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THE LAST POOR PLUNDER FROM A BLEEDING LAND¹: THE FAILURE OF INTERNATIONAL LAW TO PROTECT SYRIAN ANTIQUITIES

At length we stood on the end of the col and looked over Palmyra. I wonder if the wide world presents a more singular landscape. It is a mass of columns, ranged into long avenues, grouped into temples, lying broken on the sand or pointing one long solitary finger to Heaven. Beyond them is the immense Temple of Baal; the modern town is built inside it and its rows of columns rise out of a mass of mud roofs. And beyond, all is the desert, sand and white stretches of salt and sand again, with the dust clouds whirling over it and the Euphrates 5 days away. It looks like the white skeleton of a town, standing knee deep in the blown sand.²

INTRODUCTION

On May 14, 1900, Gertrude Bell, an English explorer, writer, and archaeologist wrote to her family describing the striking image of Palmyra she saw upon her approach into the ancient city, located in what is now the Syrian Arab Republic (“Syria”).³ One hundred and fifteen years later, in mid-May 2015, the Islamic State of Iraq and Syria (ISIS)⁴ witnessed the

1. GEORGE GORDON BYRON, CHILDE HAROLD’S PILGRIMAGE (1812), *reprinted in* LORD BYRON: THE MAJOR WORKS 56 (Jerome J. McGann ed., 2008). Here, Lord Byron is referring to the Elgin Marbles, which England acquired from Greece in the early nineteenth century and has refused to return, despite repeated requests.

2. Letter from Gertrude Bell to her Family (May 14, 1900), *reprinted in* THE LETTERS OF GERTRUDE BELL (M. Fulton ed., 2004) [hereinafter Letter from Gertrude Bell], <http://gutenberg.net.au/ebooks04/0400341h.html#ch5>; Stuart Jeffries, *Isis’s Destruction of Palmyra: ‘The Heart has Been Ripped Out of the City,’* GUARDIAN (Sept. 2, 2015), <http://www.theguardian.com/world/2015/sep/02/isis-destruction-of-palmyra-syria-heart-been-ripped-out-of-the-city>.

3. Letter from Gertrude Bell, *supra* note 2.

4. Other names commonly used to refer to ISIS include: The Islamic State in Iraq and the Levant, The Islamic State in Iraq and Al-Sham, Daesh, which is ISIS’ Arabic name, or simply the Islamic State. *Islamic State in Iraq and the Levant (ISIL)*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Islamic-State-in-Iraq-and-the-Levant> (last visited Dec. 31, 2016).

same ancient temples as it began its first siege of Palmyra.⁵ Unlike Bell, ISIS entered Palmyra as conquerors, seeking to expand its territorial hold and exploit the city's archaeological resources in the name of ideology and financial gain.⁶ After receiving word of ISIS' approach, the Syrian Director-General for Antiquities and Museums, Maamoun Abdulkarim, knew he could do little to save the archaeological site from destruction by ISIS militants.⁷ Abdulkarim, however, did try to remove the antiquities housed in the Palmyra museum and transport them to a safer location.⁸ Upon notice of approaching ISIS militants, the archaeologists in Palmyra barricaded themselves inside the museum and boxed antiquities for transport to a location outside ISIS control.⁹ Upon ISIS' arrival in the city, the Syrian army soldiers who had been guarding the archaeologists fled.¹⁰ As the ISIS militants approached the museum shooting, the archaeologists loaded the last of the antiquities onto a truck for transport to a hidden location, evading capture by mere seconds.¹¹ The antiquities were transported out of Palmyra and hidden in a secure location.¹²

Two months after ISIS' siege of Palmyra, ISIS militants murdered eighty-two-year-old Syrian archaeologist Khaled al-Asaad in front of the Palmyra museum for refusing to reveal the location of the hidden antiquities.¹³ Dubbed by some as "Mr. Palmyra," al-Asaad dedicated his life to researching the Palmyrene ruins.¹⁴ The ISIS militants beheaded al-Asaad and displayed his

5. See Dexter Filkins, *ISIS in Palmyra*, NEW YORKER (May 21, 2015), <http://www.newyorker.com/news/news-desk/isis-in-palmyra>.

6. See *id.*

7. Tim McGirk, *Syrians Race to Save Ancient City's Treasures from ISIS*, NAT'L GEOGRAPHIC (July 10, 2015), <http://news.nationalgeographic.com/2015/07/150710-palmyra-syria-isis-looting-museum-archaeology/>.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Kareem Shaheen, *Beheaded Syrian Scholar Refused to Lead Isis to Hidden Palmyra Antiquities*, GUARDIAN (Aug. 19, 2015), <http://www.theguardian.com/world/2015/aug/18/isis-beheads-archaeologist-syria>.

14. Frederick Deknatel, *The Senseless Death of Mr. Palmyra: The War on Culture Unfolding in Syria, and the 83-Year-Old Archaeologist Who Became its Latest Casualty*, FOREIGN POL'Y (Aug. 20, 2015), <http://foreignpolicy.com/2015/08/20/the-senseless-murder-of-mr-palmyra-syria-culture-islamic-state-khalid-al-asaad/>.

mutilated body on a lamppost near the ancient city.¹⁵ Prior to his execution, militants had detained and interrogated al-Asaad for a month in an attempt to extract the location of the hidden Palmyrene antiquities.¹⁶ Al-Asaad refused to cooperate.¹⁷ He died protecting his country's cultural heritage and the subject of his life's work. Following the beheading, United Nations Educational Scientific and Cultural Organization (UNESCO) Director-General Irina Bokova issued a statement saying: "They killed him because he would not betray his deep commitment to Palmyra. His work will live on far beyond the reach of these extremists. They murdered a great man, but they will never silence history."¹⁸ As ISIS continues to attempt to "silence history"¹⁹ in Syria, the dire need for an effective international legal response intensifies.

The ongoing civil war in Syria, which began in 2011, has led to the loss of a significant amount of cultural heritage.²⁰ The volatility has been especially severe due to the rise of various non-state militant groups that have formed to fight against the ruling regime led by President Bashar al-Assad.²¹ The most prominent, and destructive, of these non-state groups is ISIS.²² In its

15. *Id.*; Shaheen, *supra* note 13.

16. Shaheen, *supra* note 13.

17. Deknatel, *supra* note 14; Shaheen, *supra* note 13.

18. *Director-General Irina Bokova Deplores the Loss of Two Leading Scholars of Syrian Antiquity*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG. (Aug. 19, 2015), <http://en.unesco.org/news/director-general-irina-bokova-deplores-loss-two-leading-scholars-syrian-antiquity>.

19. *Id.*

20. See generally Ben Taub, *The Real Value of the ISIS Antiquities Trade*, NEW YORKER (Dec. 4, 2015), <http://www.newyorker.com/news/news-desk/the-real-value-of-the-isis-antiquities-trade>; Steven Lee Myers & Nicholas Kulish, *Militants Profit from Looting of Antiquities*, N.Y. TIMES, Jan. 10, 2016, at A1; Robert Fisk, *Isis Profits from Destruction of Antiquities by Selling Relics to Dealers – and then Blowing Up the Buildings They Come From to Conceal the Evidence of Looting*, INDEPENDENT (Sept. 20, 2015), <http://www.independent.co.uk/voices/isis-profits-from-destruction-of-antiquities-by-selling-relics-to-dealers-and-then-blowing-up-the-10483421.html>.

21. For background information on the development of modern Syria, the Assad Government, and tensions that led to the 2011 uprisings, see William R. Polk, *Understanding Syria: From Pre-Civil War to Post-Assad*, ATLANTIC (Dec. 10, 2013), <http://www.theatlantic.com/international/archive/2013/12/understanding-syria-from-pre-civil-war-to-post-assad/281989/>.

22. See *infra* Part II.A; see also Graeme Wood, *What ISIS Really Wants*, ATLANTIC (Mar. 2015), <http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/>; Syria: *The Story of the Conflict*,

ideological fight to reinstate the Islamic Caliphate to rule Iraq and the Levant under Islamic law,²³ ISIS has committed innumerable atrocious acts that violate the laws of war. One such atrocity is ISIS' exploitation of Syrian cultural property.²⁴ Since gaining prominence in Syria in early 2014, ISIS has destroyed numerous ancient ruins as acts of propaganda and has engaged in the looting of many archaeological sites to finance its organization.²⁵

The primary international treaties protecting cultural heritage during armed conflict have failed to protect antiquities from acts of terrorism such as those employed by ISIS. In the post-9/11 context of modern armed conflict terrorist groups often act outside the event of declared war, thus evading many international regulations, including cultural heritage protections. The primary international cultural heritage protections during armed conflict are promulgated by UNESCO and consist of the Hague Convention for the Protection of Cultural Property During the Event of Armed Conflict ("1954 Hague Convention"),²⁶ the Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict ("First Protocol"),²⁷ and the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ("Second Protocol").²⁸ These treaties contain several weaknesses preventing them from effectively protecting antiquities during modern warfare. First, the treaties do not definitively apply to non-state actors, and, as such, the destruction and looting committed by ISIS does not actually violate the treaties. Second, the

BBC NEWS (Mar. 11, 2016), <http://www.bbc.com/news/world-middle-east-26116868>.

23. *Id.*

24. Myers & Kulish, *supra* note 20; Taub, *supra* note 20; Fisk, *supra* note 20; Rick Gladstone & Maher Samaan, *Islamic State Destroys More Artifacts in Iraq and Syria*, N.Y. TIMES, July 4, 2015, at A3.

25. Amr Al Azm, *The Pillaging of Syria's Cultural Heritage*, MIDDLE EAST INST. (May 22, 2015), <http://www.mei.edu/content/at/pillaging-syrias-cultural-heritage>.

26. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

27. Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358 [hereinafter First Protocol].

28. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 212 [hereinafter Second Protocol].

treaties' definition of "armed conflict" is too narrow, limiting their application to periods of declared war, thus excluding random acts of terrorism from their scope. Third, the treaties lack synergy and coordination with other cultural heritage protections, namely the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention"),²⁹ delaying the effective response time to recognize and seize looted antiquities once they begin appearing on the international market. Fourth, the treaties have failed to establish effective safekeeping provisions for the transfer and storage of artifacts known to have originated from a conflict zone, such as Syria, thus possibly allowing seized antiquities to reenter foreign markets. Addressing these weaknesses would significantly increase the effectiveness of international cultural heritage protections. Accordingly, it is imperative that the international community strengthen regulations governing the protection and trade of cultural property in order to prevent the destruction of more invaluable cultural heritage and to limit a significant source of ISIS financing. The most effective means of strengthening these regulations is through the promulgation of a Third Protocol to the 1954 Hague Convention.

This Note will examine the international legal framework that currently governs the protection of cultural heritage and will propose additions to this framework that aim to strengthen heritage protections in consideration of the prominent role of non-state actors in modern armed conflict. The analysis will focus on the 1954 Hague Convention³⁰ and its First³¹ and Second Protocols.³² To more effectively protect antiquities during modern armed conflict, a Third Protocol should be promulgated to in-

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

30. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26.

31. First Protocol, *supra* note 27.

32. Second Protocol, *supra* note 28.

clude several provisions missing from the 1954 Hague Convention and its First and Second Protocols.³³ First, the Third Protocol will firmly establish its application to non-state actors, which will hold organizations such as ISIS legally accountable for the destruction and looting of cultural heritage. Second, the Third Protocol will expand the definition of armed conflict to not only include an event of declared war but also sporadic acts of violence or terrorism committed against cultural heritage.³⁴ Third, the Third Protocol will limit the value of illicit antiquities by prohibiting the sale or transfer of antiquities without provenance or assurance of good title and would impose criminal penalties on those caught dealing or buying stolen antiquities known to have originated from a conflict zone. Finally, the Third Protocol will establish guidelines for the storage of seized cultural objects originating from a conflict zone, which will both protect antiquities until the end of the conflict and prevent them from reentering illicit markets.

Part I will first provide general background on antiquities looting and will then discuss the early history of antiquities protections. Part II will analyze the evolution of ISIS in Syria and its use of the illicit antiquities market as a source of financing. Part II will then examine the damage and looting of Syrian cultural heritage by ISIS, specifically focusing on the ancient city of Palmyra, a World Heritage Site that has intermittently been under ISIS occupation since 2015.³⁵ Part III will examine the international legal framework governing the protection of antiquities,

33. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26; First Protocol, *supra* note 27; Second Protocol, *supra* note 28.

34. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, art. 18; Second Protocol, *supra* note 28, art. 22.

35. *Syrian Arab Republic*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., <http://whc.unesco.org/en/statesparties/SY/> (last visited Feb. 3, 2017); Kareem Shaheen, *Palmyra: Historic Syrian City Falls Under Control of Isis*, GUARDIAN (May 21, 2015), <http://www.theguardian.com/world/2015/may/20/syrian-city-of-palmyra-falls-under-control-of-isis>; Andrew Curry, *Here Are the Ancient Sites ISIS has Damaged and Destroyed*, NAT'L GEOGRAPHIC (Sept. 1, 2015), <http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/>; Rick Gladstone, *Ancient City of Palmyra Swings Back to Syrian Government Control*, N.Y. TIMES (Mar. 2, 2017), <https://www.nytimes.com/2017/03/02/world/middleeast/palmyra-syria-control.html>.

including the 1954 Hague Convention, its First and Second Protocols, the 1970 UNESCO Convention, and recent antiquities protections issued by the U.N. Security Council. Part III will conclude with an analysis of Syrian Antiquities Law. Finally, Part IV will assess the failure of the international and Syrian legal framework to effectively protect antiquities in the context of modern warfare involving non-state actors. Part IV will finish by describing provisions to be included in the Third Protocol to the 1954 Hague Convention to better protect antiquities during modern armed conflict.³⁶

I. AN EXAMINATION OF LOOTING AND EARLY CULTURAL HERITAGE PROTECTIONS

This Part will explore the historical development of the looting of archaeological materials and the factors fueling its persistence, including traditional customs of war as well as the symbolic, historical, and financial value that antiquities possess. This Part will then discuss the earliest codified cultural heritage protections and will conclude by examining the negative impact of looting on archaeological research.

A. *The History of Looting and Destruction of Cultural Heritage*

Looting of archaeological material has been a common, and even customary, aspect of war throughout human history.³⁷ Looting during warfare historically served a range of purposes, including compensation for military service, nationalist interests, and establishing social superiority.³⁸ Ancient armies, for

36. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26; First Protocol, *supra* note 27; Second Protocol, *supra* note 28.

37. See Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 *GEO. J. INT'L L.* 245, 248–59 (2006); Robert Bejesky, *A Theorization on Equity: Tracing Causal Responsibility for Missing Iraqi Antiquities and Piercing Official Immunity*, 27 *PACE INT'L L. REV.* 397, 401 (2015); see also Morag M. Kersel, *The Lure of the Artefact? The Effects of Acquiring Eastern Mediterranean Material Culture*, in *THE CAMBRIDGE PREHISTORY OF THE BRONZE AND IRON AGE MEDITERRANEAN* 367, 368 (A. Bernard Knapp & Peter Van Dommelen eds., 2015).

38. Gerstenblith, *supra* note 37, at 248–59; Bejesky, *supra* note 37, at 399–401; see also Kersel, *supra* note 37, at 368. Referencing Edward Said's *Orientalism*, Kersel describes the role that antiquities can play in representing colonial or "Western" superiority, citing Napoleon's use of looted antiquities from

example, often pillaged during wartime to compensate soldiers.³⁹ In more recent history, Napoléon excessively pillaged conquered territories, justifying his actions on the notion of French superiority.⁴⁰ British armies also stole valuable antiquities from their colonial territories in Egypt and India.⁴¹ Nonetheless, as early as the second century BCE, the Romans considered the idea that at least some cultural heritage merited protection during war.⁴² The Roman historian Polybius, for example, questioned excessive pillaging after Rome's siege of the Kingdom of Syracuse in 214–212 BCE, stating that “[Roman soldiers] should not strip cities under the idea that the misfortunes of others are an ornament to their own country.”⁴³ Building on ideas developed by the Romans, many scholars and philosophers during the Middle Ages and Renaissance condemned the pillaging of culturally significant objects and buildings during wartime.⁴⁴ Despite this kind of widespread condemnation throughout history, looting has persisted into the modern era, but has nonetheless been tempered by the legal codification of cultural heritage protections enacted during the latter half of the nineteenth century.

In 1863, the first codified protections of cultural heritage emerged in the United States as part of a general law governing military conduct during war, known as the Lieber Code.⁴⁵ Articles 31 through 36 of the Lieber Code generally prohibit seizure

Egypt and the Levant as trophies attesting his domination over the regions. Kersel, *supra* note 37 (citing EDWARD SAID, *ORIENTALISM* (1978)). Furthermore, Kersel describes the role antiquities play in the social superiority of the collector in their own community. *Id.* at 368.

39. Gerstenblith, *supra* note 37, at 249.

40. *Id.* at 251–54; Bejesky, *supra* note 37, at 399–400.

41. Bejesky, *supra* note 37, at 399–400.

42. Gerstenblith, *supra* note 37, at 248–51. According to Gerstenblith, the Romans believed that they should spare at least some cultural property that served religious purposes. *Id.* The questioning of excessive pillage appeared in the writings of prominent Romans such as Polybius, Cicero, and Pliny. *Id.* Cicero's writings were known during the Middle Ages and Renaissance, and thus possibly influenced the continued acceptance of the notion of cultural heritage protection. *See id.*

43. *Id.*

44. *Id.*

45. *Id.* at 253–54.

of cultural property and mandate that cultural buildings be secured against all avoidable injury.⁴⁶ Over thirty years later, in 1899, the first substantive international protections of cultural heritage during wartime were codified in Convention (II) Respecting the Laws and Customs of War on Land (“1899 Hague Convention”).⁴⁷ Similar to the Lieber Code, Articles 28, 47, and 56 of the 1899 Hague Convention prohibit pillaging and intentional damage to cultural and historic buildings.⁴⁸ Several years later, in 1907, the international community expanded on the 1899 Hague Convention, providing more detailed protections in the Convention (IV) Respecting the Laws and Customs of War on Land (“1907 Hague Convention”).⁴⁹ Adding to the general prohibition against pillaging in the 1899 Hague Convention, Article 27 of the 1907 Hague Convention mandates parties to take “all steps necessary” to spare cultural buildings during war.⁵⁰ Further, Article 27 places an obligation on the besieged party to indicate the presence of such buildings with distinctive signage.⁵¹ Significantly, the 1907 Hague Convention is considered customary international law and thus applies to all international actors, not just states.⁵² Nonetheless, the 1907 Hague Convention represents only the beginning of international attempts to prevent the looting and destruction of antiquities during wartime.

B. The Substantive Damage of Looting

Looting of cultural artifacts has persisted primarily due to continued demand for these items in the art marketplace.⁵³ While

46. The Lieber Code of 1863, Instructions for the Government of Armies of the United States in the Field, Series III, Vol. 3, sec. 124, General Orders no. 100, arts. 31–36 (Apr. 24, 1863); *see also* Gerstenblith, *supra* note 37, at 253–55.

47. Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, July 29, 1899, 187 Consol. T.S. 429 [hereinafter 1899 Hague Convention].

48. *Id.* arts. 28, 47, 56.

49. *Id.*; Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 187 Consol. T.S. 227 [hereinafter 1907 Hague Convention].

50. *Id.* art. 27.

51. *Id.*

52. Marina Lostal, *Syria’s World Cultural Heritage and Individual Criminal Responsibility*, INT’L REV. LAW, Apr. 2015, at 7, <http://www.qscience.com/doi/abs/10.5339/irl.2015.3>.

53. *See* Kersel, *supra* note 37, at 367–68.

reasons for this demand have varied throughout history, one theme persists—the ability of a cultural piece to symbolize a greater religious, historical, nationalistic, or social significance.⁵⁴ The history embodied in the artifact contributes to its perceived beauty and value in the international art market.⁵⁵ The art market, in contrast with archaeological experts, typically “sets a higher price on art masterpieces than on the acquisition of archaeological knowledge.”⁵⁶ Thus, the superficial historical symbolism that gives value to looted antiquities in the art market outweighs the academic value archeologists derive from *in situ* antiquities.⁵⁷ Further, reproductions or copies are incapable of possessing this historical symbolism and thus do not have the same value as an authentic antiquity. Accordingly, looters continue to reap profits from selling authentic antiquities, posing significant challenges for instituting effective law and policy to prevent their illegal excavation.

Looting antiquities can cause irreparable damage. First, most looted antiquities originate from developing countries and end up in Western art markets, museums, and private collections.⁵⁸ This not only exploits developing countries but also prevents people from those countries from enjoying their own cultural heritage. Second, looting leads to the undocumented excavation of the artifacts, which removes a significant amount of information that archaeologists can derive from them. An *in situ* artifact provides information about its age, culture, function, and much more.⁵⁹ As such, looting can significantly cripple archaeological research.

Looting remains a significant problem. In Robert Bejesky’s study on looted Iraqi antiquities following the 2003 U.S. invasion, he reported that “between eighty and ninety-five percent of antiquities on the market lack[ed] sufficient documentation.”⁶⁰

54. *See id.*

55. *See id.*

56. Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 302 (1982).

57. Translated from Latin, *in situ* means “in the natural or original position or place.” *In situ*, MERRIAM-WEBSTER DICTIONARY (2016). For more information on archaeological excavation and conservation, see Frank Matero, *Heritage, Conservation, and Archaeology: An Introduction*, ARCHAEOLOGICAL INST. AM. (June 18, 2008), <https://www.archaeological.org/news/hca/89>.

58. Bator, *supra* note 56.

59. *See* Matero, *supra* note 57.

60. Bejesky, *supra* note 37, at 399–401.

The rise of non-state actors, such as ISIS, who loot and sell antiquities as a source of financing, likely have further contributed to this figure.⁶¹

II. THE DESTRUCTION AND LOOTING OF SYRIAN CULTURAL HERITAGE

Syria is home to many archaeological sites due to its continued human occupation since the Middle Paleolithic period, including six UNESCO World Heritage Sites.⁶² All of Syria's World Heritage sites have been threatened since the beginning of the Syrian conflict.⁶³ This Part will first examine the evolution of ISIS in Syria and its antiquities department. This Part will then discuss the damage ISIS has inflicted on Syrian antiquities. It will primarily focus on the World Heritage Site of Palmyra⁶⁴ due to ISIS' intermittent occupation of the city beginning in May 2015 and its widely publicized destruction of Palmyra's ancient temples.⁶⁵ Finally, this Part will examine evidence of looting by ISIS and

61. Myers & Kulish, *supra* note 20.

62. These sites include: the Ancient City of Aleppo, the Ancient City of Bosra, the Ancient City of Damascus, the Ancient Site of Palmyra, the Ancient Villages of Northern Syria, Crac des Chevaliers, and Qal'at Salah El-Din. See *Syrian Arab Republic*, *supra* note 35. According to UNESCO, a World Heritage Site is considered to be of "outstanding value to humanity." *About World Heritage*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., <http://whc.unesco.org/en/about/> (last visited Jan. 1, 2017). To be designated as a World Heritage Site, a state party to the Convention Concerning the Protection of the World Cultural and Natural Heritage must follow the procedures outlined in the treaty to apply for designation of its culturally significant sites as World Heritage Sites. An elected committee then decides on the designation. The designation as a World Heritage Site allows a state party to receive financial assistance in preserving and protecting the site. Convention for the Protection of World Cultural and Natural Heritage, Nov. 16 1972, 1037 U.N.T.S. 151 [hereinafter World Heritage Convention]; David Kohn, *ISIS's Looting Campaign*, NEW YORKER (Oct. 14, 2014), <http://www.newyorker.com/tech/elements/isis-looting-campaign-iraq-syria>; *Syria*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Syria#toc29902> (last visited Feb. 4, 2017).

63. *Ancient History, Modern Destruction: Assessing the Current Status of Syria's World Heritage Sites Using High-Resolution Satellite Imagery*, AM. ASSOC. ADVANCEMENT SCI. (2016), <https://www.aaas.org/page/ancient-history-modern-destruction-assessing-current-status-syria-s-world-heritage-sites-using>.

64. *Syrian Arab Republic*, *supra* note 35.

65. Shaheen, *supra* note 35; Curry, *supra* note 35. See generally *Syria Civil War: Assad Hails Palmyra Recapture from IS*, BBC NEWS (Mar. 27, 2016), <http://www.bbc.com/news/world-middle-east-35906568>.

the presence of looted Syrian antiquities on the international antiquities market.

A. ISIS, Cultural Heritage, and the Antiquities Trade

Despite the graphic and often violent images permeating through the U.S. news media, ISIS' ideology stems from a concrete set of beliefs with roots in an established Sunni school of Islamic thought.⁶⁶ In its quest to return to traditional Islam, ISIS often resorts to extreme violence in order to establish its authority over the populace in its territory.⁶⁷ ISIS bases its ideology on the earliest teachings and practices of the Prophet Mohammed.⁶⁸ The primary objective of ISIS is to restore the Islamic Caliphate that ruled the Middle East for over six hundred years following the Prophet Mohammed's death in 632 CE.⁶⁹ The restoration of the caliphate necessarily involves the restoration of Islamic law, thus bringing seventh century legal and societal norms into the twenty-first century, many of which may appear barbaric in a modern context.⁷⁰ In June 2014 ISIS declared a caliphate over the territory it controlled in Iraq and Syria, with its leader Abu Bakr al-Baghdadi as Caliph.⁷¹ In accordance with the establishment of the caliphate, ISIS began organizing government departments and services, including a division dedicated to antiquities.⁷²

Related to ISIS' mission to reestablish the Islamic Caliphate is the destruction of antiquities for broader ideological purposes, as much of Syria's ancient archaeological record does not support its preferred narrative of Islamic Syrian and Levantine history.⁷³ Beyond these ideological differences, ISIS has plundered Syrian antiquities because of the immense potential for profit

66. Wood, *supra* note 22.

67. *Islamic State in Iraq and the Levant (ISIL)*, *supra* note 4.

68. *Id.*

69. The Caliphate ruled the Islamic Empire from 632 CE to 1258 CE. See *Caliphate*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/place/Caliphate> (last visited Oct. 17, 2015).

70. Wood, *supra* note 22.

71. *Islamic State of Iraq and the Levant (ISIL)*, *supra* note 4.

72. *Id.*; Andrew Keller, Deputy Assistant Sec'y for Counter Threat Fin. & Sanctions, Bureau of Econ. & Bus. Affairs, U.S. Dep't of State, Documenting ISIL's Antiquities Trafficking: The Looting and Destruction of Iraqi and Syrian Cultural Heritage: What We Know and What Can Be Done (Sept. 29, 2015).

73. ISIS instead prefers to focus on the region's Islamic history. See generally Wood, *supra* note 22.

from the already thriving antiquities trade.⁷⁴ The institutionalized nature of ISIS' antiquities department illustrates the extent to which the organization's looting has been used as a source of financing. Documents recovered from a U.S. raid on the compound of Abu Sayyaf, ISIS' director of oil and gas and antiquities divisions, revealed the scope of ISIS' antiquities department.⁷⁵ Specifically, the documents outlined the structure of the division, showing segments dedicated to research and exploration of potential archaeological sites, excavations, and marketing of antiquities.⁷⁶ Furthermore, U.S. forces found scaled photographs of intact antiquities that most likely were intended for sale.⁷⁷ While exact figures are unknown, the U.S. government estimates that ISIS has made several million dollars on the illicit sale of looted antiquities since mid-2014.⁷⁸ The large swaths of territory ISIS now occupies further increases its potential for profits as more land provides more potential for encountering buried antiquities in a country with as rich an ancient history as Syria.⁷⁹ As such, the longer ISIS remains in control of its territory, the more endangered Syria's cultural heritage becomes.

B. An Examination of Palmyra

Since ISIS gained territorial control in Syria, it has destroyed and looted a significant amount of cultural heritage, including multiple UNESCO World Heritage Sites and the movable antiquities originating from them.⁸⁰ One such World Heritage Site, Palmyra, was seized by ISIS forces in May 2015.⁸¹ Dubbed the

74. Al Azm, *supra* note 25; Myers & Kulish, *supra* note 20.

75. Keller, *supra* note 72.

76. *Id.*

77. *Id.*

78. *Id.*

79. Al Azm, *supra* note 25.

80. Curry, *supra* note 35; see also Jen Kirby, *ISIS is Waging War Against Syria's Ancient History*, N.Y. MAG. (Aug. 25, 2015), <http://nymag.com/daily/intelligencer/2015/08/isis-is-destroying-syrias-ancient-history.html#>; Jeffries, *supra* note 2.

81. Shaheen, *supra* note 35. Since May 2015 Palmyra has fallen under and out of ISIS control. See Gladstone, *supra* note 35.

“Venice of the Sands” by archaeologist and British military officer T.E. Lawrence, the site contains some of the most well-preserved evidence of Roman occupation in the Near East.⁸²

Evidence of occupation at Palmyra dates back 3,800 years; however, the city reached its peak during the Roman period from the first through third centuries CE.⁸³ The site is famous for Queen Zenobia’s rule over the city beginning around 267 CE, during which she led a successful revolt against the Roman Empire.⁸⁴ Furthermore, Palmyra functioned as a major trading hub along the Silk Road, where caravans from the east passed through on their way to Roman provinces.⁸⁵ Accordingly, the ruins at Palmyra reflect the cultural diversity of the traders who passed through.⁸⁶ The unique confluence of Phoenician, Babylonian, Arab, and Canaanite cultures at Palmyra is found almost nowhere else in the world.⁸⁷

During its occupation of Palmyra from May 2015 to March 2016, ISIS militants publicly destroyed multiple temples located in the Palmyra archaeological park.⁸⁸ In July 2015 ISIS militants publicly sledgehammered statues stolen from Palmyra⁸⁹ and destroyed the Lion of Al-lat, a two-thousand-year-old statue of a lion that was located outside the museum at Palmyra.⁹⁰ In

82. Ishaan Tharoor, *Why the Ancient City of Palmyra, Seized by the Islamic State, Matters*, WASH. POST (May 20, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/05/14/islamic-state-fighters-are-at-the-gates-of-an-ancient-roman-era-city-in-syria/>.

83. Kristin Romey, *How Ancient Palmyra, Not in ISIS’s Grip, Grew Rich and Powerful*, NAT’L GEOGRAPHIC (Aug. 26, 2015), <http://news.nationalgeographic.com/2015/08/150826-syria-palmyra-islamic-state-isis-archaeology-history/>.

84. Tharoor, *supra* note 82.

85. *Id.*

86. *See id.* *See generally* Leon Wieseltier, *The Rubble of Palmyra*, ATLANTIC (Sept. 4, 2015), <https://www.theatlantic.com/international/archive/2015/09/rubble-palmyra-syria-isis/403921/>.

87. Romey, *supra* note 83.

88. Curry, *supra* note 35; Fisk, *supra* note 20. *See generally* Rachel Shabi, *Looted in Syria – and Sold in London: The British Antiquities Shops Dealing in Artefacts Smuggled by Isis*, GUARDIAN (July 3, 2015), <http://www.theguardian.com/world/2015/jul/03/antiquities-looted-by-isis-end-up-in-london-shops; Syria Civil War: Assad Hails Palmyra Recapture from IS>, *supra* note 65.

89. Gladstone & Samaan, *supra* note 24.

90. *Isis Militants Destroy 2,000-year-old Statue of Lion at Palmyra*, GUARDIAN (July 2, 2015), <http://www.theguardian.com/world/2015/jul/02/isis-militants-destroy-palmyra-stone-lion-al-lat>.

August 2015 ISIS militants set off explosions at the Temple of Baalshamin, which was built around two thousand years ago as a dedication to the Phoenician god Baalshamin.⁹¹ A week later, ISIS militants destroyed the main Temple of Baal and a row of columns in its immediate vicinity.⁹² ISIS' demolition of these immoveable cultural properties was distinct from its pillaging of sites for profit in that it was motivated by ideological opposition to pre-Islamic symbols of paganism.⁹³ Nonetheless, ISIS appeared to have slowed its destruction during its first occupation from May 2015 to March 2016, fearing revolt by the local population.⁹⁴

C. Antiquities Looting: From Syria to the International Art Market

When Syrian forces regained control of Palmyra in March 2016, they found significant damage to the Palmyra Museum.⁹⁵ Although museum employees transported many of the artifacts out of the city before ISIS' arrival, many others remained.⁹⁶ Evidence suggests that ISIS deliberately destroyed sculptures, and many artifacts were torn from their mountings.⁹⁷ Although no direct evidence exists proving ISIS sold these missing artifacts, ISIS' practice of selling antiquities to finance its activities suggests the artifacts were likely sold.⁹⁸ Documents recovered by U.S. forces from the raid of Abu Sayyaf, the director of ISIS' oil and gas and antiquities division, demonstrate that ISIS devotes significant resources to finance its antiquities trafficking with

91. Liam Stack, *Islamic State Blows Up Temple at Palmyra Ruins in Syria*, N.Y. TIMES, Aug. 24, 2015, at A6.

92. Anne Barnard & Hwaida Saad, *U.N. Confirms Destruction of Ancient Temple by ISIS*, N.Y. TIMES, Sept. 1, 2015, at A7 ("Consecrated in A.D. 32 to the Semitic god Baal, the temple is considered one of the most important sites at Palmyra. It was a relatively intact example of the fusion of Middle Eastern, Greek and Roman influences."); Jeffries, *supra* note 2.

93. See Stack, *supra* note 91; Kohn, *supra* note 62; Kareem Fahim, *Scenes from Palmyra Indicate ISIS Slowed Assault on Treasures*, N.Y. TIMES, Mar. 29, 2016, at A8.

94. Fahim, *supra* note 93.

95. *Id.*

96. Dana Ballout, *Palmyra Museum: Photos Reveal the Treasures Lost*, WALL ST. J. (Mar. 29, 2016), <http://www.wsj.com/articles/palmyra-museum-photos-reveal-the-treasures-lost-1459284776>.

97. *Id.*

98. Keller, *supra* note 72.

the goal of reaping a profit.⁹⁹ United States forces recovered receipts from antiquities sales, authorizations for excavations, and documents showing that ISIS receives a 20 percent tax from the proceeds of looting.¹⁰⁰ Further, the documents revealed that the antiquities division has specific units dedicated to exploration of archaeological sites and marketing antiquities.¹⁰¹

Many sites in ISIS-controlled areas have been so heavily looted that satellite images of the areas resemble Swiss cheese due to holes dug by looters in search of antiquities.¹⁰² Once excavated, the antiquities are usually transported through Lebanon and Turkey, from which they enter into European and U.S. markets.¹⁰³ During their transport, the smugglers assign the antiquities falsified documents asserting provenance.¹⁰⁴ Other antiquities that are transported without such documentation are often claimed to have originated from long-held private collections.¹⁰⁵

Recent reports on the website of the Directorate-General of Antiquities and Museums (DGAM), the Syrian government agency in charge of managing Syria's archaeological sites and museums,¹⁰⁶ revealed recovered Palmyrene antiquities that were intended for sale in the international art market. Absent accurate documentation, it is nearly impossible to discover when these antiquities were illegally excavated from Palmyra, or whether ISIS was responsible. Nonetheless, many items originating from Palmyra have appeared on the international art market after ISIS began its first occupation in May 2015. In January 2016, DGAM reported that a Palmyrene limestone head was listed for sale at a gallery in New York.¹⁰⁷ The piece acquired false provenance documents asserting that it came from a private New

99. *Id.*

100. *Id.*

101. *Id.*

102. Kohn, *supra* note 62.

103. *Id.*; Shabi, *supra* note 88.

104. Shabi, *supra* note 88.

105. *Id.*

106. *See generally* Syrian Arab Republic, Ministry of Culture: Dir.-Gen. of Antiquities & Museums, GOV.SY, <http://www.dgam.gov.sy/> (last visited Mar. 8, 2017).

107. Syrian Arab Republic, Ministry of Culture: Dir.-Gen. of Antiquities & Museums, *Selling Ancient Palmyran Head in One of Antiquities Auctions*, GOV.SY (Jan. 12, 2016), <http://www.dgam.gov.sy/index.php?d=314&id=2111>.

York collection originating from Israel.¹⁰⁸ DGAM reported the sale to Interpol to stop the auction and retrieve the artifact.¹⁰⁹ Further, in March 2016 DGAM reported that Swiss authorities recovered relics originating from Palmyra.¹¹⁰ Additionally, in October 2016 DGAM reported the recovery of a set of four Palmyrene funerary busts, likely intended for sale, from ISIS headquarters in Palmyra during its first occupation from May 2015 to March 2016.¹¹¹ These reports, however, only address recovered Palmyrene artifacts and likely represent only a fraction of the overall number of illicit Syrian artifacts on the international art market.

In July 2015 an investigative report by the London-based newspaper, *The Guardian*, revealed the scale of illicitly trafficked antiquities from ISIS-controlled areas of Syria in the United Kingdom.¹¹² In the report, Mark Altaweel, a Near East specialist at the University College London Institute of Archaeology, posed as an antiquities collector and sought out London dealers selling Syrian antiquities.¹¹³ While examining a collection in one small dealer's shop, *The Guardian* reporter Rachel Shabi observed: "Every time Altaweel zones in on something that seems likely to be from an area now controlled by Isis, the dealer we're talking to grows vague about the item's origin. . . . There is never any paperwork."¹¹⁴ Altaweel claims the pieces were "so distinctive that they could only have come from a particular part of the region: the part now controlled by the so-called Islamic State."¹¹⁵ As ISIS gains more territorial control, the operation will likely grow in sophistication,¹¹⁶ and, as such, it is imperative that the international community update the international legal framework to prevent the loss of even more priceless antiquities.

108. *Id.*

109. *Id.*

110. Syrian Arab Republic, Ministry of Culture: Dir.-Gen. of Antiquities & Museums, *Looted Palmyra Relics Seized by Swiss Authorities*, GOV.SY (Mar. 12, 2016), <http://www.dgam.gov.sy/index.php?d=314&id=2119>.

111. Syrian Arab Republic, Ministry of Culture: Dir.-Gen. of Antiquities & Museums, *A Set of Palmyrene Funerary Busts*, GOV.SY (Oct. 11, 2016), <http://www.dgam.gov.sy/index.php?d=314&id=2097>.

112. Shabi, *supra* note 88.

113. *Id.*

114. *Id.*

115. *Id.*

116. See Kohn, *supra* note 62; Keller, *supra* note 72.

III. THE INTERNATIONAL LEGAL FRAMEWORK GOVERNING THE PROTECTION OF ANTIQUITIES

This Part will examine the development of international law governing the protection of antiquities. It will begin by discussing the 1954 Hague Convention and its First and Second Protocols, which provide the primary cultural heritage protections during armed conflict.¹¹⁷ This Part will then examine the 1970 UNESCO Convention and will follow by highlighting the most recent actions taken by the United Nations to protect antiquities, namely Resolution 2199 and the 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage (“2003 Declaration”).¹¹⁸ Finally, this Part will conclude with an examination of Syrian law governing the protection of antiquities.

A. The 1954 Hague Convention and its First Protocol

The international community has long recognized the importance of protecting cultural property during armed conflict. Some of the earliest modern codified international protections of cultural heritage were enacted as part of the 1907 Hague Convention.¹¹⁹ The 1907 Hague Convention, however, regulated a range of conduct during wartime, with cultural heritage protections enumerated in only a few articles. Accordingly, the 1954 Hague Convention established the most significant cultural heritage protections in modern history.¹²⁰ The 1954 Hague Convention represents the first time the international community recognized the need for protection of cultural property per se, and

117. Second Protocol, *supra* note 28.

118. S.C. Res. 2199, ¶¶ 15–17 (Feb. 12, 2015); U.N. Educational, Scientific and Cultural Organization [UNESCO] Declaration Concerning Intentional Destruction of Cultural Heritage, Oct. 17, 2003, UNESCO Doc. 32/C/Res/33 [hereinafter 2003 Declaration].

119. 1907 Hague Convention, *supra* note 49, arts. 27, 47, 56.

120. Lostal, *supra* note 52, at 8.

not merely as a subset of international humanitarian protections.¹²¹ In May 1954 UNESCO opened the 1954 Hague Convention for signing, eventually acquiring the signatures of 126 U.N. Member States.¹²²

The 1954 Hague Convention recognizes the significance of cultural property as common to all humanity, thus necessitating international protection.¹²³ It provides a set of regulations both mandating protection of cultural heritage in peace time and also prohibiting the destruction of moveable and immoveable cultural property during armed conflicts.¹²⁴ Further, scholars have suggested that the articles requiring the protection of cultural property represent customary international law, which would render them applicable to all international actors, not just Member States to the treaty.¹²⁵

The 1954 Hague Convention mandates that state parties take several measures during peacetime to prevent the destruction of cultural heritage during armed conflict. First, Article 3 of the 1954 Hague Convention mandates that state parties take measures “they consider appropriate” to safeguard cultural property during times of peace against the “foreseeable effects of an armed conflict.”¹²⁶ Article 3, however, never articulates in detail what measures states should take. The Second Protocol

121. Ariel W. Gonzalez, *Great Expectations? Towards an Effective Application of the Regime of Enhanced Protection in the Second Protocol to the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict*, in PROTECTING CULTURAL PROPERTY IN ARMED CONFLICT: AN INSIGHT INTO THE 1999 SECOND PROTOCOL TO THE HAGUE CONVENTION OF 1954 FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 59, 59 (Nout van Woudenberg & Liesbeth Lijnzaad eds., 2010).

122. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26.

123. *See id.*

124. *See id.*

125. *Customary International Humanitarian Law*, INT’L COMMITTEE RED CROSS (Oct. 29, 2010), <https://www.icrc.org/en/document/customary-international-humanitarian-law-0>. The International Court of Justice, however, has not definitively established the 1954 Hague Convention as customary international law. Bejesky, *supra* note 37, at 406; Gerstenblith, *supra* note 37, at 299–300; Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. RED CROSS 175, 178 (2005).

126. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, art. 3.

would later clarify this issue.¹²⁷ Article 7 of the 1954 Hague Convention, on the other hand, more specifically mandates that state parties train their military during peacetime in recognizing, protecting, and preventing destruction of cultural heritage.¹²⁸

Articles 4 through 17 of the 1954 Hague Convention apply during wartime and occupation.¹²⁹ Article 4 prohibits a warring party from targeting any monument designated as cultural heritage and from using cultural property for any purpose likely to expose it to destruction or damage.¹³⁰ Paragraph 2 of Article 4, however, contains a significant loophole, releasing a state party from its Article 4 obligations in cases of "military necessity," without defining what actually constitutes military necessity.¹³¹ The Second Protocol would later attempt to fix this issue by more clearly articulating situations of military necessity.¹³² Article 5 of the 1954 Hague Convention goes on to describe obligations of a state party during occupation,¹³³ although the treaty never actually defines occupation. Additionally, Article 5 imposes very weak obligations, merely mandating that the occupying party support and collaborate with the "competent national authorities" to safeguard and preserve cultural heritage.¹³⁴ Articles 8 through 14 describe a regime of "special protection" for antiquities threatened during an armed conflict.¹³⁵ The provision is designed to protect "refuges" sheltering cultural heritage during armed conflict and "immovable cultural heritage of very great importance."¹³⁶ The regime of special protection, however, has rarely been used due to its requirement that the refuge or cultural heritage building be located an "adequate distance" from any large industrial center or important military objective,

127. Second Protocol, *supra* note 28, art. 5; *see also infra* Part III.B.

128. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, art. 7.

129. *Id.* arts. 7–14.

130. *Id.* art. 4.

131. *Id.*

132. Second Protocol, *supra* note 28, art. 6; *see also infra* Part III.B.

133. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, art. 5.

134. *Id.*

135. *Id.* arts. 8–14.

136. *Id.*

which severely limits the number of refugees or important cultural buildings that qualify under the treaty.¹³⁷ The Second Protocol would later remove this distance requirement in its regime of enhanced protection.¹³⁸

Articles 18 and 19 deal with the jurisdictional application of the convention. These articles also prove largely ineffective for several reasons. First, Article 18 states that the 1954 Hague Convention only applies during the event of a declared war or occupation, thus excluding random acts of terrorism, one of the most common methods of warfare post-9/11.¹³⁹ Second, Article 19 imposes little to no obligations on non-state parties during noninternational armed conflicts.¹⁴⁰ Under Article 19, all parties in noninternational conflicts, presumably including non-state parties due to the provision's use of a lowercase "p," must apply the provisions of the convention which relate to "respect" for cultural property.¹⁴¹ It does not, however, state which provisions relate to respect for cultural property, leaving unclear which specific obligations apply to non-state actors like ISIS during noninternational armed conflicts. In addition, paragraph 2 of Article 19 states that, absent any kind of "special agreement," the convention only applies to state parties in noninternational armed conflicts.¹⁴² Thus, in order for the entirety of the 1954 Hague Convention to apply to a non-state actor such as ISIS, a non-state actor would have to enter into an agreement with the state party to the convention with whom it may be at war, which is unlikely. Accordingly, while the entirety of the 1954 Hague Convention could use improvement, the weaknesses embodied

137. *Id.*; Jean-Marie Henckaerts, *New Rules for the Protection of Cultural Property in Armed Conflict*, in *PROTECTING CULTURAL PROPERTY IN ARMED CONFLICT: AN INSIGHT INTO THE 1999 SECOND PROTOCOL TO THE HAGUE CONVENTION OF 1954 FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT* 21, 31–32 (Nout van Woudenberg & Liesbeth Lijnzaad eds., 2010).

138. See Second Protocol, *supra* note 28, arts. 10–14; see also *infra* Part III.B.

139. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, art. 18. See generally Laurie R. Blank & Benjamin R. Farley, *Identifying the Start of Conflict: Conflict Recognition, Operational Realities and Accountability in the Post-9/11 World*, 36 *MICH. J. INT'L L.* 467 (2015).

140. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, art. 19.

141. *Id.*

142. *Id.*

in Articles 18 and 19 constitute the primary barriers preventing the 1954 Hague Convention from effectively protecting cultural heritage from ISIS in the Syrian conflict.

In conjunction with the 1954 Hague Convention, UNESCO issued the First Protocol.¹⁴³ The First Protocol was promulgated primarily as a reaction to the extensive pillaging that occurred by occupying powers during World War II.¹⁴⁴ The First Protocol primarily focuses on moveable cultural property¹⁴⁵ during periods of occupation.¹⁴⁶ Sections I and II contain four main obligations: (1) to prevent the exportation of cultural property from a territory occupied by the party during armed conflict, (2) to take into custody cultural property imported into its territory from any occupied territory, (3) to return such property to the occupied territory at the end of the hostilities, and (4) to pay an indemnity to holders of cultural property who had to return it in accordance with the treaty.¹⁴⁷ The First Protocol, however, has been largely disregarded by state parties.¹⁴⁸ First, Article 9 allows a state party to ratify the First Protocol but declare sections I or II nonbinding. If a state party exercises this option, it effectively removes most of the substantive effect of the treaty.¹⁴⁹ Second, state parties dislike the provision requiring removal of cultural objects after the end of hostilities, as it can interfere with their art markets.¹⁵⁰

143. First Protocol, *supra* note 27.

144. See JIRI TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 4 (1996); Zoe Howe, *Can the 1954 Hague Convention Apply to Non-state Actors?: A Study of Iraq and Libya*, 47 TEX. INT'L L.J. 403, 411 (2012).

145. Examples of movable cultural property under the 1954 Hague Convention include works of art, manuscripts, books, and other objects of historical or archaeological interest. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, pmb1.

146. First Protocol, *supra* note 27, sec. I.

147. *Id.*

148. *Id.*; Gerstenblith, *supra* note 37, at 264–65; Bejesky, *supra* note 37, at 405.

149. First Protocol, *supra* note 27, art. 9; Gerstenblith, *supra* note 37.

150. Gerstenblith, *supra* note 37, at 266.

Ultimately, the 1954 Hague Convention and its First Protocol represented a significant step forward in the protection of cultural property. Nonetheless, its weaknesses were exposed in its failure to effectively protect cultural property during several conflicts in the 1980s and 1990s,¹⁵¹ and, in particular, in its failure to protect cultural property during the war in the former Yugoslavia,¹⁵² during which warring forces intentionally destroyed heritage sites as military objectives,¹⁵³ tragedies such as these caused the international community to recognize that significant improvement was needed.¹⁵⁴

B. The 1999 Second Protocol

Recognizing the weaknesses of the 1954 Hague Convention, the government of the Netherlands and UNESCO jointly commissioned a review of the treaty in the early 1990s.¹⁵⁵ Released in 1993, this review aimed to identify measures needed to improve its effectiveness and methods by which the international community could effectuate these improvements.¹⁵⁶ This review led to several other meetings and diplomatic conferences, eventually culminating in the promulgation of the Second Protocol to the 1954 Hague Convention on March 29, 1999.¹⁵⁷ The Second

151. Conflicts include the Iran-Iraq war, the conflict in the former Yugoslavia, the first Gulf War, and the Soviet withdrawal from Afghanistan. For more information, see Jiri Toman, *The Road to the 1999 Second Protocol*, in PROTECTING CULTURAL PROPERTY IN ARMED CONFLICT: AN INSIGHT INTO THE 1999 SECOND PROTOCOL TO THE HAGUE CONVENTION OF 1954 FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 1, 9–12 (Nout van Woudenberg & Liesbeth Lijnzaad eds., 2010).

152. The hostilities occurred between the years 1992 and 1995. *See id.* at 10.

153. *Id.*

154. Henckaerts, *supra* note 137, at 21–22.

155. *Id.* at 21–23.

156. *Id.*

157. *Id.*; Second Protocol, *supra* note 28. Syria played a substantial role in the treaty negotiations leading up to the Second Protocol and was one of fifteen nations that commented on the proposed final draft before its adoption. JIRI TOMAN, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., CULTURAL PROPERTY IN WAR: IMPROVEMENT IN PROTECTION, COMMENTARY ON THE 1999 SECOND PROTOCOL TO THE HAGUE CONVENTION OF 1954 FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 715 (2009), <http://unesdoc.unesco.org/images/0018/001864/186496e.pdf>. Furthermore, Syria was one of the first states that signed the Second Protocol after it was opened for signature. *See* Second Protocol, *supra* note 28. For reasons unknown, however, the Syrian

Protocol includes several significant provisions that grant stronger protections for cultural property during armed conflicts. First, the Second Protocol clarifies Article 3 of the 1954 Hague Convention, which establishes obligations for the protection of cultural property during peacetime.¹⁵⁸ Article 3 mandates that state parties take measures “they consider appropriate” to safeguard cultural heritage against foreseeable effects of armed conflicts, without defining what constitutes appropriate measures.¹⁵⁹ Article 5 of the Second Protocol clarifies that appropriate measures under Article 3 of the 1954 Hague Convention include such actions as the “preparation of inventories,” “the planning of emergency measures for protection against fire or structural collapse,” and “preparation for the removal of moveable cultural property.”¹⁶⁰

Second, Article 6 of the Second Protocol limits the military necessity exception in paragraph 2 of Article 4 in the 1954 Hague Convention.¹⁶¹ The military necessity exception of Article 4 of the 1954 Hague Convention releases state parties from its obligations to refrain from targeting cultural heritage or using it in such a way to expose it to destruction if a state party asserts it acted out of military necessity.¹⁶² Article 6 of the Second Protocol, however, limits the use of a military necessity waiver of the Article 4 obligations to the following situations: (1) if cultural property has been made into a military objective, (2) if there is

parliament never formally ratified the Second Protocol. Nevertheless, as a signatory under Article 18 of the Vienna Convention on the Law of Treaties (VCLT), Syria maintains a duty to refrain from any actions that “defeat the object and purpose of the treaty.” Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

158. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, art. 3.

159. *Id.*

160. Second Protocol, *supra* note 28, art. 5; see also Henckaerts, *supra* note 137, at 24. The full list of measures included under Article 5 are as follows: the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate *in situ* protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property. Second Protocol, *supra* note 28, art. 5.

161. See Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, art. 4; see also *supra* Part III.A.

162. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, art. 4.

no feasible alternative available to obtain a similar military advantage, or (3) if there is no possible choice between exposing the cultural property to damage or obtaining the same military advantage.¹⁶³ Additionally, Article 6 mandates that the decision to invoke military necessity shall only be taken by a commanding officer and that effective warning should be given whenever circumstances permit.¹⁶⁴ While Article 6 still allows for significant exceptions to cultural heritage protections in circumstances of military necessity, the provision substantially improved upon the even broader exceptions contained in Article 4 of the 1954 Hague Convention.

Third, Articles 10 through 14 of the Second Protocol establishes a regime of “enhanced protection” during armed conflict to improve upon the weak and largely ineffective regime of special protection under Articles 8 through 14 of the 1954 Hague Convention. Most importantly, the regime of enhanced protection under the Second Protocol removed the special protection requirement in the 1954 Hague Convention that the cultural refuge or building be located an “adequate distance” from any industrial center or important military objective, thus allowing many more cultural buildings to qualify for enhanced protection.¹⁶⁵ For the inclusion of a piece of cultural property on the List of Cultural Property under Enhanced Protection (the “List”), the object must meet the following three conditions:

1. It is cultural heritage of the greatest importance for humanity;
2. It is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;
3. It is not used for military purposes or to shield military sites and a declaration must have been made by the Party which has control over the cultural property, confirming that it will not be so used.¹⁶⁶

163. Second Protocol, *supra* note 28, art. 6.

164. *Id.*

165. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, arts. 8–14; *see also supra* Part III.A.

166. Second Protocol, *supra* note 28, arts. 10–14.

Once a piece of cultural heritage receives enhanced protection, state parties are bound by an affirmative duty to ensure its safety during armed conflict.¹⁶⁷ The effectiveness of the List lies in its global renown—its existence gives UNESCO leverage to warn warring state parties that any military use of or attack on cultural property included on the List will constitute a war crime.¹⁶⁸

Fourth, Article 15 of the Second Protocol clarifies in more detail the individual criminal responsibility imposed by the treaties.¹⁶⁹ Article 28 of the 1954 Hague Convention mandates that state parties draft domestic laws that impose criminal responsibility on states that breach the convention.¹⁷⁰ The 1954 Hague Convention does not, however, list the violations that require a criminal sanction, rendering the provision largely ineffective.¹⁷¹ Article 15 of the Second Protocol attempts to fix this problem by listing the violations that carry individual criminal responsibility, including attacking a piece of cultural property under enhanced protection, extensive destruction of cultural property, and theft and pillaging of cultural property, among others.¹⁷²

Finally, Article 22 of the Second Protocol expands the scope of its protections by mandating that the entire Second Protocol apply to noninternational armed conflicts.¹⁷³ This constitutes a significant improvement from the 1954 Hague Convention, which

167. *Id.* art. 12.

168. Henckaerts, *supra* note 137, at 32–33.

169. Second Protocol, *supra* note 28, art. 15.

170. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, art. 28.

171. *Id.*; *see also* Henckaerts, *supra* note 137, at 36–37.

172. Second Protocol, *supra* note 28, art. 15. The full list of punishable offenses under Article 15 are as follows:

making cultural property under enhanced protection the object of attack; using cultural property under enhanced protection or its immediate surroundings in support of military action; extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; making cultural property protected under the Convention and this Protocol the object of an attack; theft pillaging or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

Id.

173. *Id.* art. 22.

vaguely states that provisions that “relate to respect for cultural property” shall apply to noninternational conflicts.¹⁷⁴ Despite this drastic improvement contained in Article 22 of the Second Protocol, the provision remains flawed for several reasons. First, paragraph 2 of Article 22 states that, although the Second Protocol applies to noninternational conflicts, it does not apply to “situations of international disturbance and tensions” or “isolated and sporadic acts of violence.”¹⁷⁵ This limitation of the Second Protocol severely limits its effectiveness to protect cultural property against the actions of non-state terrorist groups outside the event of declared war, as exemplified by the Taliban’s destruction of the Buddhas of Bamiyan in Afghanistan in 2001.¹⁷⁶

The second significant flaw of Article 22 is its failure to clearly indicate whether it applies to both state parties and non-state parties in a noninternational armed conflict, even though the nature of noninternational armed conflicts implies the participation of a non-state party. Article 22, paragraph 1 states: “This Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties.”¹⁷⁷ Article 22 does not, however, state to whom the provision applies—all parties to the noninternational conflict, or just the state party. Furthering the confusion is the Second Protocol’s use of the uppercase term “Party” to refer to a state party and the lowercase term “party” to refer to a non-party to the

174. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, art. 19. Article 19 goes on to state that the parties to the conflict shall, through “special agreement,” attempt to bring into force all other provisions of the convention, which clearly implies that only a limited number of provisions apply to conflicts of a noninternational character. *See id.*; *see also* *The Protection of Cultural Property in Non-International Armed Conflicts*, in *PROTECTING CULTURAL PROPERTY IN ARMED CONFLICT: AN INSIGHT INTO THE 1999 SECOND PROTOCOL TO THE HAGUE CONVENTION OF 1954 FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT* 81, 82–83 (Nout van Woudenberg & Liesbeth Lijnzaad eds., 2010); *supra* Part III.A.

175. Second Protocol, *supra* note 28, art. 22.

176. 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>. The 1954 Hague Convention and its Second Protocol did not apply because the incident did not occur during a formal armed conflict. *See* 2003 Declaration, *supra* note 118.

177. Second Protocol, *supra* note 28, art. 22.

treaty.¹⁷⁸ Significantly, Article 22 only refers to uppercase "Parties," making no mention of lowercase "parties." Further, Articles 1 and 3 of the Second Protocol state that the treaty only applies to "States Parties" or "High Contracting Parties," respectively,¹⁷⁹ indicating that no part of the treaty can apply to non-state parties. In light of these provisions, Article 22 must be read to assume that the provision only applies to state parties, as it fails to specify otherwise.

Further support of this interpretation is found in Article 3 of the Second Protocol. Paragraph 1 of Article 3 defines the scope of the Second Protocol in accordance with Article 18 of the 1954 Hague Convention.¹⁸⁰ Article 18 of the 1954 Hague Convention explicitly states that it only applies to High Contracting Parties, with no mention of lowercase non-state parties.¹⁸¹ Additionally, paragraph 2 of Article 3 states that the Second Protocol will apply to a non-state party only if that party accepts and applies the provisions of the protocol.¹⁸² It does not, however, mandate its application even if the nonintentional conflict occurs within the territory of a state party.

C. *The 1970 UNESCO Convention*

One of the most notable international treaties protecting cultural heritage outside the scope of armed conflict is the 1970 UNESCO Convention.¹⁸³ The substantive articles of the 1970 UNESCO Convention describe a series of measures countries should take to combat the illicit looting, export, and import of cultural property.¹⁸⁴ The motivation for such a convention stemmed from the recognition that large numbers of looted art from developing countries were not only finding their way into private collections in Europe and the United States but also into

178. See *id.* arts. 1 ("Party" means a State Party to this Protocol.); 3 (distinguishing between "Parties to the Protocol" and a "State party to the conflict which is not bound by it [Second Protocol]").

179. *Id.*

180. *Id.* art. 3; Convention for the Protection of Cultural Property During the Event of Armed Conflict, *supra* note 26, art. 18.

181. Convention for the Protection of Cultural Property During the Event of Armed Conflict, *supra* note 26, art. 18.

182. Second Protocol, *supra* note 28, art. 3.

183. See 1970 UNESCO Convention, *supra* note 29.

184. *Id.*; Bator, *supra* note 56, at 377-79.

the halls of prestigious museums in these developed Western countries.¹⁸⁵

The 1970 UNESCO Convention focuses on three main areas to protect cultural heritage: (1) preventing illicit trafficking, (2) restitution of illegally trafficked antiquities, and (3) a framework for international cooperation under circumstances in which cultural heritage is under threat.¹⁸⁶ Articles 7 and 9 describe the most substantive provisions of the 1970 UNESCO Convention.¹⁸⁷ Article 7 establishes a series of obligations binding state parties to enact necessary legislation to prevent museums and other similar institutions from acquiring illicitly exported cultural property.¹⁸⁸ Additionally, Article 9 allows for state parties to call for a “concerted international effort” if their cultural patrimony is in jeopardy, including the possibility of a coordinated effort with other state parties to help control exports, imports, and international commerce of the heritage in jeopardy.¹⁸⁹ Article 9, however, does not specify that a state party take any particular measures when heritage is in jeopardy; instead, it allows for an “agreement” between states to take additional measures to prevent damage to cultural heritage.¹⁹⁰ Since its promulgation, the 1970 UNESCO Convention has proved fairly effective. Its provisions, however, are often implemented separately from the treaties protecting cultural heritage during armed conflict. As such, improving coordination between the two treaty frameworks would improve the international community’s ability to fight illicit trafficking of antiquities

185. Bator, *supra* note 56, at 279. Bator examined the impact of Dr. Clemency Coggins’ seminal essay, which detailed the crisis of Mayan looted antiquities. Bator emphasized the role of that essay in exposing to the art community the notion that

[t]he respectable part of the art world could no longer pretend that looting of ancient art was a matter involving only a few obscure peasants, corrupt local officials, and unscrupulous dealers. Splendid national treasures, stolen and mutilated, could within a few years find their way into the halls of America’s most sumptuous museums.

Id. at 280.

186. 1970 UNESCO Convention, *supra* note 29.

187. *Id.* arts. 7–9; Bator, *supra* note 56, at 377–78.

188. 1970 UNESCO Convention, *supra* note 29, art. 7.

189. *Id.* art. 9.

190. *Id.*

originating from conflict zones because it would impose on state parties the obligation to seize and prohibit the sale of antiquities likely originating from a particular conflict zone at the outbreak of an armed conflict.

D. Recent International Actions Protecting Antiquities

The U.N. Security Council has also passed resolutions in direct response to the outbreak of both the Iraq and Syrian conflicts. In February 2015 the U.N. Security Council adopted Resolution 2199 in response to the current situation in Syria.¹⁹¹ Resolution 2199 condemns ISIS' destruction of cultural heritage in Iraq and Syria, expresses concern over ISIS' looting of cultural property to generate income, and calls upon UNESCO to aid in preventing the destruction of cultural property by ISIS.¹⁹² Resolution 2199 represents an important step in the international community's recognition of the need for action in the protection of cultural property in Syria. While U.N. Security Council resolutions are generally considered legally binding,¹⁹³ Resolution 2199 does not offer any substantive increase in protections, and thus is ultimately insufficient for adequately updating cultural heritage protections.

Similar to U.N. Security Council Resolution 2199, in October 2003 UNESCO issued a declaration in response to the tragic destruction of cultural heritage by the Taliban, a non-state group operating in Afghanistan.¹⁹⁴ In 2001, the Taliban destroyed the Buddhas of Bamiyan in central Afghanistan, which were constructed before the introduction of Islam by Buddhists, who occupied the area during the sixth century CE.¹⁹⁵ According to the Taliban leader at the time, Mullah Muhammad Omar, they destroyed the Buddhas because they represented the "gods of the infidels."¹⁹⁶ In response to the destruction, UNESCO issued the 2003 Declaration. The 2003 Declaration outlines necessary measures states should take to combat intentional destruction

191. S.C. Res. 2199, *supra* note 118.

192. *Id.*

193. Dag Hammarskjöld Library, *Ask Dag: Are UN Resolutions Binding?*, ASK.UN.ORG, <http://ask.un.org/faq/15010> (last visited Feb. 4, 2017).

194. 2003 Declaration, *supra* note 118.

195. Bearak, *supra* note 176; Edward Delman, *Afghanistan's Buddhas Rise Again*, ATLANTIC (June 10, 2015), <http://www.theatlantic.com/international/archive/2015/06/3d-buddhas-afghanistan/395576/>.

196. Delman, *supra* note 195.

of cultural heritage and urges states to become parties to both the 1954 Hague Convention and its Second Protocol.¹⁹⁷ Most importantly, UNESCO recognized in the 2003 Declaration that the 1954 Hague Convention and its First and Second Protocols did not apply to the intentional destruction of cultural heritage committed by the Taliban because it did not occur during the treaties' limited definition of armed conflict, which excludes sporadic acts of terrorism.¹⁹⁸ This illustrates one of the significant shortcomings of the international legal framework for the protection of cultural heritage during armed conflict, particularly in the modern context of warfare involving non-state militant groups that occupy and terrorize their regions without any official declaration of war.¹⁹⁹

E. Syrian Legal Framework

Syrian domestic law governing antiquities protection gives the state's antiquities authority exclusive power over the conservation, exportation, and excavation of Syrian antiquities.²⁰⁰ The current Syrian Antiquities Law was originally passed in 1963, and was last amended in 1999. It divides antiquities into two categories: immovable and movable antiquities. Immovable antiquities are defined as "antiquities related to the land," including historic buildings or caves.²⁰¹ In contrast, movable antiquities are defined as "separate from the land or from historic buildings," including statues and coins.²⁰²

Several provisions of the Syrian Antiquities Law are relevant to the current armed conflict. Perhaps most relevant, Article 7 prohibits the destruction, transformation, or damaging of movable or immovable antiquities.²⁰³ Further, Article 26 prohibits the construction of military facilities within five hundred meters of immovable cultural heritage. More broadly, Chapter Three, including Articles 30 through 40, regulates the sale and transfer

197. 2003 Declaration, *supra* note 118.

198. *Id.*; see also *supra* Part III.A.

199. Gerstenblith, *supra* note 37, at 247 n.9.

200. Antiquities Law, Legislative Decree N. 222 of Oct. 26, 1963 (Syria), http://portal.unesco.org/culture/fr/files/30606/11438206173Antiquities_Law.pdf/Antiquities%2BLaw.pdf [hereinafter Decree N. 222].

201. *Id.* art. 3.

202. *Id.*

203. *Id.* art. 7.

of movable antiquities, prohibiting any movement without explicit state authorization and thus outlawing the antiquities trafficking engaged in by ISIS.²⁰⁴ Chapter Four, consisting of Articles 41 through 55, establishes rules for the excavation of antiquities and mandates a state-issued license for all excavations, thus definitively outlawing any unpermitted excavations, including looting.²⁰⁵ Chapter Five goes on to establish criminal penalties for the violations of the Syrian Antiquities Law.²⁰⁶ Notably, smuggling carries penalties significantly higher than other violations, possibly suggesting the prevalence of the problem long before the outbreak of the conflict.²⁰⁷ Despite the commitment to the protection of antiquities that the legislative text exhibits, the current conflict significantly restricts the ability of the Syrian government to enforce the laws, as it does not have effective control over many areas of the country. Nonetheless, the Syrian Director-General of Antiquities and Museums has been working to pass new legislation with additional antiquities protections.²⁰⁸

IV. HOW CAN THE INTERNATIONAL COMMUNITY BETTER PROTECT ANTIQUITIES IN THE MODERN CONTEXT OF ARMED CONFLICT?

The current international legal framework for the protection of cultural heritage during armed conflict is ineffective in the post-9/11 context of modern warfare. Since 9/11, the nature of international relations and the character of armed conflict have drastically changed. Terrorist groups operate outside the established concept of the nation-state, superseding the traditional definition of armed conflict and forging a global clash of civilizations,²⁰⁹ which renders state borders and formal declarations of war obsolete. Thus, terrorist organizations are able to evade many international regulations in the law of armed conflict. The

204. *Id.* arts. 30–40.

205. *Id.* arts. 41–55.

206. *Id.* arts. 56–68.

207. *Id.* art. 56.

208. Lostal, *supra* note 52, at 7; *see also* Syrian Arab Republic, Ministry of Culture: Dir.-Gen. of Antiquities & Museums, *Completing New Draft Law on Protection of Syrian Archaeological Heritage*, GOV.SY (Dec. 22, 2013), <http://www.dgam.gov.sy/index.php?d=314&id=1114>.

209. Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993.

failure of international law to prevent the destruction of the Buddhas of Bamiyan in 2003,²¹⁰ and its subsequent failure to impose legal responsibility on the Taliban, tragically exemplifies the need for an updated legal framework for the protection of cultural heritage. The consequences of the international community's failure to adequately address this legal shortfall are illustrated by the failure of international law to apply to ISIS' widespread destruction of cultural heritage in Syria. Thus, to prevent further destruction of priceless antiquities and to ensure the effectiveness of international law, the international community must strengthen protections for cultural property.

To address the failure of the current international legal framework to adequately protect cultural property in the modern context of warfare, the international community should promulgate a Third Protocol to the 1954 Hague Convention. In contrast to amending the 1954 Hague Convention and its First and Second Protocols, promulgating an additional protocol would ensure the greatest likelihood of success because any Member State can choose to sign the new protocol.²¹¹ Amending either the 1954 Hague Convention or its First or Second Protocol, however, would require unanimous adoption by all state parties to the original treaty.²¹² Further, drafting an entirely new treaty would not only require substantial negotiations but would also create two separate systems of treaty law governing the protection of antiquities during armed conflict, thus complicating the existing cultural heritage protections.

In 1999, the international community promulgated the Second Protocol to the 1954 Hague Convention after recognizing the failure of the 1954 Hague Convention.²¹³ Many similar contributing factors influencing UNESCO's decision to draft the Second Protocol exist today, including the destruction of significant cultural property during armed conflicts²¹⁴ and the changing nature of international armed conflict.²¹⁵ Such destruction provides strong

210. Gerstenblith, *supra* note 37, at 247 n.9; Bearak, *supra* note 176.

211. Henckaerts, *supra* note 137, at 21, 23.

212. *Id.*

213. Toman, *supra* note 151, at 15–16; *see supra* Part III.A.

214. Toman, *supra* note 151, at 9–12. Referenced conflicts include the Iran-Iraq war, the war in the former Yugoslavia, the first Gulf War, and the Soviet withdrawal from Afghanistan in 1988. *Id.*

215. *Id.* at 16.

motivation to amend international regulations in order to address the rise of global terrorist organizations and non-state actors. To an extent, the U.N. Security Council has already adopted an updated approach that more adequately deals with the presence of non-state actors in modern armed conflict, which entails framing international protections together with the fight against terrorism.²¹⁶ Resolution 2199, for example, exemplifies this approach by putting cultural heritage protections in the context of fighting ISIS.²¹⁷ This change, however, cannot be effective until UNESCO revises its international treaty framework with the same updated perspective, as treaty protections are more comprehensive than U.N. Security Council Resolutions, which typically deal with specific topics and situations.²¹⁸

The U.N. Security Council passed Resolution 2199 to reiterate the obligations of Member States to prevent terrorist groups in Iraq and Syria from benefiting from trade in oil and antiquities, among other things.²¹⁹ While U.N. Security Council Resolution 2199 is not substantively effective in the protection of Syrian cultural heritage because it places no additional obligations on Member States,²²⁰ the U.N. Security Council's approach in drafting Resolution 2199 serves as an effective reference to modernize the current international treaty framework for the protection of cultural property.²²¹ Following the September 11th terrorist attacks in 2001, the U.N. Security Council began to strengthen its language in resolutions to more effectively fight terrorism.²²² In

216. See VINCENT NEGRI, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., LEGAL STUDY ON THE PROTECTION OF CULTURAL HERITAGE THROUGH THE RESOLUTIONS OF THE SECURITY COUNCIL OF THE UNITED NATIONS 3 (Mar. 25, 2015), http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Study_Negri_RES2199_01.pdf; see also S.C. Res. 2199, *supra* note 118.

217. S.C. Res. 2199, *supra* note 118.

218. See, e.g., *id.*; S.C. Res. 2192 (Dec. 18, 2014); S.C. Res. 2132 (Dec. 24, 2013); S.C. Res. 2085 (Dec. 20, 2012).

219. Meetings Coverage, Security Council, Unanimously Adopting Resolution 2199 (2015), Security Council Condemns Trade with Al-Qaida Associated Groups, Threatens Further Targeted Sanctions, U.N. Meetings Coverage SC/11775 (Feb. 12, 2015) [hereinafter U.N. Meetings Coverage SC/11775].

220. Resolution 2199 does, however, place additional obligation on states that have not ratified the 1954 Hague Convention or its First or Second Protocols. See NEGRI, *supra* note 216.

221. U.N. Meetings Coverage SC/11775, *supra* note 219.

222. NEGRI, *supra* note 216.

accordance with this approach, the U.N. Security Council expanded its focus in the fight against terrorism to concentrate on combatting conditions that favor the development and spread of terrorism and extremist ideology, for example, by mandating that states report on measures taken to prevent terrorist activities, criminalize various forms of terrorism, and promote cooperation between themselves and other states in fighting terrorism.²²³ The U.N. Security Council's shift in focus adequately reflects the necessity to mold international law to the post-9/11 context of modern warfare, where the most significant threats come from terrorist organizations operating outside the established definition of armed conflict.²²⁴ The 2003 destruction of the Buddhas of Bamiyan by the Taliban in Afghanistan²²⁵ and the failure of international law to address the destruction of cultural property illustrates the need to integrate the U.N. Security Council's approach with the current international treaty framework that governs the protection of cultural property during armed conflict.²²⁶

To successfully integrate cultural heritage protections with a focus on preventing terrorism,²²⁷ a Third Protocol should be promulgated to include several elements and clarifications missing from the 1954 Hague Convention and its First and Second Protocol. First, the Third Protocol should firmly establish the application of cultural heritage protections to non-state actors, including terrorist and insurgent groups. Second, the Third Protocol should expand the definition of armed conflict to include sporadic acts of violence or terrorism committed against cultural heritage outside the event of declared war. Third, the Third Protocol should prohibit the sale or transfer of antiquities without provenance or assurance of good title and impose criminal penalties for those caught dealing or buying stolen antiquities originating from a conflict zone. Finally, the Third Protocol should

223. *Id.* at 3–4.

224. The Second Protocol applies to noninternational armed conflicts under Article 22. *See* Second Protocol, *supra* note 28, art. 22. Article 22(2), however, asserts that the Second Protocol does “not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.” *Id.*

225. Bearak, *supra* note 176.

226. Because the Taliban's occupation of Afghanistan did not technically constitute an armed conflict according Article 22(2) of Second Protocol, the protections did not apply. *See* Gerstenblith, *supra* note 37, at 247 n.9.

227. NEGRI, *supra* note 216, at 4.

establish guidelines for the storage of seized cultural objects determined to have originated from a conflict zone.

A. Bind Non-State Actors

First, and most importantly, the Third Protocol should clearly establish its application to all parties of an international or non-international armed conflict, including non-state insurgent groups. While the Second Protocol and portions of the 1954 Hague Convention apply to noninternational armed conflicts, neither definitively apply to non-state actors.²²⁸ As the majority of modern armed conflict deals with armed terrorist or insurgent groups,²²⁹ the effectiveness of the Second Protocol and the 1954 Hague Convention are severely limited without such protections.²³⁰ ISIS' widespread destruction and looting of cultural heritage tragically evidences these limits.

In order for the Third Protocol to apply to a non-state actor, the non-state entity must have international legal personality, or the capability of possessing rights and duties under international law.²³¹ While conservative authorities maintain that only states can have international legal personality, there is significant support for the endowment of international legal personality on non-state actors based on their function on the international stage.²³² In evaluating whether a non-state actor possesses international legal personality, one must consider their function, nature, role, and rights and duties under international law and in relation to other international actors.²³³ In terms of function, armed groups possess many characteristics similar to

228. See Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, arts. 18–19; Second Protocol, *supra* note 28, art. 22; see Henckaerts, *supra* note 137, at 83–84.

229. See NEGRI, *supra* note 216. See generally Blank & Farley, *supra* note 139; Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295 (2007).

230. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26; Second Protocol, *supra* note 28.

231. See *Subjects of International Law*, MAX PLANCK ENCYCL. PUB. INT'L L., <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1476?rskey=L14yef&result=1&prd=EPIL> (last updated May 2007).

232. William Thomas Worster, *Relative International Legal Personality of Non-State Actors*, 42 BROOK. J. INT'L L. 207 (2016).

233. *Id.*

that of states, including control of territory and state-like organization.²³⁴ Further, in terms of rights and duties under international law, armed groups bear direct responsibility under international human rights law, and some argue that non-state entities can contribute to the formation of customary international law.²³⁵ Accordingly, the nature of many armed groups, such as ISIS, strongly suggest the presence of, at the very least, a limited form of international legal personality, and thus the ability to bear rights and responsibilities under international treaties, such as the Third Protocol.

In particular, ISIS possesses many state-like characteristics, suggesting it bears international legal personality as a non-state armed group. For example, ISIS possesses a considerable amount of territory in Syria and Iraq, and rules that territory on a distinct set of laws.²³⁶ Further, the documents recovered by U.S. Forces from the compound of Abu Sayyaf, ISIS' director of oil and gas and antiquities divisions, evidence an organized, government-like structure, with different departments assigned to various government services and activities.²³⁷ ISIS has also engaged in other state-like activities, such as issuing identification cards for residents, promulgating fishing guidelines to preserve stock, and mandating that automobiles carry toolkits for emergencies.²³⁸ As ISIS continues to acquire and govern territory, the organization is becoming more sophisticated and may soon begin interacting with other international actors in an increasingly state-like manner.

Further, if the Third Protocol were to eventually be established as customary international law, it would apply to all international legal personalities, regardless of whether they are state parties.²³⁹ Customary international law is defined as "a general practice accepted as law."²⁴⁰ State practice (*usus*) and a sense of subjective obligation to that practice (*opinion juris sive necessitates*) by states are the primary elements considered in

234. *Id.*

235. *Id.*

236. See Wood, *supra* note 22; see also Tim Arango, *Built on Terror, ISIS is Planting Roots to Govern*, N.Y. TIMES, July 22, 2015, at A1.

237. Keller, *supra* note 72.

238. Arango, *supra* note 236.

239. *Customary International Humanitarian Law*, *supra* note 125.

240. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

establishing international law as customary.²⁴¹ Scholars have already suggested that the 1954 Hague Convention represents customary international law.²⁴² If the Third Protocol were also to gain recognition as customary international law and if its text were to apply definitively to non-state actors, then there would be clear language in place to hold armed groups, such as ISIS, accountable for actions in violation of these cultural heritage protections, as the treaty would already contemplate its application to non-state actors.

B. Expand the Definition of Armed Conflict

The Third Protocol should expand the definition of armed conflict to include sporadic acts of violence or terrorism committed against cultural heritage during periods outside the event of declared war.²⁴³ Neither the 1954 Hague Convention or its First or Second Protocols explicitly define armed conflict. Article 18 of the 1954 Hague Convention states that its provisions only apply in the event of a “declared war or any other armed conflict arising between two or more of the High Contracting Parties,” notably limiting its application to conflicts arising between State Parties.²⁴⁴ Further, Article 22 of the Second Protocol specifically excludes “sporadic acts of violence and other acts of a similar

241. Henckaerts, *supra* note 125, at 178.

242. *Customary International Humanitarian Law*, *supra* note 125; Henckaerts, *supra* note 125, at 178. The International Court of Justice, however, has never deemed the 1954 Hague Convention as customary international law. Henckaerts, *supra* note 125.

243. While Article 5 of the 1954 Hague Convention and Article 9 of the Second Protocol establish applicability during formal occupation, neither of the treaties establish whether these provisions apply to non-state occupations or periods of transitory control. For example, there was a period of time when the United States occupied Baghdad following its invasion before the United Nations formally recognized the occupation on May 22, 2003. During this period of informal occupation, the United States was not technically under any treaty obligations as an occupier. Further, the 1954 Hague Convention and its Second Protocol impose obligations on occupiers that are High Contracting Parties. Nothing in the treaties indicates that the same obligations be placed on non-state occupiers. See Gerstenblith, *supra* note 37, at 344; Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, art. 5; Second Protocol, *supra* note 28, art. 9.

244. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, art. 18.

nature”²⁴⁵ within the protocol’s scope. The nature of armed conflict post-9/11, however, primarily has involved sporadic acts of terrorism in areas where non-state organizations control territory outside formal government control. Although ISIS’ present actions in Syria would most likely fall under the “event of declared war” as defined by the 1954 Hague Convention,²⁴⁶ the organization’s destruction and looting of heritage in Iraq would most likely not be protected under the current treaty framework because Iraq is no longer technically in a state of declared war, and thus falls outside the limited definition of armed conflict in the 1954 Hague Convention and its First and Second Protocols.²⁴⁷ As such, if ISIS were to maintain occupation of certain areas of Syria after hostilities settle, expanding the scope of cultural heritage protections to prohibit sporadic acts of violence would mitigate the potential destruction that would likely occur under ISIS rule. Accordingly, Syria could avoid a tragedy similar to the Taliban’s destruction of the Buddhas of Bamiyan in 2001.²⁴⁸

C. Prohibit Sale or Transfer of Looted Antiquities

The Third Protocol should also prohibit the sale or transfer of antiquities likely originating from a conflict zone without provenience or assurance of good title and should impose criminal penalties for those caught dealing or buying stolen antiquities known to have originated in the conflict zone. Currently, the 1954 Hague Convention and the Second Protocol solely address the protection of cultural heritage located in a particular conflict zone during an armed conflict.²⁴⁹ International protections of cultural property, however, would be improved significantly by strengthening the protection of said property if or when the property leaves the conflict zone and enters the international antiquities market.

245. Second Protocol, *supra* note 28, art. 22.

246. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26, art. 18; *see also* Second Protocol, *supra* note 28, art. 22.

247. *See* Joseph Logan, *Last U.S. Troops Leave Iraq, Ending War*, REUTERS (Dec. 18, 2011), www.reuters.com/article/us-iraq-withdrawal-idUSTRE7BH03320111218; Curry, *supra* note 35.

248. Bearak, *supra* note 177.

249. *See* Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 26; Second Protocol, *supra* note 28.

While Article 9 of the 1970 UNESCO Convention allows a state party to call for an international effort for the protection of cultural property in jeopardy,²⁵⁰ establishing greater coordination between the 1970 UNESCO Convention and armed conflict protections of cultural heritage would significantly improve the efficiency of both treaty goals. In light of the current conflict in Syria, the Committee for the Protection of Cultural Property in the Event of Armed Conflict, which was established by the Second Protocol and is charged with managing the system of enhanced protection,²⁵¹ has recognized the need for synergy between cultural property protections originating from different treaty sources.²⁵² In its meeting in December 2015, it called for “further development of synergy with other UNESCO normative instruments in the field of culture, programmes and the strengthening of partnerships.”²⁵³ Formally codifying the protection of antiquities from illicit trafficking in the context of armed conflict protections would impose on state parties the responsibility to prohibit the sale of antiquities likely originating from a particular conflict zone at the outbreak of armed conflict.

For example, in 2015, when ISIS began gaining territorial control in Syria, the U.N. Security Council issued Resolution 2199, which specifically prohibited the trade of Syrian antiquities and placed an affirmative duty on Member States to domestically combat trafficking of illicit Syrian antiquities.²⁵⁴ When the looting of Iraqi cultural heritage became an issue following the 2003 invasion, the U.N. Security Council also passed a similar resolution.²⁵⁵ Resolutions, however, are largely reactionary. The U.N. Security Council almost always promulgates them after an issue has already arisen. Thus, if a provision in the Third Protocol

250. 1970 UNESCO Convention, *supra* note 29, art. 9.

251. See UNESCO's Executive Board and Other Organs Elected by the General Conference (38C), *Intergovernmental Organs and Councils of UNESCO's Institutes*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., http://www.unesco.org/eri/committees/Committees_and_Organs_GC.asp?code=+2+76&language=E (last visited Feb. 7, 2017).

252. See generally Committee for the Protection of Cultural Property in the Event of Armed Conflict, Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, U.N. Doc. CLT-15/10.COM/CONF.203/4 (Sept. 23, 2015), unesdoc.unesco.org/images/0023/002352/235219E.pdf.

253. *Id.* at 2.

254. S.C. Res. 2199, *supra* note 118.

255. S.C. Res. 1483 (May 22, 2003).

were implemented to automatically bind state parties to combat illicit trafficking once an armed conflict has arisen, the protections would apply immediately without having to wait on the U.N. Security Council to pass a resolution. Accordingly, establishing this duty at the outset of armed conflict would allow less cultural heritage to enter foreign markets, thus possibly reducing incentives to loot and, at the very least, increasing the number of seizures by state authorities of illegally excavated items.

D. Establish Guidelines for the Storage of Looted Antiquities

Finally, the Third Protocol should establish guidelines for the storage of seized cultural objects determined to have originated from a conflict zone. These guidelines must include provisions for the return of the cultural objects after the end of the conflict. Thus, once a state has seized items likely originating from a conflict zone, this provision would impose an obligation on the seizing state to hold the items for safekeeping. Unlike the First Protocol, which imposed similar terms on occupying powers,²⁵⁶ this provision would apply to all periods of armed conflict and not just in the event of occupation. Further unlike the First Protocol, states will not have the option to opt out of these substantive protections.²⁵⁷

The Third Protocol would establish guidelines for safekeeping to ensure that the antiquities are stored in proper conditions. Further, the guidelines must include a documentation requirement, both to keep track of the artifacts in storage and to prevent them from reentering foreign markets. The guidelines would also allow for a preemptive exchange agreement with a foreign museum so that museums that are likely to be in conflict zones can contract with foreign museums to hold their collections. Additionally, the Third Protocol would provide a set of rules for eventual return, thus offering a type of refugee status for cultural objects.²⁵⁸ These guidelines must include a determination that the hostilities in the country from which the antiquities originated have ended and that the origin country can now safely

256. Gerstenblith, *supra* note 37, at 265; Bejesky, *supra* note 37, at 405; Howe, *supra* note 144, at 411.

257. See First Protocol, *supra* note 27, art. 9; see also *supra* Part III.A.

258. *As ISIS Destroys Artifacts, Could Some Antiquities Have Been Saved?*, NPR (Sept. 5, 2015), <http://www.npr.org/sections/parallels/2015/09/05/437616132/as-isis-destroys-artifacts-could-some-antiquities-have-been-saved>.

protect the antiquities. If the origin country meets such requirements, the antiquities must then be returned by the host country.

The British Museum in London, for example, is guarding an object known to be looted from Syria and, in the past, has guarded antiquities from Afghanistan, which are now being returned.²⁵⁹ The museum, however, is acting more upon the basis of goodwill rather than upon international obligation. In contrast, following the Iraqi invasion, the United States required the return of any cultural patrimony known to have originated in Iraq.²⁶⁰ While seemingly noble on the surface, in practice the law put cultural heritage back into harm's way by returning it to an unstable war zone.²⁶¹ Thus, a safekeeping provision would ensure the safety of cultural heritage originating from a war zone while also mandating that the cultural heritage return to its country only after hostilities have ended.

CONCLUSION

ISIS' destruction and looting of cultural heritage is but one of the terrors the armed group has inflicted on Syrian communities. Nonetheless, ISIS' recent destruction of Palmyra shocked the world's conscience. For centuries, vast temple columns stood in the middle of the desert, inspiring travelers and enlightening future generations. The ruins of the ancient city told tales of the cultures and communities that lived and died there for thousands of years. The crumbled buildings now tell a different story—one of failure. ISIS' destruction of Palmyra, and many other ancient sites in Syria, reflects the failure of the international community to adequately protect archaeological sites and property of cultural significance. Such barbarism should provoke more from the international community than a passing statement or resolution. Rather, it should initiate substantive action that will protect ancient sites and antiquities for many

259. *British Museum 'Guarding' Object Looted from Syria*, BBC NEWS (June 5, 2015), <http://www.bbc.com/news/entertainment-arts-33020199>.

260. See 19 U.S.C. § 2609(c) (2017); *As ISIS Destroys Artifacts, Could Some Antiquities Have Been Saved?*, *supra* note 258; see also Kristin Romey, *Despite ISIS Threat, Looted Antiquities Returning to Iraq*, NAT'L GEOGRAPHIC (Mar. 24, 2015), <http://news.nationalgeographic.com/2015/03/150324-iraq-artifacts-return-isis-baghdad-museum-islamic-state-archaeology/>.

261. *As ISIS Destroys Artifacts, Could Some Antiquities Have Been Saved?*, *supra* note 258.

years into the future. Without such action, humanity will lose much more than old buildings and artifacts: it will lose the ability to see into the past and to understand the struggles, triumphs, beliefs, and lessons of civilizations that came long before us, but continue to live on through what they left behind.

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