-convention-reaches-175-state->

by UNESCO members following the destruction of the Bamiyan Buddhas, placed on equal footing the protection of cultural heritage during war and peace times.¹³⁴ It has been therefore correctly argued that by extending similar protections to cultural heritage in the absence of armed conflict, destruction of cultural heritage during peacetime “moves beyond the status of a war crime to the level of a crime against humanity.”¹³⁵

This evolution, which supports the conclusion regarding the elevated status accorded to the norm prohibiting attacks against cultural heritage, is of importance for the purposes of the Draft Convention, considering that all crimes currently listed in Art. 2 are viewed as violations of customary international law.

2. Security Council Resolutions

Another important development is the growing recognition that attacks against cultural heritage may constitute a threat to international peace and security in the meaning of the Charter of the United Nations. When the Taliban launched its campaign of destruction of cultural relics, culminating with the demolition of the Bamiyan Buddhas, various international bodies including the UNGA and UNESCO expressed their profound concerns.¹³⁶ The UNSC’s voice, however, was not heard, though the Taliban was already subject to UNSC sanctions.¹³⁷ At the time, some scholars explained that this was due to the fact that the destruction of cultural heritage in itself cannot be reasonably said to reach the threshold of a ‘threat’ under Article 39 of the UN Charter.¹³⁸

parties-00255 [<https://perma.cc/G9K7-NVYK>] (stating there are 175 parties to the Intangible Heritage Convention).

134. *UNESCO Declaration on the Destruction of Cultural Heritage*, *supra* note 86, preamble (“Mindful of the development of rules of customary international law as also affirmed by the relevant case-law, related to the protection of cultural heritage in peacetime as well as in the event of armed conflict”) (emphasis omitted).

135. *See* Gerstenblith, *supra* note 41, at 383 (suggesting that “the Declaration may be considered to be an element or evidence of customary international law”).

136. *See* G.A. Res. 53/165, ¶ 16 (Dec. 9, 1998) (“Expresses its deep concern at reports of attacks on and looting of cultural artefacts in Afghanistan . . .”). *Cf.* U.N. Educ., Sci. & Cultural Org. [UNESCO], Convention Concerning the Protection of the World Cultural and Natural Heritage, Doc. No. WHC-01/CONF.208/23, at 6 (Nov. 22, 2001) (describing UNESCO Press Release No. 2001-27).

137. *See* S.C. Res. 1267, ¶ 4 (Oct. 15, 1999) (reaffirming “respect for Afghanistan’s cultural and historical heritage”).

138. *See* Francioni & Lenzerini, *supra* note 129, at 630.

Whether this conclusion was accurate when pronounced is debatable. During the discussion that took place at the UNGA following the destruction of the Buddhas, a number of delegates linked respect for cultural and religious differences to peace and stability in the world.¹³⁹ In any event, the ensuing developments in the past (nearly) two decades suggest that the position expressed by those delegates has found broader support.

Respect for cultural heritage has been frequently linked to the notion of peace and security. Thus, for example, the preamble of the Cultural Diversity Convention recalls that “cultural diversity, flourishing within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures, *is indispensable for peace and security* at the local, national and international levels”.¹⁴⁰ The UNGA has encouraged activities “aimed at promoting interreligious and intercultural dialogue in order to enhance *peace and social stability*”.¹⁴¹ The associative value of cultural heritage can also lead to disputes that may escalate into armed conflicts, hence threatening international peace and security. For example, the dispute between Cambodia and Thailand on sovereignty over the Preah Vihear Temple led, in 2008, to an exchange of fire between the armed forces of both countries.¹⁴² This required intervention by international bodies including a second round of discussions before the ICJ, which issued an order on provisional measures, demanding both countries to withdraw their military personnel from a “provisional demilitarized zone” surrounding the Temple.¹⁴³

Notably, various Resolutions adopted by the UNSC in the period that followed the destruction of the Bamiyan Buddhas attest to the significant evolution in relation to the nexus between protection of cultural heritage and the notion of international peace and security. In 2003, the UNSC incorporated in the operative part of a Chapter VII

139. See Wangkeo, *supra* note 4, at 259 n.632 (“The delegate from Mauritius believed that international peace and security was ‘based on this fabric of understanding and mutual respect between nations, as well as respect for the religions and cultures of all the peoples of the world’ [. . .] Thailand implied the same by counting cultural diversity as a bedrock of the United Nations and its institutions.”).

140. Cultural Diversity Convention, *supra* note 68, preamble. As of May 2020, the Convention has 148 State Parties. See *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=31038&language=E&order=alpha> [<https://perma.cc/M6CR-PFUB>].

141. G.A. Res. 73/129 (Dec. 20, 2018) (emphasis added).

142. See *Q&A: Thailand-Cambodia Temple Dispute*, BBC NEWS (Nov. 7, 2013), <https://www.bbc.com/news/world-asia-pacific-12378001> [<https://perma.cc/V7ZD-AU52>].

143. See *Camb. v. Thai.*, 2011 I.C.J. at 554.

Resolution instructions to all UN Member States to take steps to facilitate the return of Iraqi cultural property to Iraqi institutions, including by establishing a prohibition on trade in or transfer of artefacts.¹⁴⁴ In a series of Chapter VII Resolutions, adopted since 2012 in the context of the situation in Mali, the UNSC first recalled that destruction of cultural and religious sites may amount to crimes under the Rome Statute.¹⁴⁵ It included, for the first time, protection of cultural heritage in the mandate of a peacekeeping operation,¹⁴⁶ thus putting it on par with several other humanitarian and civil protection goals, including humanitarian assistance and promotion and protection of human rights.¹⁴⁷ In another novel Resolution, the UNSC also included the possible imposition of sanctions in relation to attacks against cultural heritage.¹⁴⁸

In parallel, and acting under Chapter VII, the UNSC condemned the destruction of cultural heritage in Iraq and Syria by the Islamic State and the Al-Nusra Front, and noted with concern the established links between the looting and smuggling of cultural heritage and the financing of terrorism.¹⁴⁹

This evolution on the UNSC level culminated with the unanimous adoption in March 2017 of UNSC Resolution 2347, entirely dedicated to the protection of cultural heritage.¹⁵⁰ In this Resolution, the UNSC

144. See S.C. Res. 1483, ¶ 7 (May 22, 2003).

145. See S.C. Res. 2071 (Oct. 12, 2012); Gerstenblith, *supra* note 41, at 385 (describing Resolution 2100, made a few months later, where the UNSC referred to the “destruction of cultural and historical heritage”, while omitting specific reference to religious sites, which are presumably subsumed within the categories of cultural and historical heritage, as a violation of international humanitarian law).

146. S.C. Res. 2100 (Apr. 25, 2013). The Resolution, which established the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), includes two aspects related to the protection of Cultural Heritage in MINUSMA’s mandate: First, to assist the transitional authorities of Mali in protecting from attack the cultural and historical sites in Mali. Second, to operate mindfully in the vicinity of cultural and historical sites. Cultural heritage preservation was thus put on par with several other humanitarian and civil protection goals, including humanitarian assistance and promotion and protection of human rights. See *id.* at ¶ 15(f).

147. See Gerstenblith, *supra* note 41, at 385.

148. S.C. Res. 2374 (Sept. 5, 2017). The Resolution established a new sanctions committee, which may designate individuals or entities that undermine the Agreement on Peace and Reconciliation in Mali by financing them through the proceeds from organized crime, including trafficking in drugs, human beings, arms, and cultural property. See *id.* at ¶ 9.

149. See S.C. Res. 2199, ¶ 15–16 (Feb. 12, 2015).

150. See S.C. Res. 2347 (Mar. 24, 2017).

emphasized that the unlawful destruction of cultural heritage can fuel and exacerbate conflict and hamper post-conflict national reconciliation, thereby undermining the security and stability of affected States.¹⁵¹ Statements made by various representatives in the debate that preceded the adoption of the Resolution all underlined the importance attached to the protection of cultural property as a security imperative.¹⁵² For example, the British Ambassador highlighted the need to respond to cultural destruction “with the same intensity and the same unity of purpose as any other threat to international peace and security.”¹⁵³ The UN Under-Secretary-General for Political Affairs noted that the protection of cultural heritage “is not only a cultural issue, it is also a security and humanitarian imperative.”¹⁵⁴

Hence, considering attacks against cultural heritage as potentially threatening peace and security is no longer a far-fetched concept. This conclusion is noteworthy in the context of the Draft Convention for two important reasons: First, since the preamble of the Draft Convention explicitly recognizes that crimes against humanity “threaten the peace, security and well-being of the world”.¹⁵⁵ Thus, the list of crimes in Article 2 should include only those whose commission may indeed pose risks to peace and security. Second, in light of the fact that when the Rome Statute was negotiated there was relatively little support for this view,¹⁵⁶ the evolution in the past 20 years therefore supports the call to reconsider the decision to include in Article 2 of the Draft Convention

151. *Id.*

152. *See generally* Rep. of the S.C., U.N. Doc. S/Pv.7907 (2017) (detailing the debate between the representatives preceding the adoption of Resolution 2347).

153. Ambassador Peter Wilson, U.K. Deputy Permanent Representative to the United Nations, Statement at the Security Council Briefing on Protecting Cultural Heritage (Mar. 24, 2017), *available at* <https://www.gov.uk/government/speeches/what-were-witnessing-is-a-systematic-and-corrosive-assault-on-history-on-religion-on-the-very-fabric-of-identity> [<https://perma.cc/Z3UL-L4BH>].

154. Rep. of the S.C., U.N. Doc. S/Pv.7907, at 2 (2017); *accord id.* at 4 (“defending cultural heritage is more than a cultural issue; it is a security imperative that cannot be separated from the protection of human lives”). *See also* Kristin Hausler, Cultural Heritage and the Security Council: Why Resolution 2347 Matters (Mar. 31, 2018), *available at* http://www.qil-qdi.org/wp-content/uploads/2018/03/02_UNSCCultural-Heritage_Hausler_FIN.pdf [<https://perma.cc/E5C3-6XMN>] (discussing Resolution 2347 and its impact).

155. Draft Convention, *supra* note 12, at 11. *See also* Rome Statute, *supra* note 13, at 91 (“*Recognizing* that such grave crimes threaten the peace, security and well-being of the world.”).

156. *See* Gottlieb, *supra* note 118, at 889.

only the crimes identified in the 1990's as meeting the threshold of crimes against humanity.

3. The Al Mahdi Case: Recognizing the International Community as a Victim of Cultural Heritage Destruction

The importance of cultural heritage to humankind has been considered as a factor when assessing the gravity of the crime.¹⁵⁷ The Al – Mahdi case, which was innovative in a number of aspects, notably as the first case ever to focus exclusively on the war crime governing attacks against cultural property,¹⁵⁸ was also groundbreaking in another dimension: In its Reparations Order, the Court decided to grant one symbolic euro to the international community.¹⁵⁹

The decision to recognize the international community as a victim in this case is well-founded on the facts, in particular the intention of the perpetrators to destroy heritage cherished by the world community. Various statements, made during and after the destruction of Timbuktu's heritage, manifest that the acts of destruction were indeed aimed at the international community as a whole, as an act of defiance against the very meaning of civilization. One speaker on behalf of Ansar Dine told foreign reporters "from now on, as soon as foreigners speak of Timbuktu" they [Ansar Dine] would attack anything referred to as a World Heritage site," adding that "[T]here is no world heritage, it doesn't exist."¹⁶⁰ Similarly, Omar Hamaha, the military chief of Ansar

157. *Cf.* Prosecutor v. Jokić, Case No. IT-01-42/1-S, Trial Chamber Judgment and Sentence, ¶ 53 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004) ("The Trial Chamber finds that, since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town, constituted of civilian buildings and resulting in extensive destruction within the site."). *See also* Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-236, Judgment and Sentence, ¶ 80 (Sept. 27, 2016) ("Furthermore, all the sites but one (the Sheikh Mohamed Mahmoud Al Arawani Mausoleum) were UNESCO World Heritage sites and, as such, their attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community.")

158. *See* Gerstenblith, *supra* note 41, at 387 ("This prosecution for cultural heritage destruction, divorced from attacks on civilians and other civilian objects, moves the pendulum toward elevating the status of cultural heritage destruction as a crime. The Prosecutor emphasized the cultural, rather than solely the religious value, of the historic structures.")

159. Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-236, Reparations Order, ¶ 107 (Aug. 17, 2017).

160. AFP, *Mali Islamists Destroy Tombs at Ancient Timbuktu Mosque*, AHAM ONLINE (July 10, 2012), <http://english.ahram.org.eg/NewsContent/2/9/47361/World/Internatio>

Dine, stated that this group “is showing the rest of world, especially Western countries, that whether they want it or not, we will not let the younger generation believe in shrines as God, regardless of what the U.N., UNESCO, International Criminal Court or ECOWAS [the Economic Community of West African States] have to say. We do not recognize these organizations.”¹⁶¹ As also presented during the Al Mahdi case, “Mr. Al Mahdi said himself during the Djingareyber Mosque attack: It’s probably the oldest mosque here in town, and is considered a heritage site [...] a World Heritage Site. There are so many rumours relating to these shrines [...]. Those UNESCO jackasses – this [...] they think that this is heritage. Does ‘heritage’ include worshipping cows and trees?”¹⁶² During his trial, Al Mahdi stated “[I]’m really remorseful about what I had caused *the international community as a whole*.”¹⁶³

Viewing the international community as a victim, as enunciated for the first time by an international court with a concrete – even if symbolic – sanction, is certainly a turning point. Importantly, it has removed any doubt, if one ever existed, on the fact that all humankind is impacted by the destruction of cultural heritage. It thus also represents another step in aligning the law and practice with the long-standing rhetoric on the importance of cultural heritage to humanity.

The holding in the Al-Mahdi case has additional significant implications: Recognizing that the international community is a victim of destruction of cultural heritage also entails the possible application of all criminal jurisdiction paradigms – including universal jurisdiction – to cases of attacks against cultural heritage.¹⁶⁴ This conclusion is pertinent in relation to the Draft Convention, which recalls that “it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity”¹⁶⁵, and obliges each state to “take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in cases where the alleged offender is

nal/MaliIslamists-destroy-tombs-atancient-Timbuktu-m.aspx
[<https://perma.cc/X5SX-S9SV>].

161. Julius Cavendish, *Destroying Timbuktu: The Jihadist Who Inspires the Demolition of the Shrines*, TIME (July 10, 2012), <http://world.time.com/2012/07/10/destroying-timbuktu-the-jihadist-who-inspires-the-demolition-of-the-shrines/> [https://perma.cc/FY3J-XTZQ].

162. Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-236, Judgment and Sentence, ¶ 46 (Sept. 27, 2016).

163. *Id.* ¶ 70 (emphasis in original).

164. See 1 INTERNATIONAL CRIMINAL LAW 535 (M. Cherif Bassiouni ed., 1986) (discussing the application of criminal jurisdiction in the context of cultural heritage).

165. Draft Convention, *supra* note 12, preamble.

present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.”¹⁶⁶

4. Rethinking the Categorization of Crimes Against Cultural Heritage:
The Intersection between Crimes Against Property and Crimes Against
People

Crimes affecting cultural heritage have traditionally been considered as falling within the category of crimes against property. It is probably one of the reasons – perhaps the focal one – for not viewing such conduct as an independent crime against humanity, bearing in mind that currently all the other crimes against humanity under the Draft Convention belong to the category of crimes against persons.¹⁶⁷ Despite various innovative aspects in the Al Mahdi case, this classic approach was maintained by the Court, which noted that “unlike other accused convicted by this Court, Mr. Al Mahdi is not charged with crimes against persons but with a crime against property. In the view of the Chamber, even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons.”¹⁶⁸

This conservative position, however, seems to be at odds with the Court’s own findings, according to which the destruction of cultural heritage directed by Al Mahdi does not merely constitute attacks against property as such but also an affront to important values of humanity, enshrined in UNESCO’s Constitution.¹⁶⁹

Moreover, this approach fails to acknowledge important developments under international law, which point to a shift in the manner by which protection of cultural heritage is perceived. First, as argued as early as 2001, “[T]he ICTY’s prosecution of cultural property crimes is also significant because it blurred the traditional distinction between crimes against persons and crimes against property.”¹⁷⁰ The rich ICTY jurisprudence that followed that statement confirms this conclusion.¹⁷¹

Importantly, there is a growing recognition of the human dimension of cultural heritage.¹⁷² This is manifested, for example, by the two most recent conventions adopted under the auspices of UNESCO, namely

166. *Id.* art. 6(2).

167. *Id.* art. 2.

168. Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-236, Judgment and Sentence, ¶ 77 (Sept. 27, 2016).

169. *See id.* ¶ 46.

170. Abtahi, *supra* note 16, at 31.

171. *See id.* (providing an analysis of the ICTY jurisprudence).

172. Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-236, Reparations Order, ¶ 16 (Aug. 17, 2017) (“Cultural heritage is important not only in itself, but also in relation to its human dimension.”).

the 2003 Convention on Intangible Heritage and the 2005 Convention on Cultural Diversity.¹⁷³ Both Conventions are centered on the links between cultural heritage and communities and even individuals.¹⁷⁴

These developments and shift of mindset place crimes against cultural heritage at the intersection between crimes against property and crimes against people. Where cultural heritage concerns tangible property such as historic monuments, the immediate target may be the particular property, yet the impact on the human dimension, indeed on humanity as a whole, cannot and should not be ignored. Where the target is intangible heritage, the human aspect is inevitably intertwined with such acts. Either way, cultural heritage destruction may no longer be considered as a simple loss of property.¹⁷⁵

V. THE OFFENCE

In light of the foregoing discussion and for the purpose of the Draft Convention,¹⁷⁶ it is proposed to define the new crime against humanity as follows: “Causing severe damage to cultural heritage.”¹⁷⁷

The proposed specific elements of the crime are: 1) the perpetrator caused severe damage to cultural heritage; 2) the perpetrator was aware of the factual circumstances that established the status of the heritage

173. See Gottlieb, *supra* note 118, at 870 n.59 (detailing the status protecting cultural property was acknowledged in a UNESCO 2003 declaration).

174. Intangible Heritage Convention, *supra* note 133, art. 2 (defining “intangible cultural heritage” as “the practices, representations, expressions, knowledge, skills . . . that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.”); Cultural Diversity Convention, *supra* note 70, art. 4(3) (“‘Cultural expressions’ are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.”).

175. See Gerstenblith, *supra* note 41, at 392 (“Cultural heritage destruction constitutes a crime against people, not simply a loss of property.”); *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda at the Opening of the Confirmation of Charges Hearing in the Case Against Mr Ahmad Al-Faqi Al Mahdi*, INT’L CRIM. CT. (Mar. 1, 2016), available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-01-03-16> [<https://perma.cc/C5QZ-G9VR>] (“Let us be clear: what is at stake is not just walls and stones. The destroyed mausoleums were important, from a religious point of view, from an historical point of view, and from an identity point of view.”).

176. If the proposal is adopted and a new crime against humanity is introduced in the Draft Convention, it would also be recommended to introduce the new crime in the Rome Statute. See Gottlieb, *supra* note 118, at 881 (the “Rome Statute . . . strives to represent the most comprehensive approach . . . [and] ought to serve as the normative platform for the inclusion of new crimes”).

177. *Id.* at 889–90.

targeted and intended that heritage to be severely damaged nonetheless.¹⁷⁸

With regard to the elements of the crime, the following points are noteworthy.

A. *The ‘Chapeau’ Elements*

The new proposed crime must meet the three overall requirements contained in art. 2 of the Draft Convention: Firstly, the acts must be committed as part of a ‘widespread or systematic’ attack. This would generally exclude isolated or sporadic misbehavior, however heinous and revolting, from the scope of crimes against humanity.¹⁷⁹ The attacks may occur in different locations and over a large geographical area, yet this is not required.¹⁸⁰ Consequently, both acts of destruction of cultural heritage in a single town (e.g. Timbuktu) or in various locations (e.g. different sites across Syria and Iraq) may meet this requirement. As indicated by jurisprudence of international tribunals, the term ‘systematic’ would usually connote an organized plan or policy.¹⁸¹ The authority behind the crimes may also be a non-state actor.¹⁸² Thus, a religious edict such as the fatwa issued by the Taliban in February 2001, instructing the destruction of cultural heritage in Afghanistan,¹⁸³ may evidence the existence of an organizational plan or policy for the purpose of meeting the requirement of a ‘systematic attack’.¹⁸⁴

Secondly, the illegal conduct must be committed as part of an attack ‘directed against any civilian population.’ The expression ‘directed against’ specifies that “in the context of a crime against

178. *See id.* at 884.

179. Cassese, *supra* note 31, at 356–57. *But see* Draft Convention, *supra* note 12, at 34 (indicating that an “attack may be widespread due to the cumulative effect of multiple inhumane acts or the result of a single inhumane act of great magnitude.”); *id.* at 32–33 (noting in its commentary that “a single act committed by an individual perpetrator can constitute a crime against humanity if it occurs within the context of a broader campaign”).

180. Draft Convention, *supra* note 12, at 34 n. 68.

181. *Id.* at 34.

182. THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 121, at 162.

183. Jean-Christophe Peuch, *Afghanistan: Taliban Edict Threatens Central Asian Cultural Heritage*, RADIO FREE EUROPE/RADIO LIBERTY (Mar. 1, 2001) <https://www.rferl.org/a/1095862.html> [<https://perma.cc/29H5-HRXF>] (ordering the elimination of all non-Islamic statues and sanctuaries from Afghanistan).

184. *See* Newton & Scharf, *supra* 41, at 273 (discussing the widespread or systematic requirement and mentioning in that regard the 1998 Fatwa issued by Bin Laden and other Al Qaeda leaders declaring their objective to kill Americans and their allies).

humanity the civilian population is the primary object of the attack.”¹⁸⁵ This, however, does not render that only conducts targeting the physical well-being of humans are criminalized. Rather, the expression should be construed broadly to also include acts such as destruction of property (cultural or other) that cause severe harm to civilian population. That interpretation is consistent with the case-law regarding the crime of persecution, as well as with the general goal of Article 2 to protect “humanity” and not only “humans.”¹⁸⁶ The reference to *any* civilian population also calls for a broad interpretation: The term civilian should be understood as including persons of any nationality.¹⁸⁷ With the exception of the crime of persecution, there is also no need to demonstrate a discriminatory intent; it suffices that a multiplicity of victims exists.¹⁸⁸ It is therefore submitted that the phrase ‘any civilian population’ may include not only an identifiable group such as the residents of a town (e.g. those of Timbuktu) or members of a religious groups (e.g. Buddhists around the world affected by the destruction of the Bamiyan Buddhas) but also more generally the international community as a whole. The ICC’s recognition of the fact that the international community may be considered as a victim further supports this interpretation.

Thirdly, the perpetrator must have had ‘knowledge of the attack.’ This requirement constitutes an additional mental element to be distinguished from the specific *mens rea* requirement of each crime. It entails that the perpetrator must commit the acts with knowledge of the broader widespread or systematic attack on the civilian population. It is unnecessary, however, to prove that “the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.”¹⁸⁹ Furthermore, the personal motive of the perpetrator for taking part in the attack is

185. Prosecutor v. Kunarac, Case No. IT-96-23-T, Judgment, ¶ 421 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

186. Rome Statute, *supra* note 13, art. 7; Draft Convention, *supra* note 12, art. 2.

187. THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 121, at 174–75 (explaining that “crimes against humanity cover a broader range of potential victims than war crimes” and “it is unnecessary to demonstrate that the victims are linked to any particular side in the attack against the civilian population”). See also Cassese, *supra* note 31, at 354 (explaining that “any civilian population” means “any group of civilians whatever their nationality”).

188. THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 121, at 173.

189. INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES, 6 (2011), <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>; See also Draft Convention, *supra* note 12, at 42.

irrelevant; the perpetrator does not need to share the purpose or goal of the broader attack.¹⁹⁰ Thus, in relation to deliberate attacks against cultural heritage such as those witnessed in Afghanistan, Syria, and Mali, there would be no need to establish that a defendant who was a member of the groups that committed the attacks had profound understanding of the religious edict that served as a basis for the widespread destruction or was privy to the detailed plans of the attacks; it would suffice to establish that the individual concerned was aware that his or her conduct was part of a general campaign targeting cultural heritage.

B. The Specific Material Element

An important distinction between war crimes and crimes against humanity is that the former may criminalize certain conduct regardless of their outcome.¹⁹¹ In contrast, crimes against humanity as currently listed under the Rome Statute and the Draft Convention require, as part of the material element, damage or harm to be inflicted (through extermination, enslavement, sexual violence, etc.).¹⁹² Furthermore, the nature of the crimes listed in Article 2 of the Draft Convention renders that the harm inflicted is to be severe.¹⁹³ Hence, the new proposed crime will also require actual and acute damage, although it is not required that the damage caused be total or irreversible.

C. The Specific Mental Element

The specific mental elements of the new proposed crime against humanity, namely the awareness of the factual circumstances that established the status of the target (protected cultural heritage) and the intention to severely damage it, are consistent with the approach

190. Draft Convention, *supra* note 12, at 43.

191. *Id.* at 7 (criminalizing the act of intentionally directing an attack against protected property such as historic monuments in arts. 8)(2)(b)(iv) & (ix); causing damage to the targeted property is not required.)

192. Rome Statute, *supra* note 13, art. 7; *see* Draft Convention, *supra* note 12, at 13. *But see id.* at 14 (outlining a general exception to that requirement is found in the criminalization of an attempt to commit a crime against humanity; hence, a fruitless attack may be considered as an attempt to cause destruction of cultural heritage that yields individual criminal responsibility).

193. Draft Convention, *supra* note 12, at 28 (“imprisonment or other *severe* deprivation of physical liberty in violation of fundamental rules of international law”); *id.* (“other inhumane acts of a similar character intentionally causing *great* suffering, or *serious* injury to body or to mental or physical health”); *id.* at 29 (“‘persecution’ means the intentional and *severe* deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”) (emphasis added).

found in several existing crimes against humanity.¹⁹⁴ The requirement to show intent also corresponds to international instruments governing the field of cultural heritage.¹⁹⁵ The knowledge and intent could be inferred from evidence such as the deliberate attack on a heritage site carrying a protective emblem.¹⁹⁶

In exceptional circumstances, a governmental or organizational policy that deliberately fails to take actions may be considered an attack amounting to a crime against humanity, although the existence of such a policy “cannot be inferred solely from the absence of governmental or organizational action.”¹⁹⁷ Accordingly, neglecting a historic monument or an archeological site is unlikely to yield criminal responsibility under the Draft Convention. Conversely, if governmental officials purposely ignore ongoing attacks against protected heritage while possessing the means to be aware of these attacks and the ability to take appropriate steps to prevent the attacks and punish the perpetrators, they may be held responsible for their inaction.¹⁹⁸

194. Draft Convention, *supra* note 12, art. 2(1)(e)t 28 (criminalizing “[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.”) The elements of the crime as defined in relation to the corresponding crime under the Rome Statute require the perpetrator to be aware of the factual circumstances that established the gravity of the conduct. INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES, *supra* note 189, at 6.

195. Rome Statute, *supra* note 13, art. 8 (the war crime of attacking cultural heritage such as historic monuments, requires the prosecutor to show that the perpetrator “intentionally directed an attack” against the protected heritage); *See also* 1999 Protocol, *supra* note 24, art. 15 (enumerating the offences considered as serious violations of the Protocol, and which refers to offences committed “intentionally”); G.A. Res. 46/49 (Aug. 6, 1992) (using the phrase “intentional destruction,” defined by the Declaration as “an act intended to destroy in whole or in part cultural heritage”); 1972 Convention, *supra* note 71, art. 6 (imposing on State Parties the duty not to take *deliberate* measures which might damage cultural heritage in another state) (emphasis added).

196. For example, in *Prosecutor v. Strugar*, the intent to deliberately destroy cultural property—the required *mens rea* for convictions under Article 3(d) of the ICTY Statute, which is similar to the mental element of the proposed new crime against humanity—was inferred from: (1) the evidence of the deliberate attack on the Old Town of Dubrovnik; (2) the renown cultural and historical character of that property as a UNESCO World Heritage Site; and (3) the fact that protective UNESCO emblems were visible to the attackers of the property. *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Chamber Judgment, ¶ 329 (Jan. 31, 2005).

197. *See* INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES, *supra* note 189, at 6, n.6.

198. ROY S. LEE & HAKAN FRIMAN, THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 76 (2001).

D. Definition of ‘Cultural Heritage’

If a new crime against humanity is added in the Draft Convention, it would be recommended to also introduce a definition of the term ‘cultural heritage’ for the purposes of the Draft Convention. This would correspond to the structure of Article 2 of the Draft Convention (and similarly of Article 7 of the Rome Statute), which include definitions of key terms of crimes.¹⁹⁹ In addition, as a newly introduced crime it would be advisable to provide as much precision as possible.

The task of defining ‘cultural heritage’, however, is not without challenges. The definitions of ‘cultural heritage’ and ‘cultural property’ are complex, having evolved over the years and differing from one contemporary legal source to another.²⁰⁰ Different methodologies have been used in different legal instruments. Thus, for example, crimes reflecting IHL norms such as those introduced as war crimes in the Rome Statute, do not make any reference to the terms ‘cultural heritage’ or ‘cultural property’.²⁰¹ Moreover, they are often based on the purpose of the protected immovable property (e.g. “buildings dedicated to religion, art, science, or charitable purposes”²⁰²) rather than on its cultural value.

A different methodology is reflected in the Cambodian Extraordinary Chambers Statute, which neither provided its own definition of the crime nor of the term ‘cultural heritage’; instead, it included in the list of crimes subject to the Chambers’ jurisdiction the crime of destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention.²⁰³ A similar approach was applied in

199. See Rome Statute, *supra* note 13, art. 7(2); Draft Convention, *supra* note 12, art. 2(2).

200. A different definition of cultural property or heritage is found in several major international Conventions regulating that field, including the 1954 Convention, the 1970 Convention, and the 1972 Convention. See 1954 Convention, *supra* note 24, art.1; 1972 Convention, *supra* note 71, art. 8; 1970 Convention, *supra* note 35, art. 1.

201. See Rome Statute, *supra* note 13, art. 8.

202. 1907 Convention, *supra* note 117, art. 27. See also Rome Statute, *supra* note 13, art. 8(b)(ix).

203. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, “The Cambodian Extraordinary Chambers Statute,” art. 7 (“The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979.”). Limiting jurisdiction to destruction carried out in violation of the 1954 Convention may pose difficulties to the prosecution if acts of destruction committed by the Khmer Rouge regime would not be considered as being committed during an armed conflict. Agreement

the more recent Nicosia Convention, which, in relation to moveable property, borrowed the definition of ‘cultural property’ from the 1970 Convention.²⁰⁴ While this definition is rather detailed and as such can provide clarity, it also has its shortcomings. It covers only tangible heritage and as a closed-list definition it does not allow for the inclusion of forms or types of cultural heritage that are currently unknown or not yet considered worthy of protection. In addition, for the purpose of the 1970 and Nicosia Conventions, the granting of protected status entirely depends on its designation as protected heritage by States,²⁰⁵ thereby excluding heritage that has not yet been expressly designated as such.

One method which may provide the utmost clarity is to cover in the definition introduced in the Draft Convention only cultural heritage that has been listed in accordance with the mechanisms of existing conventions in the field. This will include world heritage recognized under the 1972 Convention and the 2003 Intangible Heritage Convention, as well as cultural heritage listed as benefitting from special protection under the 1954 Convention or enhanced protection under the 1999 Protocol.²⁰⁶

There are, however, inherent difficulties associated with those lists. Similarly to the abovementioned point on the definitions of the 1970 and the Nicosia Conventions, the process of listing is completely dependent on States’ willingness to propose certain cultural heritage for inscription on the lists. Moreover, the current lists do not truly reflect cultural diversity. For example, with regard to the World Heritage List of the 1972 Convention, it has been contended that the List manifests a bias in favor of some regions, notably Europe, the great prehistoric civilizations of Latin America, and a number of Asian cultures, in particular those of India and China. Cultural heritage of other regions such as sub-Saharan Africa and the Caribbean scarcely figure on the

Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea art. 7, U.N.-Camb., June 6, 2003, 2329 U.N.T.S. 117.

204. Nicosia Convention, *supra* note 36, art. 2(b). With regard to immovable property, the Nicosia Convention used the classification of the 1972 Convention, namely monuments, groups of buildings, and sites. *See* 1972 Convention, *supra* note 71, art. 1.
205. *See* 1970 Convention, *supra* note 35, art. 1 (requiring the protected property to be “specifically designated” by State Parties); 1972 Convention, *supra* note 71, art. 2 (requiring the protected moveable property to be “classified, defined or specifically designated by any Party to this Convention or to the 1970 UNESCO Convention,” and protecting immovable property to be “defined or specifically designated by any Party to this Convention or to the 1970 Convention”).
206. 1972 Convention, *supra* note 71, art. 6(3); Intangible Heritage Convention, *supra* note 133, art. 3; 1954 Convention, *supra* note 24, art. 8; 1999 Protocol, *supra* note 24, art. 15.

List.²⁰⁷ Additionally, certain types of cultural property are disproportionately represented on the List, in particular European historic towns, Christian places of worship, and archaeological sites (especially those of ancient Greece and Rome).²⁰⁸ It is also noteworthy that the 1972 Convention explicitly indicates that non-inscription of sites on the World Heritage List does not mean that they do not have an outstanding universal value worthy of protection.²⁰⁹ The Bamiyan Buddhas and the Old Bridge of Mostar are just two examples of sites that were not listed, at the time of their destruction, on the World Heritage List, but would have likely met the ‘outstanding universal value’ test of the 1972 Convention.²¹⁰

In light of the above mentioned considerations, it is proposed to introduce a definition which meets the following conditions: Firstly, the definition ought to be broad enough to include various forms of existing and potential future types of cultural heritage.²¹¹ Hence, it is recommended to phrase the definition in general terms, preferably with several illustrative examples in the commentary to the Draft Convention, rather than to lay out an exhaustive list of types of

207. Raechel Anglin, *The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide*, 20 YALE J. L. & HUMAN. 241, 251 n.58 (2008).

208. Sophie Starrenburg, *Who is the Victim of Cultural Heritage Destruction? The Reparations Order in the Case of the Prosecutor v Ahmad Al Faqi Al Mahdi*, BLOG OF THE EUROPEAN J. OF INT’L L. (Aug. 25, 2017) <https://www.ejiltalk.org/who-is-the-victim-of-cultural-heritage-destruction-the-reparations-order-in-the-case-of-the-prosecutor-v-ahmad-al-faqi-al-mahdi/> [https://perma.cc/4V5X-KHLZ] (“[T]he listing process at UNESCO has been viewed as notoriously politicised and biased towards particular forms of heritage. The World Heritage List is by no means a perfect mirror of the most important cultural sites across the globe, and should be acknowledged as a work in progress.”).

209. 1972 Convention, *supra* note 71, art. 12 (“The fact that a property has not been included in either of the [World Heritage List or the list of World Heritage in Danger] shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists.”) 2003 UNESCO Declaration, *supra* note 69, §§ VI, VII (addressing intentional destruction of cultural heritage of great importance for humanity “whether or not it is inscribed on a list maintained by UNESCO or another international organization”).

210. World Heritage List, *Cultural Landscape and Archaeological Remains of the Bamiyan Valley*, UNESCO, <https://whc.unesco.org/en/list/208/> [https://perma.cc/S29E-MW75]; World Heritage List, *Old Bridge Area of the Old City of Mostar*, UNESCO, <https://whc.unesco.org/en/list/946/> [https://perma.cc/DP7U-WC6Q].

211. Rep. of the Special Rapporteur in the Field of Cultural Rights, *Cultural Rights*, ¶ 10, U.N. Doc. A/71/317 (Aug. 9, 2016) (noting that the concepts of cultural property and cultural heritage “should be understood in broad, holistic terms”).

heritage as was done in the 1970 Convention.²¹² Further, for the reasons previously noted, the definition should not be contingent upon listing under existing conventions or on explicit designation by States. Such listing or designation can certainly support a court's assessment of the cultural value of the heritage targeted, the defendant's *mens rea* at the time of the attack, or the aggravating factors for the purpose of sentencing. Thus, for example, if the heritage targeted was listed at the time of the attack under the 1972 Convention, it should be presumed to fall within the definition of 'cultural heritage'; yet, listing should not a prerequisite for prosecution under the Draft Convention.

It is also recommended to include intangible heritage within the definition to ensure the protection of a variety of important cultural forms such as oral traditions, performing arts, and social rituals.²¹³ This will not only reflect developments that occurred in recent decades such as the conclusion of the Intangible Heritage and the Cultural Diversity Conventions, but would also serve as a step towards the harmonization of the different legal regimes currently governing intangible and tangible cultural heritage, a prominent objective advocated for by UNESCO.²¹⁴

The test for determining cultural heritage as such ought to be based on the cultural value test, which is applied - although with variations - in the definitions of cultural heritage or cultural property found in several international conventions.²¹⁵ It provides better protection than

212. 1970 Convention, *supra* note 35, art. 1.

213. See Intangible Heritage Convention, *supra* note 133, art. 2 (providing a definition of intangible cultural heritage).

214. For example, at 2004 a symposium entitled "Safeguarding of Tangible and Intangible Cultural Heritage: Toward an Integrated Approach," the then-Director-General of UNESCO, Koichiro Matsuura, highlighted the need "to pay attention to the totality of cultural heritage of nations and communities so that protection measures are not only adapted to each component but also mutually supportive where possible." In that regard, he added, the development of cooperation between the two major UNESCO Conventions dealing with the protection and safeguarding of the tangible and intangible heritage will be of outmost importance. He reiterated, "the need for the harmonization of definitions and for the development of a consistent set of heritage policies," and concluded his remarks by stating that "a new, inclusive and, where appropriate, unified vision of heritage" and "an integrated approach, which respects the diversity of cultures and which acknowledges the interdependencies of tangible and intangible heritages as well as their autonomy, will have to be studied and translated into concrete measures of implementation." *Safeguarding of Tangible and Intangible Cultural Heritage: Toward an Integrated Approach*, UNESCO (Oct. 20, 2004) <https://whc.unesco.org/en/news/89> [<https://perma.cc/5ZP9-3WPS>]

215. See 1954 Convention, *supra* note 24, art.1 (defining cultural property as "movable or immovable property of great importance to the cultural

the “purpose test” of the 1907 Convention and the Rome Statute, since it does not depend on the specific purpose for which protected objects and sites were used at the time they were attacked.²¹⁶ The cultural value test also rises above - and thus avoids - other general or legal characterizations of heritage - e.g. its use for secular or religious purposes - which are irrelevant for the sake of protection.

With regard to the threshold to be defined by the cultural value test it is proposed to use the terminology of the 1954 Convention, namely to set the bar at the level of heritage of ‘great importance to every people’.²¹⁷ This will ensure consistency with the applicable test under IHL and will provide sufficient protection to various forms of cultural heritage whose value transcends geographical boundaries,²¹⁸ while excluding those whose value is disputable.

Based on the discussion thus far, the proposed definition of the term ‘cultural heritage’ will read as follows: “Human-made creation²¹⁹ of great importance to every people, irrespective of its origin, ownership or the purposes for which it is used, its territorial or geographical location, its tangible or intangible nature, or whether it is movable or immovable.”²²⁰

VI. CONCLUSION

Since the genesis of the concept of crimes against humanity, the crimes as defined under international law focused not on the single criminal act against the direct victim, but rather on the repercussions

heritage of every people”); 1972 Convention, *supra* note 71, art. 1 (referring to heritage as “outstanding universal value”).

216. 1907 Convention, *supra* note 117, art. 27. *See also* Rome Statute, *supra* note 13, art. 8(b)(ix).

217. 1954 Convention, *supra* note 24, art. 1.

218. *See* Prosecutor v. Kordic, Case No. IT-95-14/2-A, Judgment, ¶ 91 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); Brammertz et al., *supra* note 21, at 1153; Wangkeo, *supra* note 4 at 188 (explaining the distinction between heritage that transcends geographical boundaries, on the one hand, and national patrimony on the other hand).

219. The reference to “human-made creation” is meant to distinguish between cultural and natural heritage. Though both deserve protection - as manifested by the 1972 Convention which covers both types of heritage - there have been few, if any, acts committed against natural heritage in an “iconoclastic” manner, namely for the sake of destroying natural sites as such and convey a message within the act of destruction. Addressing acts committed against cultural heritage therefore appears to be more acute. 1972 Convention, *supra* note 71, art. 4. This does not exclude any future debate on criminalization of environmental wrongs as a distinct crime against humanity, as suggested by Wattad. *See generally* Wattad, *supra* note 59.

220. Gottlieb, *supra* note 118, at 895.

of such acts on humankind. The preamble of the Draft Convention and similarly that of the Rome Statute reflect this approach by making a reference to crimes “that deeply shock the conscience of humanity.”²²¹

Cultural heritage is an integral component of humanity. As numerous statements pronounced on the international level have manifested, deliberate attacks against heritage have direct and lasting impact on the world community as a whole. Beyond those statements, various developments in recent decades – notably, since the 1990’s when the Rome Statute was negotiated - attest to the growing recognition of the importance of preserving heritage for present and future generations.

The current legal regime under ICL, however, has not followed suit. Introducing a distinct crime against humanity in the Draft Convention can bridge this gap and enhance the rule of law by countering radicalization and assist in preventing irreversible damage to the shared heritage of humanity.

Considering that attacks against cultural heritage have already been recognized as serious crimes under international law, albeit, as explained in this article, with certain shortcomings, adding a new crime against humanity should not be perceived as a groundbreaking departure from the established framework of ICL. To the contrary, it would be a natural continuation of the developments in this field, indeed one which is overdue.

221. Draft Convention, *supra* note 12, preamble; Rome Statute, *supra* note 13, preamble,