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Destruction of Cultural Heritage as a Violation of Human Rights: Application of the Alien Tort Statute

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DESTRUCTION OF CULTURAL HERITAGE AS A VIOLATION OF HUMAN RIGHTS: APPLICATION OF THE ALIEN TORT STATUTE

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ABSTRACT

In recent years, armed conflicts around the world have occasioned widespread destruction of cultural heritage sites. From the demolition of Palmyra in the Syrian Arab Republic to the destruction of Sufri Shrines in Mali, the intentional despoliation of these important cultural heritage sites is not only an uncontroverted violation of international law but a form of cultural genocide. The destruction of cultural heritage profoundly impacts citizenry on a local, national, and global level. Cultural heritage is an expression of fundamental and universally recognized human rights, including rights to freedom of expression, freedom of thought, freedom of conscience and religion, and freedom of culture. Despite the importance of this expression, suing the perpetrators of these wanton attacks in U.S. courts is extraordinarily difficult, if not impossible. While many plaintiffs have successfully stated a claim under the Alien Tort Statute for violation of the law of nations, involving personal injury or death suffered by a foreign plaintiff, the destruction of property has consistently failed to meet the stringent legal thresholds imposed by the United States Supreme Court.

This Article reviews the evolving law pertaining to the Alien Tort Statute ("ATS") and the challenges posed by its application to torts against cultural heritage. In light of recent precedent, this

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paper sets forth a bold proposal: Under existing international law, the destruction of cultural heritage should qualify as a violation of a norm of the law of nations and thus fall under the penumbra of the Alien Tort Statute. A discussion of the value of cultural heritage is particularly important as the United States grapples with the divisive conversation over the destruction of confederate monuments. Although the concept of invoking "universal jurisdiction" is controversial in principle and in practice, this avenue is necessary to effectively redress the harms to individuals and cultural groups caused by the destruction of heritage sites, and in doing so holds accountable those who commit these crimes against humanity.

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I. INTRODUCTION

> Why do we feel more pain looking at the image of the destroyed bridge than the image of massacred people? . . . Perhaps because we see our own mortality in the collapse of the bridge. We expect people to die; we count on our lives to end. The destruction of a monument to civilisation is something else. The bridge in all its beauty and grace was built to outlive us; it was an attempt to grasp eternity. . . . A dead woman is one of us—but the bridge is all of us forever.
>
> Croatian writer Slavenka Drakuliç[1]

Over the course of 5,000 years, some 14,000 wars have percolated history, resulting in, among other human catastrophes, the destruction of works of art as well as important cultural and archeological sites.[2] There are no statistics as to how much cultural heritage has been destroyed within these 5,000 years.[3] The author of the book *The Museum of Lost Art* surmises that "more masterpieces than all of the world's museums combined" have been destroyed.[4]

Throughout history, the destruction of cultural heritage was treated as "an inevitable consequence of war."[5] It served as a form of overt oppression and aggression—a tool used by an adversary to eradicate another people's culture, identity, religion, and history. Over the last decade, the world has had occasion to idly watch the destruction of cultural heritage in times of both peace and armed conflict. The occupation of northern Mali by Al-Qaida-linked and Taureg militants resulted in the decimation of a vast number of historical, cultural, and religious sites and objects.[6] Firebombs in Djerba, a Jewish neighborhood

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1. ROBERT BEVAN, THE DESTRUCTION OF MEMORY: ARCHITECTURE AT WAR 40 (2d. expanded ed. 2016).

2. JIŘÍ TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT xi–xii (1996) (discussing the historical development and providing contemporary commentary on the rules concerning the protection of cultural heritage).

3. Throughout this Article, the term "cultural heritage" is used as opposed to "cultural property." The term "cultural heritage" is all-encompassing and includes tangible culture—including buildings, monuments, books, artworks, artifacts, cultural objects etc., intangible culture—including language, folklore, traditions, dances, and knowledge, and natural heritage—including important natural sites, landscapes, biodiversity, fauna, and ecosystems. Lyndel V. Prott & Patrick J. O'Keefe, *"Cultural Heritage" or "Cultural Property,"* 1 INT'L J. CULTURAL PROP. 307, 307–08 (1992).

4. NOAH CHARNEY, THE MUSEUM OF LOST ART 7 (2018).

5. TOMAN, *supra* note 2, at 3.

6. Omar Sacirbey, *Timbuktu Artifacts Destroyed in Northern Mali Fighting*, WASH. POST (June 11, 2013), https://www.washingtonpost.com/national/on-faith/timbuktu-

in Tunisia, almost damaged the historic Ghriba Synagogue.[7] In Egypt, a series of deliberate fires devastated a Coptic church and various religious institutions.[8] In Libya, Islamic State of Iraq and Syria ("ISIS") extremists destroyed historic and cultural sites and vandalized Sufi shrines and graves.[9] The world also has witnessed the systematic destruction of temples, monasteries, shrines, fortified cities, and historic sites at the hands of ISIS in the Syrian Arab Republic and Iraq.[10] Recently, the conflict between Azerbaijan and Armenia has yielded the destruction of cultural heritage.[11]

These incidents are archetypal examples of the profound impact the destruction of cultural heritage has had on cultural and religious communities in various regions throughout the world.[12] It is in this context that scholars have attempted to fit the destruction of cultural heritage within the framework of human rights.[13] Despite the fact that

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artifacts-destroyed-in-northern-mali-fighting/2013/06/11/e3bb0c1c-d2c7-11e2-b3a2-3bf5eb37b9d0_story.html.

7. Dov Lieber, *Jewish Sites in Tunisia Firebombed Amid Social Unrest*, TIMES ISR. (Jan. 10, 2018, 9:30 AM), https://www.timesofisrael.com/historic-tunisian-synagogue-firebombed-amid-social-unrest/.

8. *See Egypt: Series of Fires in Their Churches "Not a Coincidence," Say Copts*, WORLD WATCH MONITOR (Nov. 11, 2019), https://www.worldwatchmonitor.org/2019/11/egypt-series-of-fires-in-their-churches-not-a-coincidence-say-copts/; *Egypt: Mass Attacks on Churches*, HUM. RTS. WATCH (Aug. 21, 2013, 11:59 PM), https://www.hrw.org/news/2013/08/21/egypt-mass-attacks-churches#.

9. *Libya's Cultural Heritage "Being Destroyed and Plundered by Isis,"* GUARDIAN (Dec. 15, 2015, 2:26 PM), https://www.theguardian.com/world/2015/dec/15/libyas-cultural-heritage-being-destroyed-and-plundered-by-isis.

10. Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, NAT'L GEOGRAPHIC (Sept. 1, 2015), https://www.nationalgeographic.com/news/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/.

11. Dorian Batycka, *Armenian Monuments in Line of Fire in Nagorno-Karabakh Conflict*, ART NEWSPAPER (Oct. 26, 2020, 10:53 AM), https://www.theartnewspaper.com/news/monuments-in-line-of-fire-in-nagorno-karabakh-conflict; Hugh Eakin, *When an Enemy's Cultural Heritage Becomes One's Own*, N.Y. TIMES: OP. (Nov. 30, 2020), https://www.nytimes.com/2020/11/30/opinion/armenia-azerbaijan-monuments.html.

12. Mary Dahdouh, *Making the Case for Protecting Cultural Heritage Under the Alien Tort Statute*, INTLAWGRRLS (May 3, 2018), https://ilg2.org/2018/05/03/making-the-case-for-protecting-cultural-heritage-under-the-alien-tort-statute/.

13. *See* Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 389 (2016) ("Seeing cultural heritage through the lens of human rights assists us in reaching a more integrated understanding of the role that cultural heritage plays in the lives of human beings—the local community that lives among the heritage, the regional and national communities, and the world community."); Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT'L L. 1209, 1212 (2004) ("[T]he concept of human dignity, which informs the human rights provisions of the Charter and of the Universal Declaration . . . includes peoples[']

the property may itself be the direct fatality of the attack, the intended victims are humans—individuals making up a distinct ethnic, racial, social, cultural, or religious group. The destruction of a group's cultural heritage destroys its members' collective memory, inhibiting their ability to express culture, religion, and identity, while simultaneously dissolving connections to their past.[14] Cultural heritage is talismanic of an individual's identity, connecting mind and body to an object as a way of expressing culture, practicing religion, or connecting to the past.[15] By destroying an individual or group's cultural heritage, an attacker is committing a violation of the individual or group's right to their culture or to express their religion. The attack on cultural heritage is therefore a human rights violation.

The existing international legal framework for the protection of cultural heritage, while extensive,[16] has largely proven unsuccessful at holding perpetrators accountable on both international and domestic levels. International forums often lack the authority to issue enforceable decrees or they are able to only consider claims instituted by states against other states.[17] On a national level, many countries are unable or unwilling to civilly or criminally hold accountable citizens who egregiously harm their own cultural heritage.[18] Without the presence of an adequate forum, victims of cultural heritage attacks are unable to redress the harms that result from the destruction of a piece of their identity, culture, religion, or history.

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entitlement to the respect of the cultural heritage that forms an integral part of their identity, history and civilization.").

14. *See* Marcela Jaramillo Contreras, *Beyond the Protection of Material Cultural Heritage in Times of Conflict*, *in* PROTECTING CULTURAL HERITAGE IN TIMES OF CONFLICT 23, 23 (Simon Lambert & Cynthia Rockwell eds., 2010) ("Cultural heritage represents the identity of a community, and this memory comes from the past, it lives today and is transmitted to present and future generations. This means that every category of cultural heritage has something in common: there has to be an identity component that represents the culture of any community.").

15. *See, e.g.*, Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42 COLUM. HUM. RTS. L. REV. 797, 798 (2011) ("The protection of cultural heritage has profound significance for human dignity.").

16. *See generally* Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, T.I.A.S. No. 09-313.1 [hereinafter 1954 Hague Convention].

17. Statute of the International Court of Justice art. 34, ¶ 1, Oct. 24, 1945 [hereinafter ICJ Statute].

18. For example, cultural heritage law in Syria is governed by the 1963 Antiquities Law. Emma Cunliffe, Nibal Muhesen & Marina Lostal, *The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations*, 23 INT'L J. CULTURAL PROP. 1, 15 (2016). However, any prosecutions for the severe destruction of sites such as Palmyra and Damascus cannot happen until the conflicts are resolved. *See generally id.*

This Article proposes that those victimized by the destruction of cultural heritage have a strong case for redress in U.S. courts under the Alien Tort Statute.[19] ATS is a jurisdictional statute which allows foreign plaintiffs to sue foreign defendants in U.S. federal courts for torts committed in violation of customary international law.[20] Recently, a U.S. district court in Pennsylvania permitted an individual to sue under ATS for an attack against religious property—a category of cultural heritage.[21] In light of this recent development, this Article will examine the mechanism by which a successful claim for the destruction of cultural heritage may be brought under ATS. By using ATS, victims may be able to use the favorable components of the U.S. adversarial system not only to be compensated for these atrocities, but also to hold perpetrators individually accountable.

Overall, this Article seeks to frame the intentional destruction of cultural heritage as a violation of human rights and remove it from the singular context of harms against property. Part II of this Article provides an analysis of the criteria by which a court determines whether a case may be brought under ATS, and offers an overview of how courts define violations of international norms with a specific emphasis on property-related torts. Part III discusses the universal and obligatory nature of the prohibition against the destruction of cultural heritage and concludes that such a norm is defined as part of the "law of nations" under ATS. Part IV examines a variety of substantive claims which practitioners may utilize to confer jurisdiction under ATS. Given the often-polemic attitudes towards the destruction of confederate monuments in the United States, Part V necessarily examines the definition of the destruction of cultural heritage and how that definition may be applied to U.S. courts. Lastly, Part VI offers context to the individual harms caused by the destruction of cultural heritage and provides justification for the use of ATS as a vehicle for relief.

II. THE ALIEN TORT STATUTE

The Alien Tort Statute has been a subject of much contention among the courts and scholars since its inception in 1789. While it is generally agreed that the Framers enacted ATS as an avenue for foreign plaintiffs to seek remedies in the United States for violations of international law, the extent to which the statute should be applied has triggered

19. 28 U.S.C. § 1350.

20. Filártiga v. Peña-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

21. Jane W. v. Thomas, 354 F. Supp. 3d 630, 637 (E.D. Pa. 2018); Complaint at 31, *W.*, 354 F. Supp. 3d 630 (No. 18-0569).

impassioned discourse.[22] In 1789, the First Congress enacted the Judiciary Act, which established the federal court system and enumerated the requirements for federal court jurisdiction.[23] As part of the Judiciary Act, the First Congress created ATS to provide federal courts with original jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[24] In the eighteenth and nineteenth centuries, the "law of nations"[25] formed part of both state and federal law.[26] This source of jurisprudence still has a lasting impact on the laws of today. ATS, and its application of tort law to the violation of the law of nations, remained largely undisturbed until 1980. An understanding of the case law and the scholarly discourse surrounding the polemical use of this statute is vital to establishing that the destruction of cultural heritage is a violation of international norms that can—and should—be adjudicated under ATS.

A. Filártiga *to* Kiobel*: Defining ATS Litigation*

In 1980, the Second Circuit's decision in *Filártiga v. Peña-Irala*[27] served as the catalyst for the contemporary application of ATS in federal courts. In this groundbreaking case, the Second Circuit asserted jurisdiction over an alleged tort with which the United States had little to no connection.[28] The case involved a civil action brought against Americo Norberto Peña-Irala ("Peña"), a citizen of Paraguay and the prior Inspector General of Police in Asunción, Paraguay, for the kidnapping and torturing to death of Joelito Filártiga ("Filártiga").[29] The plaintiff attempted to utilize ATS to assert jurisdiction in the Eastern District of New York, which dismissed the case for lack of subject matter

22. Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1467–74 (2014) (reviewing in detail the historical background behind the inception of the Alien Tort Statute and the forefathers' misgiving toward its enactment).

23. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

24. *Id.*

25. In the eighteenth and nineteenth centuries, the "law of nations" was comprised of laws impacting merchants, maritime law, conflicts of laws, and the laws governing relations between states. *See* Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 27–29 (1952).

26. Stephens, *supra* note 22, at 1470–71; *see also* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (noting that the Court was "bound by the law of nations which is a part of the law of the land.").

27. 630 F.2d 876 (2d Cir. 1980).

28. *Id.* at 878–79.

29. *Id.* at 878.

jurisdiction.[30] The Second Circuit reversed, holding that "whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction."[31]

In forming its opinion, the court concluded that international law must be interpreted "not as it was in 1789, but as it has evolved and exists among the nations of the world today."[32] By examining various sources of international law, including United Nations declarations and international treaties, the court concluded that torture universally violates established norms of international human rights, and thus the law of nations.[33] The court did not specify whether any of these sources standing alone is sufficient to establish the existence of well-settled international law. However, it illuminated the sources which could be used to consider a norm universal.[34]

The court said that ATS did not grant new rights to foreign plaintiffs but rather only confers federal court jurisdiction to those who seek adjudication of violations against the law of nations.[35] Nothing in this decision created a separate cause of action under ATS. The concluding remarks of the *Filártiga* court epitomize the importance of its holding:

> In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. . . . In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. . . . Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.[36]

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30. *Id.* at 878–80.

31. *Id.* at 878.

32. *Id.* at 881 (citing Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)).

33. *Id.* at 884.

34. *See id.* at 880 ("In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.").

35. *See id.* at 887. *See generally* Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011) (expanding on the type of claims authorized under ATS for federal court adjudication).

36. *Filártiga*, 630 F.2d at 890.

The *Filártiga* court's interpretation of ATS is significant in that it opened up a channel by which victims of human rights abuses are able to pursue remedies for violations of international law in U.S domestic courts. The court's language necessarily validates human rights norms and the importance of the judiciary's power to enforce these norms.

Filártiga established the viability of human rights litigation and, over the next several years, remained the guidepost for cases applying ATS.[37] While claimants rarely received the monetary fruits of these judgments, their victories symbolized a vindication of their rights—the courts recognized their suffering, held the perpetrators accountable, and strengthened the rule of law to deter future similar conduct.[38] However, the contours of the *Filártiga* decision were narrowly applied. Foreign plaintiffs could only sue for very few human rights abuses and only for so long as those foreign plaintiffs could obtain personal jurisdiction over the defendant.[39]

In 2004, the Supreme Court finally stepped in to consider the modern application of ATS in the seminal case of *Sosa v. Alvarez-Machain*.[40] Humberto Alvarez-Machain ("Alvarez-Machain"), a Mexican doctor, allegedly assisted in the torture and murder of an American Drug Enforcement Agency ("DEA") officer, Enrique Camarena-Salazar, in Mexico.[41] Jose Francisco Sosa ("Sosa"), a Mexican citizen and former police officer, assisted the DEA in kidnapping Alvarez-Machain for prosecution in the United States.[42] Although Alvarez-Machain was eventually acquitted for his alleged crimes, the litigation continued.[43] Alvarez-Machain filed a lawsuit against the U.S. officials and Mexican citizens, including Sosa, who were involved in the DEA abduction.[44]

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37. The Supreme Court uniformly rejected to review the merits of ATS cases. *See generally, e.g.*, Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *In re* Estate of Ferdinand E. Marcos Hum. Rts. Litig., 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

38. *See, e.g.*, Dolly Filártiga, *Foreword* to BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS xvii–xviii (2d ed. 2008) (describing her family's lawsuit and the court's decision as an "enormous victory for human rights," which ended in her family's "vindication").

39. Stephens, *supra* note 22, at 1490. Likewise, the plaintiff must overcome other bars to suit, including the Foreign Sovereign Immunities Act and the act of state doctrine. *See id.* at 1527, 1535.

40. 542 U.S. 692 (2004).

41. *Id.* at 697.

42. *Id.* at 698; *see also* Alvarez-Machain v. United States, 331 F.3d 604, 609 (2003), *rev'd*, 542 U.S. 692 (2004).

43. *Sosa*, 542 U.S. at 698.

44. *Id.*

Notably, Alvarez-Machain pleaded a claim under ATS against Sosa for violation of the "law of nations" for his unlawful arrest.[45]

While the majority opinion cited *Filártiga* as precedent, albeit narrowly, it restricted ATS's applicability by implicitly limiting the types of violations of international law that could be adjudicated as federal common-law claims.[46] The Justices agreed that ATS was solely a grant of jurisdiction and did not create any separate federal cause of action.[47] However, the Court recognized that the First Congress did not intend the provision to be a "stillborn."[48] The majority acknowledged that the judiciary retained the power to recognize a cause of action for a "modest" set of international law violations.[49] Nevertheless, the Court cautioned that such power should be used sparingly[50] and the application of ATS should be limited to only those few cognizable torts that demonstrated the definiteness and "acceptance among civilized nations" of actions contemplated by the "18th-century paradigms."[51] The Court ultimately concluded that "arbitrary arrest and detention" was not violative of a norm of customary international law.[52] As the Court cited *Filártiga* with seeming approval, proponents of ATS saw this case as an affirmation of the Federal Judiciary's power to recognize common law causes of action for some human rights violations.[53]

Nevertheless, *Sosa* failed to address the extraterritorial application of ATS,[54] an issue that had been previously condemned by the executive branch.[55] After *Sosa* and subsequent progeny, a new wave of litigation

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45. *Id.* at 699.

46. *See id.* at 725 (stating that "there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind").

47. *Id.* at 713.

48. *Id.* at 714.

49. *Id.* at 720.

50. *Id.* at 727–28 (explaining that "the potential implications . . . of recognizing . . . causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. . . . Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.").

51. *Id.* at 725, 732.

52. Stephens, *supra* note 22, at 1510 n.237.

53. *Id.* at 1511.

54. Extraterritorial application means the application of U.S. law abroad. *See generally* Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEO. L.J. 301 (2014) (arguing the limits of extraterritorial application of common law).

55. *See, e.g.*, Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 185–86 (2004) (describing the Bush Administration's concerted efforts to limit human rights litigation through ATS in the United States).

ensued in the United States.[56] In 2013, the Supreme Court addressed the issue of the extraterritoriality of ATS in the decision of *Kiobel v. Royal Dutch Petroleum Co.*[57] In *Kiobel*, citizens of Nigeria filed a claim against various foreign corporations for aiding and abetting Nigerian forces for allegedly committing violations of the law of nations, including the beating, raping, killing, and arresting of residents and destroying and looting of property in the Ogoni villages.[58] The petitioners alleged that the corporations "aided and abetted these [purported] atrocities by . . . providing the Nigerian forces with food, transportation, and compensation" and use of the corporations' property.[59] In particular, the petitioners claimed that the corporations "violated the law of nations by aiding and abetting the Nigerian Government in committing (1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction."[60]

The Supreme Court granted certiorari to answer the question of whether a claim under ATS may extend to "conduct occurring in the territory of a foreign sovereign."[61] The foreign corporations contended that claims under ATS should not reach conduct occurring in the territory of a foreign sovereign based on the canon of statutory interpretation commonly known as the presumption against extraterritoriality.[62] The canon presumes that the United States governs domestically and cannot impart its rules on other countries.[63] The majority held that "the presumption against extraterritoriality applies to claims under the ATS."[64] The majority reasoned that this presumption serves "to protect against unintended clashes between our laws and those of other nations which could result in international discord."[65] It further articulated that the presumption is utilized to avoid "the danger of

56. In particular, cases involving corporate liability under ATS were prevalent after *Sosa*. *See, e.g.*, Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011) (holding that corporations may be held liable under ATS), *overruled in part by* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1406–07 (2018); Doe v. Drummond Co., 782 F.3d 576, 600 (11th Cir. 2015); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 747 (9th Cir. 2011).

57. 569 U.S. 108 (2013).

58. *Id.* at 113.

59. *Id.*

60. *Id.* at 114.

61. *Id.* at 114–15.

62. *Id.* at 115.

63. *Id.*

64. *Id.* at 124.

65. *Id.* at 115 (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

unwarranted judicial interference in the conduct of foreign policy."[66] Justice Roberts's majority opinion concluded by remarking that claims that "touch and concern the territory of the United States . . . with sufficient force" will "displace the presumption against extraterritorial application."[67] The Court subsequently followed that "mere corporate presence" is insufficient to displace the exterritoriality presumption because "[c]orporations are often present in many countries."[68] Notably, the majority's opinion gave no examples of the type of contacts sufficient to establish this novel requirement.

Prior to *Kiobel*, the United States was the only country to provide damages for human rights violations committed abroad.[69] The Court evidently desired to reduce, if not totally eliminate, this American exceptionalism.[70] The Court's reluctance to allow extraterritorial application of ATS remarkably narrowed the already-thin ability of plaintiffs to bring human rights actions to federal courts in the United States. The consequence of this decision is the limited enforceability of *Filártiga* and the erosion of human rights protections as a whole.

B. Defining the Law of Nations Under ATS

When the First Congress drafted the clause "tort . . . in violation of the law of nations,"[71] the type of international norms its members intended to recognize were notably absent from the legislation. The legislative history similarly fails to answer the question as to whether the drafters desired to apply ATS broadly—to all torts—or to only a small quantum. The initial purpose of ATS was to combat the Continental Congress's "inability to 'cause infractions of treaties, or of the law of nations to be punished.'"[72]

Traditionally, only three torts were recognized at common law as violations of the law of nations, including "violation of safe conducts,

66. *Id.* at 116.

67. *Id.* at 124–25 (citing Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010)).

68. *Id.* at 125.

69. Louise Weinberg, *What We Don't Talk About When We Talk About Extraterritoriality:* Kiobel *and the Conflict of Laws*, 99 CORNELL L. REV. 1471, 1472–73, 1501 (2014) (examining the Supreme Court's decision in *Kiobel* through the lens of extraterritoriality and concluding that the holding was wrongly decided).

70. *See Kiobel*, 569 U.S. at 123 (noting that "there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms").

71. 28 U.S.C. § 1350.

72. Sosa v. Alvarez-Machain, 542 U.S. 692, 716 (2004) (citing JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed., 1893)).

infringement of the rights of ambassadors, and piracy."[73] After *Sosa*, courts have struggled to restrain themselves in defining a wrong as a violation of the law of nations.[74] Customary international law should serve as the guide post in determining which international norms are actionable under ATS.[75] The difficulty primarily arises from defining the contours of customary international law so as to satisfy the court-created standards of ATS.[76] Norms derived from customary international law are that which have traditionally been defined as general and consistent practices which "States universally abide by, or accede to, out of a sense of legal obligation and mutual concern."[77] In the more than two hundred years since the enactment of the First Judiciary Act, customary international law has evolved significantly.

Identification of a norm of customary international law generally requires consideration of "the works or jurists, writing professedly on public law; . . . the general usage and practice of nations; or [] judicial decisions recognizing and enforcing that law."[78] The Statute of the International Court of Justice ("ICJ") provides guidance on the type of sources it is proper to consider in the quest to define a norm of customary international law.[79] Article 38 sets forth the hierarchy of sources that the ICJ considers in all legal disputes:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

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73. *Id.* at 724 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769)).

74. *See* Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385, 398–99 (2010).

75. *See Sosa*, 542 U.S. at 732.

76. This article uses customary international law synonymously with the law of nations. The law of nations, while used frequently in ATS scholarship, is an antiquated phrase. Federal courts equate "customary international law" with the law of nations. Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116 (2d Cir. 2008) (quoting Flores v. S. Peru Copper Corp., 414 F.3d 323, 248 (2d Cir. 2003)). However, some scholars opine that the law of nations shares its roots more with jus cogens than with customary international law. *See* William J. Moon, *The Original Meaning of the Law of Nations*, 56 VA. J. INT'L L. 51, 54 (2016) (opining that the law of nations is best contextualized "as peremptory rules of international law (*jus cogens*)," rather than customary international law).

77. *Flores*, 414 F.3d at 248.

78. United States v. Smith, 18 U.S. (5 Wheat.) 153, 160–161 (1820).

79. ICJ Statute, *supra* note 17, at art. 38.

> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[80]

International legal instruments are not categorically equal, and some may have little to no evidentiary weight when classifying the universal law of nations.[81] These sources often contradict one another and thus further complicate interpretations of international law.[82] These contradictions leave scholars and courts struggling to determine what is sufficient to meet the high threshold of what constitutes a recognized norm.[83]

As there is no systematic test for the interpretation and definition of customary international law, it is essential to examine the precedents developed under ATS as means to establish a violation of the law of nations. As articulated in *Filártiga*, a court "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[84] Therefore, any interpretation of a norm must be characterized based on contemporary sources. In *Sosa*, the Supreme Court explained that a determination of whether a norm is

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80. *Id.* The term "publicist" is now anachronistic and can be synonymous used with scholars or jurists. *See Flores* 414 F.3d at 251 n.26 (explaining how nineteenth and twentieth century scholars differ from contemporary scholars).

81. For example, judicial decisions and the teachings of the most highly qualified publicists may only serve as "evidence" of principles of customary international law, to which courts may look "not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." The Paquete Habana, 175 U.S. 677, 700 (1900); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 102(3) (AM. L. INST. 1987) (noting that international agreements create customary international law only "when such agreements are intended for adherence by states generally and are in fact widely accepted").

82. *See, e.g.*, James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. 1996, 2032 (2000) (identifying that "gaps, contradictions, and ambiguities" in sources of international law require judges to make choices which may legitimatize "bullying" on an international scale).

83. *See generally* Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117 (2011) (providing an analysis for the differing approaches by proponents and opponents of ATS in regard to the application of international norms).

84. Filártiga v. Peña-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (citing Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)).

sufficient to support a cause of action under ATS must "involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts."[85] As one might expect, the Supreme Court desired to provide a level of practicality to the interpretation of an allegedly violative norm—ergo can the violation of this norm feasibly be adjudicated in the U.S. court system?

From *Sosa* onward, courts have utilized some version of the requirement that the law of nations must be "specific," "universal," "definable," and "obligatory."[86] This generally accepted standard was conceived in 1981 by law professors Jeffrey Blum and Ralph Steinhardt in an Article published in the Harvard International Law Journal.[87] The authors, in analyzing the *Filártiga* decision, opined that recognized international norms must be an "object of concerted international attention . . . . definable and identifiable as a tort committed by individuals[,] . . . . textually obligatory[, and] . . . . universal."[88] Blum and Steinhardt's test subsequently became part of contemporary ATS jurisprudence in the case of *Tel-Oren v. Libyan Arab Republic*, where Judge Edwards, in his concurrence, limited the reach of ATS to those violations of "definable, universal, and obligatory norms."[89] Subsequently, federal district courts and appellate courts around the United States have reiterated some variation of this language in their decisions.[90]

While the language "definable, universal, and obligatory norms" has been cited uniformly throughout federal district and appellate courts, its

85. Sosa v. Alvarez-Machain, 542 U.S. 692, 732–733 (2004).

86. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1399, 1421 (2018); Abebe-Jiri v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996); *In re* Estate of Ferdinand E. Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 716 (9th Cir. 1992); Tel-Oren v. Libyan Arab Republic, 726 F.2d 744, 781 (D.C. Cir. 1984) (Edwards, J., concurring).

87. Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Peña-Irala, 22 HARV. INT'L. L.J. 53, 87–89 (1981).

88. *Id.*

89. *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring) (citing Blum & Steinhardt, *supra* note 87, at 87–90).

90. *See* cases cited *supra* note 86; *see also* Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1091 (S.D. Fla. 1997); Granville Gold Tr. v. Commissione Del Fallimento, 928 F. Supp. 241, 243 (E.D.N.Y. 1996); Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995); Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539–40 (N.D. Cal. 1987). Scholars have also cited variations of this language in Articles. *See, e.g.*, Derek P. Jinks, Note, *The Federal Common Law of Universal, Obligatory, and Definable Human Rights Norms*, 4 ILSA J. INT'L & COMPAR. L. 465, 469–70 (1998). *But see* William S. Dodge, *Which Torts in Violation of the Law of Nations?*, 24 HASTINGS INT'L & COMPAR. L. REV. 351, 357–59 (2001) (arguing for a more expansive standard).

successful application is rare.[91] As a result, not every tort in violation of customary international law has been recognized as actionable under ATS. For example, in *Sosa*, the Court declined to recognize short term arbitrary detention as a trigger for tort liability.[92] The Second Circuit has refused to recognize torts in violation of international law for private racial or religious discrimination,[93] violations of a "right to life" or "right to health,"[94] and the failure to provide consular notification and access after arrest.[95] Similarly, the Ninth Circuit denied a claim for liability for fraud under ATS.[96]

A thorough review of case law leaves little doubt that a successful recognition of a violation of international law stems from an examination of state practice as opposed to "abstract rights and liberties devoid of articulable or discernable standards and regulations."[97] The culmination of evidence that is sufficient to establish a norm as definable, universal, and obligatory is, evidently, an analysis that must be performed on a case-by-case basis. Appellate courts have advised district courts to exercise "extraordinary care and restraint" in deciding whether an offense will violate a customary norm.[98] As will be established in the forthcoming analysis, many international instruments, state constitutions and laws, and judicial decisions support the contention that the norms prohibiting the destruction of cultural heritage are definable, universal, and obligatory so as to be considered within the law of nations.

C. Property-Related Torts and the Alien Tort Statute

ATS was enacted with the particular purpose of providing a remedy for injuries suffered by British subjects, which in turn may have disrupted renewed trade with Great Britain.[99] The trade-promoting function of ATS justified private remedies to aliens who had suffered

91. Many courts expanded upon this language but retain some of variation of this common definition. *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 174 (2d Cir. 2009) (determining whether a norm is considered part of the law of nations by whether the norm alleged "(1) is a norm of international character that States universally abide by, or accede to, out of a sense of legal obligation; (2) is defined with a specificity comparable to the 18th-century paradigms discussed in *Sosa*; and (3) is of mutual concern to States").

92. Sosa v. Alvarez-Machain, 542 U.S. 692, 736–38 (2004).

93. Bigio v. Coca-Cola Co., 239 F.3d 440, 448 (2d Cir. 2000).

94. Flores v. S. Peru Copper Corp., 414 F.3d 233, 254 (2d Cir. 2003).

95. De Los Santos Mora v. New York, 524 F.3d 183, 208 (2d Cir. 2008).

96. Hamid v. Price Waterhouse, 51 F.3d 1411, 1418 (9th Cir. 1995).

97. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999).

98. *Flores*, 414 F.3d at 248.

99. Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 882 (2006).

noncontract injury to their person or property.[100] Indeed, what the First Congress "likely had in mind in enacting the ATS was injury suffered by loyalists who returned to the United States and were 'molested' by locals in their attempts to recover family *land* or *property* as provided for in the 1783 Treaty of Peace."[101] Notwithstanding the historical reasoning behind the statute's enactment, there is a dearth of precedential case law that confers ATS jurisdiction on individuals seeking remedies for property-related injuries. This paucity illuminates the reluctance of courts to recognize cases involving non-personal injury related torts as a way to curtail application of ATS.

One of the first contemporary cases to attempt to utilize ATS for property-related torts is *Dreyfus v. Von Finck*.[102] The plaintiff, a Jew and former resident of Germany, sought recovery from West German citizens for alleged wrongful misappropriation of property in Nazi Germany during World War II.[103] The court disagreed with the plaintiff's assertion that the defendants' seizure of plaintiff's property was a tort in violation of the law of nations.[104] The court held that ATS could not form a basis for jurisdiction where the treaties upon which the plaintiff bases a tort claim—the Hague Convention, the Kellog-Briand Pact, the Versailles Treaty, and the Four Power Occupation Agreement—do not provide an express, individual right of action to enforce the general rights granted therein.[105] Seemingly wary of the potential precedential impact this case may have on property-related ATS cases, the court erroneously added an extra layer to this analysis, notwithstanding that the prohibition against

100. Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645, 1651–52 (2014).

101. *Id.* at 1654 (emphasis added). Article V of the 1783 Treaty of Peace recommended to the legislatures of states to "provide for the Restitution of all Estates, Rights and Properties, which have been confiscated belonging to real British Subjects . . . [a]nd that Persons of any other Description shall have free [l]iberty . . . to obtain the Restitution of such of their Estates, Rights and Properties as may have been confiscated . . . . And that Congress shall also earnestly recommend to the several States, that the Estates, Rights and Properties, of such last mentioned Persons shall be restored to them, they refunding to any Persons who may be now in Possession . . . ." Treaty of Peace, Gr. Brit.-U.S., art. 5, Sept. 3, 1783, 8 Stat. 80.

102. 534 F.2d 24 (2d Cir. 1976).

103. *Id.* at 26.

104. *Id.* at 30. The court's is an assertion with which this author emphatically disagrees. For an analysis of the recognition of the seizure of property as forbidden under customary international law, see Emily T. Behzadi, *"Spain for the Spaniards": An Examination of the Plunder & Polemic Restitution of the Salamanca Papers*, 11 GEO. MASON INT'L COM. L.J. 1, 32–40 (2020).

105. *Dreyfus*, 534 F.2d at 30.

the seizure of property is undoubtedly "universal, definable, and obligatory."[106]

In *Orkin v. Swiss Confederation*,[107] the plaintiff sought return of a Van Gogh drawing that the plaintiff's great-grandmother was allegedly forced to sell to a Swiss art collector to ostensibly fund her family's escape from Nazi Germany.[108] In seeking return of the painting, the plaintiff asserted jurisdiction under ATS, claiming that the forced sale and retention of the painting constituted violations of the law of nations.[109] The court held that the plaintiff cited no authority to support his claim.[110] Instead, the Second Circuit relied on *IIT v. Vencap, Ltd.*,[111] an opinion in which Judge Friendly proclaimed "[w]e cannot subscribe to plaintiffs' view that the Eighth Commandment 'Thou shalt not steal' is part of the law of nations."[112]

The facts of *Jafari v. Islamic Republic of Iran*,[113] demonstrate the reluctance of federal courts to involve themselves in the actions of state governments, particularly in the case of property-related issues. In *Jafari*, expatriate Iranian citizens claimed that the revolutionary government of Iran had improperly expropriated private property belonging to them.[114] Relying on *Dreyfus*, the court held that expropriation of private property by the revolutionary government of Iran would not constitute a tort in violation of the law of nations.[115] The court asserted that "the 'law of nations' does not prohibit a government's expropriation of the property of its own nationals."[116] Instead, the court emphasized that while expropriation of property may be foreign to the American way of life, it is "not so universally abhorred that its prohibition

106. *See, e.g.*, THE L. OF WAR ON LAND art. 54 (INST. INT'L L. 1880) [hereinafter Oxford Manual] ("Private property, whether belonging to individuals or corporations, must be respected, and can be confiscated only under the limitations contained in the following articles."); Convention with Respect to the Laws and Customs of War on Land, art. 47, July 29, 1899, 32 Stat. 1803 [hereinafter 1899 Hague Convention] ("Pillage is formally prohibited."); Charter of the International Military Tribunal, art. 6 § (b), Aug. 8, 1945, 59 Stat. 1546 [hereinafter Nuremberg Charter] (including the "plunder of public or private property" as a "War crime").

107. 444 F. App'x 469 (2d Cir. 2011).

108. *Id.* at 470; Orkin v. Swiss Confederation, 770 F. Supp. 2d 612, 613–14 (S.D.N.Y. 2011).

109. *Orkin*, 444 F. App'x at 471–72.

110. *Id.* at 472.

111. *Id.*

112. 519 F.2d 1001, 1015 (2d Cir. 1975).

113. 539 F. Supp. 209 (N.D. Ill. 1982).

114. *Id.* at 210.

115. *Id.* at 215.

116. *Id.* (citing Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980)).

commands 'the general assent of civilized nations.'"[117] The court further highlighted the sharp conflict of views that exist in the world as to expropriation, mainly between capitalist and socialist nations, stating "[w]e cannot elevate our American-centered view of governmental taking of property without compensation into a rule that binds all 'civilized nations.'"[118]

In 2003, the Southern District of New York had occasion to analyze the issue of whether the confiscation of property without just compensation violates the law of nations for purposes of ATS.[119] In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, plaintiffs brought an action against Talisman Energy, Inc. and Sudan, alleging violations of international law stemming from allegations of gross human rights violations, including extrajudicial killing, forcible displacement, war crimes, confiscation and destruction of property, kidnapping, rape, and enslavement.[120] The court declined to recognize that confiscation without just compensation violates the law of nations for purposes of a claim under ATS.[121] However, the court found that "expropriation or property destruction, committed as part of a genocide or war crimes, may violate the law of nations."[122]

While courts have traditionally accepted the notion that a domestic taking by a sovereign state does not implicate international law,[123] courts have recognized that the expropriation of property as a target of genocide may invoke the law of nations outside the ATS context. This was true in the Seventh Circuit case of *Abelesz v. Magyar Nemzeti Bank*,[124] where Holocaust survivors and heirs sued several Hungarian banks and the

117. *Id.* (quoting *Filártiga*, 630 F.2d at 881).

118. *Id.*

119. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003).

120. *Id.* at 296.

121. *Id.* at 324.

122. *Id.* at 325.

123. *See, e.g.*, United States v. Belmont, 301 U.S. 324, 332 (1937) ("What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled."); FOGADE v. ENB Revocable Tr., 263 F.3d 1274, 1294 (11th Cir. 2001) ("As a rule, when a foreign nation confiscates the property of its own nationals, it does not implicate principles of international law."); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 711 (9th Cir. 1992) (citing De Sanchez v. Banco Cent. De Nicar., 770 F.2d 1385, 1395 (5th Cir. 1985)) ("[E]xpropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law."); *De Sanchez*, 770 F.2d at 1397 ("At present, the taking by a state of its national's property does not contravene the international law of minimum human rights.").

124. 692 F.3d 661 (7th Cir. 2012).

Hungarian national railway, alleging that the banks and the national railway participated in the expropriation of property from Hungarian Jews during the Holocaust.[125] The expropriations alleged by plaintiffs in this case included "the freezing of bank accounts, the straw-man control of corporations, the looting of safe deposit boxes and suitcases . . . , and . . . charging third-class train fares to victims being sent to death camps," which all functioned as a "part of the genocidal plan to depopulate Hungary of its Jews."[126] The court held that the domestic takings exception did not apply, as the property expropriated was pursuant to and was an integral part of a widespread campaign to deprive Hungarian Jews of their wealth and to fund genocide, a long-recognized violation of international law.[127] While not invoking ATS, the case is illustrative of the close relation between property-related torts and international humanitarian law.

The district court in *Kiobel* also questioned whether property damage committed as part of genocide or war crimes would be violative of the law of nations.[128] The district court accepted Judge Allen G. Schwartz's reasoning in *Presbyterian Church* that "property destruction committed as part of genocide or war crimes, and not property destruction alone, violates the law of nations."[129] However, the court rejected the plaintiffs' argument that the wanton destruction of their real and personal property constituted "discriminatory confiscation and destruction of property in violation of customary international law."[130] The court seemingly suggested that if the plaintiffs had alleged genocide or war crimes in combination with the property destruction, the claims would not have been dismissed.[131] The inference that can be extrapolated from this decision is that property-related torts may be considered a violation of customary international law so long as they are framed within a certain

125. *Id.* at 666. To be clear, this is not an ATS case, but rather the plaintiffs attempted to invoke jurisdiction under the Foreign Sovereign Immunities Act ("FSIA")'s expropriation exception. *Id.* Like ATS, a claim of sovereign immunity raises a jurisdictional defense, not a substantive claim on the merits. *See* Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004). For a thorough analysis of expropriation cases under the FSIA, see generally Ronald Mok, Comment, *Expropriation Claims in United States Courts: The Act of State Doctrine, the Sovereign Immunity Doctrine, and the Foreign Sovereign Immunities Act. A Road Map for the Expropriated Victim*, 8 PACE INT'L L. REV. 199 (1996).

126. *Abelesz*, 692 F.3d at 675.

127. *Id.* at 675–76.

128. Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 464 (S.D. N.Y. 2006), *aff'd in part on other grounds, rev'd in part on other grounds*, 621 F.3d 111 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013).

129. *Id.* at 464 (citing Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 325 (S.D.N.Y. 2003)).

130. *Id.* (citing Amended Complaint at ¶ 115).

131. *Id.* ("Plaintiffs have not alleged genocide or war crimes.").

context—namely genocide as a war crime—not just as an attack on property alone but as a part of or an instrument of an attack on people.

Courts have sporadically endorsed the destruction of property as a sufficiently established or universally recognized violation of international law. However, on the rare occasion the courts have addressed the issue, the claim has been anchored within the broader context of international humanitarian law. With the juxtaposition of these normative concepts as background, this Article will examine the destruction of cultural heritage within the parameters of international humanitarian law and develop a standard which may be applied broadly to establish certain ATS claims.

III. THE UNIVERSAL AND OBLIGATORY NATURE OF THE PROHIBITION AGAINST THE DESTRUCTION OF CULTURAL HERITAGE

A. The Early History

The roots of the destruction of cultural heritage can be traced back to the classical era, where conquering armies would destroy historic and cultural sites and monuments as a symbol of victory.[132] The destruction of cultural heritage thus was a form of cultural or ethnic cleansing, in which the destroyer removed a group's link to its own community and erased any memory of the group's existence. These barbaric practices were universally prevalent, resulting in the loss of innumerable objects, sites, and monuments. In antiquity, there were generally no widely recognized rules that prohibited the destruction of enemy property.[133] The lack of any regulatory scheme sanctioned the destruction of the Temple of Enlil in Mesopotamia in 2250 BCE by King Narim-Sin, the burning and sacking of the Acropolis by the Persians in 479 BCE, and the destruction of the Temple of Solomon in Jerusalem in 70 CE.[134] As articulated by Jiří Toman, the destruction of cultural heritage became "an inevitable consequence of war."[135]

132. *See generally* MARGARET M. MILES, ART AS PLUNDER: THE ANCIENT ORIGINS OF DEBATE ABOUT CULTURAL PROPERTY (2009).

133. PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 711 (4th ed. 2019).

134. *Id.* at 711–12.

135. TOMAN, *supra* note 2, at 3.

Ancient scholars later acknowledged that the destruction of sacred sites was wasteful. The Greek historian Polybius (202–120 BCE) reinforced this idea, writing:

> The laws and the right of war oblige the victor to ruin and destroy fortresses, forts, towns, people, ships, resources and all other such like things belonging to the enemy in order to undermine his strength while increasing the victor's own. But although some advantage may be derived from that, no one can deny that to abandon oneself to the pointless destruction of temples, statues and other sacred objects is the action of a madman.[136]

While the Roman Republic and Empire continued this practice,[137] it also tended to show some respect for religious sanctuaries.[138] During the prosecution of Roman magistrate Gaius Verres, the Roman statesman and philosopher Cicero did not condemn these wartime practices; however, he did recommend moderation and selflessness in acts of despoliation that did not enrich or embellish the victors' homeland.[139] During the struggle between the Goths and the armies of the Eastern Roman Empire, the Byzantine General Belisarius, announced a more radical view, urging:

> Building works of art in a city can only be the undertaking of wise men who know how to live with civility; whereas destroying existing ones can only be the work of lunatics who are not ashamed of going down in history as such . . . . [B]y destroying Rome, you will not have destroyed someone else's property but your own . . . .[140]

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136. *Id.* at 4.

137. Derek Fincham, *Intentional Destruction and Spoliation of Cultural Heritage Under International Criminal Law*, 23 U.C. DAVIS J. INT'L L. & POL'Y 149, 153 (2017). The destruction of cultural treasures during the Roman Empire is well-documented. Most notably, the Arch of Titus in Rome showcases the looting and destruction of the Second Temple in Jerusalem in 70 CE by Titus, the son of the Roman Emperor Vespasian. *Id.* For an image of this depiction, see Ruth Schuster, *Archaeologists Reconstruct How the Arch of Titus Looked—in Full Color*, HAARETZ (Sept. 17, 2017), https://www.haaretz.com/archaeology/MAGAZINE-archaeologists-reconstruct-how-the-arch-of-titus-looked-in-full-color-1.5449144.

138. GERSTENBLITH, *supra* note 133, at 712.

139. TOMAN, *supra* note 2, at 4.

140. Pietro Verri, *The Condition of Cultural Property in Armed Conflicts (I): From Antiquity to World War II*, INT'L REV. RED CROSS, No. 245, Apr. 1985, at 67, 75.

After reading this letter, Totila, the King of the Goths, resolved to not inflict any further damage on Rome.[141]

Destruction of cultural heritage was not limited to periods of armed conflict. History has revealed that acrimony toward ideology and theology has oftentimes resulted in the destruction of cultural heritage. The Byzantine Empire is historically known for its iconoclasm, in which the government mandated the destruction of religious images and artifacts.[142] During the Reformation, England, Germany, France, and the Netherlands similarly participated in iconoclastic activities.[143] The destruction and desecration of art and architecture during these times served as a powerful statement against those who were theologically opposed to their views.[144]

It was not until the sixteenth and seventeenth centuries, that the protection of cultural heritage became a topic of serious debate among scholars of international law. Polish jurist Jacob Przyluski expressed the idea that belligerents should accord all works of art, not only those of religious character, with respect.[145] Thereafter, Emmerich de Vattel in his famous work, *The Law of Nations*, expounded the theory that:

> For whatever cause a country is ravaged, we ought to spare those edifices which do honour to human society, and do not contribute to increase 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 . . . .[146]

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141. *Id.* at 75–76.

142. *See* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1377 (S.D. Ind. 1989) ("During the period of Iconoclasm . . . , government edicts mandated the destruction of religious artifacts so that such religious 'images' would not be the subject of veneration. These iconoclast edicts were responsible for the destruction of many significant religious artifacts.").

143. David Freedberg, *The Structure of Byzantine and European Iconoclasm*, *in* JOHN HENRY MERRYMAN ET AL., LAW, ETHICS AND THE VISUAL ARTS 619, 619 (5th ed. 2007).

144. *See* Fincham, *supra* note 137, at 154–55.

145. TOMAN, *supra* note 2, at 4–5. Jacob Przyluski was arguably the first to express this idea although writers such as Alberic and Justin Gentilis afterward agreed with this contention. *Id.*; Stanislaw-Edward Nahlik, *Protection of Cultural Property*, *in* U.N. ED., SCI. AND CULTURAL ORG., INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW at 203 (1988).

146. EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY 571 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1797).

The scholar and architect Quatremère de Quincy published in 1796 open letters criticizing Napoléon's spoliation of Italy's art.[147] He claimed that this art formed part of common European cultural heritage and expressed that "no one has the right to dispose arbitrarily of it."[148]

On the other hand, sixteenth century political philosopher Niccolo Machiavelli took a different position. He advocated that a ruler of a conquered city is entitled to destroy said city not only to eliminate the conquered cultural identity and memory, but also to prevent future rebellions.[149] Hugo Grotius, known as the father of international law, similarly prescribed the old ideas, expressing: "it is permitted to harm an enemy, both in his person and in his property; that is, it is permissible not merely for him who wages war for a just cause, . . . but for either side indiscriminately."[150]

These early writings served as the theoretical undertone of early international instruments that are the basis of the contemporary prohibition against the destruction of cultural heritage. The defeat of Napoléon in the nineteenth century, and the devastation left in its wake, revealed a shortcoming in the laws of warfare. Prevailing sentiments no longer considered the right of enemy forces to misappropriate private property; instead, such acts were contrary to the laws of warfare of civilized nations. Accordingly, the nineteenth century served as the catalyst for modern rules in place today, which regulate the protection of cultural heritage.

B. Contemporary International Instruments and the Destruction of Cultural Heritage

Influenced by writers from Polybius to Vattel, the Prussian-American political scientist Francis Lieber[151] introduced the first legal

147. *See* JOHN HENRY MERRYMAN ET AL., LAW, ETHICS, AND THE VISUAL ARTS 11 (5th Ed. 2007). The looting during the Napoleonic Wars is a spoilation of the cultural treasures. *See* ANDREW MCCLELLAN, INVENTING THE LOUVRE: ART, POLITICS, AND THE ORIGINS OF THE MODERN MUSEUM IN EIGHTEENTH-CENTURY PARIS 1–2 (1994). The contents of Napoléon's conquest can still be seen at the Louvre in Paris. *See id.* For a more thorough investigation of the systematic confiscations of cultural heritage during the Napoleonic Wars, see *id.* (chronicling the formation of the Louvre during the Revolution and the Napoleonic Empire).

148. MERRYMAN ET AL., *supra* note 147, at 11.

149. GERSTENBLITH, *supra* note 133, at 713.

150. HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 349–50 (Stephen C. Neff ed., Francis W. Kelsey et al. trans., Cambridge Univ. Press 2012); Andrew Blom, *Hugo Grotius (1583–1645)*, INTERNET ENCYC. OF PHIL., https://iep.utm.edu/grotius/ (last visited Apr. 7, 2021).

151. Francis Lieber was a Prussian soldier who witnessed the battle of Waterloo and fought in the Greek War of Independence. Paul Finkelman, *Francis Lieber and the Modern Law of War*, 80 U. CHI. L. REV. 2071, 2078–79 (2013). He moved to the United States and

instrument to prohibit the destruction of cultural heritage during armed conflict.[152] The so-called "Lieber Code," a collection of army regulations governing the conduct of the Union Army during the American Civil War, introduced penal provisions for the destruction of cultural heritage during armed conflict.[153] The Lieber Code pays particular attention to the categorization of property, characterizing it as "private" unless used for a military purpose.[154] Article 35 emphasizes the need to protect cultural heritage, specifically "[c]lassical works of art, libraries, scientific collections, or precious instruments" from "all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded."[155] In recognition of cultural heritage as something worthy of protection, the Lieber Code also prohibits its destruction in Article 44: "all destruction of property not commanded by the authorized officer . . . [is] prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense."[156]

The Lieber Code influenced the development of military law in countries outside the United States, including France, Germany, Great Britain, Italy, Japan, Russia, and Spain.[157] The Lieber Code also became a point of reference for subsequent unratified international agreements,

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became a professor at Columbia University. *Id.* For more information on Francis Lieber's background, see generally JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012) (providing an in-depth examination of the creations of the laws of war from the American perspective).

152. War Dep't, Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863) (promulgated as General Order No. 100 by President Abraham Lincoln) [hereinafter Lieber Code]; Finkelman, *supra* note 151, at 2109; *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. 245, 249–59 (2006) (providing historical context of the early history of the law warfare regarding cultural heritage sites and objects).

153. Lieber Code, *supra* note 152, arts. 34–35, 44; *see* John C. Johnson, *Under New Management: The Obligation to Protect Cultural Property During Military Occupation*, 190/191 MIL. L. REV. 111, 119 (2006–07) (providing an overview of the importance of the Lieber Code to military treatment of cultural property).

154. *See* Lieber Code, *supra* note 152, arts. 34, 38. In particular, article 34 states:

> 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 property . . . .

Id. art. 34.

155. *Id.* art. 35.

156. *Id.* art. 44.

157. Pietro Verri, *The Condition of Cultural Property in Armed Conflicts (II): From Antiquity to World War II*, INT'L REV. RED CROSS, No. 246, June 1985, at 127, 128–29 (outlining and providing comparisons from the Lieber Code to the English Code, the Italian Code, the Spanish Code, and the Russian Code).

which extolled the prohibition of the destruction of cultural heritage, including the Brussels Declaration[158] and the Oxford Manual of the Institute of International Law.[159] The legal precedent set by the Lieber Code and subsequent declarations influenced the codification of the international protection of private property—including cultural heritage—in the 1899[160] and 1907[161] Hague Conventions.

Article 27 of the 1899 Hague Convention stresses the necessity of taking steps to spare "edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes."[162] Implicitly, Article 27's requirement to protect cultural heritage also denotes the obligation to refrain from its destruction. Eight years later, the convention and its regulations were revised at the Second International Peace Conference in 1907.[163] The language of Article 27 and its enforceability remained untouched by the subsequent amendments.[164] While some scholars believe that the 1899 and 1907 Hague Conventions are weak in their enforceability[165]—citing the vast destruction of cultural heritage during the First World War and Second World War—in actuality, they aid in the interpretation of the prohibition

158. Project of an International Declaration Concerning the Laws and Customs of War, art. 8, Aug. 27, 1874 ("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.").

159. Oxford Manual, *supra* note 106, at art. 53 ("The property of municipalities, and that of institutions devoted to religion, charity, education, art and science, cannot be seized. All destruction or willful damage to institutions of this character, historic monuments, archives, Works of art, or science, is formally forbidden, save when urgently demanded by military necessity.").

160. *See* 1899 Hague Convention, *supra* note 106, at art. 56.

161. *See* Convention Respecting the Laws and Customs of War on Land, art. 56, Oct. 18, 1907, 36 Stat. 2277 [hereinafter 1907 Hague Convention].

162. 1899 Hague Convention, *supra* note 106, at art. 27.

163. *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 29 July 1899*, INT'L COMM. RED CROSS: TREATIES, STATES PARTIES & COMMENTS., https://ihl-databases.icrc.org/ihl/INTRO/150 (last visited July 14, 2020).

164. *See id.* Although, it should be noted that seventeen of the states that ratified the 1899 Convention did not ratify the 1907 version: Argentina, Bulgaria, Chile, Colombia, Ecuador, Greece, Italy, Korea, Montenegro, Paraguay, Persia, Peru, Serbia, Spain, Turkey, Uruguay, Venezuela. *Id.* These states and their successors remain bound by the 1899 Hague Convention. *Id.*

165. *See, e.g.*, Gerstenblith, *supra* note 13, at 341 ("Despite the widespread acceptance of these conventions by European nations, the conventions failed to protect cultural property during the two world wars.").

against destruction of cultural heritage as a fundamental rule embodied in customary international law.[166]

In 1935, the Seventh International Conference of American States recommended the ratification of the Roerich Pact, which reiterated the obligation to respect and protect cultural property.[167] The Roerich Pact also initiated the use of a distinctive flag for marking the monuments and institutions protected under the agreement.[168] Around the same time, the League of Nations' International Museums Office sought to expand the protection of cultural property during armed conflict through the drafting of the International Convention for the Protection of Historic Buildings and Works of Art in Times of War.[169] The Draft Convention echoed the sentiments of previous instruments but also attempted to expand the protection of cultural heritage by prohibiting the use of monuments of artistic or historic interest for any purpose which may subject them to attack.[170] Despite these honorable attempts, neither document was able to thwart the damage to cultural heritage in World War II, which resulted in the largest destruction and displacement of cultural sites and objects known to humanity.[171]

After World War II, the international community desired to create more effective laws regulating the destruction of cultural heritage in order to prevent this type of carnage in the future. While the drafters of the Geneva Conventions of 1949 did not delineate any new provisions prohibiting the destruction of cultural heritage, the Fourth Geneva Convention reinforced the provisions of the 1899 and 1907 Hague Conventions.[172] The first real international instrument with innate

166. Karima Bennoune (Special Rapporteur in the Field of Cultural Rights), *Rep. of the Special Rapporteur in the Field of Cultural Rights*, U.N. Doc. A/HRC/31/59, at 14 (Feb. 3, 2016) (quoting Francesco Francioni & Federico Lanzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT'L L. 619, 635 (2003)) ("The Special Rapporteur recalls that many provisions of the Hague Convention are deemed to rise to the level of customary international law, binding both States not party to the Convention as well as non-State actors. She further concurs with experts that 'the prohibition of acts of deliberate destruction of cultural heritage of major value for humanity' rises to the level of customary international law.").

167. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments art. 1, Apr. 15, 1935, 49 Stat. 3267 [hereinafter Roerich Pact].

168. *Id.* art. 3.

169. *Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Times of War*, 19 LEAGUE NATIONS OFF. J. 885 app. at 937 (1938).

170. *See id.* at 938.

171. *See generally* LYNN NICHOLAS, THE RAPE OF EUROPA (1994).

172. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 53, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter Fourth Geneva Convention] ("Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public

enforceability did not occur until 1954 with the adoption of the Convention for the Protection of Cultural Property in the Event of Armed Conflict at The Hague, Netherlands.[173] The 1954 Hague Convention was the first international treaty exclusively focused on the protection of cultural heritage during times of armed conflict.[174] The 1954 Hague Convention recognized that "damage to cultural property belonging to any people whatsoever" is "damage to the cultural heritage of all mankind."[175] The 1954 Hague Convention solidified the notion that the prohibition of destruction of cultural heritage is recognized by customary international law by implementing measures that prohibit the destruction of cultural heritage,[176] require the safeguard of cultural heritage,[177] and impose sanctions on those who breach the provisions of the convention.[178] By recognizing that "the preservation of the cultural heritage is of great importance for all peoples of the world,"[179] the convention elevates the prohibition of the destruction of cultural heritage to a matter of international significance.

After the 1954 Hague Convention, additional developments materialized in international humanitarian law, specifically relating to cultural heritage and armed conflict. The vast destruction in the former Yugoslavia[180] necessitated the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") to re-examine the 1954 Hague Convention. As a result, UNESCO drafted and adopted the Second Protocol, which set forth obligations for signatories to enact national legislation making the destruction of cultural heritage a criminal offense[181] and applied such obligations to international and non-international conflicts.[182] The establishment of the 1948 Universal

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authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.").

173. 1954 Hague Convention, *supra* note 16.

174. *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/1954-hague-convention/ (last visited Feb. 26, 2021).

175. 1954 Hague Convention, *supra* note 16, at pmbl.

176. *Id.* art. 4.

177. *Id.*

178. *Id.* art. 28. ("The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.").

179. *Id.* at pmbl.

180. *See infra* Section III.C.

181. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 15, Mar. 26, 1999, 38 I.L.M. 769 [hereinafter Hague Convention Second Protocol].

182. *Id.* art. 22.

Declaration on Human Rights ("UDHR")[183] and the 1996 International Covenant on Economic, Social and Cultural Rights ("ICESCR")[184] also was instrumental in the development of the protection of cultural heritage. The UDHR and ICESCR reiterated the importance of "scientific, literary or artistic production" to individuals and recognized that such rights should not be infringed.[185]

These preceding international instruments demonstrate that the international community generally recognizes that cultural heritage cannot be destroyed without cause,[186] and any such occurrence may lead to liability.

C. The Destruction of Cultural Heritage: An International Crime

While the law of armed conflict has traditionally fixated on inter-state conflicts, international law has had to account for the evolving nature of international and non-international conflicts.[187] International conventions alone cannot prevent—and have not prevented—the continual destruction of cultural heritage by individuals who target such property with impunity.[188] This is an area where international law can

183. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 27 (Dec. 10, 1948) [hereinafter UDHR] ("1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.").

184. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, at art. 15 (Dec 16, 1966) [hereinafter ICESCR] ("1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity. 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.").

185. *Id.*; UDHR, *supra* note 183, at art. 27.

186. *See, e.g.*, 1954 Hague Convention, *supra* note 16, at art. 4(2) ("The obligations mentioned in paragraph 1 . . . may be waived only in cases where military necessity imperatively requires such a waiver.").

187. Fincham, *supra* note 137, at 179.

188. *See* Anne-Marie Carstens, *The Hostilities-Occupation Dichotomy and Cultural Property in Non-International Armed Conflicts*, 52 STAN. J. INT'L L. 1, 5 (2016) ("[W]ell-entrenched prohibitions prove woefully ineffective against the current scourge for several reasons. First and foremost, rules based on good-faith adherence cannot protect the 'cultural heritage of mankind' in conflicts where belligerents flagrantly violate these rules and target cultural property precisely for its cultural connotations.") (emphasis omitted).

be utilized as an instrument to resolve this paradigm. When prosecuting an individual for destruction of cultural heritage, two avenues for prosecution may be undertaken: crimes against humanity or war crimes.[189] By invoking the aid of international criminal tribunals, a body of international criminal law has developed as an attempt to hold accountable those who destroy or damage cultural heritage.

Individual criminal responsibility for unlawfully directing attacks against cultural heritage is universally recognized under international law.[190] The first development of criminal liability for crimes against cultural heritage arose after World War II during the Nuremberg Trials, which occasioned the prosecution of individuals for various war crimes as well as crimes against humanity.[191] The Charter of the International Military Tribunal at Nuremberg vested international jurisdiction for those war crimes including "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."[192] One of the first individuals to be prosecuted for crimes against cultural heritage, among other crimes, was Alfred Rosenberg, who was instrumental in the organization of the "Einsatzstab Rosenberg," the arm of the Third Reich charged with the despoliation of cultural heritage.[193] The Nuremberg Indictment also charges multiple individuals with the destruction of "industrial cities, cultural monuments, scientific institutions, and property of all types in the occupied territories to eliminate the possibility of competition with Germany."[194]

During the 1990s, the mass atrocities during the Balkan wars necessitated action by the United Nations Security Council.[195] The conflicts, which arose after the dissolution of the former Socialist Federal Republic of Yugoslavia, resulted in the systematic destruction of

189. *See* Roger O'Keefe, *Protection of Cultural Property Under International Criminal Law*, 11 MELB. J. INT'L L. 339, 341 (2010).

190. *See id.* at 346.

191. Fincham, *supra* note 137, at 165.

192. *See* Nuremberg Charter, *supra* note 106, at art. 6(b).

193. 1 INT'L MIL. TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 70–71, 293–95 (1947), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

194. *Id.* at 56. The destruction of cultural heritage devastated Eastern European countries. The Nazi systematic policy of ethnic and cultural cleansing occasioned the decimation of 1,710 cities, including over 6,000,000 buildings, 427 museums, 1,670 Greek Orthodox Churches, 237 Roman Catholic Churches, 67 chapels, and, notably, 532 synagogues. *Id.* at 58–59.

195. Fincham, *supra* note 137, at 165 ("With the mass atrocities which took place in the Balkan wars . . . , the United Nations Security Council created international criminal tribunals for each conflict.").

centuries-old mosques, churches, monasteries, libraries, archives, and artworks in Bosnia-Herzegovina and Croatia.[196] Similar to the Nazis' actions in World War II, the destruction of cultural heritage served as an attempt to eradicate all discernable traits of the culture of "enemy" communities.[197] The United Nations Security Council created the International Criminal Tribunal for the Former Yugoslavia ("ICTY") to hold "perpetrators accountable for their crimes in accordance with international standards of due process; to build a truthful record of the horrific criminal acts; and to deter future atrocities."[198] In an effort to prosecute crimes against cultural heritage, the Statute of the ICTY included a provision regarding the destruction of "institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science" as a subcategory of "Violations of the laws or customs of war" under Article 3(d).[199] This marked the first time an international criminal court was given jurisdiction over this particular crime,[200] and as a result multiple individuals were charged for the massive destruction left in their wake.[201]

The events of the Balkan conflict and the construction of the ICTY Statute informed the drafters of the Rome Statute of the International

196. *See* O'Keefe, *supra* note 189, at 344.

197. *Id.*; *Dubrovnik and Crimes Against Cultural Heritage*, U.N. INT'L CRIM. TRIBUNAL FORMER YUGOSLAVIA, https://www.icty.org/en/outreach/documentaries/dubrovnik-and-crimes-against-cultural-heritage (last visited July 14, 2020).

198. Jane E. Stromseth, *The International Criminal Court and Justice on the Ground*, 43 ARIZ. ST. L.J. 427, 429–30 (2011).

199. Statute of the International Criminal Tribunal for the Former Yugoslavia art. 3(d), May 25, 1993 [hereinafter ICTY Statute].

200. Mark S. Ellis, *The ICC's Role in Combatting the Destruction of Cultural Heritage*, 49 CASE W. RSRV. J. INT'L L. 23, 43 (2017).

201. *See* Prosecutor v. Milošević, Case No. IT-02-54-T, Second Amended Indictment, ¶¶ 71–72; ¶¶ 77–83 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2002), https://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-ai021023.htm (charging Milošević with, *inter alia*, multiple counts of destruction of or willful damage to religious, historical, and cultural buildings and monuments); Prosecutor v. Karadžić, Case No. IT-95-5-I, Indictment, ¶¶ 37–39 (Int'l Crim. Trib. for the Former Yugoslavia July 1995), https://www.icty.org/x/cases/karadzic/ind/en/kar-ii950724e.pdf (charging Karadžić and Mladić for "widespread and systematic damage to and destruction of Muslim and Roman Catholic sacred sites"); Prosecutor v. Stanišić, Case No. IT-08-91-T, Judgment Summary, Count 1 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 27, 2013), https://www.icty.org/x/cases/zupljanin_stanisicm/tjug/en/130327-summary.pdf (charging the defendants with "[w]anton destruction of town and villages, including destruction or wilful damage done to institutions dedicated to religion and other cultural buildings"); Prosecutor v. Jokić, Case No. IT-01-42/1-S, Sentencing Judgment, ¶¶ 8, 116 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004), https://www.icty.org/x/cases/miodrag_jokic/tjug/en/jok-sj040318e.pdf (sentencing Jokić to seven years imprisonment for, among other things, the "destruction or wilful damage done to institutions dedicated to religion, charity, and education, the arts and sciences, historic monuments and works of art and science").

Criminal Court ("ICC")[202] to prosecute crimes against cultural heritage.[203] The ICC recognizes that "all peoples are united by common bonds, their cultures pieced together in a shared heritage."[204] In recognition of the importance of cultural heritage, the ICC's prosecution of "war crimes" includes "[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, [and] historic monuments."[205] The Rome Statute explicitly declares that the violations against cultural heritage, whether of non-international or international character, fall under the umbrella of the ICC's jurisdiction.[206] The broad language of the Rome Statute implies that any attack against cultural heritage is an international crime, irrespective of whether or not harm occurs.[207]

The first and only ICC case to focus entirely on the destruction of cultural heritage was the case of *Prosecutor v. Al Mahdi*.[208] On December 17, 2015, Al Mahdi was charged with the war crime of destroying Mali's cultural heritage, including intentionally directing attacks against Timbuktu's mausoleums and other historical monuments and buildings dedicated to religion.[209] Al Mahdi pleaded guilty to the crimes,[210] and became the first individual to be convicted of international war crimes for the destruction of cultural heritage.[211] This conviction reinforced the

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202. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

203. O'Keefe, *supra* note 189, at 345.

204. Rome Statute, *supra* note 202, at pmbl.

205. *Id.* art. 8(2)(b)(ix).

206. *Id.* art. 8(2)(b), (e)–(f).

207. *See id.*

208. *See* Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶ 11 (Sept. 27, 2016), https://www.icc-cpi.int/courtrecords/cr2016_07244.pdf.

209. *Id.* at ¶¶ 2, 10–11. The ICC Prosecutor described the impact of the loss to Mali's cultural heritage, stating:

> To destroy Timbuktu's mausoleums is therefore to erase an element of collective identity built through the ages. It is to eradicate a civilisation's landmark. It is the destruction of the roots of an entire people, which irremediably affects its social attitudes, practices and structures. [An] inhabitant of Timbuktu summarised this notion as follows: "Timbuktu is on the verge of losing her soul; Timbuktu is threatened by outrageous acts of vandalism; Timbuktu is being held under a sharpened blade ready for use in a cold-blooded murder."

Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Trial Hearing, 19 (Aug. 22, 2016), https://www.icc-cpi.int/Transcripts/CR2016_05767.PDF.

210. Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Trial Hearing, 7 (Aug. 22, 2016), https://www.icc-cpi.int/Transcripts/CR2016_05767.PDF.

211. *ICC Finds Malian Extremist Guilty of War Crime in Destroying Historic Sites in Timbuktu*, UN NEWS (Sept. 27, 2016), https://news.un.org/en/story/2016/09/541172#:~:text=The%20International%20Criminal%20Court%20(ICC,heritage%20as%20a%20war%20crime.

severity of the crime of cultural heritage destruction and highlights the importance of the international community's role in safeguarding the world's cultural heritage.

Jurisdiction under the ICC is only triggered in those countries which are a party to the treaty or consent to the court's jurisdiction.[212] Many of the world's nations, with major centers of cultural heritage, including the United States, India, and China have not joined the ICC.[213] While there are a number of international criminal tribunals capable of adjudicating cultural heritage disputes, the prosecution of criminal offenses can only work with the participation of the world's most powerful countries. Despite the *Al-Mahdi* conviction and the evolution of international criminal law, the destruction of cultural heritage continues to be a pervasive global issue. Accordingly, deterrence and redress must be effectuated through both criminal and civil liability.

IV. THE SUBSTANTIVE CLAIM: DESTRUCTION OF CULTURAL HERITAGE UNDER ATS

As illustrated in the foregoing analysis, the prohibition against the destruction of cultural heritage is embodied in customary international law. While ATS clearly affords jurisdiction over claims based upon international norms recognized under customary international law, courts may nevertheless be apprehensive to hold actionable such claims of broad applicability. Indeed, courts have afforded only a limited number of violations of international norms recognition as within the law of nations. The application of international law already inspires judicial reluctance. Still, by articulating certain human rights claims, plaintiffs may prevail through a judicial finding of a violation of the law of nations.

A. War Crimes

A cause of action for war crimes is perhaps the strongest vehicle for redress for the destruction of cultural heritage under ATS. Under international law, war crimes are defined by the Geneva Conventions, to which the United States, in addition to at least 180 states, is a party.[214]

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212. *See* Rome Statute, *supra* note 202, at art. 126.

213. *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Apr. 7, 2021).

214. Fourth Geneva Convention, *supra* note 172, at art. 147; *see also* PELL, COMM. FOREIGN RELS., CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. NO. 101-30 (1984) ("[T]he Geneva Conventions, to which the United States and virtually all other countries are Parties . . .

War crimes are also among those crimes of "universal concern" according to the Restatement (Third) of Foreign Relations Law of the United States.[215] By ratifying the Geneva Conventions, Congress has formally adopted a universally accepted definition of war crimes.[216] Domestic law in the United States also recognizes war crimes as a distinct federal crime, incorporating the definitions of the Geneva Conventions.[217] This recognition under U.S. domestic law clearly demarcates congressional intent to include the commission of war crimes as a defined violation of the law of nations.

The destruction of cultural heritage constitutes a "war crime" under multiple provision in the War Crimes Act of 1996.[218] War crimes are initially defined as any conduct that constitutes a "grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party."[219] The "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" is enumerated in the First Geneva Convention[220] and Second Geneva Convention.[221] The Fourth Geneva Convention extends this prohibition to:

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.[222]

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generally reflect customary international law."); *Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380 (last visited Apr. 7, 2021).

215. RESTATEMENT, *supra* note 81, § 404.

216. *In re* Xe Servs., 665 F. Supp. 2d 569, 582 (E.D. Va. 2009) ("Claims for violations of the international norm proscribing war crimes are cognizable under the ATS. By ratifying the Geneva Conventions, Congress has adopted a precise, universally accepted definition of war crimes.").

217. War Crimes Act of 1996, 18 U.S.C. § 2441.

218. *See id.*

219. *Id.* at (c)(1).

220. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114.

221. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 51, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217.

222. Fourth Geneva Convention, *supra* note 172, at art. 53.

Through ratification of these provisions in domestic legislation, almost every country in the world, including the United States, has agreed to include the destruction of cultural heritage under the umbrella of war crimes. Indeed, war crimes are considered criminally punishable by the ICC by over 110 states, including Australia, Canada, Japan, Mexico, and all of Western Europe.[223] The War Crimes Act further defines a "war crime" as conduct "prohibited by Article 23, 25, 27, or 28 of the . . . [1907] Hague Convention."[224] These provisions, *inter alia*, prohibit the destruction of an enemy's property,[225] necessitate the protection of "buildings dedicated to religion, art, science, or charitable purposes, [or] historic monuments,"[226] and forbid pillaging.[227] Congress's carve out of provisions of the 1907 Hague Convention that relate to the prohibition against the destruction and misappropriation of property demonstrates its explicit recognition of the significance of these prohibitions and further aids in the embodiment of these prohibitions as part of customary international law.

Courts have recognized the category of "war crimes" as sufficiently specific, obligatory, and universal to give rise to a cause of action under ATS. [228] However, there is only one case that has recognized the war crime of destruction of cultural heritage as actionable under ATS—*Jane W. v. Thomas*.[229] On July 29, 1990, Moses Thomas, a former commander of a specialized branch of the Armed Forces of Liberia, ordered his troops to murder approximately 600 unarmed men, women, and children taking refuge in St. Peter's Lutheran Church.[230] The massacre was one of the

223. Rome Statute, *supra* note 202, at art. 8; *The States Parties to the Rome Statute*, *supra* note 213.

224. 18 U.S.C. § 2441(c)(2).

225. 1907 Hague Convention, *supra* note 158, at art. 23(g).

226. *Id.* art. 27.

227. *Id.* art. 28.

228. *See supra* text accompanying notes 85–97. Kadic v. Karadžić, 70 F.3d 232, 242–43 (2d Cir. 1995) (citations omitted) ("The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II . . . and remains today an important aspect of international law."); Bigio v. Coca-Cola Co., 239 F.3d 440, 448 (2d Cir. 2000) (citing *id.* at 243) ("[W]ar crimes and acts of genocide are actionable under the Alien Tort Claims Act without regard to state action . . . ."); *In re* Chiquita Brands Int'l., Inc., 792 F. Supp. 2d 1301, 1331 (S.D. Fla. 2011), *rev'd sub nom.* Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185 (11th Cir. 2014) ("War crimes are recognized violations of the law of nations under the ATS."); *In re* Xe Servs., 665 F. Supp. 2d 569, 582 (E.D. Va. 2009) ("Claims for violations of the international norm proscribing war crimes are cognizable under the ATS."); *see also* Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1181–82 (C.D. Cal. 2005) (finding war crimes actionable under ATS based on the Geneva Conventions and their incorporation into the War Crimes Act of 1996).

229. 354 F. Supp. 3d 630, 639 (E.D. Pa. 2018); Complaint, *supra* note 20, at 31.

230. Complaint, *supra* note 20, at 1–2.

most horrific attacks on civilians in the country's history, and yet, Thomas and his forces managed to evade accountability for over thirty years.[231] On February 12, 2018, four Liberian survivors of the massacre[232] filed a case in the Eastern District of Pennsylvania, alleging several claims for war crimes and crimes against humanity under ATS.[233] In the plaintiffs' ninth claim for relief, the Complaint alleged that Moses Thomas committed a war crime by "intentionally directing attacks against a building dedicated to religion or a charitable purposes that was not a military target at the time of the attack."[234] In considering a motion to dismiss the complaint, the court found that the plaintiffs' ATS claims sufficiently "touch[ed] and concern[ed]" the United States to "displace the general presumption against jurisdiction over extraterritorial claims."[235]

The court in *Jane W. v. Thomas* did not examine whether the war crime of the destruction of cultural heritage was sufficiently universal, definable, and obligatory. However, the court's tacit acceptance of this claim is demonstrative that this type of claim is actionable under ATS. The case affirms Judge Schwartz's holding in *Presbyterian Church* that "property destruction, committed as part of genocide or war crimes, may violate the law of nations."[236] A claimant's ability to bring such claims, however, is significantly narrowed to destruction of cultural heritage within the context of armed conflict. To wit, to meet this threshold of international liability for war crimes, the actions must be triggered by an armed conflict.[237] The destruction of cultural heritage may inevitably occur during a conflict of non-international nature or may occur episodically during peacetime. As such, victims of these attacks must seek alternative claims under ATS. The destruction of cultural heritage is not only a war crime, but a human rights violation. Therefore, victims may be able to seek justice through other humanitarian claims under customary international law.

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231. *Id.* at 2.

232. The victims survived the Lutheran Church Massacre "by hiding under piles of dead bodies." *Id.* They "witnessed the slaughter of hundreds of civilians, including their own family members." *Id.*

233. *Id.* at 2–3. To be clear, the destruction of cultural heritage was only one of many claims set forth by the claimants in this action. *Id.* at 19–32.

234. *Id.* at 31.

235. Jane W. v. Thomas, 354 F. Supp. 3d 630, 639 (E.D. Pa. 2018).

236. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 325 (S.D.N.Y. 2003).

237. *See supra* Section III.B. *See also, e.g.*, Complaint, *supra* note 20, at 26–27; ICTY Statute, *supra* note 198, at art. 3.

B. Crimes Against Humanity

Crimes against humanity are undoubtedly a violation of customary international law and, as such, constitute a universal, obligatory, and definable norm actionable under ATS. [238] Indeed, every modern international criminal tribunal has articles prohibiting crimes against humanity.[239] While the original concept of the crime against humanity arose out of acts committed during armed conflicts, the concept has been extended to times of peace.[240] Under international law, crimes against humanity require (1) "a widespread or systematic attack directed against [a] civilian population" and (2) a prohibited act.[241] The articles defining

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238. *See* Doe v. Saravia, 348 F. Supp. 2d 1112, 1154 (E.D. Cal. 2004) ("The prohibition of crimes against humanity has been defined with an ever greater degree of specificity than the three 18th-century offenses identified by the Supreme Court and that are designed to serve as benchmarks for gauging the acceptability of individual claims under the ATCA."); Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1202 (9th Cir. 2007) ("Plaintiffs here have alleged several claims . . . that form the least controversial core of modern day [ATS] jurisdiction, including allegations of war crimes, crimes against humanity and racial discrimination."); Kadic v. Karadžić, 70 F.3d 232, 236 (2d Cir. 1995) ("[W]e hold that . . . Karadžić may be found liable for genocide, war crimes, and crimes against humanity in his private capacity.").

239. *See, e.g.*, Rome Statute, *supra* note 202, at art. 7; Control Council for Germany Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity art. II(1)(c), Dec. 20, 1945, 15 DEP'T STATE BULL. 829 [hereinafter Control Council] (prohibiting crimes against humanity); Nuremberg Charter, *supra* note 106 at art. 6(c) (prohibiting crimes against humanity); S.C. Res. 955, annex, Statute of the International Tribunal for Rwanda, art. 3 (Nov. 8, 1994) [hereinafter ICTR Statute] (prohibiting crimes against humanity); ICTY Statute, *supra* note 198, at art. 5 (prohibiting crimes against humanity); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity art. I(b), *opened for signature* Nov. 26, 1968, 754 U.N.T.S. 73 (recognizing the existence of crimes against humanity as violations of international law).

240. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Deference Motion for Interlocutory Appeal on Jurisdiction, ¶140 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), https://www.icty.org/x/cases/tadic/acdec/en/51002.htm ("[T]here is no logical or legal basis for this [armed conflict nexus] requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity."); *see also* Control Council, *supra* note 238, at art II(c) (neglecting to mention any requirement for an armed conflict to constitute a crime against humanity); ICTR Statute, *supra* note 238, at art. 3 (neglecting to reference any sort of nexus requirement for armed conflict); Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (prohibiting genocide, a type of crime against humanity, "in time of peace or in time of war").

241. *See* Rome Statute, *supra* note 202, at art. 7(1); ICTY Statute, *supra* note 198, at art. 5; ICTR Statute, *supra* note 238, at art. 3; *see also* Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455752 at *3 n.5 (N.D. Cal. Aug. 22, 2006) (quoting Cabello v. Fernandez-Larios, 402 F.3d 1148, 1161 (11th Cir. 2005)) (defining the general elements of crimes against humanity as "a widespread or systematic attack directed against any civilian population"); *In re* Chiquita Brands Int'l, Inc., 792 F. Supp. 2d 1301, 1334 (S.D. Fla. 2011),

crimes against humanity in the respective international instruments include a list of specific acts constituting crimes against humanity,[242] as well as a more encompassing "[o]ther inhumane acts" provision, which may include acts "causing great suffering, or serious injury to body or to mental or physical health."[243]

None of the statutes explicitly include the destruction of cultural heritage, or any property for that matter. Consequently, a claim under crimes against humanity must fall within the scope of "other inhumane acts." The International Law Commission "recognized that it [is] impossible to establish an exhaustive list of the inhumane acts which might constitute crimes against humanity."[244] However, the absence of the destruction of cultural property as an explicit crime against humanity is not dispositive of its status. Given that the destruction of cultural heritage causes great suffering and serious injury to mental health, scholars have argued that these actions constitute crimes against humanity.[245]

The right to one's culture is intrinsically interconnected with the culture's specific tangible and intangible heritage. The UDHR recognizes every individual's right to the realization of their "social and cultural rights" and "the right freely to participate in the cultural life of the[ir] community."[246] Article 27 of the Fourth Geneva Convention provides that "[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs."[247] The right to one's cultural

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rev'd, Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185 (11th Cir. 2014) ("Crimes against humanity include murder, enslavement, deportation or forcible transfer, torture, rape or other inhumane acts committed as part of a widespread or systematic attack against a civilian population."); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1353 (N.D. Ga. 2002) (quoting Rome Statute, *supra* note 202, at art. 7) (defining crimes against humanity under The Rome Statute "as any of certain enumerated acts that are prohibited by international law 'when committed as part of widespread or systematic attack directed against any civilian population, with knowledge of the attack'").

242. This list specifically includes murder, enslavement, deportation or forcible transfer, torture, rape, or other inhumane acts "committed as part of a widespread and systematic attack directed against any civilian population . . . ." Rome Statute, *supra* note 202, at art. 7.

243. *Id.* at 7(1)(k); *see also* ICTY Statute, *supra* note 198, at art. 5(i); ICTR Statute, *supra* note 238, at art. 3(i).

244. *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, 51 U.N. GAOR Supp. No. 10, at 50, U.N. Doc. A/51/10 (1996), *reprinted in* [1996] 2 Y.B. Int'l L. Comm'n.

245. *See, e.g.*, O'Keefe, *supra* note 189, at 380–82; Fincham, *supra* note 137, at 167; *see also* Ann Marie Thake, *The International Destruction of Cultural Heritage as a Genocidal Act and a Crime Against Humanity*, 10 ESIL CONF. PAPER SERIES 1, 22–24 (2017).

246. UDHR, *supra* note 183, at arts. 22, 27(1).

247. Fourth Geneva Convention, *supra* note 172, at art. 27.

life is further documented in the ICESCR, which places on parties the obligation to take all the steps "necessary for the conservation, the development and the diffusion of science and culture."[248]

Cultural heritage is an indispensable resource for individuals to enjoy and cultivate their culture. The destruction of cultural heritage, while aimed to harm the physical structure or artifact itself, more potently harms the targeted cultural group. It deprives members of the targeted group the ability to express their identity, while simultaneously dehumanizing them by removing the core of their being.[249] It is for this reason that international law makes clear that this cultural destruction constitutes a crime against humanity, specifically when it is "widespread or systematic."[250] Indeed, the ICTY has held that when such destruction is "perpetrated with the requisite discriminatory intent, [it] amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of 'crimes against humanity,' for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects."[251]

By viewing the destruction of cultural heritage as a crime directed against individuals, courts have the ability to provide redress for those victims deprived of their cultural rights outside of the war-time context. Through this characterization, a strong argument may be made that a claim under ATS is actionable where the perpetrators destroy cultural heritage in an attempt to extinguish a group's culture. The destruction of culture either by property or personhood often has the same motive—to eradicate a culture and to eviscerate the group's ability of self-identification. There is a deep-rooted connection between cultural heritage and cultural rights. When the destruction of cultural heritage is

248. ICESCR, *supra* note 179, at art. 15(2).

249. *See, e.g.*, U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS, at 71, 74, 113–14 (1949) (indicting defendant for crimes against humanity for the persecution of Jews through the destruction of cultural heritage, including cultural objects, libraries, and Polish memorials and the "[s]ystematic destruction of Polish culture, robbery of Polish cultural treasures and germanization of the Polish country and population"); *see also* Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶¶ 79–80 (Sept. 27, 2016), https://www.icc-cpi.int/courtrecords/cr2016_07244.pdf (considering witnesses' testimonies that the destruction of the sites at Timbuktu was "aimed at breaking the soul of the people of Timbuktu," the court looked at the "symbolic and emotional value" of these sites for the people of Timbuktu and concluded that Al Mahdi's crime was of significant gravity).

250. *See, e.g.*, Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶¶ 336, 544 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf.

251. Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶ 207 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), https://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf.

part of a systematic and discriminatory policy against a particular group, it leads to a violation of innate cultural rights vested by customary international law and international instruments. UNESCO deems this crime a form of "cultural cleansing," involving a strategy by the perpetrator "to destroy the legitimacy of the other, deprived of his fundamental right of existence and expression."[252] Therefore, in cases where all elements of a crime against humanity are satisfied, the destruction of cultural heritage should be actionable under ATS, when it is carried out with a discriminatory intent and severely deprives the victims of their cultural rights.

C. *Cultural Genocide*

The destruction of cultural heritage has been viewed as a genocidal act.[253] However, courts have categorically failed to recognize "cultural genocide" as prohibited under customary international law.[254] Cultural genocide, as a concept of international law, is a sub-category of genocide, which may be subdivided by physical, biological, economic, political, and cultural properties.[255] In contrast to physical and biological genocide, cultural genocide entails the destruction of both tangible—such as places of worship, libraries, or museums—and intangible—such as language and dances—cultural structures.[256] International law recognizes

252. UNESCO International Conference, *Heritage and Cultural Diversity at Risk in Iraq and Syria*, 9 (Dec. 3, 2014) (quoting Ambassador Pierre Morel).

253. *See generally* Rasa Davidavičiūtė, *Cultural Heritage, Genocide, and Normative Agency*, J. APPLIED PHIL., 2020, https://doi.org/10.1111/japp.12473 (providing an analysis of the treatment of cultural heritage destruction as genocide).

254. *See, e.g.*, Flores v. S. Peru Copper Corp., 253 F. Supp. 2d 510, 518, 525 (S.D.N.Y. 2002) (finding that environmental tort claims alleged as cultural genocide were insufficient to meet the *Filártiga* standards); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167–68 (5th Cir. 1999) (holding that cultural genocide is not prohibited under customary international law).

255. David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention*, 36 CORNELL INT'L L.J. 293, 297 (2003).

256. Fincham, *supra* note 137, at 151; *see also* Hannibal Travis, *The Cultural and Intellectual Property Interests of the Indigenous Peoples of Turkey and Iraq*, 15 TEX. WESLEYAN L. REV. 415, 473–74 (2009) (concluding that the attacks on the cultural and intellectual heritage of indigenous Assyrians, Greeks, and Armenians of Iraq and Turkey constitute cultural genocide); Barry Sautman, *"Cultural Genocide" and Tibet*, 38 TEX. INT'L L.J. 173, 176–77, 182 (2003) (examining cultural genocide in Tibet); Laurelyn Whitt & Alan W. Clarke, *Bringing It Home: North American Genocides*, 20 J. GENDER, RACE & JUST. 263, 275–80 (2017) (contending that the history of settler colonialism in North America includes genocidal acts).

biological and physical genocide as a prohibitive norm but fails to acknowledge cultural genocide.[257]

The exclusion of cultural genocide as an unrecognized norm of customary international law likely derives from the failure of the drafters of the Genocide Convention to incorporate such a crime.[258] Polish jurist Rafael Lemkin, who provided some of the theoretical underpinnings of the Genocide Convention, envisioned the crime of genocide to include the destruction of cultural heritage.[259] In writing that destruction of cultural heritage should trigger universal jurisdiction, Lemkin wrote:

> An attack targeting a collectivity can also take the form of systematic and organized destruction of the art and cultural heritage in which the unique genius and achievement of a collectivity are revealed in fields of science, arts and literature. The contribution of any particular collectivity to world culture as a whole, forms the wealth of all of humanity, even while exhibiting unique characteristics.
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> . . . .
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> In the acts of barbarity, as well as in those of vandalism, the asocial and destructive spirit of the author is made evident. This spirit, by definition, is the opposite of the culture and progress of humanity. It throws the evolution of ideas back to the bleak period of the Middle Ages. Such acts shock the conscience of all humanity, while generating extreme anxiety about the future. For all these reasons, acts of vandalism and barbarity must be regarded as offenses against the law of nations.[260]

Indeed, earlier drafts of the Genocide Convention proposed criminalization of cultural genocide, which was understood to include the destruction or eradication of specific characteristics of a protected group, including its cultural heritage.[261] The crime of cultural genocide was ultimately rejected by the UN General assembly, as "the destruction of a

257. *See* Daphne Anayiotos, *The Cultural Genocide Debate: Should the UN Genocide Convention Include a Provision on Cultural Genocide, or Should the Phenomenon Be Encompassed in a Separate International Treaty?*, 22 N.Y. INT'L L. REV. 99, 124–25 (2009).

258. *Id.* at 114–15.

259. *See id.* at 102–03, 114–15; RAPHAEL LEMKIN, ACTS CONSTITUTING A GENERAL (TRANSNATIONAL) DANGER CONSIDERED AS OFFENCES AGAINST THE LAW OF NATIONS (Jim Fussell trans.,1933), http://www.preventgenocide.org/lemkin/madrid1933-english.htm.

260. LEMKIN, *supra* note 258.

261. U.N. Secretary-General, *Draft Convention on the Crime of Genocide*, art. I(II)(3), U.N. Doc. E/447 (Mar. 28, 1947).

group's cultural attributes did not rise to the level of physical destruction, the main concern of the Convention."[262]

The ICTY considered whether discriminatory attacks on cultural heritage constitute evidence of genocidal intent in *Prosecutor v. Radislav Krstić* and concluded that:

> [C]ustomary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.[263]

The ICJ has similarly questioned whether cultural heritage destruction fits within the definition of genocide. In *Bosnia and Herzegovina v. Serbia and Montenegro*, the court held:

> [T]he destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide . . . .[264]

Cultural genocide is undoubtedly a form of erasure, aiming to eradicate the social and cultural elements of a group of people. Cultural genocide may be defined as a subset of crimes against humanity as "inhumane acts" committed against a civilian population and persecutions on racial or religious grounds.[265] While international law does not recognize cultural genocide as singularly cognizable as an international law violation, it may fall under the purview of a norm

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262. STEVEN R. RATNER, JASON S. ABRAMS & JAMES L. BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 33 (3d ed. 2001).

263. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 580 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), https://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf.

264. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 47, ¶ 344 (Feb. 26).

265. *See* Control Council, *supra* note 229, at art. II(1)(c).

prohibiting racial and religious discrimination.[266] Systematic racial discrimination by a state may violate a *jus cogens* norm.[267] If such racial discrimination gives rise to a claim of apartheid,[268] it may be cognizable under ATS.[269] A fact pattern illustrative of this normative concept arises from the destruction of cultural heritage that occurred during South Africa's apartheid regime. District Six, formerly a multiracial area near Cape Town, was declared a "whites-only" area under South Africa's Group Areas Act in 1966.[270] As part of this systematic discriminatory operation, the District Six docks were flattened in order to keep races separate.[271] The destruction of heritage in pursuance of this type of blatantly discriminatory policy may provide a nexus for an actionable ATS claim. The use of this type of "cultural genocide" under ATS as a vehicle to rectify the wanton destruction of a group's cultural heritage, may be a step toward reclaiming racial and ethnic identity and dismantling structures that use cultural heritage destruction as a form of racial discrimination.

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266. Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545, 632–33 (2000) (citing multiple authorities to support the author's contention that racial and religious discrimination falls under cultural genocide and should be actionable under ATS, contending that "cultural genocide is an extreme example of discrimination, [so] plaintiffs may have a claim for discrimination even where the acts at issue do not rise to the level of cultural genocide").

267. *See* RESTATEMENT, *supra* note 81, § 702(f) & cmt. a (recognizing "systematic racial discrimination" as a violation of international law and as among "those human rights whose status as customary law is generally accepted").

268. Rome Statute, *supra* note 202, at art. 7(2)(h) (defining the "crime of apartheid" as "inhumane acts . . . committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime").

269. *See, e.g.*, Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007), *aff'd sub nom.* Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) (vacating the district court's dismissal of the plaintiffs' ATS claims for aiding and abetting apartheid); *see also* RESTATEMENT, *supra* note 81, § 702 cmt. i ("Racial discrimination is a violation of customary law when it is practiced systematically as a matter of state policy, *e.g.*, *apartheid* in the Republic of South Africa.").

270. Christiaan Beyers, *The Cultural Politics of "Community" and Citizenship in the District Six Museum, Cape Town*, 50 ANTHROPOLOGICA 359, 359–60 (2008); Steven C. Myers, *Myth and Monument in the New South Africa*, 10 INTERSECTIONS 647, 672 (2009).

271. Robert Bevan, *10 Heritage Sites Lost to Disaster and War*, GOOGLE ARTS & CULTURE, https://artsandculture.google.com/story/kALyuo79hhrkLQ (last visited July 15, 2020). District Six was a particularly important neighborhood culturally. *See* Beyers, *supra* note 270, at 359. For this reason, it was rebuilt, and a museum is now housed in this section of Cape Town. *See id.*

D. *Right to Property*

The universality of the right to property in domestic and international law should also provide redress for cultural heritage destruction under ATS. Noted property law scholar John Sprankling adopts the view that the right to property does exists not only domestically, but also on an international level.[272] According to Sprankling, transformative economic and political changes over the last three decades have helped developed an evolution of international law that recognizes a "global right to property."[273] Enshrined in the principles of natural law theory is the theory that the right to property is baked within those pre-existing natural rights of all.[274] Of course, the United States holds property interests in high regard, as rights to property are enmeshed in American constitutional law.[275]

The UDHR also acknowledges the right to property and also advances the notion that no one should be divested of their property.[276] In particular, Article 17 provides: "(1) Everyone has the right to own property alone as well as in association with others" and "(2) no one shall be arbitrarily deprived of his property."[277] Since the Cold War, a majority of the world's states are parties to human rights treaties which contain a "right to property,"[278] including the Convention for the Protection of Human Rights and Fundamental Freedoms,[279] the American Convention on Human Rights,[280] the African Charter on Human and Peoples'

272. John G. Sprankling, *The Global Right to Property*, 52 COLUM. J. TRANSNAT'L L. 464, 465–66 (2014).

273. *Id.* at 466.

274. *Id.* at 468; *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 289 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("The State of Nature has a Law of Nature to govern it, which obliges every one: and reason, which is that Law, teaches all Mankind who will but consult it, that being all equal and inde-pendent, no one ought to harm another in his Life, Health, Liberty or Possessions.").

275. *See, e.g.*, U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

276. UDHR, *supra* note 183, at art. 17.

277. *Id.*

278. Sprankling, *supra* note 272, at 475–76.

279. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262 ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.").

280. American Convention on Human Rights art. 21, Nov. 22, 1969, 1144 U.N.T.S. 123.

Rights,[281] and the Arab Charter on Human Rights.[282] Additionally, almost every member state of the United Nations protects the right of property under national law.[283]

As articulated by Sprankling, customary international law generally limits the expropriation of property.[284] Sprankling even goes so far to say "that the right to property should be recognized as customary international law."[285] The right to property is often considered in connection with human rights. As a human right, the right to property is "fundamental in nature."[286] Human rights are considered in a "superior position among the norms of international law."[287] Victims of cultural heritage destruction may capitalize on this international recognition of the right to property as a human right. As articulated throughout this Article, cultural heritage is attached to an individual and community's personhood and identity. This attachment to cultural heritage provides certain proprietary rights over what is deemed part of their identity, and by extension, part of their property. The destruction of cultural heritage, thus, is an expropriation of the property deemed to belong to a certain nation, community, or individual.

While there is no reported ATS case that has utilized the right to property as its own cause of action, the broad breadth of statute, and the American devotion to the right to property in general, may provide a strong strategy for human rights advocates.

V. CONTEXTUALIZING THE DESTRUCTION OF CULTURAL HERITAGE IN U.S. DOMESTIC COURTS

The adjudication of ATS claims against cultural heritage destruction reveals a fundamental question—namely, how should U.S. courts decide whether an object is considered "cultural heritage?" How we define "culture" is essential to this analysis. Professor Patty Gerstenblith considers culture to be an "amalgam" of "ethnicity, language, religion, or particular history."[288] While a cultural group can be associated with a

281. African Charter on Human and Peoples' Rights art. 14, June 27, 1981, 1520 U.N.T.S. 217.

282. Arab Charter on Human Rights art. 25, *adopted* May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005); Sprankling *supra* note 272, at 476.

283. Sprankling, *supra* note 272, at 484.

284. *Id.* at 491–92.

285. *Id.* at 497.

286. *See id.* at 478.

287. *Id.* (quoting OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY 60 (2010)).

288. GERSTENBLITH, *supra* note 133, at 19.

particular country or region, it is frequently much smaller.[289] The classification of cultural heritage considers an object's cultural, racial, or ethnic characteristics as it relates to a group of people. Laws pertaining to cultural heritage seek to protect works of "culture," namely objects that have artistic, archeological, anthropological, ethnological, or historical interests. However, the manner in which courts define cultural heritage is subject to an imperious dichotomy—an object's importance and symbolism may be important to one group but may be offensive, if not oppressive, to another.

For example, a divisive conversation about the cultural and historical value of confederate monuments has taken center stage in U.S. politics.[290] Equal rights activists have torn down, defaced, and destroyed confederate monuments because these monuments are said to glorify white supremacy and memorialize an insurgent government who ardently advocated for the perpetuation of slavery.[291] These statues serve as a reminder of the continued oppression and disenfranchisement of African Americans in the United States, as well as the American heritage of racism and subjugation.[292] The destruction of these statues offers African Americans the opportunity to not only repudiate the ideals that the statues represent, but also effectuate catharsis for the centuries of pain they have endured.[293] Not surprisingly, there are many who argue that these confederate monuments are symbolic of "Southern 'pride,' 'heritage' or 'culture'" and thus should not be destroyed.[294] The methodology of defining cultural heritage in U.S. courts becomes particularly vexing given that the Trump Administration issued an

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289. *Id.*; *see also* Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J.L. & JURIS. 249, 254 (1993).

290. For a comprehensive list of all of the confederate monuments that have been destroyed or removed, see Camille Squires, *All the Monuments to Racism That Have Been Torched, Occupied, or Removed*, MOTHER JONES (June 12, 2020), https://www.motherjones.com/crime-justice/2020/06/all-the-monuments-to-racism-that-have-been-torched-occupied-or-removed/.

291. Miles Parks, *Confederate Statues Were Built to Further a "White Supremacist Future,"* NPR (Aug. 20, 2017, 8:31 AM), https://www.npr.org/2017/08/20/544266880/confederate-statues-were-built-to-further-a-white-supremacist-future.

292. *See id.*; Squires, *supra* note 290.

293. *See* Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 280 (2009) ("[T]here is a public interest in destroying the monument to symbolically repudiate the racist past. Destroying it would also avoid the risk of spreading its hateful message or seeming to endorse it.").

294. *See* Keisha N. Blain, *Destroying Confederate Monuments Isn't "Erasing" History. It's Learning from It.*, WASH. POST (June 19, 2020, 7:00 AM), https://www.washingtonpost.com/outlook/2020/06/19/destroying-confederate-monuments-isnt-erasing-history-its-learning-it/.

executive order to prosecute those who destroy confederate monuments.[295]

International norms clearly defined under ATS, such as torture and extrajudicial killing, are undoubtedly easier to define than the destruction of cultural heritage. With the destruction of cultural heritage, there are occasions where mitigating factors take the destruction out of the tortious realm. For example, in June 2020, protestors in Bristol destroyed the statute of Edward Colston, a nefarious British slave trader.[296] The destruction of this statue can be argued to be a reclamation of agency for the ancestors of oppressed slaves and a condemnation of the figure's racist past. However, many citizens believe this action to be a vilification of their history and culture.[297] William Dalrymple, a recognized Scottish historian and writer, compared the destruction of the Edward Colston statute to the Taliban's bombing of the Bamiyan Buddhas in 2001.[298] Under the former circumstance, however, an ATS claim should not be plausible due to the oppressive symbolism attached to the statue.

The classification of the destruction of cultural heritage within an ATS framework must be viewed in a context broader than the historical relevance of an object. It is similarly important to think outside an imperialist view of cultural heritage and to instead place focus on the purpose for which the object or monument was created. The definition of cultural heritage should be examined through an "oppressor-oppressee" paradigm. The destruction of objects which symbolize the message of an oppressor should serve as an exemption, not only as to how we define cultural heritage, but also as to how the objects are treated under international and national cultural heritage laws.

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295. Exec. Order No. 13933, 85 Fed. Reg. 40,081 (July 2, 2020) (stating that destructions of confederate monuments are "criminal acts" and calling for the Attorney General to prioritize prosecutions based on these matters).

296. Aditya Iyer, *A Toppled Statue in Bristol Reveals Limited Understandings of What Decolonizing Requires*, HYPERALLERGIC (June 10, 2020) https://hyperallergic.com/570444/toppled-statue-in-bristol-limited-understanding-of-decolonizing/.

297. *See* Mark Landler, *In an English City, an Early Benefactor Is Now "a Toxic Brand,"* N.Y. TIMES (June 14, 2020), https://www.nytimes.com/2020/06/14/world/europe/Bristol-Colston-statue-slavery.html (quoting Mayor Marvin Rees of Bristol: "Some people are saying, 'Colston is Bristol, and therefore Colston is me. And if you take that statue down, you're taking something of me down.'").

298. Iyer, *supra* note 296. In 2001, the Taliban government destroyed the great rock sculptures of the Buddhas of Bamiyan in Afghanistan. Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT'L L. 619, 619–20 (2003). The Buddhas were located on the Taliban's "territory" and seen as part of the ancient pre-Islamic past. *Id.* at 620.

The destruction of property by an "oppressee" from the Western perspective has, categorically, been seen as a political symbol, as opposed to a violation of international law. For example, the destruction of the Berlin Wall by civilian East and West Germans is still notable as a symbol of the fall of communism in the Eastern Bloc.[299] After Ukraine's independence, thousands of statues of Vladimir Lenin were destroyed, serving as another symbol of the fall of communism.[300] In 2003, the toppling of the large Saddam Hussein statue by civilian Iraqis and American troops served as an iconic symbol of celebration of the U.S. invasion and the ousting of an authoritative regime.[301] The potent symbolic power of the destruction of oppressive symbols must be considered in tandem with any claim brought under ATS.

However, for the most part, individuals bringing claims under ATS for destruction of cultural heritage will likely bring a claim against the oppressor. In recent decades, the international community has made a point to condemn destruction of cultural heritage by oppressors, or groups labeled terrorists or extremists.[302] For example, in the case of *Prosecutor v. Al Mahdi*, Ahmad Al Faqi Al Mahdi, was the leader of the ISIS-affiliated jihadist group, Hesbah, whose purpose was to impose its ideology on the people of Timbuktu.[303] In his quest to eliminate local resident and pilgrim places for prayer, Al Mahdi destroyed ten religious and historical monuments in Timbuktu, Mali.[304] The U.N. Security Council condemned these actions, and as stated above, Al Mahdi was

299. E. Perot Bissell V, *Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law*, 128 YALE L.J. 1130, 1151 (2019); *see also* Katrin Bennhold, *The Fall of the Berlin Wall in Photos: An Accident of History That Changed the World*, N.Y. TIMES, https://www.nytimes.com/2019/11/09/world/berlin-wall-photos-30-year-anniversary.html (Nov. 9, 2019).

300. Bissell, *supra* note 299, at 1151.

301. *Id. But see* Max Fisher, *The Truth About Iconic 2003 Saddam Statue-Toppling*, ATL. (Jan. 3, 2011), https://www.theatlantic.com/international/archive/2011/01/the-truth-about-iconic-2003-saddam-statue-toppling/342802/ (suggesting that images from the scene misrepresented its import).

302. *See UNESCO Director-General of UNESCO Calls for a Halt to Destruction of Cultural Heritage Site in Timbuktu*, UNESCO (June 30, 2012), http://whc.unesco.org/en/news/901/; Press Release, Security Council, Security Council Press Statement on Destruction of Cultural Heritage, Executions in Palmyra, U.N. Press Release SC/12690 (Jan. 20, 2017), https://www.un.org/press/en/2017/sc12690.doc.htm; Press Release, Security Council, Security Council Condemns Destruction, Smuggling of Cultural Heritage by Terrorist Groups, Unanimously Adopting Resolution 2347 (2017), U.N. Press Release SC/12764 (Mar. 14, 2017), https://www.un.org/press/en/2017/sc12764.doc.htm.

303. Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶ 33 (Sept. 27, 2016), https://www.icc-cpi.int/courtrecords/cr2016_07244.pdf.

304. *Id.* ¶¶ 34–38.

ultimately convicted of war crimes.[305] Groups like ISIS—the oppressors—use the destruction of monuments to incite violence and hate, to propagandize their power, and to eradicate rival religious systems.[306] This destruction of cultural heritage as a manifestation of oppression is the key distinction to cognizability under ATS.

The categorization of cultural heritage within the ATS context invariably exists along a spectrum, and if a case is brought under ATS, courts must recognize the distinction. For example, the Taliban destroyed the Bamiyan Buddhas because they saw them as an affront to their religious values, while the international community saw the Buddhas as part of universal heritage.[307] The content of a piece of property, while important, should also be considered by courts in conjunction with the identity of those destroying it. A recent U.N. Report noted that "[c]ultural heritage is to be understood as the resources enabling the cultural identification and development processes of individuals and groups, which they, implicitly or explicitly, wish to transmit to future generations."[308] The oppressee should be the appraiser of the future of objects which were erected to support systematic repression of the protected group. Conversely, the oppressor should be held liable for acts that destroy the heritage of the oppressee as a protected group. ATS is an appropriate vehicle to hold the oppressor civilly liable for acts of oppression through the destruction of cultural heritage.

VI. PERSONHOOD OF CULTURAL HERITAGE: WHY THE ALIEN TORT STATUTE?

The resounding justification for the creation and enforcement of cultural heritage protection statutes and conventions focuses on the universal value of these objects, monuments, and sites.[309] The 1954

305. *Id.* ¶¶ 62–63; *UNESCO Director-General of UNESCO Calls for a Halt to Destruction of Cultural Heritage Site in Timbuktu*, *supra* note 302.

306. *See* Christopher W. Jones, *Understanding ISIS's Destruction of Antiquities as a Rejection of Nationalism*, 6 J. E. MEDITERRANEAN ARCHAEOLOGY & HERITAGE STUD. 31, 31–32 (2018).

307. *See* Francioni & Lenzerini, *supra* note 298, at 625.

308. Karima Bennoune (Special Rapporteur in the Field of Cultural Rights), *Rep. of the Special Rapporteur in the Field of Cultural Rights*, 11, U.N. Doc. A/HRC/31/59 (Feb. 3, 2016).

309. *See, e.g.*, Convention Concerning the Protection of the World Cultural and Natural Heritage pmbl., Nov. 16, 1972, 1037 U.N.T.S. 151 ("Considering that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole . . ."). *But see* Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural

Hague Convention enforces the idea of cultural heritage as part of the global collective:

> [D]amage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world; . . . [T]he preservation of the cultural heritage is of great importance for all peoples of the world and . . . it is important that this heritage should receive international protection.[310]

Many of these international instruments belie the immense importance that cultural heritage symbolizes to the specific individuals, regions, and communities from which they originate. While it is certainly true that cultural heritage holds universal significance, its impact must be scrutinized on a smaller scale and from a post-colonial point of view.[311]

Concepts of cultural identity, history, and religion are inculcated into a group's personhood through cultural heritage. Cultural heritage is used to cement the group's legacy, memories, physical places, objects and intangible beliefs, and practices even after death. For example, in Spain, the Monastery and Site of El Escorial, Madrid, one of the most important architectural monuments in Spain's history, also serves as the burial site of the kings and queens of Spain and members of its royal families.[312] In Iran, Isfahan, once the capital of Persia and one of the most historically important Islamic centers, is still a place for political, commercial, social, and religious activities for Iranian citizens.[313] In Russia, the Red Square is an integral part of Russian cultural life, utilized for large-scale military parades, rock concerts, festivals and other events.[314] John Moustakas, while sympathizing with "cultural nationalism," reiterated the nexus between a cultural object and a group's personhood:

Property pmbl., Nov. 14, 1970, 823 U.N.T.S. 231 ("[C]ultural 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 . . .").

310. 1954 Hague Convention, *supra* note 16, at pmbl.

311. While not the topic of this paper, it is important to understand the contrasting views of cultural heritage from a "cultural nationalism" versus "cultural internationalism" point of view. *See generally* John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986).

312. *El Escorial Monastery*, EL ESCORIAL, https://el-escorial.com/ (last visited Apr. 7, 2021).

313. Andrew Lawler, *Isfahan: Iran's Hidden Jewel*, SMITHSONIAN MAG. (Apr. 2009), https://www.smithsonianmag.com/travel/isfahan-irans-hidden-jewel-116221512/.

314. *A Brief History of Red Square*, RUSS. NAT'L TOURIST OFF., https://www.visitrussia.org.uk/blog/a-brief-history-of-red-square/ (last visited Apr. 7, 2021).

> [T]he term property for personhood might describe property so closely bound up with our individual identities that its loss "causes pain that cannot be relieved by the object's replacement" . . . . Some property can be essential to the preservation of group identity and group self-esteem.[315]

The collectivity of a group, be it territorially, historically, racially, ethnically, or culturally bounded, possesses an undisputed interest in its cultural heritage that becomes synonymous with its identity.[316] Cultural heritage, either tangible or intangible, becomes intrinsic in an individual's being, infused into a person's traits, such as personality, disposition, and behaviors. Through this conscious or unconscious outlook on cultural heritage, any attack on this heritage is an affront to an individual's being and identity.

The above begs the question as to whether the American courts should be a vehicle used to punish those culpable of attacks on individual and collective personhood, specifically of cultural heritage. As articulated by the court in *Sosa*, "Congress did not intend the ATS to sit on the shelf until some future time when it might enact further legislation."[317] Although ATS cases certainly trigger foreign policy concerns, there are multiple arguments that favor the use of ATS as a vehicle to civilly prosecute destruction of cultural heritage claims. The utilization of ATS allows a foreign victim of the destruction of cultural heritage to sue a foreign defendant in federal court. The use of the U.S. court system offers a myriad of advantages favorable to plaintiffs including the right to a jury trial, availability of punitive remedies, forum selection, availability of contingency fees, extensive discovery process, and, of course, adversarial nature of the American court system.[318]

International tribunals have failed to effectively deter individuals from the direction of fatal force against cultural heritage. There is no

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315. John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1184–85 & n.17 (1989) (quoting Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982)).

316. Coombe, *supra* note 289, at 264 (quoting Richard Handler, *Who Owns the Past? History, Cultural Property, and the Logic of Possessive Individualism*, *in* BRETT WILLIAMS, THE POLITICS OF CULTURE 63, 66 (1991) ("[I]t is our culture and history, which belong to us alone, which make us what we are, which constitute our identity and assure our survival . . . [I]ts identity or objective oneness over time, depends on the secure possession of a culture . . . [and] culture and history become synonymous because the group's history is preserved and embodied in material objects—cultural property.").

317. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

318. *See, e.g.*, John R. Wilson, Note, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L.J. 659, 668 (2004).

uniform mechanism to penalize individuals civilly for such offenses. On a practical level, the purely jurisdictional view of ATS would not change with its application to the protection of cultural heritage. Any claimant would have to satisfy the Supreme Court's heightened requirements under *Kiobel* in order to be afforded jurisdiction under the statute.[319] However, the United States is well-suited to exercise the "traditional objectives of tort law, deterrence and compensation."[320] Victims of cultural heritage offenses can be recompensed with compensatory and punitive damages. While a monetary award cannot possibly remedy the destruction of a piece of culture, economic recovery can serve as affirmation of the suffering caused by the offender's transgressions and, in the process, deter individual actors from future wrongdoings.

As sites continue to be destroyed in Iraq and Syria, ATS can also be used as a conduit to the further development of customary international law by uniformly and unambiguously forbidding the destruction of cultural heritage.[321] To date, international instruments have left it up to states to enforce violations of the prohibitions against destruction.[322] Such autonomy implies that individual states must institute their own remedies. If international law accords such enforcement to individual countries, "every nation has a duty not only to enforce human rights norms in its own backyard, but also to ensure that human rights are respected globally."[323]

Of course, the omnipresent question that undoubtedly plagues the mind of the reader is whether American courts are able to decide the rights of foreign plaintiffs against foreign defendants. The plain language of ATS confers jurisdiction over foreign plaintiffs for disputes that occurred outside of the United States. The drafters of the Constitution specifically empowered Congress with the ability to "define and punish . . . Offences against the Law of Nations."[324] Congress took advantage of such empowerment with the creation of ATS. Since its enactment, Congress has not amended ATS to take the judiciary out of this equation. Although the Supreme Court has curtailed the ability of many potential plaintiffs to sustain a successful claim in federal court, the preservation

319. *See supra* Section II.A.

320. Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 50 TEX. INT'L L.J. 661, 675 (2016).

321. *See supra* text accompanying notes 315–16 (explaining that civil remedies for terrorism serve larger objectives of tort and public international law).

322. Michael C. Small, Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L.J. 163, 178 (1985).

323. *Id.*

324. U.S. CONST. art. I, § 8, cl. 10.

of ATS is indicative of a fundamental desire for it to remain a crucial part of human rights litigation.

VII. CONCLUSION

ATS serves as a gateway to federal jurisdiction, allowing a foreign plaintiff who has been a victim of a tort committed in violation of international law to pursue remedies in U.S. district courts. As articulated by this Article, the prohibition against the destruction of cultural heritage is universal and obligatory, forming part of the law of nations. International law has evolved to encompass a broad range of human rights norms, including the protection and prohibition against the destruction of cultural heritage. While the scope of ATS human rights litigation is narrow, the opinion in *Jane W. v. Thomas* offers a beacon of hope that ATS may be a device to effectively hold accountable and deter those individuals that commit wanton damage to and destruction of cultural heritage.

Motivated by radical xenophobia, patriotism, or religion, perpetrators of such attacks resort to cultural destruction in order to erase any discernable trace of a group's culture, history, identity, or religion. Recent examples of the catastrophic destruction of cultural heritage have triggered the necessity to create remedies for individuals and groups that are subject to such attacks. Although civil remedies are not an elixir to cure the damages caused by such destruction, they may reinforce public confidence in the rule of law and offer victims monetary redress. Only when the United States works toward protecting the dignity and integrity of cultural groups can it truly call itself the bastion of liberty and justice.