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# Syria's world cultural heritage and individual criminal responsibility

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## ABSTRACT

Recent reports have confirmed damage to five of the six Syrian world heritage sites during the current armed conflict as well as extensive looting of several of its archaeological sites on the Syrian Tentative List of world heritage. This article examines the role and fate of Syrian world cultural heritage from the beginning of the conflict, maps out the different cultural property obligations applicable to Syria while illustrating, where possible, how they may have been violated. Then, it assesses if and how those responsible for these acts can be prosecuted and punished. The analysis reveals an accountability gap concerning crimes against Syrian world cultural heritage. As such, the article proposes to reinstate the debate over crimes against common cultural heritage which once arose in the context of the Buddhas of Bamiyan.

*Keywords:* Syrian world cultural heritage, criminal accountability, Chautauqua Blueprint, Syrian Antiquities Law, crimes against common cultural heritage

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## INTRODUCTION

In a recent speech, US Secretary of State John Kerry labelled the destruction of heritage in Syria “a purposeful final insult”<sup>1</sup> which is “stealing the soul of millions.”<sup>2</sup> He referred to the devastation in the Ancient City of Aleppo (a declared world heritage site), and to the extensive looting of Apamea and Dura Europos (on the Syrian Tentative List of world heritage) as a tragedy for the Syrian people and the rest of the world, and remarked: “How shocking and historically shameful it would be if we did nothing while the forces of chaos rob the very cradle of our civilization.”<sup>3</sup>

World cultural heritage is, by definition, of “outstanding universal value”<sup>4</sup> and thus constitutes the finest category of tangible cultural property on land. As such, what happens to Syrian world heritage sites is often referred to separately from the rest of cultural objects. For example, a common statement by United Nations (UN) Secretary-General Ban Ki-Moon, United Nations Educational, Scientific and Cultural Organization (UNESCO) Director-General Irina Bokova, and Joint Special Representative for Syria Lakhdar Brahimi concerning Syria’s cultural property drew attention first and foremost to the fact that “[w]orld heritage sites ha[d] suffered considerable and sometimes irreversible damage.”<sup>5</sup> Likewise, the UN Security Council Resolution 2139 (2014) called on all parties to the Syrian conflict to “save Syria’s rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria’s World Heritage Sites.”<sup>6</sup> In the same vein, the American Association for the Advancement of Science (AAAS) recently published two reports based on satellite imagery assessing the current status of Syrian declared and tentative world heritage sites respectively.<sup>7</sup>

Based on the information provided by different sources, it is safe to say some world heritage sites, or at least some of its components, are irrevocably lost. “How shocking and historically shameful it would be if we did nothing,”<sup>8</sup> Kerry said. But what can be done based on the current legal framework as applied to Syria?

One way to react to the alleged looting, damage and destruction of Syrian cultural heritage is through individual criminal responsibility. As we shall see, several of the international conventions to which Syria is a party introduce the possibility of instituting criminal proceedings for those that commit cultural heritage violations. To this we need to add the Syrian Antiquities Law of 26 October 1963 passed under Decree, Law No. 222 (Syrian Antiquities Law) and the Chautauqua Blueprint, a draft statute for a would-be Syrian Extraordinary Tribunal,<sup>9</sup> both of which include crimes concerning cultural objects. However, despite this web of legal instruments, the analysis of the cultural property obligations applicable to the Syrian armed conflict in sections 2 and 3 shows that the basis to prosecute those who have looted, damaged or destroyed Syrian world cultural heritage sites are either absent, due to the overall lack of implementation of international cultural heritage conventions, or insufficient, due to the fact that international criminal law is in its infancy. For example, as shown in section 3.4, the article of the Chautauqua Blueprint concerning cultural objects is unable to express the facts and degrees of wrongdoing when crimes involve world heritage sites.

<sup>1</sup>John Kerry, *Remarks at Threats to Cultural Heritage in Iraq and Syria* Event, (Sept. 22, 2014) available at <http://www.state.gov/secretary/remarks/2014/09/231992.htm>

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

<sup>3</sup>*Id.*

<sup>4</sup>See Convention Concerning the Protection of World Cultural and Natural Heritage, art. 1, Nov. 16, 1972, 1037 U.N. T.S. 151.

<sup>5</sup>Statement by UN Secretary-General Ban Ki-moon, UNESCO Director-General Irina Bokova and UN and League of Arab States Joint Special Representative for Syria Lakhdar Brahimi: The destruction of Syria’s cultural heritage must stop, (Mar. 12, 2014) [hereinafter Common Statement], available at <http://www.un.org/sg/statements/index.asp?nid=7521>

<sup>6</sup>S.C. Res. 2139, ¶ 8, U.N. Doc. S/RES/2139 (Feb. 22, 2014).

<sup>7</sup>AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE, *Ancient History, Modern Destruction: Assessing the Current Status of Syria’s World Heritage Sites Using High-Resolution Satellite Imagery* (Washington, D.C. Sep. 2014) [hereinafter AAAS Report], available at <http://www.aaas.org/page/ancient-history-modern-destruction-assessing-current-status-syria-s-world-heritage-sites-using>. The second report concerning sites on the Syrian Tentative List is available at <http://www.aaas.org/page/ancient-history-modern-destruction-assessing-status-syria-s-tentative-world-heritage-sites-7#Dura-Europos>.

<sup>8</sup>Kerry, *supra* note 1.

<sup>9</sup>INSTITUTE FOR NATIONAL SECURITY AND COUNTERTERRORISM – SYRACUSE UNIVERSITY, “Chautauqua Blueprint” to Prosecute Syrian War Crimes Unveiled (Oct. 3, 2013), available at <http://insct.syr.edu/chautauqua-blueprint-prosecute-syrian-war-crimes-unveiled/>

The destruction of the Buddhas of Bamiyan in 2001, led UNESCO and some scholars to espouse the notion of crimes against culture or crimes against the common heritage of humanity.<sup>10</sup> It appears that this so-called crime did little more than express the general outcry of the international community at the time. This article concludes suggesting that, now that these acts of destruction have become systematic in the Arab and Sahel regions—and thus we may speak of a “Bamiyanisation” phenomenon—the concept of crime against cultural heritage should be carried through in order to solve or at least reduce the current accountability gap.

### 1. THE SYRIAN ARMED CONFLICT AND ITS IMPACT ON THE COUNTRY’S CULTURAL HERITAGE

Syria has witnessed the rise and fall of several civilisations, among them the Arameans, the Phoenicians, and the Romans, all of which left their imprint on its territory in the form of what is called today “cultural heritage.”<sup>11</sup> Ever since Syria gained independence from France in 1946, it has followed a pattern of political instability marked by several coups, as well as the Six-Day War, where it lost part of its territory (the Golan Heights) to Israel. Prior to the current civil war, the Ba’ath party had been in charge of the country for several decades; first under Hafez Al-Assad, and since 2000, under the rule of his son, Bashar Al-Assad. Although the majority of the members of the current government are Alawite, a division within the Shia Muslims, and the majority of the population is Sunni, religious differences did not spark the Syrian conflict. Instead, the Arab Spring, which began in early 2011 in Tunisia and spread later to Egypt, inspired the predominantly young Syrian population to demand political changes from the Bashar Al-Assad regime. What began as a social uprising then escalated into a full-blown non-international armed conflict by July 2012.<sup>12</sup>

With the precedent of the war in Iraq, it was clear that the cultural heritage of neighbouring Syria was also at risk. It has been claimed that the difference with Syria lies in its scale of built heritage scattered throughout its territory.<sup>13</sup> Syria is, so to speak, “an open-air museum,”<sup>14</sup> that is directly exposed to all possible dangers arising from armed conflict. In addition, as the Syrian Directorate General of Antiquities and Museums (DGAM) has acknowledged, it is difficult to ensure “the protection of the immovable heritage in the country, especially for those archaeological and world heritage sites that are located in conflict areas and cannot be accessed.”<sup>15</sup>

Syria has six declared world heritage sites, all of which were included on the List of World Heritage in Danger by the World Heritage Committee in 2013,<sup>16</sup> namely: the Ancient City of Damascus, the Ancient City of Bosra, the Site of Palmyra, the Ancient City of Aleppo, *Crac des Chevaliers* and *Qal’at Salah El-Din*, as well as the Ancient Villages of Northern Syria. With the exception of Damascus, damage has been confirmed in all other five sites.<sup>17</sup> To this, we need to add twelve properties that are part of the so-called Tentative List, including the Ebla, Apamea, Dura Europos, and Mari sites, where extensive looting has also been documented.<sup>18</sup>

One of the first world heritage sites to have fallen prey of the war, and so far the one where the most extensive damage has been reported, is the Ancient City of Aleppo. In August 2012 the presidential forces reportedly took control of its Citadel to the sound of “Bashar or we burn the

<sup>10</sup>See Francesco Bandarin, *Editorial*, THE WORLD HERITAGE NEWSLETTER, May-June. 2001, at 1; and Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 Eur. J. Int’l L. 619, 621 (2003).

<sup>11</sup>This article uses the terms “cultural property” and “cultural heritage” indistinctively.

<sup>12</sup>International Committee of the Red Cross, “Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting” (Jul. 17, 2012) available at: <https://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm>.

<sup>13</sup>Interview with Michael Danti, *Looting Antiquities, A Fundamental Part of ISIS’ Revenue Stream* (Sep. 29, 2014) available at <http://www.npr.org/2014/09/29/352538352/looting-antiquities-a-fundamental-part-of-isis-revenue-stream>.

<sup>14</sup>Cheikhmous Ali, *Syrian Heritage Under Threat*, 1 Journal Of Eastern Mediterranean Archaeology & Heritage Studies 351 (2013).

<sup>15</sup>UNESCO, *Regional training on Syrian cultural heritage: addressing the issue of illicit trafficking, Final report and Recommendations* (Amman, Feb. 10–13, 2013) 6, available at [http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Amman/pdf/20130322\\_Report\\_Syria\\_workshop\\_FINAL.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Amman/pdf/20130322_Report_Syria_workshop_FINAL.pdf).

<sup>16</sup>See World Heritage Committee, *Convention Concerning The Protection Of The World Cultural And Natural Heritage* 114 (UNESCO, WHC-13/37.COM/7B.Add, May 2013).

<sup>17</sup>See AAAS Report, *supra* note 7.

<sup>18</sup>See generally, Jesse Casana & Mitra Panahipour, *Satellite-Based Monitoring of Looting and Damage to Archaeological Sites in Syria*, 2 Journal Of Eastern Mediterranean Archaeology And Heritage Studies 128 (2014).

country down.”<sup>19</sup> According to existing information, the Ancient City’s medieval market (*Souq al-Madina*) has been burned to the ground, the main gate of the Great Umayyad Mosque completely destroyed, and the outer wall of the Citadel extensively damaged.<sup>20</sup> *Crac des Chevaliers*, situated near the city of Homs on the border with Lebanon, is (or was) the largest Christian military fortification in the “Holy Land,” where crusaders would seek refuge in the Middle Ages.<sup>21</sup> After continuous armed clashes, the castle was bombarded during the summer of 2013 and some parts reduced to rubble.<sup>22</sup> The DGAM state of conservation report of 2014 notes that some of Palmyra’s remains have been shelled and that, in the Ancient Villages in Northern Syria, (also known as the “Dead Cities”) there have been illegal excavations and looting, as well as use of stone statues in al-Qatora as training targets and sniper posts.<sup>23</sup> In the Ancient City of Bosra “[c]lashes had caused damage to the Mabrak el-Naqa building and Nymph Temple, The mosque of Omari, The Saint-Serge Cathedral, al-Fatemi mosque, Medresat Abu Al-Fidaa, as well as some old houses in the town itself at the north and east of the amphitheatre.”<sup>24</sup>

The World Heritage Centre, the International Council of Monuments and Sites (ICOMOS), and the International Centre for the Conservation and Restoration of Monuments (ICCROM) have reached the conclusion that, in some places, the extent of the damage is such that the outstanding universal value of these sites, a feature that is necessary for these properties to retain the special status of world heritage, may have been permanently compromised.<sup>25</sup>

Given that the Syrian conflict was initially motivated by irreconcilable views on the political make-up of the country, the damage caused to its cultural property was mostly a direct consequence of the heat of battle, as well as the general breakdown of the rule of law that accompanies armed conflicts. However, as the months have gone by, the situation has degenerated into a sectarian conflict. Sunni extremist groups joined the rebels hoping to oppose the secular regime espoused by Bashar Al-Assad until they managed to hijack the conflict in a considerable part of the territory.<sup>26</sup> Hence the proclamation of an “Islamic State” spanning Syria and Iraq by ISIS, an al-Qaeda splinter group.

The Islamic State aims to establish a new caliphate based on religious authority where, among other things, the hands of thieves will be cut off, women will only be allowed to leave their homes when strictly necessary, fully-covered and, as the chilling detonation of the shrine of Prophet Younis (Jonas Tomb) in Mosul shows,<sup>27</sup> the traces of “infidel” cultural and religious heritage will be erased.

As the conflict has grown into a religious one between Sunnis and Shiites, the nature of the danger to which the built cultural heritage is exposed has acquired a whole new dimension: cultural heritage is now liable to become a central target in the Syrian conflict for ideological reasons. Ban Ki-Moon, Irina Bokova, Lakhdar Brahimi have already taken stock of this turn as they have pointed out that there are alarming reports showing that human representations in art are

<sup>19</sup>Laila M. Rey, *La Ciudadela de Alepo, Dañada por la Artillería Siria*, EL MUNDO, Aug. 10, 2012, available at <http://www.elmundo.es/elmundo/2012/08/10/internacional/1344592069.html>. The article contains a link to a video showing the moment in which the Syrian army enters the Citadel of Aleppo.

<sup>20</sup>Syrian Directorate General of Museums & Antiquities, *State Party Report: State of Conservation of the Syrian Cultural Heritage Sites*, 1–28 (2014), [hereinafter DGAM 2014 Report] available at <http://whc.unesco.org/en/list/21/documents/>; see also, Silvia Perini & Emma Cunliffe, *Towards a protection of the Syrian cultural heritage: A summary of the international responses* (March 2011 - March 2014) (Girona: Heritage for Peace, 2014) available at <http://www.heritageforpeace.org/wp-content/uploads/2014/04/Towards-a-protection-of-the-Syrian-cultural-heritage.pdf>; see also, The Association for the Protection of Syrian Archaeology (APSA), <http://www.apsa2011.com/index.php/en/provinces/aleppo/great-umayyad-mosque.html> (last visited Dec. 12, 2014). The footage from the October 2014 shows the interior of the mosque being burnt.

<sup>21</sup>Nikolaus Pevsner, *Breve Historia de la Arquitectura Europea* at 109–110 (Alianza Forma, 1994).

<sup>22</sup>CHANNEL 4 NEWS, *Syria: inside the Crac des Chevaliers crusader castle*, (Mar. 31, 2014), available at <https://www.youtube.com/watch?v=S9tqmxe4llw> (last visited Dec. 10, 2014). The video shows the signs of the occupation by Syrian rebel forces and the effects of the bombardment of the castle allegedly by Bashar forces.

<sup>23</sup>DGAM 2014 Report, *supra* note 20, at 19.

<sup>24</sup>*Id.* at 24.

<sup>25</sup>UNESCO, State of Conservation (SOC) Ancient City of Aleppo (Syrian Arab Republic): *ANALYSIS AND CONCLUSIONS OF THE WORLD HERITAGE CENTRE, ICOMOS and ICCROM* (2014), available at <http://whc.unesco.org/en/soc/2914>

<sup>26</sup>Editorial, *Syria’s war: The new normal*, THE ECONOMIST, Jul. 27, 2013.

<sup>27</sup>EURONEWS, *Massive Explosion as ISIS destroys Jonah’s Tomb in Mosul* (Jul. 25, 2014) available at <https://www.youtube.com/watch?v=2qiZpndjg6Y>.

being destroyed by extremist groups' intent on eradicating unique testimonies of the rich cultural diversity of Syria.<sup>28</sup>

ISIS does not appear to be doing quite the same with artefacts of a movable nature, or that can otherwise be removed. It has been claimed that the illicit trade with antiquities constitutes an important source of income of the Islamic State,<sup>29</sup> an issue that should be taken seriously in light of the fact that since its split with al-Qaeda in February 2014, "IS[IS] has consolidated its reputation as arguably the world's most dangerous (and certainly its richest) jihadist terrorist entity."<sup>30</sup> Against this backdrop, it is perhaps not a coincidence that the museum in Raqqa, the capital city of the Islamic State and part of the World Heritage Tentative List, has been extensively looted.<sup>31</sup> However, until there is firsthand reporting and accounting at these sites, we may not know for many years exactly what damage and destruction is being done and for what purpose.

## 2. SYRIA'S CULTURAL PROPERTY OBLIGATIONS

### 2.1. Under domestic law

The Syrian Antiquities Law, which was last amended in 1999,<sup>32</sup> is divided into six chapters, corresponding to general provisions, immovable antiquities, movable antiquities, excavations, penalties and miscellaneous provisions. The law does not contemplate the derogation or suspension of its obligations in exceptional circumstances. Therefore, the Syrian Antiquities Law continues to apply during the current conflict.

The Syrian Antiquities Law is driven by the idea that cultural goods represent a public interest, and is characterised by a strict retentive spirit and a highly punitive set of sanctions.<sup>33</sup> Antiquities are defined as movable and immovable property dating back at least 200 years (Article 1). With very few exceptions,<sup>34</sup> antiquities belong to the state and should be exhibited in museums.<sup>35</sup> As such, the state retains the right to expropriate the antiquity or piece of land where the archaeological site is situated, previous payment of a "suitable financial reward" in the case of movable antiquities (Article 35) and compensation *irrespective* "of the archaeological, artistic or historical value of the expropriated buildings and areas" to the owner (Article 20). In all circumstances the state has the exclusive power to oversee the conservation, pertinent modifications or archaeological excavations of the sites.<sup>36</sup>

The general export of antiquities seems to be altogether banned,<sup>37</sup> as Article 69 provides that an export license may only be granted with regard to antiquities that are to be exchanged with museums and other scientific institutions, and with regard to antiquities given to an organisation or mission after excavations are finished. This general ban extends to cultural objects that have

<sup>28</sup>See Common Statement, *supra* note 5, at 1.

<sup>29</sup>See Sam Hardy, *How the West buys 'conflict antiquities' from Iraq and Syria (and funds terror)*, REUTERS (27 Oct. 2014); see also The Syrian Campaign, *Open Letter Calling on UN to Ban Trade in Syrian Artifacts*, <https://diary.thesyriacampaign.org/un-ban-the-trade-in-syrian-antiquities/> (last visited Dec. 10, 2014). The letter urges the Security Council to pass a resolution akin to the one in Iraq, S.C. Res. 1483, ¶ 7, U.N. Doc. S/RES/1483 (May 22, 2003). It also encourages the action "not only for the sake of protecting world heritage but also to reduce the violence" since the sale of Syrian antiquities is fuelling the conflict. A ban of this sort is already in force in the European Union pursuant to COUNCIL REGULATION 1332/2013, Amending Regulation (EU) No 36/2012 Concerning Restrictive Measures in View of the Situation in Syria, 2013 O.J. (L 335/3) 11(c); ICOMOS, *Emergency Red List of Syrian Cultural Objects At Risk*, available at [http://icom.museum/uploads/tx\\_hpoindexbdd/ERL\\_SYRIE\\_EN.pdf](http://icom.museum/uploads/tx_hpoindexbdd/ERL_SYRIE_EN.pdf).

<sup>30</sup>Andrew Phillips, *The Islamic State's challenge to international order*, 68 Australian Journal Of International Affairs 495, 496 (2014).

<sup>31</sup>See UNESCO, *Looting of museums and warehouses in Syria*, available at <http://www.unesco.org/new/en/safeguarding-syrian-cultural-heritage/situation-in-syria/museums/>

<sup>32</sup>Syrian Arab Republic, Ministry of Culture, DGAM, *Antiquities Law*, LEGISLATIVE DECREE n. 222 (Oct. 26, 1963). English translation with all amendments available at [http://portal.unesco.org/culture/fr/files/30606/11438206173Antiquities\\_Law.pdf/Antiquities%2BLaw.pdf](http://portal.unesco.org/culture/fr/files/30606/11438206173Antiquities_Law.pdf/Antiquities%2BLaw.pdf)

<sup>33</sup>*Id.* Chapter 5.

<sup>34</sup>*Id.* articles 32 and 52. Foreign excavation missions licensed to work on Syrian soil likely to be covered by the Euphrates Dam water are nonetheless entitled to half the discoveries, see amendment of the Legislative Decree n. 295, art. 1.

<sup>35</sup>See Articles 3–5, 20–21, 30, 52 of the Syrian Antiquities Law *supra* note 32.

<sup>36</sup>*Id.* articles 22, 39, 47–50.

<sup>37</sup>An earlier version of the Syrian Antiquities Law contained a chapter dedicated to trading antiquities, and another to exporting them, but all their provisions were annulled by the last amendment carried out in 1999; see generally Ammar Abdulrahman, *The New Syrian Law on Antiquities*, in *Trade In Illicit Antiquities: The Destruction Of The World's Archaeological Heritage* (Neil Brodie, et al., eds., 2001).

been imported into the country (Article 33). Moreover, any relocation of antiquities *within* Syria's borders requires the permission of the pertinent authorities (Article 40).

Trade in antiquities, including selling pieces falsely representing they are antiquities, is forbidden (Articles 57 and 58). However, the concept of "trade" is nowhere defined in the law. This leaves open the question if the crime would encompass, for example, selling unimportant items which are nonetheless antiquities for which "collectors are given permission from antiquities authorities to dispense with" (Article 32) when the sale is made to a foreigner, or the object is meant to leave the national territory, or if it would encompass selling antiquities within the national territory to Syrian nationals. It is also unclear if the sanctions on trade are imposed on the seller, purchaser, or both. None of the above are minor details in light of the 10 to 15 years of imprisonment, and 100,000 to 500,000 Syrian Pounds fine, that "trade in antiquities" carries (Article 57(c)).

There are two provisions in the prescriptive part directly relevant to the current armed conflict. Article 7 prohibits, *inter alia*, destroying, transforming and damaging both movable and immovable antiquities by writing on them, engraving on them, or changing their features. Article 26 bans building military facilities within 500 meters of registered immovable archaeological and historical properties. There seems to be a poor correspondence between the chapters that prescribe conduct (1-4) and the one concerning sanctions (Chapter 5) since the latter introduces new forms of prohibited behaviour (see section 3.3 below).

There is no preamble in the Syrian Antiquities Law explaining the motives behind its adoption, at least not in its English version. Judging by its content, there is room to suspect that looting and smuggling constituted generalised practices that were further made possible by the disinterest of the authorities or, perhaps, their complicity. Hence, the relative disproportion of the sanctions for smuggling in comparison with other violations (15–25 years as opposed to 1–3 years), and the distribution of rewards to those who co-operate of their own free will, but also to those whose job it is to co-operate. As a matter of fact, the law introduces the possibility of paying the police or customs officials who help confiscate an antiquity with a reward of up to 20 percent of its value (Article 72), and provides that 10 percent of the fines obtained have to be given to the officials involved in the operation (Article 73). Ammar Abdulrahman partly confirms this theory. Concerning the last amendment to the Syrian Antiquities Law in 1999, he notes that illicit excavations still constituted a problem at that time in, for example, the so-called "Dead Cities."<sup>38</sup> These ancient villages are so numerous and scattered that he says, "they can be guarded only at great cost."<sup>39</sup> Abdulrahman pointed to education in the values of the historical heritage of Syria as one essential way to progressively eliminate illicit activities; as, in his own words, "it is obvious that no law, however strict, can be fully effective without the willing cooperation of everyone involved."<sup>40</sup> While this is true, it is also important to remark that Syria is party to the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>41</sup> and thus, if enforcement fails at the national level, there are other mechanisms available that can help illicitly exported property return to its state of origin.

A new draft bill on antiquities was being prepared before the outbreak of the conflict that the DGAM was expecting to present to the Parliament after December 2013.<sup>42</sup> In line with the growing international concern over world cultural heritage properties, the new draft features "a higher level of legal protection for the sites inscribed on the World Heritage List;"<sup>43</sup> a category that otherwise receives the same treatment as any other cultural object in the current Syrian Antiquities Law applicable to the armed conflict.

## 2.2. Under international law

There are three sets of rules that apply to Syria's cultural property under international law in the context of armed conflict. Those enshrined in the 1907 IV Hague Convention and Annexed

<sup>38</sup>Abdulrahman, *supra* note 37, at 111.

<sup>39</sup>*Id.*

<sup>40</sup>*Id.* at 113.

<sup>41</sup>Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, United Nations Educational, Scientific and Cultural Organization, November 14, 1970, 823 U.N.T.S.

<sup>42</sup>DGAM, *Completing new draft law on protection of Syrian archaeological heritage* (Dec. 22, 2013), available at <http://www.dgam.gov.sy/index.php?d=314&id=1114>

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

Regulations (1907 IV Hague Regulations),<sup>44</sup> which represent customary international law;<sup>45</sup> the basic rules of the respect of cultural property in the 1954 Hague Convention;<sup>46</sup> and the 1972 Convention concerning the Protection of World Cultural and Natural Heritage (World Heritage Convention).<sup>47</sup>

### 2.2.1. Customary international law

Article 27 of the 1907 IV Hague Regulations states:

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.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.<sup>48</sup>

Violations of the customary 1907 IV Hague Regulations incur individual criminal responsibility.<sup>49</sup> The defence mounted by Slobodan Praljak at the International Criminal Tribunal for the former Yugoslavia (ICTY) for his involvement in the destruction of the Mostar Bridge, was that the Bosnian Muslims' failure to provide "distinctive and visible signs" indicating the presence of protected monuments relieved the Croatian army (*Hrvatsko vijeće obrane* or HVO) of its obligation to abide by Article 27.<sup>50</sup> The Trial Chamber, however, rejected this view, declaring that "*le non-usage de ce signe ne prive en aucun cas le bien de sa protection*".<sup>51</sup> This issue would unlikely arise in proceedings concerning violations against Syrian world cultural heritage given that these sites belong to the World Heritage List and they bear the world heritage emblem. In fact, in the case against Pavle Strugar concerning the Old Town of Dubrovnik, the ICTY Trial Chamber held that the Old Town's status as a UNESCO world heritage site proved the intent of the accused to deliberately destroy cultural property.<sup>52</sup>

During occupation, under the 1907 IV Hague Regulations:

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 wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.<sup>53</sup>

The mention of "legal proceedings" in the second limb of the article is said to have been the basis on which Wilhelm Keitel and Alfred Rosenberg were prosecuted at Nuremberg<sup>54</sup> for their involvement in the *Einsatzstab Rosenberg*, a Nazi educational research institute and museum containing more than 21,000 artworks stolen from countries across occupied Europe. Keitel and

<sup>44</sup>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 C.T.S. 227.

<sup>45</sup>See e.g. Lawrence D. Egbert, *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 248, 248-49 (1947); *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 98 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

<sup>46</sup>Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, May 14, 1954, 249 U.N.T.S. 240. Syria is also a party to the First Protocol of the 1954 Hague Convention devised to prevent the exportation of cultural property from occupied territories. See Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, May 14, 1954, 249 U.N.T.S. 358.

<sup>47</sup>World Heritage Convention *supra* note 4.

<sup>48</sup>Article 27, the 1907 IV Hague Regulations *supra* note 44.

<sup>49</sup>See *Prosecutor v. Tadic*, *supra* note 45, ¶ 137.

<sup>50</sup>*Prosecutor v. Prlic et al.* Case No. IT-04-74-T, Judgment, ¶ 177 (vol. 1) (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013).

<sup>51</sup>*Id.* "The non-use of the emblem does not deprive the property of its protection under any circumstances" (own translation); see also Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 3(d), May 25, 1993, 32 I.L.M. 1159 [hereinafter ICTY Statute].

<sup>52</sup>*Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment, ¶ 329 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005).

<sup>53</sup>Article 56, 1907 IV Hague Regulations *supra* note 44.

<sup>54</sup>Suzanne L. Schairer, *The Intersection of Human Rights and Cultural Property Issues under International Law*, 11 The Italian Yearbook Of International Law 59, 80 (2001); see also United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* ("London Agreement"), art. 6(b), Aug. 8, 1945, 82 U.N.T.C. 280.

the chief of the institute, Rosenberg, were found guilty *inter alia* of the war crime of plunder.<sup>55</sup> These convictions on the basis of art theft were, until then, unprecedented,<sup>56</sup> and demonstrate an emergent will to award special treatment to cultural property *per se*.<sup>57</sup>

Indeed, the above provisions were chided for being over-inclusive. In the aftermath of the Second World War, what was instead needed was “a convention of narrower application, so as to render feasible a higher standard of protection”<sup>58</sup> for cultural objects. Various states, including Syria, subsequently gathered in The Hague under the aegis of UNESCO, and adopted the 1954 Hague Convention.

### 2.2.2. The 1954 Hague Convention

This Convention defines “cultural property” roughly as movables and immovables of great importance to the cultural heritage of every people, understood as “every nation”.<sup>59</sup> During peacetime, state parties must adopt those measures they consider appropriate to safeguard cultural property within their territory against the foreseeable effects of an armed conflict (Article 3). It is not clear what general preventive measures Syria had in place before the war. When Syria submitted its last implementation report of the Convention in 2010,<sup>60</sup> plans to manage its listed world heritage sites were largely absent.<sup>61</sup> Cheikhmous Ali indicates that, after the outbreak of hostilities, the Syrian Prime Minister issued a recommendation to take additional measures such as the placing of alarm systems and surveillance cameras, because it was feared that well-organised groups were going to engage in extensive looting; however, these precautions were not fully implemented “[d]ue to the slow pace of bureaucracy.”<sup>62</sup>

Despite this apparent lack of planning and the difficulties of the DGAM to access archaeological sites in hostile areas, it must be noted that spontaneous volunteer networks of ordinary Syrian citizens are currently collaborating with local authorities to protect archaeological remains.<sup>63</sup> However:

[these] activists and archeologists who are risking their lives on the ground to protect this history ... enter heritage sites and use techniques dating back to World War II to protect them. They cover ancient mosaics with sandbags and disassemble sundials brick by brick in order to hide them for reconstruction at a later date.<sup>64</sup>

In non-international armed conflicts such as the one in Syria, each warring party is bound to respect, as a minimum, the obligations of Article 4.<sup>65</sup> Parties are thus obliged to refrain (*i*) from using cultural property as well as its surroundings in a way that is likely to expose it to damage or destruction, and (*ii*) from directing any acts of hostility against such property (Article 4(1)). For instance, the alleged take-over of the Citadel of Aleppo by the Syrian army in August 2012 would fall under the first limb of the article, and the air-raid over the castle of *Crac des Chevaliers* in July 2013 under the second.<sup>66</sup> However, it would be for a court of law to decide whether these two examples constitute violations of the Convention since the above obligations may be lifted “in cases where military necessity imperatively requires such a waiver” (Article 4(2)).<sup>67</sup>

<sup>55</sup>Egbert, *supra* note 45, at 282; see also Jacqueline Nowlan, *Cultural Property and the Nuremberg War Crimes Trial*, 6 *Humanitaeres Voelkerrecht* 221, 221 (1993).

<sup>56</sup>Jadranka Petrovic, *The Old Bridge Of Mostar And Increasing Respect For Cultural Property In Armed Conflict*, 52 (Martinus Nijhoff Publishers, 2012).

<sup>57</sup>Apart from Articles 27 and 56, the 1907 IV Hague Regulations contain other norms that are relevant – albeit indirectly – to cultural and religious sites in Syria, such as the prohibition of pillage in Articles 28 and 47.

<sup>58</sup>Roger O’Keefe, *The Protection Of Cultural Property In Armed Conflict*, 101 (Cambridge University Press, 2006).

<sup>59</sup>See generally Roger O’Keefe, *The Meaning of “Cultural Property under the 1954 Hague Convention*, 55 *Netherlands International Law Review* 26 (1999).

<sup>60</sup>DGAM, *Periodic Report on Implementation of the 1954 Hague Convention for the Protection of Cultural Property in The Event of Armed Conflict and its two (1954 and 1999) Protocols (2005–2010)* (2010).

<sup>61</sup>*Id.* at 4.

<sup>62</sup>Ali, *supra* note 14, at 353-4.

<sup>63</sup>The work of some social networks is proving crucial in coordinating cooperation, documenting damage, and denouncing the situation. See APSA, *supra* note 20, *Le patrimoine archéologique syrien en danger*, and *Eyes on Heritage*.

<sup>64</sup>See *The Syria Campaign*, *supra* note 29.

<sup>65</sup>See The 1954 Hague Convention, *supra* note 46, art. 19(1).

<sup>66</sup>See CHANNEL 4 NEWS, *Supra* note 22.

<sup>67</sup>While the 1999 Second Protocol to the 1954 Hague Convention (1999 Second Protocol) adopted in the aftermath of the Balkan War provides a definition of this concept, Syria has signed, but not ratified, this instrument



Article 4(3) directs the state, and the parties in the conflict in the case of non-international armed conflict, to put a stop to *any* form of theft or *any* act of vandalism (emphasis added). Nevertheless, Article 4(3) does not clarify if such control needs to be exercised with regard to the members of one's own armed forces or organised armed group, or if it extends to anyone perpetrating this sort of behaviour, including the local population. This detail may be crucial to measuring the degree of responsibility of each side of the conflict, in whose sight wholesale looting may be occurring.<sup>68</sup> The last two obligations of Article 4 are more straightforward: reprisals against cultural property are prohibited and the fact that a party has failed to adopt safeguarding measures does not relieve its counterparties from its obligations under the Convention.<sup>69</sup>

### 2.3.3. Under the 1972 World Heritage Convention

It is usually said that the World Heritage Convention is a peacetime treaty. One essential rule of the interpretation of treaties is that they must be understood "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of *its object and purpose*."<sup>70</sup> The thrust behind the World Heritage Convention was to build an "effective cooperative international framework"<sup>71</sup> to protect cultural (and natural) heritage from potential and/or specific threats, including those arising in wartime,<sup>72</sup> which means that it also applies during armed conflict.<sup>73</sup>

Even though Syria is party to the World Heritage Convention, appeals to stop the destruction of Syria's cultural heritage tend to focus on the 1954 Hague Convention exclusively.<sup>74</sup> This one-sided approach may be explained by the conviction that the 1954 Hague Convention represents *lex specialis* in the protection of cultural property in armed conflict.<sup>75</sup> However, as Jan Klabbers puts it, the principle of *lex specialis* comes with a number of methodological issues such as the lack of criteria to determine which treaty is the special one, and which is the general one.<sup>76</sup> These methodological issues are put into the spotlight with regard to the protection of world heritage sites in armed conflict. Although the 1954 Hague Convention is designed for the protection of cultural property *in armed conflict*, the World Heritage Convention is the only treaty dealing with *world cultural heritage*,<sup>77</sup> rendering both treaties special.

#### Footnote continued

and thus is not bound by such definition; see Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999, art. 6, Mar. 26, 1999, 2253 U.N.T.S. 212.

<sup>68</sup>On this point, Patty Gerstenblith argues that a systematic and historical reading of this article supports the view that armed forces and groups are required to control the behaviour of only their own personnel. See Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 Cardozo Pub. L. Pol'y & Ethics J. 677, 693 (2009); see also 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. 249, 309 (2006); see also Craig Forrest, *International Law and the Protection of Cultural Heritage* (Routledge, 2010), 91-2. However, in case of belligerent occupation, the obligation would extend to the members of the local population as well. See Catherine Phuong, *The Protection of Iraqi Cultural Property*, 53 INT'L & COMP. L. Q. 985, 987 (2004).

<sup>69</sup>Paragraphs 4 and 5 of article 4, 1954 Hague Convention *supra* note 46.

<sup>70</sup>VIENNA CONVENTION ON THE LAW OF TREATIES, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (emphasis added).

<sup>71</sup>Conférence Générale, *Opportunité D'établir UN Instrument International Concernant La Protection Des Monuments Et Des Sites De Valeur Universelle*, ¶ 2 (UNESCO Doc. 16C/19, Juillet 31, 1970).

<sup>72</sup>UNESCO, ETUDE PRELIMINAIRE SUR LES ASPECTS JURIDIQUE ET TECHNIQUES D'UNE REGLEMENTATION INTERNATIONALE EVENTUELLE SUR LA PROTECTION DES MONUMENT ET DES SITES DE VALEUR UNIVERSELLE, U.N. Doc. 166 EX/28 (Mar. 12, 2003), UNESCO Doc 16C/19 ANNEX ¶ 2, 54 & 79.

<sup>73</sup>Other scholars support this contention, see e.g., Guido Carducci, *The 1972 World Heritage Convention in the framework of other UNESCO conventions on cultural heritage*, in *The 1972 World Heritage Convention: A Commentary* (Francesco Francioni ed., 2008), 365; Forrest, *supra* note 68, at 392; O'Keefe, *supra* note 58, at 312.

<sup>74</sup>See e.g., Common Statement, *supra* note 5, at 2; see also UNESCO, *UNESCO Director-General condemns military presence and destruction at World Heritage Sites in Syria*, Feb. 20, 2014, available at <http://whc.unesco.org/en/news/1108/>; UNESCO, *UNESCO Director-General deplores continuing destruction of ancient Aleppo, a World Heritage Site*, Apr. 24, 2014, available at [http://www.unesco.org/new/en/media-services/single-view/news/unesco\\_director\\_general\\_deplores\\_continuing\\_destruction\\_of\\_ancient\\_aleppo\\_a\\_world\\_heritage\\_site/#.VjhRmsDn4](http://www.unesco.org/new/en/media-services/single-view/news/unesco_director_general_deplores_continuing_destruction_of_ancient_aleppo_a_world_heritage_site/#.VjhRmsDn4).

<sup>75</sup>See e.g., Caroline Ehler, *Prosecuting The Destruction Of Cultural Property In International Criminal Law: With A Case Study On The Khmer Rouge's Destruction Of Cambodia's Heritage*, 61 (Martinus Nijhoff Publishers, 2014).

<sup>76</sup>Jan Klabbers, *Beyond the Vienna Convention: Conflicting Treaty Provisions*, in *The Law Of Treaties Beyond The Vienna Convention 199* (Enzo Cannizzaro ed., 2011).

<sup>77</sup>The World Heritage Convention also deals with world *natural* heritage. However, these two categories traditionally benefit from different regimes above all in armed conflict, see e.g., Britta Sjöstedt, *The Role of Multilateral Environmental Agreements in Armed Conflict: 'Green-keeping' in Virunga Park. Applying the UNESCO World Heritage*

The World Heritage Convention defines “cultural heritage” roughly as monuments, groups of buildings and sites of outstanding universal value.<sup>78</sup> This threshold of importance is higher than that required for cultural property (i.e., great importance to the cultural heritage of every nation), for which all Syrian world cultural heritage is by default entitled, at least, to the protection of the 1954 Hague Convention. Nevertheless, the World Heritage Convention also contains provisions on obligations during armed conflict. Under Article 6(3), states must refrain from taking any deliberate measures which might damage, directly or indirectly, the world cultural heritage situated on the territory of another state party.

In the context of armed conflict, it is submitted that the prohibition enshrined in Article 6(3) of the Convention encompasses, at least, four different types of measures, namely: (i) direct attacks; (ii) use of cultural sites that might lead to their direct harm; (iii) attacks aimed at another objective but that might harm those sites indirectly; (iv) use of the surroundings of cultural heritage sites that may cause them indirect damage. In Syria, however, the harm done to world cultural heritage has occurred within its own borders. Thus, attention must be paid primarily to Article 4, according to which:

Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage . . . *situated on its territory*, belongs primarily to that State.<sup>79</sup>

Article 4 does not elaborate on the meaning of “protection” or “conservation.” According to the rules of the interpretation of international law, when a treaty provision leaves its meaning open to the extent that the choice renders it effective or ineffective, “it is reasonable to opt for a meaningful rather than for a meaningless interpretation.”<sup>80</sup> In addition, a trend exists in international law that tries to level the regimes of protection in international and non-international armed conflicts.<sup>81</sup> Therefore, the most appropriate way to render the obligation of “protection” and “conservation” of world cultural heritage effective during non-international armed conflict is to interpret Article 4 by analogy with Article 6(3). This means that, just as in international armed conflicts, a ban exists regarding at least the four types of measures mentioned above when they are deliberate, a concept that, just like the imperative military necessity in the 1954 Hague Convention, is left undefined.

It is important to note that Articles 6(3) and 4 of the World Heritage Convention do not reduce its scope of protection to *listed* world heritage sites. As a result, there is a strong presumption that the obligations of these provisions also apply to the twelve Syrian sites on the Tentative List. This protection could also be extended to other monuments, groups of buildings or sites when it could be successfully argued that they are of outstanding universal value.

### 3. PROSPECTS OF CRIMINAL ACCOUNTABILITY AND JUSTICE FOR VIOLATIONS AGAINST SYRIAN WORLD CULTURAL HERITAGE

#### 3.1. Pursuant to the 1954 Hague Convention

The wish to introduce mandatory punishment for individuals damaging, destroying or plundering cultural property was a key motivation<sup>82</sup> behind the 1954 Hague Convention:

. . . the High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary

*Footnote continued*

Convention in the Armed Conflict of the Democratic Republic of the Congo, 82 *Nordic Journal Of International Law* 129 (2013).

<sup>78</sup>See *The World Heritage Convention*, *supra* note 4, art. 1; see also *THE OPERATIONAL GUIDELINES FOR THE IMPLEMENTATION OF THE WORLD HERITAGE CONVENTION*, ¶ 49–53 (UNESCO Doc. WHC 13/01, July 2013), available at <http://whc.unesco.org/archive/opguide13-en.pdf>

<sup>79</sup>Article 4, *World Heritage Convention supra* note 4.

<sup>80</sup>Carlo Focarelli, *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*, 21 *European Journal Of International Law* 125, 130 (2010).

<sup>81</sup>Theodor Meron, *The Humanization of Humanitarian Law*, 94 *AM. J. INT'L L.* 239, 261 (2000). The 1999 Second Protocol and the Statute of the International Criminal Court attest to this trend in the realm of cultural property as both award cultural property the same level of protection in both international and non-international armed conflicts.

<sup>82</sup>Roger O'Keefe, *Protection of Cultural Property under International Criminal Law*, 11 *Melbourne Journal Of International Law* 339, 359 (2010); see also Jiri Toman, *THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT* (Dartmouth, UNESCO 1996), at 292.

sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.<sup>83</sup>

This section shows that, due to the poor implementation of this provision and the doubts surrounding its scope and interpretation, the prospects of holding someone accountable for acts against world cultural heritage in the conflict in Syria pursuant to the 1954 Hague Convention are far from realisable.

There is a generalised lack of implementation of the above article into the domestic legal orders of state parties to the 1954 Hague Convention.<sup>84</sup> Unfortunately, Syria falls into this pattern of passivity. According to the last implementation report, despite the reform that its criminal laws underwent in 1996, the 1949 Syrian Criminal Code lacks criminal sanctions in this regard.<sup>85</sup> Syria is thus not ready to prosecute suspected perpetrators on the basis of the 1954 Hague Convention.

There could be the possibility of subjecting suspects to trial in the domestic fora of foreign state parties pursuant to the principle of universal criminal jurisdiction, a principle that allows states to bring criminal proceedings against individuals regardless of the nationality of the suspect or the territory where he or she allegedly committed the crime. Indeed, the 1954 Hague Convention allows the trial of persons “of whatever nationality” that have committed a violation of the Convention.<sup>86</sup> However, as Roger O’Keefe points out, it is open to question whether this amounts to establishing universal criminal jurisdiction.<sup>87</sup> This is because, although the “provision expressly states that such offences are to be punishable whatever the nationality of the offender, [it] does not advance . . . whether this includes offences committed by non-nationals *outside* the territory of the forum state.”<sup>88</sup> Based on the preparatory works of the Convention, O’Keefe argues that the provision allows but does not oblige a party to exercise universal jurisdiction over its breaches.<sup>89</sup> The lack of the mandatory establishment of universal jurisdiction over offences of the Convention affects the chances of prosecuting suspected perpetrators in any country other than Syria.

Even if the above hurdles did not exist, the fact that the situation in Syria amounts to a non-international armed conflict brings another interpretative issue. This is because in non-international armed conflicts, parties are only obliged to apply the obligations of Article 4, whereas it is in Article 28 that the 1954 Hague Convention spells out the obligation to prosecute and impose criminal sanctions.<sup>90</sup> In O’Keefe’s view, the better interpretation is to regard Article 28 as a necessary secondary rule attached to the primary obligation of Article 4.<sup>91</sup> All in all, however, the overall lack of implementation coupled with that of clarity makes Article 28 a “dead letter” for current Syrian purposes.

### 3.2. Under the 1972 World Heritage Convention

The attempts to criminalise breaches against world cultural heritage gained momentum with the destruction of the Buddhas of Bamiyan in 2001.<sup>92</sup> This act was labelled a “crime against culture,”<sup>93</sup> and later gave rise to the notion of “crimes against the common heritage of humanity.”<sup>94</sup>

<sup>83</sup>Article 28 of the 1954 Hague Convention *supra* note 46.

<sup>84</sup>See UNESCO, *Report on the implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two 1954 and 1999 Protocols, Report on the Activities from 1995 to 2004*, 20 (Paris: UNESCO Doc. CLT-2005/WS/6), available at <http://unesdoc.unesco.org/images/0014/001407/140792e.pdf>.

<sup>85</sup>*Id* at 4.

<sup>86</sup>See article 28, 1954 Hague Convention *supra* note 46.

<sup>87</sup>O’Keefe, *supra* note 82, at 360.

<sup>88</sup>*Id.* at 361 (emphasis added).

<sup>89</sup>*Id.* 362; see M. Cherif Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 Syracuse J. INT’L L. & COM. 281, 312 (1983) (criticising back then that the universality principle has not been recognised with regard to crimes concerning cultural property); however, the 1996 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (1996) prepared by the International Law Commission foresees universal criminal jurisdiction for crimes concerning cultural objects. See DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND, arts. 8&20(e)(4), 51 U.N. GAOR, Supp. No. 10, U.N. Doc. A/CN.4/L.532, at 14 (July 26, 1996).

<sup>90</sup>See the 1954 Hague Convention, *supra* note 46, art. 19(1); see O’Keefe, *supra* note 82, at 361-362; see also REPORT OF THE GROUP OF EXPERTS FOR CAMBODIA ESTABLISHED PURSUANT TO GENERAL ASSEMBLY RESOLUTION 52/135, ¶ 76, U.N. Doc.52/135 (1999).

<sup>91</sup>See O’Keefe, *supra* note 82, at 361–362.

<sup>92</sup>See generally Francesco Francioni & Federico Lenzerini, *supra* note 10.

<sup>93</sup>See Bandarin, *supra* note 10.

<sup>94</sup>See generally UNESCO Doc., WHC-01/CONF.208/23.

Francesco Bandarin, then Director of the World Heritage Centre, commented at the time: “[t]his is a far-reaching concept, which firmly places cultural and natural heritage within the reach of international law, and has implications that go beyond Bamyán.”<sup>95</sup> In fact, although the World Heritage Convention lacks any explicit reference to individual criminal responsibility, or any secondary norms for that matter, the then UNESCO Director-General, Koichiro Matsuura affirmed that the destruction of the Buddhas granted an examination of “all the means available to prevent and punish crimes against cultural properties within other existing conventions.”<sup>96</sup> Those responsible for the implementation of the World Heritage Convention took the hint. The Chair of the World Heritage Committee declared that such a tragedy showed that “the application of the World Heritage Convention need[ed] to be reviewed to give it more ‘teeth’ to deal with wanton destruction of World Heritage.”<sup>97</sup>

The general outcry over the loss of the Buddhas led to the adoption of the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (2003 UNESCO Declaration)<sup>98</sup> which contains the following provision:

States should take all appropriate measures, in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed, acts of intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization.<sup>99</sup>

This confirms that individual criminal responsibility represents an alternative to deal with the intentional destruction of world heritage sites protected under the World Heritage Convention. Although declarations are “resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected,”<sup>100</sup> nothing indicates that Syria or any other parties bound by the World Heritage Convention have debated or introduced these offences into their domestic legal orders. Perhaps the 2003 UNESCO Declaration should have taken advantage of the rare occasion which triggered its adoption and used it as an opportunity to specify in solemn manner, not that states had an obligation to introduce criminal sanctions (that already existed), but how this obligation should be implemented. For example, given that its preamble starts by saying that the destruction of the Buddhas “affected the international community as a whole,” Article VII could have proposed the establishment of universal criminal jurisdiction and an obligation to prosecute or extradite suspects of acts of destruction. Section 4 proposes to re-appraise the idea of crimes against common cultural heritage along these lines.

### 3.3. Domestic Courts – the Syrian Antiquities Law

Under the Syrian Antiquities Law, all offences carry imprisonment plus additional fines, for which it would be for criminal (and perhaps military) courts<sup>101</sup> to hear cases concerning Syrian world heritage sites.<sup>102</sup> But to what extent can the Syrian Antiquities Law and its courts express the fact and the degree of the wrongdoing,<sup>103</sup> and to what extent can they deliver justice?

Removing “ruins, stones, or soil from an archaeological place without permission” is punishable with one month to two years of imprisonment and additional fines under Article 62(d). This provision would encompass looting and thus a major source of the deterioration of Syrian world heritage.

<sup>95</sup>See Bandarin, *supra* note 10, at 1.

<sup>96</sup>*Id.*, at 1–2.

<sup>97</sup>Interview with Peter King, Chair of the World Heritage Committee, WORLD HERITAGE NEWSLETTER (UNESCO WORLD HERITAGE CENTRE), MAY-JUN. 2001, at 2, available at [http://whc.unesco.org/documents/publi\\_news\\_30\\_en.pdf](http://whc.unesco.org/documents/publi_news_30_en.pdf)

<sup>98</sup>UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, Oct. 17, 2003.

<sup>99</sup>*Id.* article VII.

<sup>100</sup>Report of the Commission on Human Rights, United Nations document E/3616/Rev. I, ¶ 105, 18<sup>th</sup> session, Economic and Social Council (19 March–14 April 1962) United Nations, New York.

<sup>101</sup>The Syrian Antiquities Law also provides that the person responsible for the offence against a cultural object must return it or, if it has been destroyed or it has disappeared, s/he must pay compensation in addition to the fine. The rules of restitution and compensation would be presumably enforced by a civil court (*see* Articles 65 and 68).

<sup>102</sup>*See generally* Chapter 5 of the Syrian Antiquities Law *supra* note 32.

<sup>103</sup>Addressing this question with regard to the ICTY and ICC Statutes, *see generally* Micaela Frulli, *The Criminalization of Offences Against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 European Journal Of International Law 203 (2010); *see also*, Andrew Ashworth, *Principles of Criminal Law* (5th ed., Oxford University Press 2006), 20.

Damage and destruction is prohibited in Article 7 (mentioned earlier) and sanctioned with five to ten years of imprisonment plus fines (Article 58(a)). Article 7 does not contemplate any exception for which the Syrian Antiquities Law espouses, in principle, a stricter standard than those of international law, where the damage and destruction of cultural property may be justified, for example, by imperative military necessity.

Violations of Article 26, which, as mentioned above, bans building military facilities within 500 meters of registered immovable archeological and historical properties, entails one to three years of imprisonment plus fines (Article 59(a)). However, it must be noted that this provision uses the term “building” a military facility, rather than “placing.” As such, it is not clear if this would encompass temporary installations such as garrison stations and military camps like those on the site of Palmyra, “*qui est devenue une base militaire de l’armée du régime*.”<sup>104</sup>

Related types of conduct, such as the parking of tanks and rocket launchers inside and around the Old Citadel of Aleppo and Palmyra<sup>105</sup> would fall within Article 62(e), which punishes with one to two years of imprisonment the use of “registered historical buildings for purposes different from those *for which they were intended*” (emphasis added). It is expected that the court called to apply this provision draws a distinction between the original and current purposes since, as Ali highlights, historical places such as *Crac des Chevaliers*, the Citadel of Aleppo and Palmyra have resumed since 2011 the strategic military role they played in medieval times.<sup>106</sup>

In sum, although important interpretative challenges remain open, in principle, Syrian domestic courts would be able to prosecute the majority of, if not all, conduct that has directly endangered Syrian world heritage (i.e., the fact of the wrongdoing), even though not *qua* world heritage (of outstanding universal value)<sup>107</sup> but as any other antiquity. The higher degree of the gravity of the crime against world cultural heritage is not reflected in the definition of the crime either and, sometimes, would not be able to be reflected in its punishment. For example, the just mentioned Article 58(a), which foresees five to ten years of imprisonment, requires imposing the maximum penalty when the damaged or destroyed antiquity belongs to the state, which is almost always. Hence the punishment concerning a local mosque would be the same as that concerning *Crac des Chevaliers*, or Aleppo’s *souq*.

An examination of who would stand trial for acts against world heritage is relevant to know the extent to which Syrian courts would be able to deliver justice in general terms. The Syrian Antiquities Law reads:

A penalty equal to that of the perpetrator is given to anyone whose legal responsibility is to protect antiquities or control the crimes mentioned in this Law, if they knew or were told of such crimes and failed to take the appropriate measures in order to control them.<sup>108</sup>

Those responsible for protecting antiquities under the Syrian Antiquities Law are the members of the DGAM (Article 2). While the DGAM has shown commitment since the beginning of the armed conflict to report on the situation and carry out its tasks within the limits of the possible,<sup>109</sup> its neutrality has been called into question by some: “they have revealed only partial information in agreement with the regime’s propaganda offensive.”<sup>110</sup> Ali further points out, for example, that they have not requested the Syrian army to ensure the protection of sites such as Apamea or Palmyra, and that some of the statements where the DGAM reassured that Syrian museums were well protected have proven untrue.<sup>111</sup> But this is all open to question.

<sup>104</sup>“That has become a military base of the regime” (own translation). Interview with Cheikhmous Ali, (Mar. 26, 2014), available at <http://www.lesclesdumoyenorient.com/Entretien-avec-Cheikhmous-Ali-Le.html>.

<sup>105</sup>*Id.* at 18; see also Ali *supra* note 14 at 358.

<sup>106</sup>Ali, *supra* note 104.

<sup>107</sup>See article 1, World Heritage Convention *supra* note 4.

<sup>108</sup>Article 63, Syrian Antiquities Law *supra* note 32.

<sup>109</sup>See *e.g.*, UNESCO Regional Training, *supra* note 15; Recently, the DGAM further issued an international appeal for international co-operation given “the increasing magnitude of the danger threatening the Syrian cultural heritage was beyond [its] capabilities to contain alone.” See Maamoun AbdulKarim, *Syrian Cultural Heritage. Three and a Half Years of Suffering* (Damascus: DGAM, Jul. 21, 2014) 1, available at [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Statement\\_DGAM\\_July\\_2014\\_01.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Statement_DGAM_July_2014_01.pdf).

<sup>110</sup>Ali, *supra* note 14, at 358; see also Salam Al Quntar, *Syrian Cultural Property in the Crossfire: Reality and Effectiveness of Protection Efforts*, 1 Journal Of Eastern Mediterranean Archaeology And Heritage Studies 348, 350 (2014).

<sup>111</sup>Ali, *supra* note 14, at 358–359.

The doctrine of command responsibility, according to which a person is not relieved from criminal responsibility when he knew or had reason to know that his *de jure* or *de facto* subordinates had committed crimes and nevertheless failed to “take the necessary and reasonable measures to prevent such acts or to punish the perpetrators,”<sup>112</sup> could and should also be applicable in the context of Article 63.<sup>113</sup> This would bring into the picture higher-ranking officials in the chain of command of both the Syrian army and the rebel militias.

An important weakness should be mentioned. The Syrian criminal courts would only be able to return to their normal function after the conflict is over and when an authority is established or reinstated into power. As long as these cases are handled on Syrian territory by Syrian nationals, there is room to suspect that “victor’s justice” would prevail and a large number of violations against world heritage sites would thus be overlooked.<sup>114</sup>

### 3.4. Syrian Extraordinary Tribunal – the Chautauqua Blueprint

Given the unfeasibility of having the Syrian case brought before the International Criminal Court (ICC),<sup>115</sup> a group of international experts began discussing possible alternatives, which led to the preparation of a “discussion draft of a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes.”<sup>116</sup> The final document was signed on 27 August 2013 and is known as the “Chautauqua Blueprint.” The Syrian Extraordinary Tribunal would complement the work of domestic criminal courts by focusing on those most responsible for atrocity crimes.

Although the Tribunal intends to prosecute perpetrators on all sides of the conflict when the political situation permits, given that it would sit in Damascus and its judges would be predominantly of Syrian nationality,<sup>117</sup> the degree to which it could deliver justice may be called into question in the same terms as the Syrian domestic courts. Cases may only be brought against the defeated and “the involvement of victors in the prosecution . . . could result in biased and unfair trials.”<sup>118</sup>

Turning to its capacity of expressing the fact of the wrongdoing and its degree, the potential Tribunal would have jurisdiction over war crimes consisting of:

Intentionally directing attacks against buildings [that are] dedicated to religion education, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.<sup>119</sup>

This article is unsatisfactory on three grounds outlined below. It must be noted that some of such criticisms have already been voiced by Micaela Frulli insofar as the Chautauqua Blueprint reproduces word-by-word the crime against cultural objects of the ICC Statute.<sup>120</sup>

First, the definitions and list of objects the Blueprint comprises in this war crime is far behind any current concept of cultural property, let alone that of world heritage sites.<sup>121</sup> As Frulli notes, this list of objects regresses to the provisions of the 1907 IV Hague Regulations, as they include

<sup>112</sup>See *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶ 331 & 343 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) [hereinafter “The Celebici Case”].

<sup>113</sup>Guénaël Mettraux, *The Law of Command Responsibility* 98 (Oxford University Press, 2009). While traditionally connected to acts defined as war crimes, “the principle of command responsibility applies, in principle, and has been made to apply, to crimes such as genocide or crimes against humanity which do not require any linkage with an armed conflict.”

<sup>114</sup>See Annika Jones, *Seeking International Criminal Justice in Syria*, 89 *International Law Studies* 802, 813 (2013), with regard to the potential Internationalised Tribunal on the grounds that victors would be involved in the prosecution of the defeated.

<sup>115</sup>Syria is not party to the ICC Statute, the Security Council Draft Resolution, U.N. Doc. S/2014/348 of 22 May 2014 which sought to defer the situation in Syria to the ICC was vetoed by Russia and China. Alternative modes for the ICC to gain jurisdiction over Syria also seem unlikely at the time of writing, see Rome Statute of the International Criminal Court, art. 12, July 17, 1993, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

<sup>116</sup>*Chautauqua Blueprint*, *supra* note 9.

<sup>117</sup>*Id.* at 1.

<sup>118</sup>Jones, *supra* note 114, at 813.

<sup>119</sup>The text corresponds to Article 20(d)(4) - applicable in non-international armed conflicts, and also to Article 20(b)(10) - applicable in international armed conflicts of the Chautauqua Blueprint *supra* note 9.

<sup>120</sup>Frulli, *supra* note 103, at 207–211 (the author rightly chides the ICC Statute for following what she calls a *civilian-use* approach, as opposed to a more specific *cultural-value* approach which would better reflect the gravity of the crime): see also PETROVIC, *supra* note 56, at 211–230 (examining the ICTY’s approach to Cultural Property).

<sup>121</sup>The definition of “cultural property” enshrined in the 1954 Hague Convention denotes objects of importance to every nation, see *supra* notes 46 and 59; and world cultural heritage needs to be of “outstanding universal value” to qualify as such, see article 1 of the World Heritage Convention, *supra* note 4.

“historic monuments together with hospitals and places where the sick and wounded are collected.”<sup>122</sup> This also means that the list does not require a threshold of importance, and thereby it covers every historic monument and place of worship regardless of whether they are important for humanity, a nation, a city, or solely a local community. As mentioned in their analysis, the 1907 IV Hague Regulations were indeed deemed inadequate by the end of the Second World War for being over-inclusive. This issue was tackled to some extent in *Jokic*,<sup>123</sup> a case before the ICTY, which also involved the shelling of the Old Town of Dubrovnik. The Trial Chamber noted that the Old Town’s belonging to the World Heritage List granted it a special status that had “been taken into consideration in the definition and evaluation of the gravity of the crime.”<sup>124</sup> Since in the practice of the ICTY, “sentences must reflect the inherent gravity of the *totality* of the criminal conduct of the accused,”<sup>125</sup> it is difficult to determine the extent to which the special legal status of this world heritage site increased the defendant’s conviction.

Second, while the gist of all cultural property regulation is that these objects deserve a treatment sitting over and above that of civilian objects,<sup>126</sup> the Chautauqua Blueprint fails to recognise such a difference. The general rule for the protection of civilian property is that it may not be attacked unless it has been turned into a military objective.<sup>127</sup> The same exception applies under the Chautauqua Blueprint for historic monuments, places of worship and the like: directing attacks against cultural buildings is not a war crime if they are military objectives. Hence, the bombardment of *Crac des Chevaliers* and its subsequent partial destruction would go unpunished inasmuch as it is proved that Syrian rebels were housed inside and the attack provided a definite military advantage to the Syrian army.

Third, and connected to the previous point, the Chautauqua Blueprint does not encompass the full range of acts that may be otherwise regarded as a violation against cultural property, let alone world cultural heritage. For one thing, the Blueprint does not cover acts of looting against cultural objects<sup>128</sup> and, judging by the images that show sites such as Apamea before and after the conflict just to name one example,<sup>129</sup> this is a significant omission. In addition, the *use* of cultural institutions for military purposes is not included in the definition of the crime. Not criminalising “the conduct of those who transformed the very same property into a military objective,” is an important blind spot.<sup>130</sup> Indeed, this way, impunity under the Chautauqua Blueprint may come full circle: the Syrian rebels who allegedly occupied *Crac des Chevaliers* and turned it into a military objective cannot be held accountable, nor can the members of the Syrian army who reportedly bombed the world heritage site on the basis that it had been turned into a military objective.

In conclusion, the coupling of a would-be Extraordinary Syrian Tribunal and the Syrian domestic courts promises a multi-layered approach to seeking justice, but not a comprehensive one. If the suspicion of victor’s justice materialises, a good deal of the violations committed would be overlooked. Both the Syrian Antiquities Law and the Chautauqua Blueprint, being blind to the existence of world cultural heritage, are incapable of expressing the gravity embedded in acts against it. The capacity to express the fact of the wrongdoing is further compromised under the Chautauqua Blueprint, since looting and the use of cultural heritage for military purposes is not part of the war crime; something particularly regrettable in light of the fact that the Syrian Extraordinary Tribunal would be expected to hear high-profile cases such as those involving world heritage. This also means that Syrian ordinary and extraordinary tribunals would work on an asymmetrical basis: low-level perpetrators would be prosecuted for a wider range of crimes in the

<sup>122</sup>Frulli, *supra* note 103, at 211.

<sup>123</sup>See *Prosecutor v. Jokic*, Case No. IT-01-42/1-S, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Mar. 18 2004).

<sup>124</sup>*Id.* at ¶ 67.

<sup>125</sup>*Strugar*, *supra* note 52 at ¶ 459 (emphasis added).

<sup>126</sup>TOMAN, *supra* note 82, at 57.

<sup>127</sup>See PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), art. 52(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; See Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I Rules Ch. 2* (Cambridge University Press, 2005); see also Chautauqua Blueprint, *supra* note 9, art. 20(b)(2).

<sup>128</sup>Instead, wholesale looting may in Syria fall under more generic offences, such as “pillaging a town or a place” in Article 20(d)(5) of the Chautauqua Blueprint, and “[d]estroying or seizing the property of an adversary, unless such destruction or seizure be imperatively demanded by the necessities of the conflict” in Article 20(d)(12). See Chautauqua Blueprint, *supra* note 9.

<sup>129</sup>Casana & Panahipour, *supra* note 18, at 131-2.

<sup>130</sup>Frulli, *supra* note 103, at 215.

Syrian domestic courts in comparison to high-level perpetrators standing trial at the Extraordinary Tribunal pursuant to the Chatauqua Blueprint.

#### 4. THE CRIME AGAINST COMMON CULTURAL HERITAGE: A RE-APPRAISAL

The increase in the prospects of criminal accountability has been a driving force behind the adoption of international laws for the protection of cultural heritage.<sup>131</sup> Among the various cultural property international treaties, the World Heritage Convention stands out for having recognised the exceptional category of world cultural heritage, and for having made the obligation to protect world cultural heritage an almost-universal obligation via its 191 state parties.<sup>132</sup> As argued by Francesco Francioni and Federico Lenzerini,<sup>133</sup> and confirmed by the 2003 UNESCO Declaration, failure to protect this heritage constitutes a violation of international law and should entail the criminal responsibility of individuals. In line with its unique value, the international community likewise distinguishes between damage caused to world heritage sites in Syria from the rest of its cultural objects, as illustrated in the introduction. Yet, mapping the different venues that seek criminal accountability for these acts in the Syrian context reveals that crimes concerning cultural objects may only be prosecuted under the Syrian Antiquities Law and the Chatauqua Blueprint; and none of them is capable of either fully expressing the fact and degree of the wrongdoing, or rendering justice broadly understood.

Thus, a gap exists concerning criminal accountability for acts leading to the damage and destruction of world heritage sites and similar cultural heritage of great importance to humanity. As mentioned earlier, this was first noticed after the destruction of the Buddhas of Bamiyan, a kind of act that was unprecedented in 2001. Now that we live in a period when danger to world cultural heritage is deliberate and systematic, the gap not only exists, it has also grown wider. Therefore, the idea of crimes against common cultural heritage should be re-introduced.<sup>134</sup>

Although the 2003 UNESCO Declaration helped to instil the notion of such crime, any future debate has to move beyond its parameters. Indeed, the 2003 UNESCO Declaration presented important limitations in terms of both substance and form. The Declaration constituted, as is usually the case with international cultural heritage instruments, an *ad hoc* reaction to a particular event. As a matter of substance, its content was reduced to the specificities of the Bamiyan episode and the offence enshrined in its Article VII is incapable of encompassing the actual range of violations against world cultural heritage. For example, the *actus reus* of “acts of intentional destruction” excludes the unlawful use of cultural heritage, and would also seem to exclude acts intended to cause “damage,”<sup>135</sup> such as the use of stone statues in al-Qatora as training targets or occasional looting. Concerning the *mens rea*, Article II(2) of the 2003 UNESCO Declaration states that “intentional destruction” corresponds to an “act intended to destroy.” Hence, Article VII would not appear to cover destruction occasioned recklessly or indirectly in the course of hostilities. As a matter of form, the 2003 UNESCO Declaration phrases as a recommendation what was already obligatory under Article 28 of the 1954 Hague Convention.<sup>136</sup> Given that international criminal law

<sup>131</sup>One of the first documents presented at the International Conferences on the Drafting of the 1954 Hague Convention was by Georges Berlia entitled, *Report on the International Protection of Cultural Property, by Penal Measures, in the Event of Armed Conflict, Conflict* (UNESCO Doc 5 C/PRG/6 Annex I, Mar. 8, 1950); see O’Keefe, *supra* note 82, at 359; see also e.g., Additional Protocol I *supra* note 127, art. 85(4)(d) applicable in international armed conflicts; see 1996 Draft Code of Crimes against the Peace and Security of Mankind, *supra* note 89, art. 20(e)(iv); and (not applicable to Syria) 1999 Second Protocol, *supra* note 67, art. 15–16.

<sup>132</sup>The only States not parties to the World Heritage Convention, as of October 2014 are Somalia, Tuvalu, East Timor, the Republic of Nauru, Lichtenstein and South Sudan. See States Parties: Ratification Status, available at <http://whc.unesco.org/en/statesparties/>.

<sup>133</sup>Francioni & Lenzerini, *supra* note 10, at 645.

<sup>134</sup>I prefer the expression “crimes against common cultural heritage” as opposed to “crimes against the common heritage of humanity” because the latter may lead to confusion with the concept of common heritage of mankind; see generally, Kemal Baslar, *The Concept of The Common Heritage of Mankind in International Law* (Martinus Nijhoff, 1998).

<sup>135</sup>The concept of “intentional destruction” in the sense of the 2003 UNESCO Declaration comprises acts aimed at destroying cultural heritage “in whole or in part”, see 2003 UNESCO Declaration, *supra* note 98, art. II(2).

<sup>136</sup>This criticism has been raised by Lyndell V. Prott, *UNESCO International Framework for the Protection of the Cultural Heritage, in Cultural Heritage Issues: The Legacy Of Conquest, Colonization And Commerce 278–279* (James A.R. Nafziger & Ann M. Nicgorski eds., 2009); and by Federico Lenzerini, *The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage: One Step Forward and Two Steps Back*, 13 *The Italian Yearbook of International Law* 141 (2003).



was more developed by 2003 than in 1954, the Declaration could have instead used Article VII to include explicit guidelines on how to implement such an obligation.

For the sake of triggering the debate, a way to effectively establish crimes against common cultural heritage is briefly suggested here: the World Heritage Committee, the body in charge of implementing the World Heritage Convention, could include this matter on its agenda, perhaps following a previous discussion by the UNESCO General Conference, and eventually adopt a more comprehensive definition of the crime avoiding the loopholes mentioned above. It could also make clear that, as Francioni and Lenzerini pointed out, this offence should be prosecuted on the basis of universal criminal jurisdiction.<sup>137</sup> The decisions of the World Heritage Committee are reflected in the Operational Guidelines for the Implementation of the World Heritage Convention (Operational Guidelines) which, despite not being mentioned in the World Heritage Convention, state parties accept as binding.<sup>138</sup> Basing the crime against common cultural heritage in the World Heritage Convention would allow its prosecution irrespective of whether it is committed during wartime or peacetime, and introducing it through the Operational Guidelines would offer some guarantees that state parties incorporate the crime into their domestic criminal systems.

## CONCLUSION

International criminal law is typically regarded as being in its infancy. However, the fact that this is common knowledge should not deter the exercise of identifying and assessing the specific gaps that exist between international criminal law and conventional obligations. This article has shown that the legal bases for prosecuting individuals for violations of the 1954 Hague Convention and the World Heritage Convention are largely absent. Those responsible may be prosecuted under the Syrian Antiquities Law, a law that was presumably approved independently of those conventions and hence present a number of caveats explained above. If the Chautauqua Blueprint is successful, it would turn a blind eye to three major causes of damage (*viz.* looting, use for military purposes, attacks against sites that constitute military objectives) allowing those behind this vicious circle of violations to “walk away.”

This is especially frustrating if one takes into consideration that the driving force behind the adoption of conventional laws for the protection of cultural property has mostly been motivated by a desire to hold individuals accountable. The accountability gap shown in the case of Syria should serve those involved in the implementation of cultural heritage laws (e.g., UNESCO, the World Heritage Committee at the international level) as a warning that the 2003 UNESCO Declaration, or any other instrument before that, did not manage to have consequences for Bamiyan or beyond. Although this article focused on the case of Syria, one may also be able to identify a “Bamiyanisation” phenomenon, that is, a wave of iconoclasm spanning North Africa and the Arab region. This should provide another, and hopefully the last *momentum* to fully develop and implement the crime against common cultural heritage that so far only exists at the conceptual level.

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<sup>137</sup>Francioni & Lenzerini, *supra* note 10, at 646. A precedent, although not binding for Syria, exists in this regard. Offences against cultural property under enhanced protection give rise to universal criminal jurisdiction under the 1999 Second Protocol (Articles 15-6). However, while this category is practically the same as that of world cultural heritage, there are only ten listed properties on the List of Cultural Property under Enhanced Protection in comparison to the 779 on the World Heritage List even though *all* parties to the 1999 Second Protocol are also parties to the World Heritage Convention; see Committee For The Protection Of Cultural Property In The Event Of Armed Conflict, *Item 8 Of The Provisional Agenda: Synergies Between The Second Protocol To The Hague Convention And Other Relevant Unesco Instruments And Programmes* (Paris: UNESCO Doc. CLT-10/CONF/204/4, May 14, 2010) 4.

<sup>138</sup>Peter Strasser, *Putting Reform Into Action - Thirty Years of the World Heritage Convention: How to Reform a Convention without Changing its Regulations*, 11 International Journal Of Cultural Property 215, 246 (2002).