

**DESTROYING THE SHRINES OF UNBELIEVERS:
THE CHALLENGE OF ICONOCLASM TO THE
INTERNATIONAL FRAMEWORK FOR THE PROTECTION OF
CULTURAL PROPERTY**

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On the basis of consultations between the religious leaders of the Islamic Emirate of Afghanistan, religious judgments of the ulema and rulings of the Supreme Court of the Islamic Emirate of Afghanistan, all statues and non-Islamic shrines located in different parts of the Islamic Emirate of Afghanistan must be destroyed. These statues have been and remain shrines of unbelievers and these unbelievers continue to worship and respect them. God Almighty is the only real shrine and all fake idols must be destroyed.¹

I. Introduction

On March 4, 2001, the *New York Times* confronted its readers with a front-page photograph² of the Taliban's³ destruction of a pair of colossal

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¹ This quote is taken from a February 26, 2001 edict issued by the Islamic State of Afghanistan. The edict is transcribed in full in the following sources: LLEWELYN MORGAN, *THE BUDDHAS OF BAMİYAN* 15 (2012); Finbarr Barry Flood, *Between Cult and Culture: Bamiyan: Islamic Iconoclasm, and the Museum*, 84 *ART BULL.* 641, 655 (2002).

² Barry Bearak, *Over World Protests, Taliban Are Destroying Ancient Buddhas*, *N.Y. TIMES*, Mar. 4, 2001, at A1.

³ Literally “the students” in Pashto, the Taliban is a Sunni Islamic fundamentalist group that ruled Afghanistan from 1996 until 2001, when a U.S.-led NATO invasion toppled the regime for providing refuge to al-Qaeda and Osama bin Laden. Zachary Laub, *The*

statues of the Buddha that had watched over Afghanistan's Bamiyan Valley since the 6th century A.D.⁴ In the photograph, smoke and dust billow and roil from the niche, carved into a sandstone cliff face, in which the larger of the statues had towered at a height of 53 meters.⁵ At a time when Afghanistan was just returning to American and international public consciousness after a decade of relative indifference, the deliberate destruction of the Bamiyan Buddhas was, perversely, the first time that many people outside the archaeological community became aware of their existence.⁶ It was significant that the destruction of the Buddhas was pictured on the front page of a newspaper with an international readership. The Taliban ensured that an Al-Jazeera journalist was on scene to capture the destruction on film.⁷ The fact that Afghans were prohibited by the Taliban regime from owning televisions suggests that they had an international audience in mind.⁸ Justified as the enforcement of the religious proscription on idol worship, common to all three of the Abrahamic religions,⁹ the destruction of the Bamiyan Buddhas was also a statement of defiance of the international community, which had lobbied strenuously for their preservation, as well as the preservation of pre-Islamic artifacts at other sites in Afghanistan.

Taliban in Afghanistan, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/afghanistan/taliban-afghanistan/p10551> <http://www.loc.gov/>.

⁴ The dates of the statues' construction have not been established definitively; however, there is general agreement that the smaller (and older) of the statues was constructed in the 6th century AD and that the larger statue was constructed 50 to 100 years later. MORGAN, *supra* note 1, 4.

⁵ 53 meters = approximately 174 feet. By comparison, the Statue of Liberty measures 151 feet from its base to the top of its torch and 306 feet from the base of its pedestal to the top of its torch. *Statue Statistics—Statue of Liberty National Monument*, NAT'L PARK SERV., <http://www.nps.gov/stli/historyculture/statue-statistics.htm> (last visited Oct. 16, 2014). Before their destruction, the Bamiyan Buddhas were the largest standing Buddha carvings in the world. *Id.* at 11–13.

⁶ Although the destruction of the Buddhas was motivated by a desire to destroy their potential for idolatry, their destruction increased their notoriety and arguably augmented their cultural significance.

⁷ MORGAN, *supra* note 1, at 1.

⁸ Emma Graham-Harrison, *Afghanistan's Taliban Embrace Power of Video Propaganda*, THE GUARDIAN, June 4, 2014, <http://www.theguardian.com/world/2014/jun/04/afghanistan-taliban-video-propaganda-bowe-bergdahl> (noting that in "the days before 2001 . . . , owning a television was a criminal offen[s]e").

⁹ "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath or that is in the water under the earth: Thou shalt not bow down thyself to them, nor serve them: for I the Lord thy God am a jealous God . . ." *Exodus* 20:4–5 (King James); "O ye who believe! Strong drink and games of chance and idols and divining arrows are only an infamy of Satan's handiwork. Leave it aside in order that ye may succeed." *Quran* 5:90 (Pickthall).

Indeed, the Bamiyan Buddhas were only the largest and most notable targets of a sustained iconoclastic¹⁰ campaign, which also saw the destruction of an estimated 2,500 pre-Islamic artifacts in the collection of the National Museum in Kabul.¹¹ The collective loss to Afghanistan's archaeological record was staggering.

This article seeks to locate the destruction of the Bamiyan Buddhas within the framework of the post-World War II international laws that were developed to prevent the loss, damage, and destruction of cultural property, defined generally as the tangible constituents of cultural heritage.¹² The inadequacy of these laws to achieve their goals has been frequently lamented,¹³ while one prominent critic has gone as far as to

¹⁰ Literally "image breaking" in Greek, iconoclasm is the deliberate destruction of religious icons, symbols, or monuments for religious motives, political motives, or a combination of the two. See ALAIN BESANCON, *THE FORBIDDEN IMAGE: AN INTELLECTUAL HISTORY OF ICONOCLASM* (2007).

¹¹ Omara Khan Massoudi, *The National Museum of Afghanistan*, in *AFGHANISTAN: HIDDEN TREASURES FROM THE NATIONAL MUSEUM, KABUL* 35, 39 (Fredrick Hiebert & Pierre Cambon, eds., 2008). These losses are in addition to the losses suffered during the Soviet invasion and Afghan civil war. It has been estimated that 70% of the collection of the National Museum was destroyed or stolen during thirty-five years of near-constant war. Rod Norland, *Saving Relics, Afghans Defy the Taliban*, N.Y. TIMES, Jan. 12, 2014, http://www.nytimes.com/2014/01/13/world/asia/saving-relics-afghans-defy-the-taliban.html?_r=0.

¹² Some commentators argue that the legal term "cultural property" should be replaced by "cultural heritage," a broader concept that embraces not only tangible culture (i.e., buildings, monuments, and works of art), but also intangible culture (i.e., language, folklore, and traditions) and natural heritage (i.e., landscape and biodiversity). See generally Lyndell V. Prott & Patrick J. O'Keefe, 'Cultural Heritage' or 'Cultural Property'?, 1 INT'L J. OF CULTURAL PROP. 307 (1992); Manlio Frigo, *Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?*, 86 INT'L R. OF THE RED CROSS 367 (2004).

¹³ See, e.g., Andrea Cunning, *The Safeguarding of Cultural Property in Times of War & Peace*, 11 TULSA J. COMP. & INT'L L. 211 (2003) ("This article will examine the development of the law regarding the protection of cultural property in the event of armed conflict and will argue that the contemporary law on the subject is inadequately enforced."); Karen J. Detling, *Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 MD. J. INT'L L. & TRADE 41 (1993) ("Despite nearly universal agreement that cultural property is an inappropriate object of belligerent destruction, such heritage remains as vulnerable as ever, as recent armed conflicts in the Persian Gulf and the former Yugoslavia tragically evidence."); David Keane, *The Failure to Protect Cultural Property in Wartime*, 14 DEPAUL-LCA J. ART & ENT. L. 1 (2004) ("This paper will demonstrate that while the international rules evolve and strengthen, the destruction of cultural property continues."); Sasha P. Paroff, *Another Victim of the War in Iraq: The Looting of the National Museum in Baghdad and the Inadequacies of International Protection of Cultural Property*, 53 EMORY L. J. 2021 (2004) ("Subscribing to the view that artworks and artifacts are the cultural property of all the world's people, international

describe the entire framework as misguided.¹⁴ Indeed the period since these laws were developed has repeatedly demonstrated that, particularly during times of conflict, political unrest, and social upheaval, cultural property remains vulnerable to a wide range of threats, including deliberate targeting, collateral damage, looting, and neglect.

At the time of the destruction of its colossal Buddhas, the Bamiyan Valley was not a site of conflict. Although engaged in a civil war with the Northern Alliance, the Taliban exercised full control of Bamiyan.¹⁵ Consequently, the destruction of the Bamiyan Buddhas did not occur in the context of either an international or a non-international armed conflict.¹⁶ Instead, the destruction of the Buddhas represented a phenomenon that is not clearly addressed under international law: the ideologically-motivated destruction of cultural property in an act of state-sponsored iconoclasm within the state's own territory.¹⁷ In this situation, a gap in international law creates the possibility of a counter-intuitive outcome: namely, there is less potential for criminal liability as a result of the deliberate destruction of the Buddhas while the Bamiyan Valley was under Taliban control than if the Buddhas had merely suffered collateral damage during a battle for control of the valley.¹⁸

agreements have sought to protect cultural property, even during war. However, as the looting in Iraq illustrates, international attempts to protect cultural property have not immunized museums from looting and destruction.”)

¹⁴ Eric Posner, *The International Protection of Cultural Property: Some Skeptical Observations* (Univ. of Chicago Sch. of Law, Pub. Law and Legal Theory, Working Paper No. 141) (“There is no good argument for international legal regulation of cultural property, during peacetime or wartime.”)

¹⁵ Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUROPEAN J. INT’L L. 619, 622 (2003).

¹⁶ The term “international armed conflict” refers to a “traditional” war between two or more sovereign nation-states. The term “non-international armed conflict” refers to an internal conflict within a nation-state, i.e., a civil war or internal rebellion. See INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 15 (2013).

¹⁷ Although the Islamic Emirate of Afghanistan, the government established by the Taliban, was recognized by only Saudi Arabia, Pakistan, and the United Arab Emirates, it was in effective control of over 90% of Afghanistan’s territory at the time of the destruction of the Bamiyan Buddhas. Francioni & Lenzerini, *supra* note 15, at 622.

¹⁸ Other commentators have recognized the challenge that deliberate destruction represents to the international framework designed to protect cultural property. See, e.g., Corrine Brenner, *Cultural Property Law: Reflecting on the Bamiyan Buddha’s Destruction*, 29 SUFFOLK TRANSNAT’L L. REV. 237, 239 (2005–2006) (“while cultural property law provides a useful framework, it is of little use when belligerents intentionally destroy cultural property.”); Megan Kossiakoff, *The Art of War: The Protection of Cultural Property During the “Seige” of Sarajevo (1992–95)*, 14 DEPAUL-

This article argues that the destruction of the Bamiyan Buddhas was a crime under international law and assesses two possible approaches that have been proposed for criminal prosecution of individuals involved in their destruction. One approach would argue that the destruction of the Bamiyan Buddhas violated the human rights of a particular culture or people;¹⁹ the other would argue that the destruction of the Buddhas was a crime against humanity (*crimina juris gentium*).²⁰ After offering an historical overview of cultural-property protections under international law, this article will place the destruction of the Bamiyan Buddhas in its historical and political context before testing the “rights-based” and “crimes-against-humanity” theories for criminal prosecution of the responsible actors by briefly applying each theory to the facts and circumstances surrounding the destruction of the Buddhas. The article will conclude that a “crimes-against-humanity” approach to prosecutions for willful destruction of cultural property offers greater potential to strengthen the protections afforded to cultural property under international law.

II. Protection of Cultural Property Under International Law

The framework for protection of cultural property under international law is generally seen as embracing two separate legal regimes designed to address distinct threats to cultural property.²¹ One regime applies in

LCA J. ART & ENT. L. 109, 125 (2004) (“The Hague Convention, though it offers a framework for responsible commanders, is of little use in the increasingly common situation when an attacker wishes specifically to destroy the other side’s cultural identity.”).

¹⁹ Kruti J. Patel, *Culture Wars: Protection of Cultural Monuments in a Human Rights Context*, 11 CHI.-KENT J. INT’L & COMP. L. (2011), available at http://www.kentlaw.edu/jicl/v11/Student%20Notes/Patel_Note.pdf.

²⁰ Francioni & Lenzerini, *supra* note 15.

²¹ See, e.g., M. Cherif Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYRACUSE J. INT’L L. & COM. 281 (1983) (“[T]he applicable international conventions distinguish their contextual applicability either explicitly or implicitly i.e., during armed conflicts (war), or at other times (peace.”); Victoria A. Birov, *Prize or Plunder?: The Pillaging of Works of Art and the International Law of War*, 30 N.Y.U. J. INT’L L. & POL. 201, 222 (1997–1998) (“International law regulating the transport of cultural property during times of peace developed separately and distinctly from legal mechanisms protecting cultural property during armed conflict. The applicable conventions consider whether the crimes against cultural property were committed during war or peace.”); John C. Johnson, *Under New Management: The Obligation to Protect Cultural Property During Military Occupation*, 190/191 MIL. L. REV. 111, 114 (2006/2007) (“The protection of cultural property can be

times of armed conflict and is intended to spare cultural property from the depredations of war. The centerpiece of this regime is the 1954 Hague Convention for the Protection of Cultural Property During Armed Conflict.²² The other regime applies in times of peace and is intended to prohibit the international trade in moveable cultural property exported in violation of the law of its country of origin. The centerpiece of this regime is the 1970 U.N. Educational, Scientific, and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.²³ This “dual track approach” has been criticized as illogical and confusing.²⁴ In the case of the Bamiyan Buddhas, the lack of clarity regarding which regime—or, indeed, whether either regime—applies creates a significant gap in coverage. In order to understand how this gap in coverage came to exist, this article reviews both the “wartime” and “peacetime” legal regimes, adopting an historical approach that seeks to demonstrate the evolution of cultural property protections.

A. Protection of Cultural Property During Armed Conflict

The development of a specific body of law to protect what we now call cultural property began in the law of armed conflict in the eighteenth and nineteenth centuries. In his 1758 treatise *The Law of Nations*,²⁵ the Swiss political philosopher Emheric de Vattel wrote,

divided into two distinct international legal regimes: one designed to avoid targeting of or damage to cultural property during armed conflict, and another designed to prevent illegal trafficking in cultural property in times of peace”).

²² Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 539, reprinted in INT’L AND OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 40 (2013) [hereinafter 1954 Hague Convention].

²³ 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, 10 I.L.M. 289 [hereinafter 1970 UNESCO Convention], available at http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_DO=DO_TOPIC&URL_SECTION=201.html [hereinafter 1970 UNESCO Convention].

²⁴ Bassiouni, *supra* note 21, at 287 (“The distinction is no longer helpful or useful because the question concerns not the context, but the object of the protection.”).

²⁵ The full title of Vattel’s text is *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*. EMHERIC DE VATTEL, LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (Joseph Chitty, trans., 6th ed. 1844), available at http://www.loc.gov/tr/frd/Military_Law/Lieber_Collection/pdf/De_Vattel_LawOfNations.pdf.

For whatever cause a country is ravaged, we ought to spare those edifices[,] which do honor to human society, and do not contribute to the cause of the enemy's strength—such as temples, tombs, public buildings, and all works of remarkable beauty. What advantage is obtained by destroying them? It is declaring one's self an enemy to mankind, thus wantonly to deprive them of these monuments of art and models of taste We still detest those barbarians who destroyed so many wonders of art, when they overran the Roman Empire.²⁶

This passage, from one of the foundational texts of modern international law, is routinely cited as the earliest expression of the notion that cultural property—in Vattel's terms “monuments of art and models of taste”—should be spared from destruction in armed conflict.²⁷ As conceived by Vattel, respect for cultural property is a characteristic of civilized people, and its absence an attribute of the barbarian. This view has carried through in the commentary on protections for cultural property to this day.²⁸

The call for cultural property to be spared in wartime did not find concrete expression in a binding legal instrument until another century had passed. In 1863, President Abraham Lincoln issued the *Instructions for the Government of Armies of the United States in the Field*, better known as the “Lieber Code” for its author, Francis Lieber.²⁹ Section II of the Code provided for the seizure of all moveable public property.³⁰ And Article 34 of the Code mandated that the kinds of property that we

²⁶ Keane, *supra* note 13, at 2.

²⁷ See generally *id.*; Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277, 283 (1997); Cuning, *supra* note 13, at 211; Johnson, *supra* note 21, at 117.

²⁸ For example, “The Süddeutsche Zeitung reported the disaster [the looting of the Iraqi National Museum] under the headline ‘Barbaren in Bagdad (Barbarians in Baghdad).’” Wayne Sandholtz, *The Iraqi National Museum and International Law: A Duty to Protect*, 44 COLUM. J. TRANSNAT'L L. 185, 189 (2005). Similarly, the titles of the comprehensive accounts of two notorious examples of cultural pillage evoke images of sexual violence. LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S ART TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1995); LAWRENCE ROTHFIELD, *THE RAPE OF MESOPOTAMIA: BEHIND THE LOOTING OF THE IRAQ MUSEUM* (2009). Both titles draw their imagery from the story of the Rape of Europa in Ovid's *Metamorphoses*.

²⁹ President Abraham Lincoln, GEN. ORDER NO. 100 (24 Apr. 1863), available at http://avalon.law.yale.edu/19th_century/lieber.asp [hereinafter Lieber Code].

³⁰ *Id.* art. 31.

would now label “cultural property” were to be treated as private property:

As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property³¹

In addition, Article 35 called for the protection of “classical works of art, libraries, scientific collections, or precious instruments . . . against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.”³²

Although the Lieber Code applied only to the conduct of Union forces during the American Civil War, its influence on the development of the law of armed conflict can hardly be overstated. Subsequent international efforts to codify the law of armed conflict—the Declaration of the Conference of Brussels of 1874³³ and the Oxford Manual of 1880³⁴—took the Lieber Code, including its provisions for protection of

³¹ *Id.* art. 34.

³² *Id.* art. 35

³³ The Conference of Brussels was a meeting of representatives of fifteen European nations in 1874 in order to consider a draft codification of the law of land warfare submitted for consideration by Czar Alexander II of Russia. *Project of an International Delegation Concerning the Laws and Customs of War*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=42F78058BABF9C51C12563CD002D6659> (last visited Oct. 16, 2014). Although the conference unanimously adopted the ponderously titled declaration, it was never ratified by the sending states. *Id.* Article 8 of the Declaration provides:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure or destruction of, or willful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities.

Id. In addition, Article 39 forbids pillage and Article 40 calls for respect of private property. *Id.*

³⁴ The Oxford Manual, formally entitled *The Laws of War on Land*, was prepared by the Institute of International Law, a private body of international lawyers founded in Ghent,

cultural property, as their starting point.³⁵ Subsequently, the first international treaties regulating the conduct of belligerents, the Hague Conventions of 1899³⁶ and 1907,³⁷ drew heavily on both the Brussels Declaration and the Oxford Manual, extending the influence of the Lieber Code.³⁸ Consequently, it is not an exaggeration to say that the Lieber Code's provisions for protection of cultural property were the progenitors of the entire framework of protections for cultural property that now exist under international law.

The Conventions that resulted from the peace conferences held at The Hague in 1899 and 1907 have been criticized for their failure to prevent the subsequent outbreak of the two World Wars or to prevent the widespread human suffering and destruction of property that characterized both conflicts.³⁹ However, the Hague Conventions represented major steps in the effort to regulate the means and methods of war during international armed conflicts. The 1899 and 1907 Hague Conventions, and their annexed Regulations are substantially similar and the provisions addressing protection of cultural property are identical.

Belgium in 1873. *The Laws of War on Land*, INT'L COMM. OF THE RED CROSS, <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=40371257507EBB71C12563CD002D6676> (last visited Oct. 16, 2014). The Manual purported to codify the existing customary law of war as it then existed. *Id.* Article 34 of the Oxford Manual provides:

In case of bombardment all necessary steps must be taken to spare, if it can be done, buildings dedicated to religion, art, science and charitable purposes, hospitals, and places where the sick and wounded are gathered on the condition that they are not being utilized at the time, directly or indirectly, for defense.

It is the duty of the besieged to indicate the presence of such buildings by visible signs notified to the assailant beforehand.

Id. The Institute of International Law still exists. Information on its history and current activities can be found on its website <http://www.idi-iil.org>.

³⁵ Johnson, *supra* note 21, at 120.

³⁶ Convention 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, 32 Stat. 1779, T.S. No. 392 [hereinafter 1899 Hague Convention], available at http://avalon.law.yale.edu/19th_century/hague02.asp.

³⁷ Convention Respecting the Laws and Customs of War on Land and its Annex, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, reprinted in INT'L & OPERATIONAL LAW DEP'T, *supra* note 21, at 28 [hereinafter 1907 Hague Convention].

³⁸ Johnson, *supra* note 21, at 120.

³⁹ Keane, *supra* note 13, at 6; Brenner, *supra* note 18, at 240.

Articles 28⁴⁰ and 47⁴¹ of the Regulations prohibit pillage. Article 46 prohibits confiscation of private property.⁴² Article 55 prohibits attack or bombardment of undefended towns, villages, or buildings, which could include cultural targets.⁴³ Two articles of the Regulations specifically address the protection of cultural property (again, the term is not used) in terms familiar from the Lieber Code. Article 27 provides:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.⁴⁴

Article 56 provides that cultural property is to be treated as private property:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art, is forbidden and shall be made subject to legal proceedings.⁴⁵

Although the provisions regarding cultural property in the Hague Regulations do not represent major advances over similar provisions in the Brussels Declaration or the Oxford Manual, the impact of the Hague Regulations extended much further.

Unlike the Brussels Declaration or the Oxford Manual, the Hague Regulations were annexed to binding international Conventions with dozens of States Parties.⁴⁶ This laid the basis for a 1946 judgment of the

⁴⁰ 1907 Hague Convention, *supra* note 37, at 32.

⁴¹ *Id.* at 34.

⁴² *Id.*

⁴³ *Id.* at 35.

⁴⁴ *Id.* at 32.

⁴⁵ *Id.* at 35.

⁴⁶ The 1907 Convention ultimately garnered forty-six States Parties: Austria, Belarus, Belgium, Bolivia, Brazil, China, Cuba, Denmark, Dominican Republic, El Salvador, Ethiopia, Fiji, Finland, France, Germany, Guatemala, Haiti, Hungary, Japan, Liberia,

International Military Tribunal at Nuremberg, which found that the 1907 Hague Regulations were customary international law, binding even on States that had not ratified them.⁴⁷ Unfortunately, the International Military Tribunal was sitting in judgment of events in a conflict that demonstrated the inadequacy of the Hague Regulations to prevent, among other abuses, the systematic plunder of Europe's cultural heritage by the Nazis. Recognition of those failings motivated drafters of the 1954 Hague Convention.⁴⁸

While the earlier Hague conferences were called by great powers, the conference that convened at the Hague in 1954 was called by the recently formed United Nations Educational, Scientific, and Cultural Organization (UNESCO), a specialized agency of the United Nations whose purpose "to contribute to peace and security by promoting collaboration among nations through education, science and culture"⁴⁹ has made it the lead body for development of cultural-property protections since the Second World War. The Convention for the Protection of Cultural Property During Armed Conflict (1954 Hague Convention), which was adopted by the conference on May 14, 1954,

Luxembourg, Mexico, Netherlands, Nicaragua, Norway, Panama, Poland, Portugal, Romania, Russian Federation, South Africa, Sweden, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America. *Convention IV respecting the Laws and Customs of War on Land and Its Annex*, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMSStatesParties&xp_treatySelected=195 (last visited Oct. 17, 2014) (listing states party).

⁴⁷ The Tribunal's Judgment: The Law Relating to War Crimes and Crimes Against Humanity reads, in part,

The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption [B]ut by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war

Judgement: The Law Relating to War Crimes and Crimes Against Humanity, YALE L. SCH., <http://avalon.law.yale.edu/imt/judlawre.asp> (last accessed Oct. 17, 2014).

⁴⁸ David A. Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence Into Customary International Law*, 11 B.U. INT'L L.J. 349, 350 (1993).

⁴⁹ *A Decade of American Foreign Policy 1941-1949, Constitution of the United Nations Educational, Scientific and Cultural Organization, Nov. 16, 1945*, YALE L. SCH., <http://unesdoc.unesco.org/images/0021/002161/216192e.pdf#page=7> (last accessed Oct. 17, 2014).

was the first international treaty to deal exclusively with protection of cultural property in any context.⁵⁰

The 1954 Hague Convention substantially supplements the protections for cultural property provided in the 1899 and 1907 Hague Conventions.⁵¹ One major improvement over the earlier conventions is that 1954 Convention abandoned the private-property distinction that was first used in the Lieber Code. Instead, the Convention introduced the term “cultural property” to legal parlance. Article 1 of the Hague Convention defines the term expansively:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books, and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in subgroup (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-group (a);

⁵⁰ The 1954 Hague Convention currently has 126 States Parties. For a list of them, see Appendix B. Although the United States was an original signatory to the 1954 Hague Convention, the treaty was not ratified by the U.S. Senate until September 25, 2009. Dick Jackson, International and Operational Law Practice Note: *Law of War Treaties Pass the Senate*, ARMY LAW., Jan. 2009, at 56.

⁵¹ Article 36 of the convention clarifies that it supplements the 1899 and 1907 Hague Conventions, as well as the Roerich Pact. 1954 Hague Convention, *supra* note 21, at 46. The Roerich Pact, formerly entitled the Treaty on the Protection of Artistic and Scientific Institutions and Monuments, is an inter-American regional treaty for protection of cultural property; it is still binding in North America and parts of South America. Birov, *supra* note 21, at 209.

- (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as “centres containing monuments.”⁵²

Notably, cultural property’s intrinsic value is derived from its transnational significance—its importance to the cultural heritage of *every people*—rather than to its unique local or national interest. This internationalist view of cultural property is also expressed in the preamble to the convention, which asserts, “damage to cultural property belonging to any people whatsoever means damage to *the cultural heritage of all mankind*” and “the preservation of the cultural heritage is of great importance for *all peoples of the world*.”⁵³

Although the 1954 Hague Convention’s focus is the protection of cultural property during armed conflict, it mandates actions by States Parties during times of peace. Protection for cultural property under the terms of the 1954 Hague Convention consists of two responsibilities: the protection of cultural property and respect for cultural property.⁵⁴ Safeguarding cultural property is action taken by a state party to protect its own cultural property in advance of an armed conflict: Article 3 requires parties “to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.”⁵⁵ Respect for cultural property is action taken by a state party to ensure that cultural property, either in its own territory or in the territory of another belligerent, is unharmed. Article 4.1 mandates that state parties refrain from using cultural property in a manner likely to expose it to damage or destruction and prohibits “any act of hostility directed against such property.”⁵⁶ Article 4.3 requires parties “to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”⁵⁷ Article 4.5 clarifies that a state party is not excused from its responsibilities under the Convention solely because another party failed to take measures to safeguard cultural property prior to the

⁵² 1954 Hague Convention, *supra* note 22, at 40.

⁵³ *Id.* (emphasis added).

⁵⁴ “Art. 2. For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property.” *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 41.

armed conflict.⁵⁸ Unlike the 1907 Hague Convention, which applied only to international armed conflicts, the 1954 Hague Convention extended protection to cultural property during both international and non-international armed conflicts.⁵⁹ Under Article 19, in a non-international armed conflict within the territory of a state party, “each party to the conflict shall be bound to apply, as a minimum, the provisions . . . which relate to respect for cultural property.”⁶⁰

Although the 1954 Hague Convention expanded the protections for cultural property under the 1907 Convention, in one crucial area—that of enforcement—it offered no significant improvement. Pursuant to Article 28, parties agree to take, “within the framework of their ordinary jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit . . . a breach.”⁶¹ Herein lies the greatest weakness of the 1954 Hague Convention. In the words of one commentator,

This article lacks teeth because no international body exists to impose sanctions. Instead, the creation and scope of sanctions are left to the parties actually affected by the crime to impose as they see fit. The language leaves much room for discretion and from this vagueness stems the problems with enforcement.⁶²

Consequently, in common with other areas of international law, including human rights law, the secondary rules—that is, the “rules governing how and by whom [the law] may be made, applied, and enforced”—are insufficiently developed.⁶³

⁵⁸ *Id.*

⁵⁹ Article 18 provides that the Convention applies in the event of “any other armed conflict” between the parties and in cases “of partial or total occupation” of territory, while Article 19 provides for the Convention’s application that “relate to respect for cultural property” in the event of an “armed conflict not of an international character.” *Id.* at 43.

⁶⁰ *Id.* at 44.

⁶¹ *Id.* at 45.

⁶² Meyer, *supra* note 48, at 357.

⁶³ Monica Hakimi, *Secondary Human Rights Law*, 34 YALE J. INT’L L. 596, 596 (2009).

B. Protection of Cultural Property in Times of Peace

Nearly two decades after adopting the 1954 Hague Convention, UNESCO adopted two conventions for the protection of cultural property in times of peace.

At its 16th General Conference in Paris in 1970, UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (1970 UNESCO Convention),⁶⁴ which is focused on preventing illicit trafficking in cultural property.⁶⁵ The 1970 UNESCO Convention expanded the definition of cultural property to include “almost anything made or altered by man.”⁶⁶ Article 1 defines cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science” and which belongs to one of eleven identified categories.⁶⁷

⁶⁴ 1970 UNESCO Convention, *supra* note 23. The Convention currently has 125 States Parties. For a list of them, see Appendix B.

⁶⁵ Johnson, *supra* note 21, at 134.

⁶⁶ Brenner, *supra* note 18, at 244.

⁶⁷ 1970 UNESCO Convention, *supra* note 23, art. 1. The eleven categories are:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs ;
 - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

By contrast with the 1954 Hague Convention, the 1970 UNESCO Convention departs from an internationalist conception of cultural property. The Preamble to the 1970 Convention asserts “that cultural property constitutes one of the basic elements of civilization and *national culture*, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and *traditional setting*.”⁶⁸ Although generally more expansive, this definition of cultural property is narrower than the definition given in the 1954 Hague Convention in one key respect: in order for the property to enjoy protections under the 1970 UNESCO Convention, it must be “specifically designated by the State.”⁶⁹ The designation of cultural property is left to state parties,⁷⁰ but it generally happens through domestic legislation declaring certain categories of goods cultural property.⁷¹ Article 2 of the 1970 UNESCO Convention states that “the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin.”⁷² The Article continues, “To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.”⁷³ In accordance with Article 3 of the Convention, “import, export or

-
- (i) postage, revenue and similar stamps, singly or in collections;
 - (j) archives, including sound, photographic and cinematographic archives;
 - (k) articles of furniture more than one hundred years old and old musical instruments.

Id.

⁶⁸ *Id.* p.mbl. (emphasis added).

⁶⁹ Johnson, *supra* note 21, at 135 (noting that this part of the definition narrows the scope of application of the Convention).

⁷⁰ 1970 UNESCO Convention, *supra* note 23, art. 5(a) and (b).

⁷¹ Domestic legislation regarding cultural property can be used in ways that seem to circumvent the purposes of the system. For example, in an interview with the Asia Society, Paul Bucherer discusses a 1998 Pakistani law, which states that “all antique material which remains for at least one year on Pakistani soil becomes Pakistani cultural heritage and may not be exported.” Interview by Nermeen Shaikh with Paul Bucherer, Dir., Bibliotheca Afghanica (n.d.) [hereinafter Bucherer Interview], available at <http://asiasociety.org/how-can-afghanistans-cultural-heritage-be-preserved> (last visited Nov. 4, 2014) (published on the Asia Society website as *How Can Afghanistan’s Cultural Heritage be Preserved?*). Since many Afghan antiquities are smuggled into Pakistan from Afghanistan, the effect of this law is to make it impossible for those antiquities to be returned to Afghanistan when and if they surface on the art market. *Id.*

⁷² 1970 UNESCO Convention, *supra* note 23, art. 2.1.

⁷³ *Id.* art. 2.2.

transfer of ownership of cultural property” is “illicit” if “effected contrary to the provisions adopted under this Convention,”⁷⁴ that is, unless the transfer is accompanied by an export certificate as mandated in Article 6.⁷⁵

At its 17th General Conference in 1970, also in Paris, UNESCO adopted the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (1972 World Heritage Convention),⁷⁶ with the purpose of identifying and protecting sites of mankind’s cultural and natural heritage⁷⁷ around the world that possess “outstanding universal

⁷⁴ *Id.* art. 3.

⁷⁵ *Id.* art. 6.

⁷⁶ Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, T.I.A.S. 8226 (1972) [hereinafter 1972 World Heritage Convention], available at <http://whc.unesco.org/archive/convention-en.pdf> (last visited Mar. 18, 2014).

⁷⁷ *Id.* arts. 1, 2. The convention defines “cultural heritage” as:

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding value from the point of view of history, art, or science;
groups of buildings: groups of separate buildings, which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art, or science;
sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

Id. art. 1.

“Natural heritage” is defined as:

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

value” from a standpoint of history, art, science, aesthetic value, ethnology, anthropology, science, conservation, or natural beauty.⁷⁸ To achieve its goals, the Convention established a World Heritage List—essentially a means for international recognition of sites, much like the National Register of Historic Places in the United States—and a World Heritage Fund to administer the list. As of this article’s date, 190 nations are party to the Convention.⁷⁹ This far exceeds the number of parties to either the 1954 Hague Convention or the 1970 UNESCO Convention. This is perhaps due to the fact that the Convention imposes virtually no burden on state parties and does nothing to threaten national rights with regard to cultural heritage. Article 4 states that the parties recognize each state’s primary responsibility for safeguarding cultural and natural heritage located on that state’s own territory.⁸⁰ In its recognition of world heritage, Article 6.1 stresses national control:

Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.⁸¹

Furthermore, the Convention establishes no system to sanction state parties that fail to fulfill their responsibilities.

III. The Destruction of the Bamiyan Buddhas in Context

The Bamiyan Buddhas have been aptly described as “Afghanistan's Stonehenge.”⁸² The uncontested importance of the Buddhas as part of the pre-Islamic history of Afghanistan explains the symbolism of their

Id. art. 2.

⁷⁸ Although the Convention’s definition of “cultural heritage” is broader than the definition of cultural property given in the 1954 Hague Convention, it is not as broad as the concept of cultural heritage advanced by some commentators. *See supra* note 12.

⁷⁹ *See* Appendix B (State Parties to Cultural Property Conventions).

⁸⁰ 1972 World Heritage Convention, *supra* note 76, art. 4.

⁸¹ *Id.* art. 6.

⁸² MORGAN, *supra* note 1, at 4.

destruction by the Taliban.⁸³ Among the multiple messages conveyed to the world by the destruction of the Buddhas were contempt for, and a desire to erase, Afghanistan's pre-Islamic past. The goal was nothing less than to remake the past in their own distorted image, just as they were remaking the present. Hence, in order to understand the destruction of the Buddhas, it is necessary to have a general understanding of their place in Afghanistan's history.

Historians believe that Buddhism was transmitted to the territory comprising modern Afghanistan by the 3rd century of the Common Era (CE), mostly like via the fabled "Silk Route," the series of trade routes that linked East Asia with the Mediterranean for hundreds of years.⁸⁴ Buddhism remained the dominant religion in the region for four centuries, until the Islamic conquest in the 7th century CE. For much of that period, the Bamiyan Valley was the site of a large Buddhist monastic community.⁸⁵ In his account of a visit to the region in 630 CE, the Chinese Buddhist pilgrim Xuanzang⁸⁶ described Bamiyan as a flourishing Buddhist center with "several tens" of monasteries and "several thousand" monks.⁸⁷ Many monks lived as hermits in small caves carved into Bamiyan's limestone cliffs, which are clearly visible in photographs of the Buddhas.⁸⁸ The caves were often elaborately decorated with religious statuary and brightly colored frescoes, traces of which remain.⁸⁹ At the time of Xuanzang's visit, the two colossal

⁸³ The destruction of the World Trade Centers in New York was a similarly symbolic act. The parallel between the destruction of both sites was explored in American artist J. Otto Siebald's drawings for a proposal to rebuild both sites in the July 15, 2002 issue of the *New Yorker*. See Calvin Tomkins, *After the Towers*, *NEW YORKER*, July 15, 2002, at 59. In the drawing, "the two Buddhas are rebuilt in New York City, while Twin Towers, accommodating refugees, occupy the empty niches at Bamiyan." MORGAN, *supra* note 4, at 25.

⁸⁴ ARCHAEOLOGICAL SURVEY OF INDIA, *BAMIYAN: CHALLENGE TO WORLD HERITAGE 3* (2002).

⁸⁵ MORGAN, *supra* note 1, at 48–51.

⁸⁶ The name is also transliterated as Hsüan-Tsang. For example, see ARCHAEOLOGICAL SURVEY OF INDIA, *supra* note 84, at 3.

⁸⁷ MORGAN, *supra* note 1, at 54.

⁸⁸ Flood, *supra* note 1, figs.1 & 2.

⁸⁹ *Id.* The destruction of the giant Buddhas revealed many more decorated caves that had been previously hidden. As reported by the French Centre National de la Recherche Scientifique, these previously unknown frescoes include what may be the earliest evidence of oil painting. Géraldine Véron, *Secrets of the Bamiyan Buddhas*, *CNRS INT'L MAG.*, Jan. 2009, <http://www2.cnrs.fr/en/1345.htm>.

standing Buddhas already dominated Bamiyan.⁹⁰ Radiocarbon dating confirms that the smaller of the statues, which stood at 35 meters, was the older of the two, with an estimated date of construction of 550 CE; the larger of the statues, standing at 55 meters, was constructed around 615 CE.⁹¹ The statues were carved in what is described as the “Gandharan⁹² Buddhist” or “Greco-Buddhist” sculptural style, a fusion of Greco-Roman and Indian stylistic influences, which reflect the region’s cultural diversity at this time.⁹³ Although it was once believed that the Islamic conquest of Afghanistan marked a complete break with Afghanistan’s Buddhist past, historians now agree that Buddhism remained a significant religion in Afghanistan until the Mongol invasions in the 13th century CE.⁹⁴ Bamiyan’s decline as a center of Buddhism was probably gradual. Although the Buddhas were periodically targeted by vandals or by rulers who saw them as idols, they remained and eventually their original identifications with manifestations of the Buddha were forgotten. The statues were transformed in the folklore⁹⁵ of the Hazara, the Persian-speaking, Shiite ethnic minority who currently form a majority of the Bamiyan Valley’s inhabitants. The third largest ethnic group in Afghanistan, the Hazaras also form substantial ethnic minorities in neighboring Iran and in Pakistan. However, as adherents of Shi’a Islam, the Hazaras are both an ethnic and a religious minority in Afghanistan.⁹⁶

⁹⁰ MORGAN, *supra* note 1, at 54.

⁹¹ *Id.*

⁹² Ganhara refers to a kingdom that existed in this region of Afghanistan as part of the Kushan Empire from roughly the 1st century CE until the 4th century CE, though its stylistic influence lingered. Afghanistan’s history during this period is obscure. Morgan writes,

The author of the *Beishi*, the Chinese *History of the Northern Dynasties*, writing in the seventh century, speaks for historians of pretty much any period of Afghan history when he writes despairingly of the period from the mid-third to the mid-sixth centuries, ‘From the time of the Northern Wei and the Jin, the dynasties of the Western Territories swallowed each other up and it is not possible to obtain a clear idea of events that took place at that time.’

Id. at 129.

⁹³ *Id.* at 7.

⁹⁴ *Id.* at 93–103.

⁹⁵ See Appendix A (The Tale of Salsal and Shahmama).

⁹⁶ For general background on the Haraza, see S. A. MOUSAVI, *THE HAZARAS OF AFGHANISTAN* (1998).

The destruction of the Bamiyan Buddhas was anticipated by many weeks, but it represented a reversal in Taliban policy. Mullah Omar, the Taliban leader, had previously stated that the statues were part of Afghanistan's pre-Islamic past that should be preserved in part because there were no long any Buddhists in Afghanistan to venerate them. Hence, the statues no longer function as idols. It has been speculated that Mullah Omar's change of opinion was as a consequence of pressure exerted by Al-Qaeda.⁹⁷ While the Taliban were trying to mollify the West to obtain diplomatic recognition and humanitarian assistance, Osama Bin Laden was, at this stage, deliberately provoking the west. The fact that the Buddhas were culturally significant to the Hazaras, a Shiite minority despised by the devoutly Sunni Al-Qaeda, was perhaps a bonus motivation.

IV. "People" v. "Peoples"

Secondary international law consists in part of case law by international bodies applying norms and assessing penalties against violators. Attaching individual criminal liability for violations of treaty obligations, which generally fall on states, is not automatic, and the 1954 Hague Convention provides that states are generally responsible for prosecuting violators. Consequently, the case law in this area is underdeveloped. However, since 1993, the International Criminal Tribunal for Yugoslavia (ICTY) has been commended for advancing international norms for protection of cultural property in its case law.⁹⁸ The ICTY has convicted Yugoslav commanders for destruction of cultural property; however, the majority of those convictions have been premised on a theory that destruction of the cultural property (in most cases, religious cultural property) was part of a larger campaign of cultural genocide.⁹⁹ Hence, the destruction of the cultural property is an anthropocentric crime (that is, a crime against a group of people for

⁹⁷ Bucherer Interview, *supra* note 71.

⁹⁸ Theodor Meron, President, International Criminal Tribunal for the Former Yugoslavia, Keynote Address at the UNESCO Symposium on the 50th Anniversary of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict: The Protection of Cultural Property in the Event of an Armed Conflict Within the Case-Law of the International Criminal Tribunal for the Former Yugoslavia (May 14, 2004).

⁹⁹ Hirad Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1, 1 (2001).

whom the property forms a significant part of its group identity), rather than a crime against property.¹⁰⁰

The case law of the ICTY has been cited in support of the two competing theories that have been proposed for prosecution of the individuals responsible for the destruction of the Buddhas. One approach would argue that the destruction of the Buddhas represented a violation of the human rights of Buddhists globally for whom the statues are a part of their global heritage.¹⁰¹ Another approach would argue that the Buddhas represented “cultural heritage of significant value for humankind” and that their destruction “constitutes a breach of general international law.”¹⁰² Each of these theories is novel and has not been tested before an international tribunal (and the first challenge would be getting such a case before an international tribunal). However, an assessment of these alternatives exposes competing policy interests within the framework of cultural-property protections, which present a further impediment to closing the “gap” where the destruction of the Buddhas exists.

A human rights-based approach has the potential to strengthen national claims, as the only rightful possessors of cultural property located not only within the nation’s own borders but also in foreign museums and collections, thereby fueling recovery claims.¹⁰³ However,

¹⁰⁰ *Id.* (“The anthropocentric approach of law psychologically confines crimes against cultural property to a less visible position than other crimes. Even when crimes against cultural property are addressed, it is because the perpetrators’ objective was to harm the population whom the cultural property represented. For example, the ICTY addresses crimes involving the destruction of a mosque because they harmed the Muslim population. The same reasoning applies to the destruction of a Catholic monastery, which injured the Croat population, or of an Orthodox church, which harmed the Serb population. These anthropocentric and ethnocentric approaches require the establishment of a link between cultural property and the group of individuals that it represents. As a result, in the hierarchy of international crimes, there is often a tendency to place crimes against cultural property below crimes against persons. Although no one can deny the difference between the torture or murder of a human being and the destruction of cultural property, it remains important to recognize the seriousness of the latter, especially given its long-term effects.”).

¹⁰¹ Patel, *supra* note 19.

¹⁰² Franciono & Lenzerini, *supra* note 15, at 619.

¹⁰³ I deliberately use the legally imprecise term “recovery claim” to refer to a variety of types of claims for return of cultural property. Legal scholarship recognizes three types of recovery of cultural property. “Restitution” is the term most frequently to refer to the recovery of unlawfully obtained property (i.e., wartime pillage or stolen property). “Return” is used for property removed from a colonized country by the colonizing power and for cases of unlawful export. “Repatriation” refers to a specific form of restitution—

more significantly, this approach also has the potential to make the international laws that are designed to protect cultural property enforceable only when enforcement aligns with national interests and that may offer inadequate protection for cultural property that cannot be clearly linked to the identity of a particular people. By contrast, an approach that sees destruction of cultural property as a crime against humanity has the potential to criminalize destruction of a broader range of cultural property and to apply in a wider variety of contexts. However, this approach would also strengthen an “internationalist” view of cultural property,¹⁰⁴ which generally favors freer movement of cultural property and opposes aggressive recovery claims. Consequently, antiquities-rich states, which are heavily invested in laws to prevent the movement of cultural property, may resist this development. In addition, other countries, including the United States, may resist the development based upon long-standing concerns regarding erosion of national sovereignty by international law.

V. Conclusion

This attempt to place the destruction of the Bamiyan Buddhas within the framework of cultural property protections demonstrates the continuing relevance of a criticism made by Prof. M. Cherif Bassiouni twenty years before their destruction. He wrote,

The distinction made between relevant international instruments in their applicability of the contexts of war and peace is inappropriate to the effective enforcement of a common interest, based on the shared values and expectations of the world community which are presumably embodied in all these instruments. The

either to its origin country or to a specific ethnic group—and usually refers to claims by indigenous groups. Marie Cornu & Marc-André Renold, *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution*, 17 INT'L J. OF CULTURAL PROPERTY 1, 2 (2010).

¹⁰⁴ The legal scholar most closely associated with this view is Stanford law professor John Henry Merryman. See John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985). John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986); John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT'L L. & POL. 1 (1998); John Henry Merryman, *Cultural Property Internationalism*, 12 INT'L J. OF CULTURAL PROP. 11 (2005). See also Joseph P. Fishman, *Locating the International Interest in Intranational Cultural Property Disputes*, 35 YALE J. INT'L L. 347 (2010).

consequences of this distinction are that certain violations are deemed international crimes while others are not specifically deemed so. The legal distinction, in turn, produces significant differences with respect to enforcement, and that in large part, is reflected in the jurisdictional bases set forth explicitly or implicitly in these instruments. These instruments are either too limited or too narrow in their intended enforcement.¹⁰⁵

The recommendation that Professor Bassiouni subsequently offered—the adoption of a unified convention dealing with all aspects and types of property protection—seems as unlikely to happen now as it did when he wrote.¹⁰⁶ However, the gap that he identified still exists and in it squarely falls the destruction of the Bamiyan Buddhas. In the absence of a new convention, it remains for the elaboration of the second body of international law to close the gap. In order for that gap to be closed and not widened, the case law should articulate an internationalist perspective that “cultural heritage of significant value for humankind constitutes a breach of general international law applicable both in peacetime and in the event of armed conflicts”¹⁰⁷ Ultimately, development of a “trusteeship” model for cultural property, which would emphasize that we all, whatever our nationality, hold cultural property in trust for future generations, would best serve our common interest. This would require a change in a system that often seems to favor the provincial interest over the cosmopolitan in ways that distort our understanding of the past. States respect borders; culture does not.

Of course, these developments may be decades away, and even if it should occur, there is no way to retrieve all that has been lost. The final words of this article go to the writer Bruce Chatwin, who, in the midst of the Soviet invasion, lamented the Afghanistan that he once visited:

But that day will not bring back the things we loved: the high, clear days and the blue icecaps on the mountains . . . We shall not lie on our backs at the Red Castle and watch the vultures wheeling over the valley where they killed the grandson of Genghiz. We will not read Babur’s memoirs in his garden at Istalif . . . We will not stand on the Buddha’s

¹⁰⁵ Bassiouni, *supra* note 22, at 318.

¹⁰⁶ *Id.* at 319.

¹⁰⁷ Franciono & Lenzerini, *supra* note 15, at 619.

head at Bamiyan, upright in his niche like a while in a dry-dock.¹⁰⁸

¹⁰⁸ Bruce Chatwin, *A Lament for Afghanistan*, in *WHAT AM I DOING HERE?* 286 (1989).

Appendix A

The Tale of Salsal and Shahmama

Persian primary sources from as early as the 9th century CE refer to popular romances in which the Bamiyan Buddhas appear as characters.¹⁰⁹ Almost all of these sources refer to the statues as Surkh-But (the Red Idol) and Khing-But (the Bright Gray Idol); the former is identified as a male lover, the latter as his female beloved. Although the texts of the romances have not survived, the outlines of the presumed tale survive in folk tales handed down by the Harzara.¹¹⁰

According to these folk tales, the larger statue represents Salsal, a warrior, and the smaller statue, his beloved, Shahmama, the daughter of the emir (ruler) of Bamiyan. Shahmama's father believed that Salsal was unworthy of Shahmama but agreed to allow Salsal to marry her if he could prove his worth by accomplishing two extraordinary feats. At this time, Bamiyan was plagued by two problems: frequent destructive flooding and a double-headed dragon. If Salsal could resolve both problems, the emir agreed to grant his daughter's hand in marriage.

In order to accomplish these feats, Salsal needed a legendary weapon, a sword made of steel mined from Fuladi Mountain and forged by a wise man at Ahangaran in Ghur. Salsal made this journey and returned with the sword. He first resolved the flooding by damming the river. He then killed the dragon, skinned it, and sent its hide to be used as a carpet at his marriage to Shahmama. The emir accepted Salsal as a hero and agreed to his marriage to Shahmama.

The date of the marriage was announced. The emir then ordered the carving of a pair of niches for Salsal and Shahmama on cliff-face to celebrate their marriage and as a memorial of Salsal's triumph over the dragon. The bigger niche was covered with red curtains, the smaller

¹⁰⁹ Said Reza Husseini, *Destruction of Bamiyan Buddhas: Taliban Iconoclasm and Hazara Response*, 16 HIMALAYAN AND CENT. ASIAN STUD. 15, 22 (2012).

¹¹⁰ *Id.* at 23. The story that I recount here was collected by Said Reza Husseini in fieldwork among the Hazara. However, a variant narrative, using the same names for the statues, was collected by the nineteenth-century British traveler Edward Stirling and recorded in his diary, which was published as *THE JOURNALS OF EDWARD STIRLING IN PERSIA AND AFGHANISTAN, 1828–29* (J. L. Lee ed., 1991). This is the story that Morgan recounts. MORGAN, *supra* note 1, at 129. I have chosen to use Husseini's version because it was collected more recently, at firsthand, and by a native Afghan.

niche with green curtains. Salsal and Shahmama were supposed to remove these curtains at sunrise in order for the people see them as a couple standing in the niches, and then walk on the carpet made of dragon skin towards their marriage home. However, when the curtains were removed, both of them had turned into stone, the result of a curse by the dragon. Thereafter, the niches were referred to as the “niches of love.”

Appendix B

State Parties to Cultural Property Conventions

1. State Parties to the 1954 Hague Convention:

Albania, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Chad, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Holy See, Honduras, Hungary, India, Indonesia, Iran, Iraq, Israel, Italy, Japan, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Latvia, Lebanon, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malaysia, Mali, Mauritius, Mexico, Monaco, Mongolia, Montenegro, Morocco, Myanmar, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Palestine, Panama, Paraguay, Peru, Poland, Portugal, Qatar, Republic of Moldova, Romania, Russian Federation, Rwanda, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, Ukraine, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Yemen, and Zimbabwe.

2. State Parties to the 1970 UNESCO Convention:

Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Azerbaijan, Bahamas, Bangladesh, Barbados, Belarus, Belgium, Belize, Bhutan, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Central African Republic, Chad, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of Korea, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Grenada, Guatemala, Guinea, Haiti, Honduras, Hungary, Iceland, India, Iran, Iraq, Italy, Japan, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Lesotho, Libya, Lithuania, Madagascar, Mali,

Mauritania, Mauritius, Mexico, Mongolia, Montenegro, Morocco, Myanmar, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Palestine, Panama, Paraguay, Peru, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saudi Arabia, Senegal, Serbia, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, the Former Yugoslav Republic of Macedonia, Tunisia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Zambia, and Zimbabwe.

3. State Parties to the 1972 World Heritage Convention:

Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei, Bulgaria, Burkina Faso, Cabo Verde, Cambodia, Cameroon, Canada, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libya, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Moldova, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Niue, Norway, Oman, Pakistan, Palau, Palestine, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab

Republic, Tajikistan, Tanzania, Thailand, the Former Yugoslav Republic of Macedonia, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam, Yemen, Zambia, and Zimbabwe.