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# CULTURAL PRESERVATION IN AREAS OF MILITARY CONFLICT: INTERPRETING THE SHORTCOMINGS AND SUCCESS OF INTERNATIONAL LAWS

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## ABSTRACT

*The strategy of using cultural landmarks as tangible targets to gain international recognition, political leverage, and local power exists in tangent with armed conflict. Over the past seventy-five years, the international community has grown increasingly cognizant of the destructive nature of warfare and has taken measures to protect cultural property and the diverse history it represents. The United Nations (UN) solution was to form governing bodies and draft treaties aimed at preserving culture and deterring the destruction of cultural property. Over the years, the inability to enforce the enacted treaties and regulations has led many to question the effectiveness of these international efforts and of the UN as a whole. Furthermore, in the wake of the continued destruction of recognized sites, it is clear that enforcement is not enough. Efforts must be made to recognize what contributes to and resolves instances of violence against cultural heritage in order to prevent such destruction from occurring.*

*State parties of the World Heritage Organization, non-governmental organizations, and the international community employ a diverse body of domestic and international law in their attempts to address the preservation of cultural landmarks, but the effectiveness of these efforts depends on a complex interplay of international politics and is often difficult to predict. Focusing on the political dynamics at play, this Note will analyze three World Heritage Sites, the political climate surrounding each site, and how the body of law concerning cultural preservation was applied in each situation. This Note will then conclude that the existing body of law is not enough to protect sites of cultural heritage; instead, governments must begin to incorporate politics, respect for the international community, and cultural or religious differences that allows each site to be protected within the existing frameworks.*

## INTRODUCTION

The international community has long recognized the historical and cultural justifications for cultural preservation, as evidenced through international treaties and conventions.<sup>1</sup> Following World War II, the international community witnessed the increasingly destructive capabilities of war and the inevitable ramifications on cultural heritage.<sup>2</sup> A grow-

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<sup>1</sup> See Louise Arimatsu & Mohbuba Choudhury, *Protecting Cultural Property in Non-International Armed Conflicts: Syria and Iraq*, 91 INT'L L. STUD. 641, 642-43, 643 n.5 (2015) ("The ambition to protect cultural property in war dates back to the latter half of the nineteenth century, when States first began to codify rules to limit the detrimental effects of warfare.").

<sup>2</sup> See *id.* at 643-44 ("In particular, the large scale destruction and misappropriation of cultural property during the Second World War exposed the need for a more robust protection regime.").

ing international desire to protect and preserve monuments for cultural heritage led to the development of a substantive body of law motivated by and grounded in cultural, as opposed to political or economic, rationale.<sup>3</sup> The doctrine of cultural preservation aims to govern nations' efforts to preserve properties of cultural significance and to prevent or prohibit damage caused by military conquest, political statements, or intentional destruction by sparring religious, cultural, or ethnic groups.<sup>4</sup> As the number of culturally motivated armed conflicts has increased in recent years,<sup>5</sup> the need to develop enforceable laws and procedures to protect cultural heritage has become more urgent.

Cultural heritage is significant not only for its ongoing contributions to and influence on art and architecture but also for its versatile political uses and near-universal ability to affect a broad range of issues.<sup>6</sup> The increasingly relevant relationship between culture and armed conflict was highlighted by the Council of Europe:<sup>7</sup> "There is scarcely a domestic or foreign policy field which is not also to some extent a cultural policy field . . . . At the same time, it appears that the number of cultural conflicts

<sup>3</sup> See *id.* at 647-55 (discussing the various reasons underlying the protection of cultural property).

<sup>4</sup> See Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, 242 [hereinafter 1954 Hague Convention]. See also Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention]. Article 1 of the UNESCO Convention defines cultural property as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, literature, art or science and which belongs to the following categories: (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance." *Id.* art 1. The UNESCO Convention also requires a State to designate the property's importance. See *id.*

<sup>5</sup> See, e.g., Arimatsu & Mohbuba, *supra* note 1, at 645 (discussing the heavy human toll stemming from the recent armed conflicts between Syria and Iraq).

<sup>6</sup> See *id.* at 652, n.37 ("[I]t is well-established that cultural property is not only constituted by, but also functions to constitute identities. States have been particularly resourceful in instrumentalizing cultural property to define identities for political ends.") (internal citations omitted). By definition, the value of cultural property and cultural heritage sites stems from their unique nature and from their individual contributions to society. Conceivably these sites can then be compared to a non-renewable resource. See generally Frank G. Fechner, *The Fundamental Aims of Cultural Property Law*, 7 INT'L J. CULTURAL PROP. 376 (1998); Markus M. Muller, *Cultural Heritage Protection: Legitimacy, Property, and Functionalism*, 7 INT'L J. CULTURAL PROP. 295 (1998).

<sup>7</sup> The Council of Europe is the continent's largest human rights organization, dedicated in part to protecting and preserving minority cultures. See *Values*, COUNCIL OF EUROPE, <http://www.coe.int/en/web/about-us/values> (last visited Nov. 10, 2015) [hereinafter *COE Values*].

worldwide . . . has exceeded the number of non-cultural conflicts since the mid-1980s.”<sup>8</sup> The Council of Europe’s analysis of recent conflicts succinctly summarizes the uniform presence and motivation of cultural involvement in current events.<sup>9</sup> By studying the “root causes of conflict before they erupt,”<sup>10</sup> the Council of Europe is not limited to studying military conflicts that stem from cultural differences. Policies related to politics, military strategy, education, and communication between countries are among the policies and laws the Council of Europe studies for signs of cultural inequalities and subsequent unrest.<sup>11</sup>

Conversely, the need to protect cultural heritage is being utilized as a counter to a new type of ethnic cleansing: when destroying a culture’s identity, in which aggressors wipe out entire histories they believe are subservient to their own.<sup>12</sup> The growing link between culture and politics has strengthened the link between culture and human rights and has allowed the body of law supporting cultural heritage to grow in importance and recognition.<sup>13</sup> Scholars, politicians, and officials alike now argue that the protection of cultural property must receive a level of recognition equivalent to a *jus cogens*, that is, become a norm in international law that cannot be set aside.<sup>14</sup> Equating the destruction of cultural property to a violation of a *jus cogens* was perhaps most strongly defined by the International Covenant on Economic, Social, and Cultural Rights, which states the “full realization” of cultural rights, being inextricably related to human rights, can only occur if member nations take steps necessary to conserve both “science and culture.”<sup>15</sup> In this statement, the ICESCR not only pushes for culture to be recognized as a basic human right, but also urges member states to take action to protect national and international citizens from having the human right of culture stripped away or destroyed.<sup>16</sup>

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<sup>8</sup> Secretariat of Directorate of Culture & Cultural & Nat’l Heritage, *The Role of Culture and Cultural Heritage in Conflict Prevention, Transformation, Resolution and Post-Conflict Action: The Council of Europe Approach*, COUNCIL OF EUROPE 2 (Jan. 18, 2011), [https://www.coe.int/t/dg4/cultureheritage/News/CultureReconciliation\\_en.pdf](https://www.coe.int/t/dg4/cultureheritage/News/CultureReconciliation_en.pdf) [hereinafter *COE Culture Report*].

<sup>9</sup> *See id.* at 5.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.*

<sup>12</sup> *See generally* 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 (2001).

<sup>13</sup> *See* Arimatsu & Choudhury, *supra* note 1, at 652.

<sup>14</sup> *See* Corinne Brenner, Note, *Cultural Property Law: Reflecting on the Bamiyan Buddhas’ Destruction*, 29 SUFFOLK TRANSNAT’L L. REV. 237, 247 (2006) (discussing the doctrine of *jus cogens*).

<sup>15</sup> *Id.* (internal citation omitted).

<sup>16</sup> International Covenant on Economic, Social and Cultural Rights art. 15, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]. The

This Note will examine three World Heritage Sites: the Ancient City of Aleppo, located in Syria; the Land of Olives and Vines located in Palestine; and the Cultural Landscape and Archaeological Remains of the Bamiyan Valley, located in Bamiyan, Afghanistan. The political climate and military activity has varied for each site; consequently, the results have been disparate as well: one site's preservation, one site's destruction, and one site's fate still undecided. National and international politics play a major factor in determining the international community's responses and the number of avenues available for activists to use to save a particular site.<sup>17</sup>

In summary, this paper will analyze three sites and their current security and the laws, current events, and dangers surrounding them: the Land of Olives and Vines was arguably saved by UNESCO recognition, the prospect of UNESCO recognition arguably contributed to the destruction of the Buddhas of Bamiyan, and UNESCO recognition has the potential to protect the Ancient City of Aleppo from further destruction as a contingency of the Syrian Civil War. Each site, renowned for its contributions to history and culture, was recognized and marked for protection by UNESCO; however, the disparate results clearly indicate that a uniform system of recognition is not a guarantee of protection. To successfully preserve a site and protect it from destruction, the international community must communicate and collaborate with the domestic government, recognize political tensions, and emphasize the international and national significance of preserving cultural heritage.

## I. THE HISTORY AND DEVELOPMENT OF LAW

For the purposes of this Note, the United Nations serves as the allegiance of countries who have signed on to treaties and pacts, dedicated to preserving sites and monuments of cultural significance against military aggression and political unrest.<sup>18</sup> One of the purposes enumerated in the Charter is “[t]o achieve international co-operation in solving international problems of an economic, social, *cultural*, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language,

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Council of Europe more directly explains the effects a loss of culture may have on a population: “Destroying the cultural expressions and the heritage associated with a specific identity hampers those people who claim that identity from uniting and, in the long-term, prevents the group from expressing itself and from fulfilling its potential as European citizens.” COE *Culture Report*, *supra* note 7, at 2.

<sup>17</sup> Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT’L L. 183, 215-16 (2003) (discussing the role of the political motives behind the destruction of cultural property and claiming that “it is apparently more acceptable for a host state to destroy relics for economic purposes if there is a lack of political vindictiveness”).

<sup>18</sup> See *infra* Part II; see also U.N. Charter pmbl.

or religion.”<sup>19</sup> To achieve this co-operation, the UN established the United Nations Educational, Scientific, and Cultural Organization (UNESCO) as a body of the UN for the specific purpose of protecting cultural property,<sup>20</sup> which in turn led to the development of the World Heritage Committee.<sup>21</sup> The implementation, success, and failures of the conventions and treaties developed by the UN and the World Heritage Committee are used to explain the state of the World Heritage Sites discussed below.<sup>22</sup>

The establishment of a unified system to protect cultural property was realized through the UN’s founding of UNESCO, which in turn defined and formed the World Heritage List.<sup>23</sup> The World Heritage List currently

<sup>19</sup> U.N. Charter art. 1(3) (emphasis added)

<sup>20</sup> The UNESCO Constitution initially established UNESCO’s jurisdiction over matters of cultural preservation by “promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed . . . by the Charter of the United Nations.” Constitution of the United Nations Educational, Scientific and Cultural Organization, art. 1, § 1, Nov. 4, 1945, T.I.A.S. No. 1580, 4 U.N.T.S. 275 [hereinafter UNESCO Constitution]. See also *Introducing UNESCO*, UNESCO, <http://en.unesco.org/about-us/introducing-unesco>.

<sup>21</sup> “Noting that the cultural heritage and the natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction.” Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151, <http://unesdoc.unesco.org/images/0013/001333/133369e.pdf> [hereinafter World Heritage Convention]. See also *id.* art. 8(1) (“An Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value, called ‘the World Heritage Committee,’ is hereby established within the United Nations Educational, Scientific and Cultural Organization.”).

<sup>22</sup> For a discussion of the development of the United Nations and relevant treaties, see generally Louise Arimatsu & Mohbuba Choudhury, *Protecting Cultural Property in Non-International Armed Conflicts: Syria and Iraq*, 91 INT’L L. STUD. 641, 642-43, 643 n.5 (2015), and Abtahi, *supra* note 12.

<sup>23</sup> Criteria for the selection of a site to the World Heritage List are established in Article 77 of the Operational Guidelines for the Implementation of the World Heritage Convention, U.N. Doc. WHC. 08/01 (Jan. 2008) [hereinafter Operational Guidelines]. Divided into a ten-point criterion, the first five Operational Guidelines focus exclusively on cultural sites, and are therefore the criteria that guide this Article. *Id.* ¶ 77. The property must (i) represent a masterpiece of human creative genius; (ii) exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design; (iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; (iv) be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history; (v) be an outstanding example of a traditional human

consists of 802 cultural properties.<sup>24</sup> Each designation of a new site was intended to bestow honor and protection for the cultural significance embodied *in situ*.<sup>25</sup> Sites admitted to the World Heritage List are recognized as possessing “cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity.”<sup>26</sup> This definition is a reiteration of the current trend in acknowledging sites of cultural significance: the site’s significance ought to transcend national and political boundaries.<sup>27</sup>

By invoking help from local populations, providing emergency assistance, and encouraging the establishment of management plans and reporting systems, UNESCO aims to monitor the status of World Heritage Sites by encouraging “countries to sign the World Heritage Convention and to ensure the protection of their natural and cultural heritage.”<sup>28</sup> Supplementing this list, the List of World Heritage in Danger has forty-eight properties selected in accordance with the standards set forth in Article 11(4) of the Convention Concerning the Protection of the World Cultural and Natural Property (UNESCO Convention).<sup>29</sup> Historical relevance, broad geographic range, and cultural diversity of these admitted sites indicate that the international community’s selection of sites as wor-

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settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change; (vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. *Id.*

<sup>24</sup> World Heritage Centre, *The List*, UNESCO, <http://whc.unesco.org/en/list/> (listing 1031 properties total: thirty-one “transboundary,” two “delisted,” forty-eight “in danger,” thirty-two “mixed,” 163 “state parties,” and 197 “natural,” among the “cultural” properties) (last visited Jan. 20, 2015).

<sup>25</sup> See World Heritage Centre, *UNESCO’s World Heritage Mission*, UNESCO, <http://whc.unesco.org/en/about/> (last visited Feb. 28, 2015) [hereinafter *UNESCO Mission*].

<sup>26</sup> Operational Guidelines, *supra* note 23, ¶ 49.

<sup>27</sup> See, e.g., Arimatsu & Choudhury, *supra* note 1, at 652 n.3.

<sup>28</sup> *UNESCO Mission*, *supra* note 25.

<sup>29</sup> World Heritage Centre, *The List in Danger*, UNESCO, <http://whc.unesco.org/en/danger/> (last visited Dec. 30, 2015) [hereinafter *List in Danger*]. The four requirements under Article 11(4) of the UNESCO Convention are that: (1) the property under consideration is on the World Heritage List; (2) the property is threatened by serious and specific danger; (3) major operations are necessary for the conservation of the property; and (4) assistance under the *Convention* has been requested for the property. See UNESCO Convention, *supra* note 4, art. 11. See also Operational Guidelines, *supra* note 23, ¶ 6. The Committee has the view that its assistance in certain cases may most effectively be limited to messages of its concern, including the message sent by inscription of a property on the List of World Heritage in Danger and that such assistance may be requested by any Committee member or the Secretariat. *Id.*

thy and in need of protection was independent of the political climates previously or currently surrounding the monuments, city centers, and archaeological sites.<sup>30</sup> Rather than abandoning a site due to political pressures, individual nations and the international community are increasingly relying on UNESCO and the World Heritage List to protect significant sites and to leverage international law and policy to prevent, resolve, or mitigate armed conflict in at-risk areas.<sup>31</sup>

Nations first joined together to draft international treaties dedicated to protecting cultural property in the latter half of the nineteenth and early twentieth centuries.<sup>32</sup> Within this timeframe, the Fourth Geneva Convention,<sup>33</sup> the UNESCO Convention of 1970,<sup>34</sup> the World Heritage Convention,<sup>35</sup> the UNIDROIT Convention,<sup>36</sup> and the Roerich Pact<sup>37</sup> became the most influential treaties.<sup>38</sup> Military and government efforts to protect sites of cultural and historical significance gained notable legal traction post-World War II, largely building off of proposals and guidelines which had been first introduced in the late nineteenth century and had been limited in scope and power.<sup>39</sup>

Protection of cultural property has become an increasingly valued international priority, as has the need to establish objective parameters that could be used to define and recognize cultural property worthy of preservation and international protection.<sup>40</sup> The 1907 Hague Convention

<sup>30</sup> See, e.g., Arimatsu & Choudhury, *supra* note 1, at 651-52 (discussing the independent value of cultural property). See also discussions *infra* Parts III (A)-(C) (illustrating the range of different admitted sites).

<sup>31</sup> See discussions *infra* Parts III(A)-(C).

<sup>32</sup> See Arimatsu & Choudhury, *supra* note 1, at 642 n.5 (listing several international treaties dating back to the nineteenth century) (internal citations omitted).

<sup>33</sup> The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 46, Aug. 12 1949, 6 U.S.T. 3616, 75 U.N.T.S. 287 T.I.A.S. No 3365 (1956) [hereinafter Geneva Convention].

<sup>34</sup> Convention on the Means of Prohibiting and Preventing the Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 23 U.N.T.S. 231, reprinted in 10 I.L.M. 289 (1971) [hereinafter 1970 UNESCO Convention].

<sup>35</sup> World Heritage Convention, *supra* note 21.

<sup>36</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention].

<sup>37</sup> Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 289 (entered into force July 13, 1935) [hereinafter Roerich Pact].

<sup>38</sup> See, e.g., Matthew Thurlow, Note, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE HUM. RTS. & DEV. L.J. 153, 155-62 (2005) (listing the aforementioned conventions and treaties, as the ones the United States has joined).

<sup>39</sup> See *id.* at 154-56.

<sup>40</sup> The threshold of becoming a *jus cogens* is provided by the International Court of Justice — requiring “the evidence of a general practice accepted as law.” See Statute



definition was minimal at best: protection was granted for private property and private and public institutions whose purpose was religious, charitable, educational, or dedicated to the arts and sciences.<sup>41</sup> The 1954 Hague Convention eliminated this distinction, the Convention most relevant to this Note, instead giving protection to all qualifying cultural property regardless of ownership.<sup>42</sup> This new definition is helpful to the extent that it prioritizes cultural significance over ownership.<sup>43</sup> However, it introduces the limitation that individuals will only receive protection under the 1954 Hague Convention if the state in which they reside has ratified the treaty.<sup>44</sup> Finally, the importance of cultural heritage was uncontroversially acknowledged in the Universal Declaration of Human Rights, which declared that “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”<sup>45</sup> By identifying the right to cultural participation as an international, non-revocable human right, member states bound themselves to protecting individuals’ ability to identify with and participate in their cultural heritage; a right which is necessarily tied to the continued existence of cultural property.<sup>46</sup>

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of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993; 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §102(2) (1987). Article 38 of the Statute of the International Court of Justice defines international norms sufficient enough to be tried for are: “(b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” See also Rome Statute of the International Criminal Court art. 25(1), adopted July 17, 1998, 2187 U.N.T.S. 90 (“The Court shall have jurisdiction over natural persons pursuant to this Statute.”) [hereinafter Rome Statute].

<sup>41</sup> Hague Convention IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (entered into force Nov. 27, 1909) [hereinafter Hague Convention of 1907] (one of the many Hague Conventions of 1907 however).

<sup>42</sup> 1954 Hague Convention, *supra* note 4.

<sup>43</sup> *Id.*

<sup>44</sup> 1954 Hague Convention, *supra* note 4, art. 18.

<sup>45</sup> G.A. Res. 217(III) A, Universal Declaration of Human Rights, art. 27, ¶ 1 (Dec. 10, 1948).

<sup>46</sup> *Id.* The continued push for raising cultural heritage to a *jus cogens* is marked by the development of laws and treaties, as well as the focus of conventions: International Committee of the Red Cross, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law Applicable in Armed Conflicts: Geneva 1974-77*, Res. 20 (IV), 4th Sess., 55th plenary Mtg., at 213 (1977) [hereinafter Official Records] (declaring the 1954 Hague Convention to be “of paramount importance for the international protection of the cultural heritage of mankind”). UNIDROIT, *supra* note 37, Art. 3, ¶¶ 1-8. The UNIDROIT Convention addresses how to recompense victims of cultural property loss, but no mention is made of how parties are expected to punish or prevent these wrongs from initially taking place

The World Heritage properties analyzed in this Note fulfill the criteria set forth by the World Heritage Organization. Each site is known to be “of great importance to the cultural history of every people,” a reputation that pre-existed and justified their inscriptions as World Heritage Sites.<sup>47</sup> As discussed earlier, the World Heritage Organization considers monuments, groups of buildings, and sites to represent cultural heritage when they “are of Outstanding Universal Value from the point of view of history, art, or science.”<sup>48</sup> The selection of sites is based on a set of ten criteria listed in the Operational Guidelines.<sup>49</sup> Article 6 of the World Heritage Convention emphasizes that the protection of cultural heritage is an international task, and that all members must help to identify, protect, conserve, and preserve sites of international cultural significance.<sup>50</sup> Parties to the Convention are expressly forbidden from taking “measures which might . . . directly or indirectly” damage or destroy the listed sites.<sup>51</sup>

Due to the recognized cultural importance of each of these sites, the 1954 Hague Convention and the protocol set forth by the United Nations ought to be sufficient protection.<sup>52</sup> But the growing number of sites on the World Heritage List in Danger indicates that recognition of their cultural significance is not enough to protect sites from the conflict that surrounds them.<sup>53</sup>

The Ancient City of Aleppo, having satisfied the criteria set forth by Article 11(4) of the Convention, is considered facing immediate danger due to the constant military activity and has been irreparably affected by Syria’s Civil War.<sup>54</sup> Under Article 11(4), any site that “is threatened by serious and specific dangers, such as the threat of disappearance caused by . . . destruction caused by changes in the use or ownership of the land . . . the outbreak or the threat of armed conflict” is considered to be in danger and is entitled to special protections.<sup>55</sup> Despite acknowledgment of a site’s endangerment by UNESCO, the availability of protections is constrained both by the local laws of the country and the ability of international treaties to timely react to the endangerment.

Protection of cultural properties from armed conflict has only continued to develop over the past two centuries, resulting in the doctrine of cultural preservation continuing on an upward path of notoriety and

<sup>47</sup> Operational Guidelines, *supra* note 23.

<sup>48</sup> *Id.* art. 1.

<sup>49</sup> Operational Guidelines, *supra* note 23.

<sup>50</sup> World Heritage Convention, *supra* note 21, art. 6.

<sup>51</sup> *Id.*

<sup>52</sup> For a discussion of the development of the 1954 Hague Convention, see generally Arimatsu & Choudhury, *supra* note 1.

<sup>53</sup> *List in Danger*, *supra* note 29.

<sup>54</sup> World Heritage Convention, *supra* note 21, art. 11(4).

<sup>55</sup> *Id.*

being incorporated in both domestic and international laws.<sup>56</sup> Reaching the status of customary international law, the doctrine may now be considered an alternative tool of negotiation in the political areas that surround World Heritage sites.<sup>57</sup> Recognized sites of cultural importance in areas of military conflict either fall victim to such conflict or are protected by the international community. In the below example of the Land of Olive and Vines in Battir, Palestine, the international community's commitment to protecting the site allowed the history and cultural importance of the site to become leverage for negotiations for peaceful agreements, resulting in the side-stepping of potential military involvement.

As the custom of protecting cultural properties has evolved, the following section will examine how states are now increasingly being pressured to recognize and live up to the requirements set forth by customary international law.<sup>58</sup> With requirements placed on each state actor who has signed or ratified either the UN or an independent treaty focused on cultural preservation, the binding laws establish new standards that introduce the use of World Heritage sites as a new bargaining power, in some cases potentially able to reduce the use of armed conflict. Destruction of cultural property is not the end of a political party or ideology; it is the elimination of a people's identity, belief system, values, and heritage.<sup>59</sup>

In spite of the numerous treaties and protocols established over the past century, the lack of an international enforcement mechanism has meant that successful protection of sites is dependent on a domestic country's ratification of the protocols and its willingness to use national resources to protect cultural sites, enforce guidelines in treaties, and prosecute those who damage the sites.<sup>60</sup> While the development of law has sought to govern and enforce the protection of sites, the politics surrounding each site's history, location, and ethnic affiliations arguably remain the most determinative factor for whether or not a site is

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<sup>56</sup> As an example of the continued recognition of cultural protection as an independent body of law, the 1954 Hague Convention is still gaining signatories — as of April 17, 2012, 126 countries are signatories. *1954 Hague Convention, List of Signatories*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E>.

<sup>57</sup> See *infra* Part III (B).

<sup>58</sup> The 1954 Hague Convention defines the obligations of the Contracting Parties as “refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.” 1954 Hague Convention, *supra* note 4, art. 4(1).

<sup>59</sup> See *id.* See also Rome Statute, *supra* note 40.

<sup>60</sup> See Brenner, *supra* note 14, at 243, 258 n.107 (discussing the ratification requirement and the lack of enforcement mechanisms to defend property).

destroyed.<sup>61</sup> Thus, it is necessary to incorporate each of these factors to have a truly efficient resolution.

## II. THE EFFECTS OF CULTURAL PRESERVATION: THREE EXAMPLES

### A. *Syrian Arab Republic: Ancient City of Aleppo*

#### 1. History and Cultural Significance of Aleppo

The Ancient City of Aleppo is significant to many races, cultures, and religions because of its multi-layered history and culture.<sup>62</sup> The City of Aleppo is renowned for the influx of cultures that took turns ruling the city; the Hittites, Assyrians, Akkadians, Greeks, Romans, Umayyads, Ayyubids, Mameluks and Ottomans all occupied the city at one time.<sup>63</sup> The city's religious and military architecture, coupled with the culturally rich society that has developed over the centuries, met the criteria set forth by the World Heritage Convention.<sup>64</sup>

#### 2. Qualifying Aleppo as a World Heritage Site

In determining what makes the city of Aleppo unique, the World Heritage Committee emphasized the city's outstanding universal value, characterizing it as a "reflection of the social, cultural and economic aspects of what was once one of the richest cities of all humanity."<sup>65</sup> For this reason, scholars and politicians believe that damage to the city, especially damage caused by military conflicts, constitutes an infringement of the

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<sup>61</sup> See Wangkeo, *supra* note 17, at 292 (discussing the issue of religious or political "iconoclasm," that is the "destruction of icons due to the belief that the images are imbued with an unacceptable symbolic significance") (internal citation omitted).

<sup>62</sup> In describing the contributions Syria has made to society, Christian Sahner writes: "Its cultures have left behind archaeological treasures of unmatched richness and beauty. They bear witness to the many peoples who have mixed across these lands through the centuries—Babylonians, Greeks, Romans, Byzantines, Umayyads and Ottomans, among others—each contributing to the ethnic, religious and linguistic tableau that is modern Syria." Christian C. Sahner, *Saving Syria*, WALL ST. J. 1-2 (Aug. 21, 2012) <http://www.wsj.com/articles/SB10000872396390444508504577591571057240042>; Nick Compton, *What is the oldest city in the world?*, GUARDIAN (Feb. 26, 2015), <http://www.theguardian.com/cities/2015/feb/16/whats-the-oldest-city-in-the-world> (recognizing Aleppo as "the oldest city currently being fought for and sacked").

<sup>63</sup> World Heritage Centre, *Ancient City of Aleppo*, UNESCO, <http://whc.unesco.org/en/list/21> (defining the cultural and historical significance of the site which qualified it as recognition for World Heritage) [hereinafter *Aleppo on List*].

<sup>64</sup> Operational Guidelines, *supra* note 23 (listing criterion iii and iv as the supporting reasons for Aleppo's inscription). The physical limits of the property follow the outline of the old city and include the North, Northeast, and East suburbs. See World Heritage Convention, *supra* note 21.

<sup>65</sup> See *Aleppo on List*, *supra* note 63. See also generally Operational Guidelines, *supra* note 23.

rights of the Syrian people.<sup>66</sup> Irina Bokova, the Director-General of UNESCO, emphasized the irreparable damage cultural destruction can have on a people: “The destruction of heritage represents a cultural hemorrhage in addition to the tragic humanitarian crisis and suffering experienced by the people of Syria.”<sup>67</sup>

Damage to this site would be an insurmountable blow against the identity and history of Syrian people and against the universal history of humanity, in direct opposition to the goals of UNESCO.<sup>68</sup> Tangible cultural heritage is preserved in the city’s architecture and market places, and the intangible cultural value of the city, including performing arts and training in traditional artisanal skills, relies on the continued existence of the city’s infrastructure. Thus, tangible and intangible cultural heritage is equally threatened by serious damage done to the city, which enhances the social fragmentation and migration Aleppo is enduring as a result of the civil war.<sup>69</sup>

The Ancient City of Aleppo was declared a World Heritage Site in 1986, following severe damage from World War II and further destruction from attempts to modernize the city.<sup>70</sup> It represents an “important interchange of human values” and “an exceptional testimony to a cultural tradition or to a civilization which is living.”<sup>71</sup> The site is an example of a

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<sup>66</sup> See Sarah Cascone, *The Fight to Save Syria’s Cultural History from Ravages of War*, ART-NET (Aug. 8, 2014), <https://news.artnet.com/art-world/the-fight-to-save-syrias-cultural-history-from-ravages-of-war-75404>; UNESCO chief calls for ‘protected cultural zones’ in war-torn Iraq, Syria, UN NEWS CENTRE (Dec. 3, 2014), <http://www.un.org/apps/news/story.asp?NewsID=49506#.VI4RDHgaWyM>.

<sup>67</sup> For statements by Irina Bokova, Director-General of UNESCO, see World Heritage Centre, *UNESCO to create an Observatory of the Safeguarding of Syria’s Cultural Heritage*, UNESCO (May 28, 2014), <http://whc.unesco.org/en/news/1135/> [hereinafter Bokova Statements]. “The destruction of such precious heritage gravely affects the identity and history of the Syrian people and all humanity, damaging the foundations of society for many years to come. The protection of cultural heritage, both tangible and intangible, is inseparable from the protection of human lives, and should be an integral part of humanitarian and peacebuilding efforts.” Statement by Mr. Ban Ki-Moon, Ms. Irina Bokova, and Mr. Lakhdar Brahimi: The Destruction of the Cultural Heritage of Syria Must Stop, UNESCO (Mar. 12, 2014), <http://www.unesco.org/new/en/media-services/in-focus-articles/the-destruction-of-syrias-cultural-heritage-must-stop>.

<sup>68</sup> “That the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfill in a spirit of mutual assistance and concern . . . .” UNESCO Constitution, *supra* note 20, pmb1. The fighting in Syria is not only targeted against the Ancient City of Aleppo; out of the six World Heritage sites designated in Syria, all but one have been placed on the World Heritage in Danger List. See *List in Danger*, *supra* note 29.

<sup>69</sup> Bokova Statements, *supra* note 67.

<sup>70</sup> World Heritage Convention, *supra* note 21.

<sup>71</sup> Operational Guidelines, *supra* note 23, ¶ 77.

UNESCO site that is now currently in danger of destruction as a casualty of the Syrian Civil War because of its current use as a military strongpoint by both rebel groups and the Syrian government.<sup>72</sup>

### 3. Aleppo's Inscription to the World Heritage List in Danger

In 2013, the site was added to the List of World Heritage in Danger in efforts to prevent the continuous damage resulting from militarized clashes between pro-government forces and the pro-Syrian army, culminating in the September 25, 2012 Battle of Aleppo.<sup>73</sup> UNESCO condemns the destruction of cultural property, largely because of the result it has on the people and culture: "Destroying the cultural expressions and the heritage associated with a specific identity hampers those people who claim that identity from uniting and, in the long-term, prevents the group from expressing itself and from fulfilling its potential as European citizens."<sup>74</sup>

The use of the City of Aleppo as a holding ground for military conflict is a direct violation of the protections currently afforded cultural heritage sites by the international community;<sup>75</sup> yet it is only by examining these protections that the international community can attempt to interfere in the civil war. Under UNESCO's universal protection, it is imperative to determine what laws and treaties the international community can use to protect the cultural site from further irreparable destruction.

The Syrian Arab Republic, in addition to being a member state of UNESCO and thus bound by its provisions, signed the 1954 Hague Convention on May 14, 1954, and the Second Hague Protocol for the Protection of Cultural Property.<sup>76</sup> Article 3 of the 1954 Hague Convention places an affirmative duty on signatory parties to protect cultural property situated within their territory: "The High Contracting Parties under-

<sup>72</sup> See World Heritage Centre, *UNESCO Director-General condemns military presence and destruction at World Heritage Sites in Syria*, UNESCO (Feb. 20, 2014), <http://whc.unesco.org/en/news/1108/>; Alan Taylor, *Destruction Comes to Aleppo*, ATLANTIC (Oct. 4, 2012), <http://www.theatlantic.com/photo/2012/10/destruction-comes-to-aleppo/100381/>.

<sup>73</sup> UNESCO's damage assessment of the Ancient City of Aleppo estimated that since 2013 at least 121 buildings have been damaged or destroyed, totaling more than thirty percent of the World Heritage property area. See World Heritage Centre, *Safeguarding Syrian Cultural Heritage*, UNESCO, <http://www.unesco.org/new/en/safeguarding-syrian-cultural-heritage/situation-in-syria/built-heritage/ancient-city-of-aleppo/>.

<sup>74</sup> COE Culture Report, *supra* note 7, at 2.

<sup>75</sup> See First Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, No. 3511, 249 U.N.T.S. 215 [hereinafter First Hague Protocol].

<sup>76</sup> 1954 Hague Convention, *supra* note 4; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 LL.M. 769 [hereinafter Second Hague Protocol].

take to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.”<sup>77</sup> Article 4 of the Hague Convention requires all parties to the Convention to respect cultural property situated within their own territory.<sup>78</sup> Reinforcing this duty to protect one’s own cultural property, Article 4 prohibits the use of cultural property as a shield or protection for military equipment or forces.<sup>79</sup> If the international community regards the conflict between the Syrian rebels and the government as two opposing forces, then Article 5 can be said to govern the occupation of Aleppo, in which case the rebel forces are required to allow the “competent authorities” to ensure the preservation and protection of cultural property.<sup>80</sup>

Furthermore, the 1954 Hague Convention clearly prohibits a member party from violating the Convention, and places an affirmative duty on each country to prohibit such violations from occurring within their borders: “The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.”<sup>81</sup> The civil war in Syria adds an additional layer of complexity; the government is fighting civilian rebel forces within the country, not an international combatant.<sup>82</sup> Nonetheless, the damage to the City of Aleppo constitutes a breach of the 1954 Hague Convention.<sup>83</sup>

Additionally, the damage was relatively foreseeable. Under Article 3, Syria has a duty to protect “against the foreseeable effects of an armed conflict.”<sup>84</sup> Targeting the Ancient City of Aleppo was a strategic deci-

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<sup>77</sup> 1954 Hague Convention, *supra* note 4, art. 3.

<sup>78</sup> *Id.* art. 4.

<sup>79</sup> Parties are required to respect cultural property by “refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.” *Id.* art. 4(1).

<sup>80</sup> *Id.* See also Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277, 292 (1997).

<sup>81</sup> 1954 Hague Convention, *supra* note 4, art. 28.

<sup>82</sup> *Syria: The Story of the Conflict*, BBC NEWS (Oct. 9, 2015), <http://www.bbc.com/news/world-middle-east-26116868>.

<sup>83</sup> “The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.” 1954 Hague Convention, *supra* note 4.

<sup>84</sup> *Id.* art. 3. See also *Rule of Law in Armed Conflicts Project, Syria*, GENEVA ACAD. OF INT’L HUMANITARIAN L. & HUM. RTS., [http://www.geneva-academy.ch/RULAC/applicable\\_international\\_law.php?id\\_state=211](http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=211); *Advancing on Aleppo*,

sion, not based on military necessity.<sup>85</sup> The decision to use the site of Aleppo for military purposes was avoidable in that it was a decision made for strategic reasons and not based on an emergency or unanticipated turn of events. As a result, a waiver dictated by military necessity should not be granted to the State.<sup>86</sup> Both sides use destruction of the buildings and monuments as a political tool in the civil war.<sup>87</sup> Because both sides inflicted damage on the Ancient City of Aleppo, it is necessary to turn to the international community to search for a solution.<sup>88</sup>

Under the Second Protocol to the Hague Convention, there is a strong presumption against the destruction of cultural property during armed conflicts unless an attacking party is able to establish that (1) the cultural property has been transformed into a military objective, and that (2) there is no feasible alternative with similar military advantages.<sup>89</sup> The Ancient City of Aleppo's current occupation by Syrian rebel forces strips the site of protections.<sup>90</sup>

#### 4. Using International Law to Preserve and Save Aleppo

Recognition as a site of cultural significance by UNESCO is not enough to ensure the protection of the City of Aleppo; thus the international community must turn to alternative methods to protect the cultural site.<sup>91</sup> In efforts to prevent further irreparable damage to the City of Aleppo, international parties have attempted to involve the UN Security Council, with the hope that the UN Security Council will pass a resolution to facilitate the restitution of stolen and illegally exported cultural

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ECONOMIST (Feb. 21, 2015), <http://www.economist.com/news/middle-east-and-africa/21644200-regime-getting-closer-surrounding-syrias-northern-hub-advancing>.

<sup>85</sup> *The Slow Destruction of the Aleppo Citadel*, SYRIA:DIRECT, <http://syriadirect.org/news/the-slow-destruction-of-the-aleppo-citadel/>.

<sup>86</sup> 1954 Hague Convention, *supra* note 4, art. 4(2).

<sup>87</sup> *Historic Buildings blown up in Syria's Aleppo*, AGENCE FRANCE-PRESSE (Sept. 3, 2014), <https://uk.news.yahoo.com/historic-buildings-blown-syrias-aleppo-172709413.html#um5VTwO>.

<sup>88</sup> In addition to the physical evidence of warfare apparent on the City, UNESCO sources also indicate that armed groups are located within the city. *See Aleppo on List*, *supra* note 63. (referencing efforts made to safeguard Syrian cultural heritage). *See also* Sahner, *supra* note 62 (“The fighting has spread to Aleppo, where gunfire has engulfed the great medieval citadel in the center of town, which has served as a makeshift army base.”).

<sup>89</sup> Second Hague Protocol, *supra* note 76.

<sup>90</sup> 1954 Hague Convention, *supra* note 4, arts. 3, 4.

<sup>91</sup> *See, e.g.,* 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 (2003) (proposing the creation of two new war crimes and one new crime against humanity and outlines the various elements for prosecutors to prove).



objects from Syria and to ban the continued sale and transfer of Syrian cultural objects.<sup>92</sup>

Turning to the 1954 Hague Convention, the need to “demilitarize cultural sites”<sup>93</sup> and to stop the site’s use as a military base is an urgent, preliminary step required to prevent further destruction of the Ancient City of Aleppo. In response to this urgency, UNESCO bypassed the established laws and treaties, and launched the “Emergency Safeguarding of the Syrian Heritage Project.”<sup>94</sup> As part of this project, police forces and customs officers in Syria were trained on the tools available through the 1970 UNESCO Convention to fight illicit trafficking of cultural property and protect museums and were also educated on the sites and history that make up Syria’s cultural heritage.<sup>95</sup>

The number of forces threatening the cultural heritage of Syria increased in 2014, when the United States military began conducting a series of airstrikes in the region.<sup>96</sup> Intending to “disrupt the imminent attack plotting against the United States and Western interests conducted by a network of seasoned al-Qaeda veterans,” the United States entered the country as an attacker against the incumbent government.<sup>97</sup> However, the United States is not a party to the 1954 Hague Convention.<sup>98</sup> Instead, the United States’ military actions are only limited by the 1907 Hague Convention.<sup>99</sup>

The civil war in Syria, coupled with the recent involvement of the United States’ military, highlights the main issue with the current legal framework surrounding cultural preservation: there is little to no ability for countries to enforce compliance or to punish countries that violate the 1954 Convention.<sup>100</sup> The 1954 Convention permits sanctions, but there is no established enforcement body. Each state may “take, within the

<sup>92</sup> UNESCO, *UNESCO-EU: Launch of the Emergency Safeguarding of the Syrian Heritage Project*, UNESCO (Mar. 1, 2014), <http://en.unesco.org/syrian-observatory/emergency-safeguarding-syrian-cultural-heritage-project>.

<sup>93</sup> Bokova Statements, *supra* note 67.

<sup>94</sup> See *supra* note 92.

<sup>95</sup> *Id.* See also UNESCO Convention, *supra* note 4.

<sup>96</sup> *Military Airstrikes Continue Against ISIL in Syria and Iraq*, U.S. DEP’T OF DEFENSE, <http://www.defense.gov/News-Article-View/Article/603844>.

<sup>97</sup> Terrence McCoy, *U.S. airstrikes just brought fresh carnage to ancient Aleppo, perhaps the world’s most war-ravaged place*, WASH. POST (Sept. 24, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/09/24/u-s-airstrikes-just-brought-fresh-carnage-to-ancient-aleppo-perhaps-the-worlds-most-war-ravaged-place/>.

<sup>98</sup> Although the United States ratified the 1954 Hague Convention on March 13, 2009, it has not yet signed it and is thus not bound by the articles. See 1954 Hague Convention, *supra* note 4.

<sup>99</sup> 1907 Hague Convention, *supra* note 41.

<sup>100</sup> See generally Arimatsu & Choudhury, *supra* note 1, at 671-85 (discussing the obligations of Syria and Iraq as well as the consequences of their failure to comply with obligations).

framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality who commit or order to be committed a breach of the present Convention.”<sup>101</sup>

Because of the lack of an international enforcement body, parties affected by the crime may impose sanctions they believe are appropriate. As a result of the lack of uniformity in enforcing sanctions, much of the strength of the 1954 Hague Convention comes from the judgment of other State Parties.<sup>102</sup> Holding countries accountable for the destruction of cultural property in armed conflict “stigmatizes their behavior, vindicates victims and their rights, and serves to enforce humanitarian law and combat impunity for international crimes,”<sup>103</sup> effectively working as a deterrent.

The Ancient City of Aleppo is protected by the Antiquities Law, which is administered by the Directorate of Antiquities and Museums (DGAM).<sup>104</sup> In the wake of civil war, the purpose of the Antiquities Law is not to hold attackers liable for the destruction of the city, but to prevent further damage by raising awareness both nationally and internationally in efforts to conserve and eventually attempt to repair the damage done to the city.<sup>105</sup>

Another solution is to hold parties accountable in the International Criminal Court (ICC), under the Rome Statute, although this solution would only hold parties accountable and would not stem or prevent the ongoing destruction in Aleppo.<sup>106</sup> The ICC is the “first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community.”<sup>107</sup> Article 8 of the Rome Statute, when defining war crimes, draws destruction of cultural property under its jurisdiction,

<sup>101</sup> 1954 Hague Convention, *supra* note 4, art. 28, ¶ 260.

<sup>102</sup> “Although less effective than sanctions, much of the pressure for cultural property protection stems from the moral realm, international indignation, and diplomatic missives, not the concrete realm of sanctions.” David A. Meyer, *The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law*, 11 B.U. INT’L L.J. 349, 352 (1993).

<sup>103</sup> Mark Kersten, *Prosecuting crimes against cultural property in Northern Mali: Why it Matters*, JUSTICE IN CONFLICT (Aug. 2, 2012), <http://justiceinconflict.org/2012/08/21/prosecuting-crimes-against-cultural-property-in-northern-mali-why-it-matters/0>.

<sup>104</sup> World Heritage Convention, *supra* note 21.

<sup>105</sup> *Damaged Heritage*, HERITAGE FOR PEACE, <http://www.heritageforpeace.org/syria-culture-and-heritage/damage-to-cultural-heritage/>.

<sup>106</sup> Currently, neither the United States nor Syria are signatories to the Rome Statute. See *The State Parties to the Rome Statute*, INT’L CRIM. CT. [http://www.iccpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#S](http://www.iccpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#S).

<sup>107</sup> *About the Court*, INT’L CRIM. CT. [http://www.iccpi.int/en\\_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx](http://www.iccpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx).

defined as “[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”<sup>108</sup>

Although the ICTY has been willing to accept crimes against cultural property in relation to religious or educational indictments, the ICTY has not issued a holding in support of holding a state liable, or issued an opinion condemning, destruction inflicted on secular aspects of cultural heritage.<sup>109</sup> The destruction of cultural property has been publicly condemned by the ICTY, which stated destruction of cultural property “manifests a nearly pure expression of the notion of crimes against humanity” and the “destruction of a unique religious culture and its concomitant cultural objects injures all of humanity.”<sup>110</sup> For an indictment focused on the secular components of cultural property, the international tribunal must consider the crimes committed to be severe enough to warrant an indictment.<sup>111</sup>

In the case of the Ancient City of Aleppo, the significance of the City’s cultural heritage resides largely in the religious layering of the City.<sup>112</sup> Coupled with the human rights abuses being committed by both sides of the Syrian Civil War, it seems likely that a trial in front of the ICTY would include abuses of cultural heritage. Although it would not fully address the issue of proactively protecting cultural property, establishing a venue through which deterrence can be achieved and punishment can be imposed would positively impact the doctrine of cultural preservation, prevent further destruction, and hopefully provide mandated repair and restoration efforts. By bringing a case to the ICTY, precedent would be established not just with a holding from the ICTY, but each claim would identify claims of cultural destruction that could be brought to court. In addition, a holding would establish the judiciary as an alternative forum to both establish new law and bring enforceable claims; these advancements could then develop and bring resolution to future claims of cultural destruction. These claims are not the ultimate solution to acts of destruction that have already occurred. To be truly effective, the international community needs to develop a system of enforcement that can prevent complete cultural destruction from occurring.

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<sup>108</sup> Compare Rome Statute, *supra* note 40, art. 8(2)(iv) with Statute of the ICTY, art. 3(d), which avoids defining cultural property and instead refers to “institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.”

<sup>109</sup> Kersten, *supra* note 103. For a general history of the ICTY’s interaction with crimes against cultural heritage, see generally Micaela Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 EUR. J. INT’L L. 203 (2011).

<sup>110</sup> Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Judgment, ¶ 207 (Feb. 26, 2001), [http://www.icty.org/case/kordic\\_cerkez/4](http://www.icty.org/case/kordic_cerkez/4).

<sup>111</sup> See generally Abtahi, *supra* note 12.

<sup>112</sup> *Aleppo on List*, *supra* note 63.

## 5. The Current State of Affairs

Current solutions to protect the City of Aleppo from further damage must draw from a broad range of Syrian laws as well as international laws and treaties. A large portion of the potential solutions depends on who is to be held liable for the destruction of the city. Currently, the city is held partly by Rebels and partly held by the Government.<sup>113</sup> The government continues to conduct incessant bombing runs, countered by the Rebels' mortar and gunfire.<sup>114</sup> The danger to the architectural structures and foundations is imminent.<sup>115</sup> The International Criminal Court holds that "[t]he perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historical monuments, . . . which were not military objectives, to be the object of the attack."<sup>116</sup> Through a holding that reiterates the definition of cultural property found in the 1954 Hague Convention, the International Criminal Court establishes a precedent that links the perpetrator of cultural destruction to a crime worthy of punishment.<sup>117</sup>

Recognizing the inherent difficulty in distinguishing who is considered a defender or attacker in a civil war, Article 5(3) of the 1954 Hague Convention attempts to place the burden on the legitimate government: "Any High Contracting Party whose government is considered their legitimate government by members of a resistance movement, shall, if possible, draw their attention to the obligation to comply with those provisions of the Convention dealing with respect for cultural property."<sup>118</sup> In this case, Syria carries the affirmative duty to protect the City of Aleppo. The Syrian government has not fulfilled the obligations of a defending party, nor have the rebels fulfilled the responsibilities of an occupying power.<sup>119</sup>

While it is unclear how the Syrian Civil War will be resolved<sup>120</sup>, the international community's efforts to abate the destruction of the World Heritage site are gaining momentum. By examining the treaties Syria has signed, the international community must work within a broader legal framework from which they can unite and take action.

<sup>113</sup> *The Battle for Aleppo nearing its final stage*, LIVELEAK (Mar. 1, 2015), [http://www.liveleak.com/view?i=02b\\_1425255406](http://www.liveleak.com/view?i=02b_1425255406).

<sup>114</sup> *Id.*

<sup>115</sup> *The destruction of Syria's cultural heritage must stop*, UNESCO (Mar. 12, 2014), <http://www.unesco.org/new/en/media-services/in-focus-articles/the-destruction-of-syrias-cultural-heritage-must-stop/>.

<sup>116</sup> International Criminal Court, Elements of Crimes, art. 8(2)(b)(ix), U.N. Doc. PCNICC/2000/1/Add.2 (2000).

<sup>117</sup> 1954 Hague Convention, *supra* note 4.

<sup>118</sup> *Id.* art. 5(3).

<sup>119</sup> *Id.* art. 5.

<sup>120</sup> For a summary of the current state of affairs, see *Middle East, Syria Conflict: Attacks reported as truce comes into effect*, BBC NEWS (Feb. 27, 2016), <http://www.bbc.com/news/world-middle-east-35674908>.

B. *Palestine: Land of Olives and Vines - Cultural Landscape of Southern Jerusalem, Battir*

1. History and Cultural Significance of the Land of Olives and Vines

Battir was added to the list of World Heritage Sites in July 2014, in recognition of its historical and cultural significance to regional populations.<sup>121</sup> From both international and national perspectives, the region's historical use of irrigation in its agriculture represents a series of accomplishments in the Palestinian agrarian culture.<sup>122</sup> The culture of Battir is intrinsically tied to the land of its residents; thus, the right to cultural participation is inherently tied to the continued survival of Battir's borders.<sup>123</sup>

2. Qualifying Battir as a World Heritage Site

Battir was selected because it is “an outstanding example” of a “technological ensemble or landscape which illustrates significant stages in human history” and is “an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture.”<sup>124</sup> The International Covenant on Economic, Social and Cultural Rights protects the relationship between culture and land: “The expression ‘cultural life’ is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present, and a future.”<sup>125</sup> The cultural protections afforded to Battir are further supported by the World Heritage Site's joinder of cultural participation and education. The right to education includes “the transmission and enrichment of common cultural and moral values in which the individual and society find their identity and worth.”<sup>126</sup> The survival of Battir's culture is dependent on the

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<sup>121</sup> World Heritage Centre, *Palestine: Land of Olives and Vines- Cultural Landscape of Southern Jerusalem, Battir, inscribed on World Heritage List and on List of World Heritage in Danger*, UNESCO (June 20, 2014), <http://whc.unesco.org/en/news/1154> (approving Battir for the World Heritage List and also adding it to the World Heritage List in Danger) [hereinafter *Battir on List*].

<sup>122</sup> See *id.* (summarizing the cultural importance of Battir and the criterion it fulfills).

<sup>123</sup> *Id.*

<sup>124</sup> Operational Guidelines, *supra* note 23, ¶ 77.

<sup>125</sup> International Covenant on Economic, Social and Cultural Rights, Gen. Comment No. 21 (2009), ¶ 11. See also generally Deena R. Hurwitz, Commentary, *Communication to 38th World Heritage Committee on the Nomination of Battir as a World Heritage Site in Danger* (June 3, 2014) (on file with author).

<sup>126</sup> W. HADDAD ET AL., WORLD CONFERENCE ON EDUCATION FOR ALL MEETING BASIC LEARNING NEEDS-FINAL REPORT 1-3 (1990), <http://unesdoc.unesco.org/images/0009/000975/097551e.pdf>.

continued access to and use of the land and the ability to continue irrigating and farming the land.<sup>127</sup>

### 3. Battir's Inscription to the World Heritage List in Danger

Conflict around the site of Battir arose because Israel wished to build its separation wall through the Battir village.<sup>128</sup> As the threat of destruction loomed, the World Heritage Committee ruled that the "landscape had become vulnerable under the impact of sociocultural and geopolitical transformations that could bring irreversible damage to its authenticity and integrity."<sup>129</sup> The Advisory Opinion of the International Court of Justice further highlighted the international value of Battir. In its opinion, the ICJ emphasized the international scope of the issue, holding that "the obligations violated by Israel include certain obligations . . . [which] are by their very nature 'the concern of all States' and '[i]n view of the importance of the rights involved,' all States can be held to have a legal interest in their protection."<sup>130</sup> Thus, Battir's establishment as a World Heritage Site is especially significant because of the ongoing political and cultural conflicts occurring between Palestine and Israel; conflicts that often result in military involvement and destruction.<sup>131</sup>

Palestine, in addition to being a member country of UNESCO as of 2011,<sup>132</sup> signed the 1954 Hague Convention and the Second Hague Protocol for the Protection of Cultural Property.<sup>133</sup> The policy choice made by the World Heritage Committee is additionally complicated by the politi-

<sup>127</sup> Isabel Kershner, *A Palestinian Village Tries to Protect an Ancient Wonder of Agriculture*, N.Y. TIMES (June 25, 2012), [http://www.nytimes.com/2012/06/26/world/middleeast/palestinian-village-tries-to-protect-landmark.html?\\_r=0](http://www.nytimes.com/2012/06/26/world/middleeast/palestinian-village-tries-to-protect-landmark.html?_r=0).

<sup>128</sup> *Israeli government decides not to build separation wall through Battir Village-Role of UNESCO and Jewish Home Party*, EMEK SHAVEH (Sept. 22, 2014), <http://alt-arch.org/en/israeli-government-battir-village/> [hereinafter EMEK HAVEH].

<sup>129</sup> Tovah Lazaroff, *Battir in West Bank named 'Palestine's' second World Heritage Site*, JERUSALEM POST (June 22, 2014), <http://www.jpost.com/Diplomacy-and-Politics/Battir-becomes-second-World-Heritage-site-registered-to-under-Palestine-360121>.

<sup>130</sup> Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 3, ¶ 155, <http://www.icj-cij.org/docket/files/131/1677.pdf> (for a summary of all of the advisory opinions).

<sup>131</sup> For a brief history of the Palestinian-Israeli conflict, see generally George E. Bisharat, *Facts, Rights, and Remedies: Implementing International Law in the Israel/Palestine Conflict*, 28 HASTINGS INT'L & COMP. L. REV. 319 (2005) (analyzing the source of conflict between Israel and Palestine and alternate resolutions).

<sup>132</sup> *UNESCO votes to admit Palestine as full member*, UN NEWS CTR. (Oct. 31, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40253#.Vrl5vngaWyM>.

<sup>133</sup> See *List of Member States to Second Protocol to the Hague Convention*, INT'L COMMITTEE OF RED CROSS, [https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=590](https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=590).

cally charged location of Battir.<sup>134</sup> UNESCO recognized Palestine's independence in 2011 when Palestine became a member state.<sup>135</sup> At the time, Battir was under Israeli military control, but the allocation of the site to Palestine resolved a question of control that neither country was able to resolve domestically.<sup>136</sup>

#### 4. Using International Law to Save Battir and the Current State of Affairs

The verification of the site by UNESCO is considered an amicable resolution to the conflict based on Israel's plan to build the Israeli West Bank barrier that, had UNESCO not granted Battir special protection status, would have resulted in the destruction of this historical site.<sup>137</sup> UNESCO's recognition of Battir placed it under international protection, and subsequently barred Israel from continuing on its planned course.<sup>138</sup> UNESCO provided that "[e]ach State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States parties to this Convention."<sup>139</sup> The Israeli Supreme Court's ruling against the separation wall in Battir followed UNESCO's inscription of Battir as a World Heritage site.<sup>140</sup> This resolution highlights UNESCO's conceivable power to resolve polit-

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<sup>134</sup> With Battir on the border of Palestine and Israel, it is a contentious and politically charged location for both governments. As Gidon Bromberg recognizes, "[a]t this difficult moment of continued violence in the region, Battir remains a ray of hope for cooperation between Israelis and Palestinians toward a better future." Tovah Lazaroff, *Battir in West Bank named "Palestine's" second World Heritage Site*, JERUSALEM POST (June 22, 2014), <http://www.jpost.com/Diplomacy-and-Politics/Battir-becomes-second-World-Heritage-site-registered-to-under-Palestine-360121> (quoting Lazaroff).

<sup>135</sup> Press Release, General Conference admits Palestine as UNESCO Member, UNESCO (Oct. 31, 2011), [http://www.unesco.org/new/en/media-services/single-view/news/general\\_conference\\_admits\\_palestine\\_as\\_unesco\\_member\\_state/#.Vz2H5dc7tJk](http://www.unesco.org/new/en/media-services/single-view/news/general_conference_admits_palestine_as_unesco_member_state/#.Vz2H5dc7tJk); Karl Vick, *Palestinian Statehood Gets Recognized by UNESCO: What's Next?*, TIME MAG. (Oct. 31, 2011), <http://world.time.com/2011/10/31/palestinian-statehood-gets-recognized-unesco-whats-next/>.

<sup>136</sup> EMEK HAVEH, *supra* note 128.

<sup>137</sup> Harriet Sherwood, *Israeli separation wall threatens Battir's ancient terraces*, GUARDIAN (Dec. 22, 2012), <http://www.theguardian.com/world/2012/dec/11/israel-palestinians-battir-separation-wall>.

<sup>138</sup> See generally Victor Kattan, *The Legality of the West Bank Wall: Israel's High Court of Justice v. the International Court of Justice*, 40 VAND. J. TRANSNAT'L L. 1425 (2007).

<sup>139</sup> World Heritage Convention, *supra* note 21, ¶ 6.2.

<sup>140</sup> See generally Kattan, *supra* note 138; Sarah Levy, *Israeli high court freezes plan to build Separation Wall through West Bank village of Battir*, MONDOWEISS (Jan. 7, 2015), <http://mondoweiss.net/2015/01/separation-through-village>.

ical disputes through its powers allocated to protecting and preserving sites of cultural significance.

The amicable resolution reached in Battir is representative of the goals of UNESCO. Because both parties are signatories to UNESCO's World Heritage Convention, the mutual decision to abide by the regulations gave the Convention the political clout it might otherwise lack, without any such enforcement mechanisms.<sup>141</sup> In responding to the Battir conflict, the World Heritage Committee stepped beyond the boundaries of protecting one community's cultural heritage. Grounding itself in the international ramifications surrounding Battir's continued survival, the World Heritage Community involved itself in the political sphere and took an active role in policy-making. The establishment of Battir as a World Heritage site became a persuasive rallying cry for the international community, and was ultimately successful as a force of pressure on Israel to respect the international community's desire to preserve Battir.

### C. *Cultural Landscape and Archaeological Remains of the Bamiyan Valley, Afghanistan*

#### 1. History and Cultural Significance of the Bamiyan Buddhas.

The 2001 bombing of the Bamiyan Buddhas is symbolic of the inadequacies that are still at issue between the international community's efforts to preserve cultural heritage and a nation's decision to destroy the heritage. The Buddhas of Bamiyan, located in Bamiyan, Afghanistan, were recognized as great examples of early Buddhist art.<sup>142</sup> The two Buddhas, at least 1,500 years old, stood at 175 feet high and 120 feet high respectively.<sup>143</sup> Built directly into the cliffs, they survived the current mass looting of Afghanistan's cultural property and an attempt by Genghis Khan to destroy the statues nearly 800 years ago.<sup>144</sup> The significance of the Bamiyan Buddhas' cultural heritage has been extensively documented since the 1920s.<sup>145</sup>

The attempt to save, and subsequent loss, of the Bamiyan Buddhas represented protections given to cultural property within the sphere of inter-

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<sup>141</sup> "Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention." See World Heritage Convention, *supra* note 21, art. 6(3).

<sup>142</sup> World Heritage Centre, *Cultural Landscape and Archaeological Remains of the Bamiyan Valley*, UNESCO, <http://whc.unesco.org/en/list/208> [hereinafter *Bamiyan on List*].

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* See also The Destruction of Relics and Monuments in Afghanistan, G.A. Res. 55/234, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/234 (2001) (stating that destruction of the Bamiyan Buddhas "would be an irreparable loss for humanity as a whole").



national law as well as failures of the law. While the Buddhas were within the political territory of Afghanistan, the variety of cultures it affected made the Buddhas a prime example of how cultural heritage can be important to a multitude of cultures, regardless of its geographic position.

The destruction of the Buddhas is an eminent example of the need for the international community to juggle international and national laws to protect cultural heritage. The failure to save the Bamiyan Buddhas highlights the strategic interests of the international community to cooperate with the country at issue to prevent the destruction of cultural property.<sup>146</sup> The incident raises the issue: when is it an international responsibility to protect cultural property by infringing on a sovereign nation's rights?

## 2. Qualifying the Bamiyan Buddhas as a World Heritage Site

The Bamiyan Buddhas were destroyed by the Taliban in 2001, but were declared a World Heritage Site in 2003.<sup>147</sup> Even considering and incorporating the destruction of the site, UNESCO World Heritage held that it met the five criteria for inclusion of a cultural site.<sup>148</sup> In a country where ninety to ninety-five percent of the population was under Taliban control, the destruction of the Bamiyan Buddhas drew a clear contrast between the international community's inability to measure up to a nation's power with the aspirations of international law.<sup>149</sup> The Taliban refused to recog-

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<sup>146</sup> Request for entry onto the list of World Heritage Sites was first made in 1983, but its status was “[d]eferred as conditions under which recommendation made not yet fulfilled.” *Bamiyan on List*, *supra* note 142. The unified interest in preserving cultural heritage is apparent in the sheer number of countries that joined together to protest the destruction of the Buddhas. *See* Wangkeo, *supra* note 17, at 247-48. The joining of these countries is also significant because they are all signatories to different treaties, yet they overlook the different levels of obligations they are bound to and instead solely focus on preserving the Bamiyan Buddhas.

<sup>147</sup> “The property is in a fragile state of conservation considering that it has suffered from abandonment, military action, and dynamite explosions.” *Bamiyan on List*, *supra* note 142.

<sup>148</sup> The decision to list the site as a World Heritage Site was based on the following criteria: “(i) represent a masterpiece of human creative genius; (ii) on developments in architecture (. . .), monumental arts; (iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; (iv) be an outstanding example of a architectural ensemble which illustrates (a) significant stage(s) of human history.” Operational Guidelines, *supra* note 23, ¶ 77; *see also* *Bamiyan on List*, *supra* note 142.

<sup>149</sup> Wangkeo, *supra* note 17, at 244-45 (noting the international community's refusal to recognize the Taliban's power).

nize the cultural significance of the statues, as the Taliban considered the Bamiyan Buddhas to be an affront to Islam.<sup>150</sup>

However, this refusal to recognize another religion or culture extended beyond religious differences. The international community's desire to protect the statues was also a catalyst for the demolition of both Buddhas.<sup>151</sup> The Buddhas were bombed and ultimately completely destroyed despite, and arguably because of, the continued efforts of the international community to prevent the destruction of this important site.<sup>152</sup>

For some, the destruction of the sites was the result of the emphasis the cultural community placed on preserving and restoring the monuments, and the destruction represented the Taliban's resistance to investments in this cultural property rather than in (what they viewed to be) the more pressing issues of education, food, and infrastructure issues.<sup>153</sup> The destruction of the Bamiyan Buddhas is representative of the consistent cultural destruction the Taliban inflicted on Afghanistan. More importantly, the destruction represents the devastating results that occur when the international community attempts to affirmatively protect cultural property by opposing the national government.<sup>154</sup>

### 3. The Failures of International Law to Save the Bamiyan Buddhas

The current doctrine of cultural property law was not enough to change the Taliban government's actions. As showcased by the destruction of the Bamiyan Buddhas, the international community must develop new means of responding to intentional destruction of cultural property. Article 4 of the 1954 Hague Convention forbids the destruction of cultural

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<sup>150</sup> W.L. Rathje, *Why the Taliban are destroying Buddhas*, USA TODAY (Mar. 22, 2001), <http://usatoday30.usatoday.com/news/science/archaeology/2001-03-22-afghan-buddhas.htm>.

<sup>151</sup> "As the Taliban see it, the UN and others . . . will give millions of dollars to save un-Islamic stone statues but not one cent to save the lives of Afghani men, women, and children." *Id.*

<sup>152</sup> Barry Bearak, *Over World Protests, Taliban are Destroying Ancient Buddhas*, N.Y. TIMES (Mar. 4, 2001), <http://www.nytimes.com/2001/03/04/world/over-world-protests-taliban-are-destroying-ancient-buddhas.html>.

<sup>153</sup> Barbara Crossette, *Taliban Explains Buddha Demolition*, N.Y. TIMES (Mar. 19, 2001), <http://www.nytimes.com/2001/03/19/world/19TALI.html>.

<sup>154</sup> "During the oppressive Taliban regime cultural activities were severely restricted and diminished. Ignorance and suppression ruled everywhere throughout the country. Bamiyan's two colossal statues, along with others in the Folangi valley and Kakrak, were dynamited and hundreds of statues in the collection of the Kabul Museums were destroyed in 2001, which inflicted irreparable losses on our cultural heritage." Abdul Wasy Ferooz, Address at the 105th Annual Meeting of the Archaeological Institute of America on the Impact of War upon Afghanistan's Cultural Heritage (Jan. 3, 2004), [http://www.archaeological.org/pdfs/papers/AIA\\_Afghanistan\\_address\\_lowres.pdf](http://www.archaeological.org/pdfs/papers/AIA_Afghanistan_address_lowres.pdf).

property for the purposes of retaliation.<sup>155</sup> However, because the 1954 Hague Convention is meant to protect against threats from external parties, it is essentially useless in preventing a domestic state from actively choosing to destroy a site of cultural heritage.<sup>156</sup> Arguably, the destruction of the Bamiyan Buddhas was caused by little more than the Taliban's desire to make a political statement on the value the West placed on the protection and preservation of areas of cultural significance. As a result of this difference in values, the Taliban was motivated to destroy the Buddhas as its own statement, rejecting these values and instead prioritizing its own culture through the rejection of other cultures' history.<sup>157</sup>

The international community, supported by the Convention, attempted to reach a solution through offers of monetary donations, conservation efforts, and ultimately offers to relocate the Buddhas.<sup>158</sup> As a member state to the Convention, the government of Afghanistan was obligated to follow the Convention by accepting one of the multiple types of aid offered: "[w]hilst fully respecting the sovereignty of the States . . . and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate."<sup>159</sup> Under Article 6, the Taliban (as the government of Afghanistan) had multiple options of aid, none of which would have directly infringed upon their property rights.<sup>160</sup> By choosing to refuse all types of aid offered, the government prioritized their political motives over the cultural heritage the Bamiyan Buddhas represented:

[P]olitics were destroying the Buddhas. An isolated government, which had foisted itself on its own population and was being encouraged by al-Qaida [sic] to take on the world, had found a brilliant source of international publicity where it could strike a successful pose of defiance. Our condemnation made it all the more

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<sup>155</sup> 1954 Hague Convention, *supra* note 4.

<sup>156</sup> See generally Wangkeo, *supra* note 17 (identifying the 1954 Hague Convention's assumption that the destruction of cultural property stems from external countries, and does not address threats arising within a country).

<sup>157</sup> Crossette, *supra* note 153.

<sup>158</sup> Member States of the Convention are urged to "do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation . . . which it may be able to obtain." World Heritage Convention, *supra* note 21. See generally Report of the Bureau of the World Heritage Committee, Convention concerning the Protection of the Cultural and Natural Heritage Doc. WHO-2001/CONF.205/10 (June 25-30, 2001), <http://whc.unesco.org/archive/repbur01.htm> (giving a full chronology of the international efforts made in an attempt to dissuade the Taliban from carrying out their destruction of the Bamiyan Buddhas),

<sup>159</sup> World Heritage Convention, *supra* note 21, art. 6, ¶ 1.

<sup>160</sup> *Id.*

important for the confrontationist leadership to go ahead with the destruction.<sup>161</sup>

The destruction of the Bamiyan Buddhas was neither the result of economic destitution nor a casualty of war; the destruction of the Bamiyan Buddhas was a premeditated, politically charged decision by the Taliban government to gain publicity in the eyes of the international community and to condemn the international community's decisions and values.<sup>162</sup>

The destruction of the Bamiyan Buddhas occurred through an apparent loophole in international law: because the destruction was not of an international character and did not take place during a time of warfare, the previously established international conventions, including the Hague Convention of 1954, did not apply.<sup>163</sup> The 1970 UNESCO Convention could not be applied in this case because it did not anticipate, and therefore did not account for, the destruction of cultural property being instigated and completed by the state itself.<sup>164</sup>

In response to current international events, an addendum to both the 1970 UNESCO Convention and the 1954 Hague Convention should be made to recommend the inclusion of protection against the destruction of cultural heritage sites by domestic countries. In spite of the international community's unified outrage concerning the destruction of the Buddhas, there is currently no *jus cogens* that places on an individual state the duty to protect or conserve cultural heritage for future citizens.<sup>165</sup>

The World Heritage's response to the destruction of the Buddhas was similarly ineffective. The resolution "[c]ondemn[ed] the willful destruction of the cultural heritage of Afghanistan by the Taliban forces, particularly the statues of Bamiyan, as crime[s] against the common heritage of humanity."<sup>166</sup> Despite the strong wording of the response, it carries no force in deterring similar actions from being taken by countries and governments in the future. Following the unified efforts of the international

<sup>161</sup> Michael Semple, *Guest Blog: Why the Buddhas of Bamiyan were destroyed*, AFGHANISTAN ANALYSTS NETWORK (Mar. 2, 2011), <http://www.afghanistan-analysts.org/guest-blog-why-the-buddhas-of-bamian-were-destroyed/>.

<sup>162</sup> World Heritage Convention, *supra* note 21, art. 6, ¶ 1.

<sup>163</sup> Andrea Cuning, *The Safeguarding of Cultural Property in Times of War & Peace*, 11 TULSA J. COMP. & INT'L L. 211, 234-35 (2003). Applicability of the 1954 Convention is further thrown into doubt because Afghanistan is not a state party to the 1954 Hague Convention. See 1954 Hague Convention, *supra* note 4 (including a complete list of signatories to the 1954 Hague Convention).

<sup>164</sup> The Convention further limits its applicability to movable cultural property. See UNESCO Convention, *supra* note 4.

<sup>165</sup> See Roger O'Keefe, *World Cultural Heritage: Obligations to the International Community as a Whole?*, 53 INT'L & COMP. L. Q. 189, 205 (2004) (concluding that the destruction of the Bamiyan Buddhas was not a violation that arose to a *jus cogens*).

<sup>166</sup> World Heritage Committee, *Acts Constituting "Crimes Against the Common Heritage of Humanity"*, U.N. Doc. No. WHC-01/CONF.208/23 (Dec. 11-16, 2001), <http://whc.unesco.org/archive/2001/whc-01-conf208-23e.pdf>.

community to prevent the destruction of the Bamiyan Buddhas, the post-destruction response was relatively mild in its punitive power, and had no tangible effects on the legal development of cultural heritage law. States responded with “diplomatic condemnation” to the Taliban’s mistreatment of the country’s cultural property, but states admitted that the Taliban’s refusal to cooperate or acknowledge diplomatic efforts was not reason enough to impermissibly interfere with the state’s domestic affairs.<sup>167</sup> This condemnation, although lacking any power to punish the Taliban or affirmatively prevent similar acts, is significant in that the weight of its uniformity can be used to legally justify cultural heritage as a *ius cogens* in the 21st century.<sup>168</sup>

The lack of an established means by which states can be punished for cultural destruction is highlighted in this case. Although sanctions would seem to be a clear solution, the UNESCO Constitution does not formally adopt sanctions as a means with which to correct violations of its Conventions or treaties.<sup>169</sup> Hypothetically, sanctions on Afghanistan would politically stigmatize the Taliban regime, would expose the government to international shame resulting from the continued condemnation of its actions, and would not address the larger political issue of the UN’s non-recognition of the Taliban as the legitimate government of Afghanistan.

Despite the original cause of destruction, UNESCO and international governments are again working together to protect, preserve, and restore the site.<sup>170</sup> For such an undertaking to be successful, it is necessary that the international community recognize that it is working within the political and cultural confines of the Afghani government. The decision to reconstruct the Buddhas is also under debate for the legacy the international community wants the Buddhas to be remembered for, either the original cultural and historical value of the Buddhas or now as a monument to the fanaticism of prior regimes.<sup>171</sup>

## CONCLUSION

The recognized sites of Battir, Bamiyan, and Aleppo are uniform only in their presence on the World Heritage List in Danger. Each site was nominated and added to the list on account of its fulfillment of the ten criteria set forth by the World Heritage Committee. Perhaps the strongest indicator of the effect a World Heritage inscription can have is found not in the inherent value of a site, but the respect a country already gives to international law. If a country does not respect international opinion

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<sup>167</sup> O’Keefe, *supra* note 165, at 205.

<sup>168</sup> *Id.*

<sup>169</sup> See generally UNESCO Constitution, *supra* note 20.

<sup>170</sup> Rod Nordland, *Countries Divided on Future of Ancient Buddhas*, N.Y. TIMES, (Mar. 22, 2014), [http://www.nytimes.com/2014/03/23/world/asia/countries-divided-on-future-of-ancient-buddhas.html?\\_r=0](http://www.nytimes.com/2014/03/23/world/asia/countries-divided-on-future-of-ancient-buddhas.html?_r=0).

<sup>171</sup> See Crossette, *supra* note 153.

or feel encumbered by international persuasion, there is no motivation for that country to compromise or provide additional protections to the site.

The case of the Buddhas falls within this theory. The Taliban were very outspoken in dealing with the international community's efforts to preserve the statues.<sup>172</sup> Rather than viewing the international community's desire to save the Buddhas, and their willingness to contribute their own resources, the Taliban interpreted these efforts as an affront to their domestic struggles, isolation from the international community, and the international community's incorrect prioritization of issues. Mr. Rahmatulla Hashimi, an envoy for the Taliban, succinctly summarized the Taliban's point of view in a 2001 interview with the *New York Times* — regarding the decision to destroy the Bamiyan Buddhas, he viewed the international offers of money and resources as an insult to the country's true issues, stating “[i]f money is going to statues while children are dying of malnutrition next door, then that makes it harmful, and we destroy it.”<sup>173</sup> In retrospect, the international recognition of the Buddhas' cultural significance and the narrow view that the money could only be used to restore and protect the statues led to the destruction of the Buddhas. The international community must recognize that although cultural preservation is important, compromise or additional resources may also be required to encourage a domestic country to place the same emphasis on such preservation.

In comparison to the above, the Land of Olives and Vines represents a country's ability to gain further international support and recognition by following international norms. The territory at issue seemed inevitably bound for conflict and international involvement, yet the case was instead peacefully resolved. The peacefulness of the resolution would have been impossible without each side's respect and consideration for the judicial process. By establishing a clear, mutually upheld precedent, finding resolutions to protect areas of cultural preservation from military conflict via a domestic or international judicial process may gain traction and respect as an amicable, final resolution. One caveat to this solution, as shown by comparing the Bamiyan Buddhas to Battir, is the willingness of involved countries to cooperate and respect the opinions of the international community.

As the civil war in Aleppo continues, it is unclear what measures, if any, will be taken to ameliorate or stem the damage being inflicted on the city's cultural heritage. The international community is very much involved in the Syrian Civil War, yet similarly to the Bamiyan Buddhas, it is difficult to gain support or isolated efforts to protect the cultural heritage of the city when residents are in dire need of housing, food, and

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<sup>172</sup> *See id.*

<sup>173</sup> *Id.* (internal citation omitted).

restructuring the infrastructure.<sup>174</sup> Existing military protocol has not provided sufficient protection thus far, and it is unlikely that either the rebels or the government can be persuaded to change their tactics. Instead, international allies should focus on how they can encourage or sway military policy (i.e. through their own resources or military support) and provide incentives tied to protecting the city's cultural heritage. Aleppo has a rich history many are eager to save; providing strong incentives that are not isolated from the current events may be the best way to save what is left.

International treaties, organizations, and bodies originally aimed at protecting sites of cultural or historical significance are testing the scope and strength of their powers. Despite the gradual advancements made, particularly over the past century, the rapid rise of culturally motivated crimes, relying on the political power and leverage of cultural heritage sites, has made the destruction of sites a persuasive reason to develop enforcement mechanisms. With no current uniform definition or *jus cogen* relating to protecting cultural property, countries are held to different standards and are able to choose which treaties to follow based on their political motives.<sup>175</sup> Not only are countries able to choose how well they protect or preserve their own cultural sites, but they also may determine whether to hold other countries liable for violating their own treaty obligations.<sup>176</sup> Without a uniform enforcement mechanism, cultural heritage protection as a body of law lacks deterrent and punitive force.

These organizations are no longer limited to identifying and naming sites in need of conservation or protection; organizations are now working with or working around governments to prevent armed conflicts from escalating.<sup>177</sup> While such involvement may at times be crucial to these sites' preservation, international organizations dedicated to protecting cultural heritage sites can also cause the converse effect of catalyzing such sites destruction. However, the effects extend beyond the international community's involvement in individual sites; the operations of govern-

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<sup>174</sup> Kurt Pelda, *Aleppo at War: Everyday Life in the Death Zone*, SPIEGEL (Mar. 6, 2013), <http://www.spiegel.de/international/world/civil-war-makes-life-a-struggle-in-aleppo-in-northern-syria-a-887265.html> (last visited Feb. 8, 2016).

<sup>175</sup> "Although the Second Protocol to the 1954 Hague Convention . . . does condense and clarify cultural property law, limited *international* participation means that a patchwork of treaties remains in place." Thurlow, *supra* note 38, at 182.

<sup>176</sup> Meyer, *supra* note 102.

<sup>177</sup> In making UNESCO a more effective tool to protect cultural heritage, UNESCO must be able to deter governments. Suggested mechanisms include: "cutting off funding for sites, launching widespread public relations campaigns (free from politics) for sites in danger from neglect or overuse, and invoking targeted international sanctions." Elizabeth Keough, *Heritage in Peril: A Critique of UNESCO's World Heritage Program*, 10 WASH. U. GLOBAL STUD. L. REV. 593, 613 (2011).

ments and even the relationships of governments are affected.<sup>178</sup> While the doctrine of law governing cultural heritage is growing, the variability between countries regarding what treaties have been signed or ratified, combined with the lack of uniform enforcement policies, means continued improvements are necessary before all cultural heritage sites can reasonably be protected from destruction.

With recognition systems such as UNESCO's World Heritage already in place, the emphasis now needs to be on how countries can use the international body of law to make substantial changes. Rather than just viewing recognition systems as aspirational goals, countries should turn to the existing body of law as a way to work through political differences. Although the destruction of the Bamiyan Buddhas represents the international community's inability to prevent destruction of cultural property, their history represents the development of cultural heritage being used for political leverage. This development was reiterated with the recognition of the Land of Wine and Olives in Battir, Palestine. Not only was this site saved from imminent destruction, but the subsequent allocation of the land to Palestine also marked a peaceful resolution to a political dispute in a geo-political area that is constantly under war. Both of these examples can be used to study the current situation of the Ancient City of Aleppo. The city's architecture, living culture, and historical value are being destroyed by both sides of the civil war and each side's allies; an international solution is the only way to prevent total destruction of Aleppo. Taking advantage of international sources would give each side clear, equally binding guidelines, and could be used as a model throughout the country to preserve the current status of the other five endangered sites.

The ability to use existing treaties flexibly and creatively saved the site of Battir, and it may save future sites of cultural significance. But for a doctrine of law to develop to become effective at protecting cultural heritage, and not just aspirational, it will be necessary to strengthen existing treaties and pacts and to develop an enforcement mechanism. Categorizing sites of cultural significance is not enough; states must contextualize the cultural and political differences that motivate cultural destruction to form a body of law that will encompass the dangers facing cultural sites in the modern world.

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<sup>178</sup> See generally Kattan, *supra* note 138.