

A War on Ukraine, A War on Culture: Protecting Cultural Identity in International Law

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I. INTRODUCTION

On February 21, 2022, Putin delivered the following address to Russia and the rest of the world:

“I would like to emphasize again that Ukraine is not just a neighboring country for us. It is an inalienable part of our own history, culture, and spiritual space . . . Modern Ukraine was entirely created by Russia or, to be more precise, by Bolshevik, Communist Russia.”¹

This speech, which Putin used to question Ukraine’s sovereignty, legitimacy, and statehood, set the stage for the upcoming Russian invasion of Ukraine. Putin claimed that Russians and Ukrainians are “one people” whose common history implies that they should also share a common political fate today.² In May 2023, local Russian officials were pressuring Ukrainian parents to send their children away to Russian-occupied Crimea, claiming the children would be safer staying at “summer camp.”³ More than 16,000 Ukrainian children took

1. President Vladimir Putin, Address to the Citizens of the Russian Federation on Ukraine (Feb. 21, 2022, 22:35) (transcript available at <http://en.kremlin.ru/events/president/news/67828>).

2. Jeffrey Mankoff, *Russia’s War in Ukraine: Identity, History, and Conflict*, CSIS (Apr. 22, 2022), <https://www.csis.org/analysis/russias-war-ukraine-identity-history-and-conflict>.

3. Briar Stewart, *Russia is accused of deporting thousands of Ukrainian children. 17 returned home this week*, CBC (Mar. 23, 2023),

part in this “summer camp,” which war crimes investigators now see as an attempt to “re-educate” them with pro-Russian views.⁴ This re-education is an example of depriving the younger generation of their rightful Ukrainian culture. This is evidence of a country attempting to erase a national identity. This is not just war; it is a war on culture. As reflected in Putin’s speech, evidence continues to show Russia’s intentions towards eliminating Ukraine’s culture.

Cultural identity is central to a nation’s identity, history, and freedom. During times of war, the prosperity of a cultural identity is essential to survive conflict and violence. The international community has adopted legal instruments to reinforce cultural protection, especially after the devastations of the Second World War⁵ through the destruction of literature, cities, monuments, and art.⁶ The Hague Convention for the Protection of Cultural Property in Armed Conflict (“the 1954 Hague Convention”) was drafted in reaction to the devastation caused by the Second World War in an effort to define the meaning of ‘cultural property’ and the ability for States to enforce protection.⁷ Through legal scholarship and novel instruments, the international law community has continuously attempted to redefine the meaning of ‘cultural property,’ ‘cultural heritage’ and ‘cultural identity.’ However, international law continues to fall short in defining cultural identity within fixed legal instruments. The ongoing War in Ukraine and the destruction of Ukrainian cultural heritage demonstrates the importance of safeguarding cultural identity for future generations.

In addition to killing thousands of Ukrainian civilians in their war effort, the Russian military has targeted Ukrainian cultural heritage sites, institutions, artifacts, and *children*.⁸ The general Ukrainian population recognizes these cultural attacks as Putin’s “personal project,” a part of his larger rejection of

<https://www.cbc.ca/news/world/ukrainian-children-return-1.6788318>.

4. *Id.*

5. MARINA LOSTAL, INTERNATIONAL CULTURAL HERITAGE LAW IN ARMED CONFLICT; CASE-STUDIES OF SYRIA, LIBYA, MALI, THE INVASION OF IRAQ, AND THE BUDDHAS OF BAMMIAN 2 (May 2017).

6. FRANCESCO FRACIONI & JAMES GORDLEY, ENFORCING INTERNATIONAL CULTURAL HERITAGE 41 (June 6, 2013).

7. LOSTAL, *supra* note 5, at 8.

8. See Jason Farago, et al. *A Culture in the Cross Hairs*, N.Y. TIMES (Dec. 19, 2022) <https://www.nytimes.com/interactive/2022/12/19/arts/design/ukraine-cultural-heritage-war-impacts.html>.

Ukraine's independent culture, religion, and traditions.⁹ Ukraine has pushed back by claiming its own separate and distinct cultural identity by registering cultural property—tangible and intangible—and self-determined identity rights using digital technology.¹⁰ The Ukraine War is unique in that it has utilized technology and social media to connect the whole world to the issues at hand.¹¹ With an active social media leader like Volodymyr Zelenskyy,¹² it has also become a war fought online to capture the massive destruction occurring every day.¹³ Cultural heritage has been more easily preserved and communicated on the internet, being the 'most viral world' and the most "internet-accessible war in history."¹⁴ Digital technology can play a role in cultural heritage by using it to enable accountability and raise awareness.¹⁵

The question is how can countries protect their cultural identity and define it in a legal framework? Considering these challenges, this note addresses international legal instruments, how they have been interpreted, and their potential application to the War in Ukraine today. Part I discusses the type of legal instruments that influence the determination of cultural identity through defining terms like 'cultural property' and 'cultural heritage' in international law. This part further demonstrates the current work that has been done in Ukraine today to safeguard intangible and tangible cultural properties that signify importance and culture to the people of Ukraine. Part II looks at the type of accountability international courts have used for the destruction of cultural heritage during wars. Countries attempt to claim genocide via the acts of cultural

9. Jane Recker, *Inside the Efforts to Preserve Ukraine's Cultural Heritage*, SMITHSONIAN MAG. (Mar. 30, 2022), <https://www.smithsonianmag.com/smart-news/inside-the-efforts-to-preserve-ukraines-cultural-heritage-180979840/>.

10. See Richard Kurin, *How Ukrainians Are Defending Their Cultural Heritage from Russian Destruction*, SMITHSONIAN MAG. (Feb. 22, 2023) <https://www.smithsonianmag.com/smithsonian-institution/ukrainians-defend-their-cultural-heritage-russian-destruction-180981661/>.

11. Steven Feldstein, *Disentangling the Digital Battlefield: How the Internet has Changed War*, WAR ON THE ROCKS (Dec. 7, 2022), <https://warontherocks.com/2022/12/disentangling-the-digital-battlefield-how-the-internet-has-changed-war/>.

12. Volodymyr Zelenskyy / Володимир Зеленський (@ZelenskyyUa), X (last visited Jan. 21, 2024), <https://x.com/ZelenskyyUa?s=20>.

13. See Feldstein, *supra* note 11.

14. *Id.*

15. *Id.*

destruction as a crime against humanity.¹⁶ Genocide has a high standard that is difficult to prove. Cultural genocide is an even harder standard that has often been rejected by international law, therefore making it hard to enforce liability for the cleansing of a cultural identity.¹⁷ Part III summarizes whether the legal framework would support Ukraine's protection of its cultural identity, further concluding that creating an *ad hoc* criminal court would be most successful regarding efficiency and effectiveness for justice. This note recognizes the political contradictions with international law and the difficulty of future litigation.

II. BACKGROUND

A. HISTORY AND DEVELOPMENT OF "CULTURE" IN INTERNATIONAL LAW

Culture is an integral part of a country's self-identity. When war occurs, an essential military strategy is to erase an opponent's identity and "exterminate the enemy by obliterating its culture."¹⁸ One of the first instruments created for protecting cultural property was during the American Civil War, in 1863—a military code of conduct called the "Lieber Code" — addressed the threats of destruction to "classical works of art, libraries, scientific collections or precious instruments . . . must be secured against all avoidable injury even when they are contained in fortified places whilst besieged or bombarded."¹⁹ Influenced by

16. See Laura Pineschi, *Cultural Diversity as a Human Right? General Comment No. 21 of the Committee on Economic, Social and Cultural Rights in 4 CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY 27, 52–53* (Silvia Borelli & Federico Lenzerini eds., 2012) (explaining that "the effective enjoyment of cultural rights is an essential prerequisite for the effective enjoyment of civil and political rights, that under certain conditions the deliberate destruction of the cultural heritage of certain communities can amount to a cultural genocide and that the respect of cultural diversity is indispensable for the maintenance of international peace and security.").

17. See HIRAD ABTAHI, *ADJUDICATING ATTACKS TARGETING CULTURE: REVISITING THE APPROACH UNDER STATE RESPONSIBILITY AND INDIVIDUAL CRIMINAL RESPONSIBILITY* 298 (2023) ("In sum, the ICTY has, based on the travaux préparatoires, refused to consider the destruction of tangible culture, whether secular or religious, as cultural genocide.").

18. JORIS D. KILA, *HERITAGE UNDER SIEGE, MILITARY IMPLEMENTATION OF CULTURAL PROPERTY PROTECTION FOLLOWING THE 1954 HAGUE CONVENTION* 37 (June 7, 2012) (quoting Bevan's statement in *The Destruction of Memory*).

19. War Dep't, General Orders No. 100, Instructions for the Government of

the Lieber Code, the first international conventions, the Hague Conventions and Regulations of 1899 and 1907, codified rules on the conduct of war and stated that “all seizure of, destruction or willful damage done to institutions of this character to historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.”²⁰ Countries began to realize that cultural instruments and sites have an impalpable value that needs to be protected by the legal framework.

The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) has been the leading force behind the enforcement of protection of cultural property worldwide since 1945.²¹ UNESCO became a safeguard through its programs to protect cultural property and missions to combat crimes against the potential destruction of cultural heritage.²² UNESCO led the international community in the adoption of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, which encourages States to adopt peacetime protective measures for the safeguarding of cultural property.²³

UNESCO was also a critical player in fostering the extensions of the 1954 Hague Convention in 1954 and 1999 to include protections of cultural property.²⁴ The 1954 First Protocol prohibits the export of movable cultural property from an occupied territory and requires its return to the territory of the State from which the property was exported;²⁵ the 1999

Armies of the United States in the Field (Apr. 24, 1863) [hereinafter Lieber Code].

20. 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land art. 56, Oct. 18, 1907, 205 CTS 277.

21. *History of UNESCO*, <https://www.unesco.org/en/history> (last visited Jan. 12, 2024).

22. *See Protecting Cultural Heritage in The Event of Armed Conflict*, <https://en.unesco.org/protecting-heritage> (last visited Nov. 6, 2023).

23. *See id.* *See also* Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter 1954 Hague Convention].

24. Francesco Francioni, *The Evolving Framework for the Protection of Cultural Heritage in International Law in CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY* 3, 9 (Silvia Borelli & Federico Lenzerini eds., 2012) (stating that UNESCO became a leading actor in the adoption of international conventions, recommendations and declarations to contribute to the development of general international law) [hereinafter Francioni, *Evolving Framework*].

25. *1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict*, <https://en.unesco.org/protecting-heritage/convention-and-protocols/1954-convention> (last visited Jan. 12, 2024).

Second Protocol strengthened provisions of the Convention and created an institutional element, the Committee for the Protection of Cultural Property in the Event of Armed Conflict.²⁶ The 1949 Geneva Conventions and the 1977 Additional Protocols have complemented the 1954 Hague Convention and subsequent protocols by containing certain provisions that forbid the destruction of real or personal property of the State.²⁷

Outside of the international treaties, UNESCO actively promotes protecting cultural identity through instruments including declarations and recommendations.²⁸ The Declaration of the Principles of International Cultural Co-operation (1966),²⁹ the Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It (1976),³⁰ the Declaration on Race and Racial Prejudice (1978)³¹, the Universal

26. *Making the Convention more operational: 1999 Second Protocol*, <https://en.unesco.org/protecting-heritage/convention-and-protocols/1999-second-protocol> (last visited Jan. 12, 2024).

27. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 53, Aug. 12, 1949, 75 U.N.T.S. 287.

28. See Yvonne Donders, *A Right to Cultural Identity in UNESCO*, in CULTURE HUMAN RIGHTS 317, 325 (2008) [hereinafter Donders, *A Right to Cultural Identity*].

29. Gen. Conf. of UNESCO, *Declaration of the Principles of International Cultural Co-Operation*, U.N. Doc. CFS.67/VII.4/A ¶ 8, art. VI, (Nov. 4, 1966), <https://www.unesco.org/en/legal-affairs/declaration-principles-international-cultural-co-operation#:~:text=In%20cultural%20co%2Doperation%2C%20stress,informati on%2C%20to%20ensure%20its%20authenticity> (citing that “international co-operation, while promoting the enrichment of all cultures through its beneficent action, shall respect the distinctive character of each”) [hereinafter *Principles of International Cultural Co-Operation*].

30. Gen. Conf. of UNESCO, *Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It*, U.N. Doc. 19 C/Resolutions (Vol. I), art. I, ¶ 1, (Nov. 26, 1976), <https://en.unesco.org/about-us/legal-affairs/recommendation-participation-people-large-cultural-life-and-their> (concerning that “everything that should be done by Member States or the authorities to democratize the means and instruments of cultural activity, so as to enable all individuals to participate freely and fully in cultural creation and its benefits, in accordance with the requirements of social progress”) [hereinafter *Rec. on Participation by the People at Large*].

31. Gen. Conf. of UNESCO, *Declaration on Race and Racial Prejudice*, art. 5, ¶ 1, (Nov. 27, 1978), <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-race-and-racial-prejudice> (stating that “Culture, as a product of all human beings and a common heritage of mankind, and education in its broadest sense, offer men and women increasingly effective means of adaptation, enabling them not only to affirm that they are born equal in dignity and rights, but also to recognize that they should respect the right of all groups to their own cultural identity and the development of their distinctive cultural life within the national and international contexts, it being understood

Declaration on Cultural Diversity (2001),³² and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression (2005).³³

Today, 194 member states have adopted the binding legal instrument of the 1954 Hague Convention, relying on its definition of ‘cultural property’ and enforcement measures.³⁴ “The terms *cultural property* and *cultural heritage* are both used in legal instruments and in academic commentary” synonymously, although the term ‘heritage’ is broader.³⁵ As explained by academic leader Francesco Francioni,³⁶ ‘cultural

that it rests with each group to decide in complete freedom on the maintenance, and, if appropriate, the adaptation or enrichment of the values which it regards as essential to its identity”).

32. Gen. Conf. of UNESCO, *Universal Declaration on Cultural Diversity*, art. 5, (Nov. 2, 2001), <https://www.ohchr.org/en/instruments-mechanisms/instruments/universal-declaration-cultural-diversity> (stating that “All persons should therefore be able to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons should be entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms”).

33. UNESCO Convention on Diversity of Cultural Expressions, art. 2, Oct. 20, 2005, CLT-2016/WS/7, <https://www.unesco.org/creativity/en/2005-convention> (stating that “Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof”).

34. 1954 Hague Convention, *supra* note 23, art. 1 (defining “cultural property” as a “movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or reproductions of the property defined above”). *See also States Parties*, <https://en.unesco.org/protecting-heritage/convention-and-protocols/states-parties> (last visited Nov. 24, 2023).

35. NOELLE HIGGINS, *THE PROTECTION OF CULTURAL HERITAGE DURING ARMED CONFLICT* 6 (2020).

36. “Francesco Francioni studied law at the University of Florence and at Harvard University, where he obtained a master’s degree in 1968.” *Oral Archives: Francesco Francioni*, <https://whc.unesco.org/en/oralarchives/francesco-francioni/> (last visited Apr. 14, 2023). He is “a specialist in international cultural heritage and human rights law” and a “prolific author.” *Id.* He was “involved in several UNESCO cultural conventions.” *Id.* Francioni was known to have “played a leading role in the

heritage' further "represents the totality of cultural objects, traditions, knowledge and skills that a given nation or community has inherited by way of learning processes from previous generations and which provides its sense of identity to be transmitted to subsequent generations."³⁷ Earlier treaties used the neutral expression 'cultural property' until the term "heritage" was officially adopted by UNESCO in the 1972 World Heritage Convention.³⁸

The 1972 World Heritage Convention was adopted by UNESCO to promote "the close link between culture and nature . . . the of concept of 'world heritage' to designate sites, monuments, and assets which . . . are eligible for placement under a system of special international protection embodied in the World Heritage List."³⁹ This list is often referred to as the "Red List," by the International Council of Museums, an organization fighting illicit trafficking of cultural goods, keeping track of a list of stolen objects, and launching a standard Object ID to keep track of objects at risk.⁴⁰ This text defined 'cultural heritage' to consider:

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

drafting of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict." *Id.* Additionally, "[h]e also chaired the UNESCO meeting of experts held in Turin in 2001 to define the concept of intangible heritage in the Convention for the Safeguarding of the Intangible Cultural Heritage of 2003." *Id.*

37. Francesco Francioni, *Culture, Heritage and Human Rights: An Introduction*, in CULTURAL HUMAN RIGHTS 1, 6 (2008) [hereinafter Francioni, *Culture Heritage and Human Rights*].

38. *Id.*

39. Francesco Francioni, *Part I The 1972 World Heritage Convention: An Introduction*, in THE 1972 WORLD HERITAGE CONVENTION: A COMMENTARY 3, 5 (Francesco Francioni ed., 1st ed. 2008).

40. 1970-2020: ICOM's key role in 50 years of fighting illicit trafficking of cultural goods, INT'L COUNCIL OF MUSEUMS (Nov. 20, 2020), <https://icom.museum/en/news/1970-2020-icom-fighting-illicit-trafficking/>.

combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.⁴¹

The frustrations with the 1972 Convention were expressed by many countries in Africa, Latin America, and the Asia-Pacific, namely in regard to recognizing the importance of cultural heritage extending to the intangible aspects.⁴² There are aspects of cultural heritage that cannot be touched such as music, dance, and traditions. The first legal instrument that reached a broader definition of cultural property was the non-binding text of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore.⁴³ It still had a disappointing impact, as it only formed the initial framework to safeguard intangible cultural property.⁴⁴ The 1989 Recommendation used the American definition of the term ‘folklore’ which “is the totality of tradition-based creations of a cultural community, expressed by a group of individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means.”⁴⁵ This definition was built on by the 2003 Convention, which defined “Intangible Cultural Heritage” as “practices, representations, expressions, knowledge, skills . . . constantly recreated by communities and groups.”⁴⁶ Cultural and social identity makes its way into many of the definitions of cultural heritage, further tying objects and practices to a group and community.

41. Convention Concerning the Protection of the World Cultural and Natural Heritage art. 1, ¶ 1, Nov. 16, 1972, 1037 U.N.T.S. 151. [hereinafter 1972 World Heritage Convention].

42. Janet Blake, *Safeguarding Intangible Cultural Heritage*, in THE OXFORD HANDBOOK OF INTERNATIONAL CULTURAL HERITAGE LAW 347, 347–48 (Francesco Francioni & Ana Filipa Vrdoljak eds., 2020).

43. Gen. Conf. of UNESCO, *Recommendation on the Safeguarding of Traditional Culture and Folklore*, (Nov. 26, 1976), <https://www.unesco.org/en/legal-affairs/recommendation-safeguarding-traditional-culture-and-folklore>.

44. Blake, *supra* note 42, at 348–49.

45. Susan Keitumetse, *UNESCO 2003 Convention on Intangible Heritage: Practical Implications for Heritage Management Approaches in Africa*, 61 S. AFR. ARCHAEOLOGICAL BULL. 166, 166 (2006).

46. Convention for the Safeguarding of the Intangible Cultural Heritage art. 2, ¶ 1, Oct. 17, 2003, 2368 U.N.T.S. 3. [hereinafter 2003 Convention].

B. ENFORCING "CULTURAL HERITAGE" IN INTERNATIONAL COURT SYSTEMS

Historically, the crime of persecution on the grounds of cultural grouping or identity has been included in the statutes of international courts such as the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), International Criminal Tribunal for Rwanda ("ICTR"), the International Criminal Court ("ICC"),⁴⁷ and the International Court of Justice ("ICJ").⁴⁸ The ICC is "a permanent autonomous court, whereas the *ad hoc* tribunals for the former Yugoslavia and Rwanda . . . were established within the framework of the United Nations to deal with specific situations, and only have a limited mandate and jurisdiction."⁴⁹

The ICTY was a tribunal court created in response to the Bosnian War in the 1990s, being one of the greatest instances of "destruction of cultural heritage in Europe since the Second

47. See the inclusion of "[p]ersecution against any identifiable group or collectivity on . . . cultural . . . grounds" in the Rome Statute of the International Criminal Court. Rome Statute of the International Criminal Court, art. 7, ¶ 1(h), Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute]. The ICC Statute is the treaty that established the International Criminal Court (ICC) adopted on July 17, 1998, currently with 124 states party to the statute. See *Chapter XVIII Penal Matters: Rome Statute of the International Criminal Court*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en (last visited Nov. 27, 2023). The ICC was formed to recognize "that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time." ICC Statute, *supra*, pmb1.

48. See U.N. Charter art. 1, ¶ 3 (stating that the purpose of the United Nations includes "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character"). See also *id.* art. 92 (stating that the International Court of Justice is the principal judicial organ of the U.N., and "forms an integral part of the present Charter"). The International Court of Justice (ICJ), established in 1945, acts as the world court and has jurisdiction to settle legal disputes concerning: "the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or extent of the reparation to be made for the breach of an international obligation." See Statute of the International Court of Justice, art. 36, para. 2, June 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute]. Thus, issues of cultural destruction and persecution are implicitly within the jurisdiction of the ICJ.

49. *Understanding the International Criminal Court*, INT'L CRIM. CT. 10 (2020), <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>.

World War.”⁵⁰ The ICTY “actively included charges related to the intentional destruction of cultural and religious property in its indictments, and its jurisprudence went on to make a distinctive contribution to the prosecution of crimes against cultural heritage, particularly in establishing that the deliberate destruction of structures which symbolize a group’s identity was a manifestation of persecution and a crime against humanity.”⁵¹ The ICTY opened a door to serious prosecutions tied to intentions to erase a cultural identity. The ICTY developed a similar statute to the ICC’s Rome Statute, which criminalized “intentionally directing attacks against civilian objects, that is, objects which are not military objectives,” and “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives” as war crimes.⁵² The ICC has jurisdiction to prosecute the persons responsible for war crimes and can be a powerful tool when prosecuting individuals for “crimes against humanity” or “genocide.”⁵³ The ICC’s jurisdiction is limited to States that have adopted the Rome Statute, unlike the ICTY which was specifically developed in response to the war in the Balkan territories. The creation of an *ad hoc* tribunal was an effective response to hold individuals accountable.⁵⁴ Many cases have discussed the violation of “cultural heritage” during war and how to define the offense. The ICTY court in *Prosecutor v Strugar*

50. Helen Walasek, *Cultural Heritage and Memory After Ethnic Cleansing in Post-Conflict Bosnia-Herzegovina*, 101 INT’L REV. RED CROSS 273, 275 (2019).

51. *Id.* at 278.

52. See ICC Statute, *supra* note 47, art. 8, paras. 2(b)(ii), (e)(iv). The Statute of the International Criminal Tribunal for the Former Yugoslavia includes similar language about avoiding force against civilian populations when not justified by “military necessity”. Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 3, 5, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute]. The ICTY Statute also includes language almost identical to the ICC Statute prohibiting the “seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.” ICTY Statute, *supra*, art. 3, para. (d).

53. ICC Statute, *supra* note 47, arts. 5–8.

54. Federico Lenzerini, *The Role of International and Mixed Criminal Courts in Enforcement*, in ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW 40, 58 (Francesco Francioni & James Gordley eds., June 6, 2013) (stating “[t]he ICTY has paved a way that should be followed also by other international and mixed criminal courts having the competence of judging crimes against cultural heritage.”).

found that “cultural . . . property is, by definition, of ‘great importance to the cultural heritage of every people’ . . . therefore . . . , even though the victim of the offence at issue is to be understood broadly as a ‘people,’ rather than any particular individual . . . thus the offences under Article 3(b) and 3(d) of the Statute are serious violations of international humanitarian law.”⁵⁵ The “people” described unite persons belonging to a community of a similar “identity.” The precedent of the courts shows the discussion of ‘cultural identity’ in relation to war and targeted offenses.

The *Al Madhi* case sets a precedent for crimes against cultural heritage during the occupation of Timbuktu.⁵⁶ Militant extremists were directing the Islamic police forces to carry out a series of attacks on historic mausoleums, as well as implementing policies that resulted in outrages on personal dignity.⁵⁷ The ICC recognized that the crimes would specifically target buildings of symbolic and emotional value for Timbuktu.⁵⁸ During the prosecution of Al Mahdi, the ICC prosecutor signed a letter of intent with UNESCO to increase collaborative efforts between UNESCO and ICC in addressing destructive attacks on cultural heritage.⁵⁹ The ICC can only be enforced under the rubric of a war crime.⁶⁰

C. HISTORY AND CULTURE OF UKRAINE

The root of enforcing a legal framework is to avoid the risk of endangerment or extinction of a culture’s identity. Recent armed conflicts in Mali, Iraq, and Syria have highlighted the actions of cultural cleansing and the destruction of cultural property at the forefront of war.⁶¹ The Ukraine war today is no

55. *Prosecutor v. Strugar*, Case IT-01-42-T, Trial Chamber, Judgement of Jan. 31, 2005, ¶ 232.

56. Anne-Marie Carstens, *The Swinging Pendulum of Cultural Heritage Crimes in International Criminal Law*, in INTERSECTIONS IN INTERNATIONAL CULTURAL HERITAGE LAW 109, 109 (2020) (explaining that the crimes committed against the World Heritage Site of Timbuktu have raise anew a debate over how far international criminal law and international criminal tribunals should go in redressing attacks on cultural heritage).

57. *Id.* at 111.

58. *Id.* at 142.

59. *Id.* at 111.

60. See ICJ Statute, *supra* note 48.

61. See generally Kalliopi Chainoglou, *The Protection of Intangible Cultural Heritage in Armed Conflict: Dissolving the Boundaries Between the Existing*

different. The offenses committed by the Russian Army reflect Putin's purpose of abolishing Ukrainian culture. The history of Russia's actions further demonstrates its intentions. The war on culture began significantly before the start of the 2022 war. The history of the land goes back to the medieval state of Kievan Rus in the 9th century and is by no means straightforward.⁶² A distinct Ukrainian language had already begun to emerge in the dying days of the Kievan Rus.⁶³ Considerable back and forth throughout the 16th century occurred between Poland-Lithuania when the Cossacks, in present-day Ukraine, began to form their uprising.⁶⁴ In the 1700s, the Russian empire absorbed modern-day Ukraine, and the imperial authorities of Russia began to systematically persecute expressions of Ukrainian culture.⁶⁵ The empire even suppressed Ukrainians of their language.⁶⁶ Nevertheless, despite this, "a distinct Ukrainian national consciousness emerged" and was urged to cultivate the Ukrainian culture further.⁶⁷ "When the Russian Empire collapsed in the aftermath of the revolutions of 1917, the Ukrainians declared a state of their own.⁶⁸ Following the declaration, Ukraine was one of the fifteen republics occupied by the Soviet Union in 1922.⁶⁹ Again, Russia, as the Soviet Union, forbade Ukraine to have its own history.⁷⁰ The Ukrainian ever-complex history has been a perpetual fight for cultural freedom.

More recently, since Russia's full-scale invasion into Kyiv, Ukraine's capital, on February 22, 2022, former Soviet-republic Ukraine has been fighting for its own sovereign state path. Russia's annexation of Crimea, Ukraine, in 2014 was the first time since World War II that a European state annexed the

Legal Regimes?, 2 SANTANDER ART AND CULT. L. REV. 109 (2017).

62. Ivan Alekseyevich Yerofeyev et. al, *Ukraine*. ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Ukraine> (Last visited Nov. 3, 2023).

63. Björn Alexander Düben, "There is no Ukraine": *Fact-Checking the Kremlin's Version of Ukrainian History*, LSE BLOG (July 1, 2020), <https://blogs.lse.ac.uk/lseih/2020/07/01/there-is-no-ukraine-fact-checking-the-kremlins-version-of-ukrainian-history/#:~:text=In%20the%2016th%20through,their%20Polish%20overlords%20in%201648>.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Robert Perks, *Ukraine's Forbidden History: Memory and Nationalism*, 21 ORAL HISTORY 43 (1993).

territory of another.⁷¹ After the 2014 annexation, Interpol, the international police organization, said it was searching for 52 paintings by Ukrainian artists that had been illegally transferred to an art museum in Simferopol, Russia, in March 2014.⁷² To show Ukraine's awareness of Russia's intentions, Ukraine was ready to proactively protect its property by quickly wrapping outdoor statues in sheaths of sandbags and by moving precious works of art into underground vaults.⁷³ These offenses began with paintings but have escalated into more severe offenses involving children.⁷⁴ Although both countries have deep cultural and familial ties with each other, Ukraine is still its own country with its own history and culture. Therefore, it is important to discuss the role of existing international law serving Ukraine in the protection of its identity.

III. ANALYSIS

A. FINDING THE MEANING OF "CULTURAL IDENTITY" THROUGH EXISTING INTERNATIONAL LEGAL INSTRUMENTS

The definition of "culture" in legal instruments has evolved over the last century. While international law has found definitions for synonyms like "cultural property"⁷⁵ and "cultural heritage,"⁷⁶ international law hesitates to define "cultural identity" in a legal instrument. Analyzing the different definitions of cultural 'property' and 'heritage' helps better understand the meaning of cultural identity. The 1972 World Heritage Convention opened a discussion around defining 'cultural heritage' beyond *property* as it considered protection of cultural heritage at a national level often remained incomplete.⁷⁷ A culture relies on cultural heritage to cover more

71. Jonathan Masters, *Ukraine: Conflict at the Crossroads of Europe and Russia*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/backgrounder/ukraine-conflict-crossroads-europe-and-russia> (last updated Feb. 14, 2023, 7:00 AM).

72. Jeffrey Gettleman & Oleksandra Mykolyshyn, *As Russians Steal Ukraine's Art, They Attack Its Identity, Too*, N.Y. TIMES 4 (Jan. 14, 2023) <https://www.nytimes.com/2023/01/14/world/asia/ukraine-art-russia-steal.html>.

73. *Id.*

74. *Id.*; Stewart, *supra* note 3.

75. 2003 Convention, *supra* note 46.

76. 1972 World Heritage Convention, *supra* note 41, art. 1.

77. 1972 World Heritage Convention, *supra* note 41, prmb. (emphasis added).

than movable properties.⁷⁸ It is specific to the “practices, representations, expressions, knowledge, and skills” that are manifested by “communities, groups and, in some cases, individuals,” emphasizing that it must be a shared experience between more than one person.⁷⁹ The latest definition of ‘cultural property’ is defined by the adoption of the 2003 Convention, giving broader scope to protection including intangible cultural heritage as:

practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a *sense of identity* and continuity, thus promoting respect for cultural diversity and human creativity.⁸⁰

This definition relies on the term “sense of identity,” which is key in recognizing a culture’s significance. The “continuity” of the identity is significant to a culture’s prosperity, especially in times of war and destruction. A flexible definition of ‘cultural heritage’ helps acknowledge different social aggregations, such as indigenous peoples and minorities.⁸¹ Intangible cultural heritage is no longer limited to cultural foods, dances, habitual language, storytelling, sports, and medicine.⁸² Operational Directives encourage State Parties to create coordinative

78. Tullio Scovazzi, *The Definition of Intangible Cultural Heritage*, in 4 CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY 179, 179 (Silvia Borelli & Federico Lenzerini eds., 2012).

79. *Id.*; see also 1972 World Heritage Convention, *supra* note 41.

80. 2003 Convention *supra* note 46, art. 2(1) (emphasis added). Article 2(2) further defines the encompassing domains “(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship.” *Id.*

81. Sabrina Urbinati, *The Role for Communities*, in 4 CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY 201, 206 (Silvia Borelli & Federico Lenzerini eds., 2012).

82. 2003 Convention, *supra* note 46, art. 2(2).

mechanisms defining intangible cultural heritage through “identification and definition of the different elements of intangible cultural heritage present on their territories, drawing up of inventories; the elaboration and implementation of programs, projects, and activities; and the preparation of nomination files for inscription on the Lists.”⁸³ These implementations are at the discretion of the States and are not a necessary obligation to act on.⁸⁴ It is difficult to set protocols specific to each culture’s representation.

Comparing the recent definition to the inaugural of the 1954 Hague Convention “marked the beginning of an era in international law in which cultural items became objects worthy of independent legal concern in their own right.”⁸⁵ Introducing the concept of cultural property not only as a measure of protection possessing material value highlights the “contribution to the culture of the world.”⁸⁶ The preamble further described the term “*being convinced* that damage to cultural property belonging to any people whatsoever means *damage to the cultural heritage of all mankind*, since each people makes its contributions to the culture of the world.”⁸⁷ This places value on all cultural property as contributions to global humanity. It is the property and heritage that helps make up people in the world. Through its adoption, “cultural property” has been described “as the object of individual rights, property rights, but also as public patrimony which is the duty of governments to safeguard and transmit to future generations.”⁸⁸ Further, the legal instrument has been seen “as an essential dimension of human rights, when it reflects the spiritual, religious and cultural specificity of minorities and groups.”⁸⁹ It is imperative to uphold culture as a human right and underscore the value of humanity. A culture has a right to prosperity and survival during war. Cultural property is vital to humanity as it allows tangible and intangible expression of identity.⁹⁰ Therefore,

83. Urbinati, *supra* note 81, at 209 (citing UNESCO doc. ITH/10/3.GA/CONF.201/Resolutions Rev., ¶ 80 (July 27, 2010)).

84. *Id.* at 210.

85. LOSTAL, *supra* note 5, at 62.

86. Francioni, *Evolving Framework*, *supra* note 24, at 9 (citing 1954 Hague Convention, *supra* note 23, prml.).

87. 1954 Hague Convention, *supra* note 23, prml. (emphasis added).

88. Francioni, *Evolving Framework*, *supra* note 24, at 4.

89. *Id.*

90. See ROGER O’KEEFE ET AL., PROTECTION OF CULTURAL PROPERTY MILITARY MANUAL 1, 13, 23 (2016).

States and international agencies should do everything in their power to protect it. Cultural property holds values that cannot be remedied through compensation. Once the property is destroyed, it cannot be recreated. History is in the act of its creation and memorialization.

UNESCO, as the leading force behind the drafting of the 1954 Hague Convention, explained the commitments that States should take concerning safeguarding cultural property. Article 3 of the Hague Conventions recommends that States prepare against the foreseeable effects of an armed conflict “by taking such measures as they consider appropriate.”⁹¹ The obligations suggested by UNESCO require adopting preventive measures such as preparing inventories and plans that support safeguarding cultural property.⁹² In addition, they recommend developing initiatives that guarantee respect for cultural property, for example: refraining from using such property in any manner that might expose it to destruction or deterioration.⁹³ The criticism of this obligation is that it remains a recommendation, with no further information on how to best “prepare” for cultural destruction.⁹⁴ These challenges have cast their own light on the Ukraine war today.

Russia and Ukraine are both parties to the 1954 Hague Cultural Property Convention,⁹⁵ while Ukraine was the only party extended to the 1999 Second Protocol of the Hague Convention.⁹⁶ Absent reciprocity to the 1999 Second Protocol of

91. 1954 Hague Convention, *supra* note 23, art. 3.

92. *1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, <https://en.unesco.org/protecting-heritage/convention-and-protocols/1954-convention#:~:text=The%201954%20Hague%20Convention%20aims,regardless%20of%20their%20origin%20or> (last visited Jan. 8, 2023).

93. *Id.*

94. Lucas Lixinski & Vassilis P Tzevelekos, *The World Heritage Convention and the Law of State Responsibility Promises and Pitfalls*, in *INTERSECTIONS IN INTERNATIONAL CULTURAL HERITAGE LAW* 257, 258 (2020) (describing the ‘softness’ of cultural heritage law lacking concreteness with concern to conduct and duties).

95. *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention*, <https://www.unesco.org/en/legal-affairs/convention-protection-cultural-property-event-armed-conflict-regulations-execution-convention#item-3> (last visited Jan. 12, 2024).

96. *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, <https://www.unesco.org/en/legal-affairs/second-protocol-hague-convention-1954-protection-cultural-property-event-armed-conflict?hub=66535> (last visited Jan. 12, 2024).

the Hague Convention limits Ukraine from putting cultural heritage on the International List of Cultural Property under Enhanced Protection and having that second level of protection.⁹⁷ Following the start of the war, UNESCO held a declaration on the protection of cultural heritage in Ukraine, calling for respect “for the obligations stemming from the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two (1954 and 1999) Protocols, to prevent destruction and damage to cultural heritage in Ukraine.”⁹⁸ In addition, UNESCO urged the Russian Federation “to ratify the Second Protocol to the Hague Convention at the earliest opportunity” and

to comply with its obligations according to Article 4 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its First Protocol by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.⁹⁹

The “Russian forces have already been accused of attacking sacred sites such as the 16th Century cave complex, a monastery in the Donetsk region, damaging the mosque of Sultan Suleiman the Magnificent in Mariupol,” looting the Vasylivka Historical and Architectural Museum, and more.¹⁰⁰ The destruction of these sacred sites sends a message to the international legal community, a message that disregards the value and protection of Ukrainian heritage and identity. Disregarding the value to this property rejects its contribution to the world and sends a repeated message that disregards Ukrainian identity.

97. *Making the Convention More Operational: 1999 Second Protocol*, UNESCO, <https://en.unesco.org/protecting-heritage/convention-and-protocols/1999-second-protocol> (last visited Jan 8, 2023).

98. Declaration on The Protection of Cultural Heritage in Ukraine, *2nd Extraordinary Meeting of the Committee for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, C54/22/2.EXT.COM/3 (Mar. 18, 2022).

99. *Id.*

100. Dick Jackson, *Ukraine Symposium – Cultural Property Protection in the Ukraine Conflict*, LIEBER INST. W. POINT (Apr. 14, 2022), <https://lieber.westpoint.edu/cultural-property-protection-ukraine-conflict/>.

The light on intangible cultural property in Ukraine has strived to safeguard traditions and sense of identity. “The value of intangible cultural heritage in the modern life of Ukrainians . . . [encompasses] the need to preserve cultural values in the course of historical development as a powerful ethno-unifying factor,” especially to further transmit it to future generations.¹⁰¹ “[T]he methods . . . of fixing intangible values seem contradictory . . . [but] their formal fixation leads to the preservation of spiritual culture.”¹⁰² Because of the war’s adverse effect on Ukraine’s tradition, Ukraine recently asked the Member States of the Committee to “fast-track the examination of the nomination file for borscht to be inscribed on the List of Urgent Safeguarding as a case of extreme urgency.”¹⁰³ This traditional dish mobilizes attention from the international community, ultimately serving as a symbol of promoting the social and cultural well-being of Ukraine’s identity. Ukraine has continued to promote its culture and sovereignty through intangible cultural property, encouraging Ukrainian musicians to leave the State to join the ‘cultural front’ in the Ukrainian Freedom Orchestra or Kyiv Philharmonic Orchestra to tour across Europe and the United States featuring Ukrainian composers in series of concerts.¹⁰⁴ Beyond expression through the arts, international communication has been key to spreading intangible cultural property awareness. The UN World Day of Creativity and Innovation, Education and Culture Commissioner Mariya Gabriel expressed solidarity with Ukrainian artists, culture sectors, and cultural heritage professionals, announced measures to support Ukrainian artists, how to help protect the country’s cultural heritage, and the value of the common European identity.¹⁰⁵ These methods have allowed Ukrainians to preserve their identity and intangible culture during a war directed at doing the opposite.

101. Chmil, H. Kuznietsova, et al., *Intangible Cultural Heritage as a Resource for Consolidating Modern Ukrainian Society*, LINGUISTICS AND CULTURE REV. 747–760 (2021).

102. *Id.* at 757.

103. *Culture of Ukrainian Borscht Cooking Inscribed on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding*, UNESCO (Jul. 1, 2022), <https://www.unesco.org/en/articles/culture-ukrainian-borscht-cooking-inscribed-list-intangible-cultural-heritage-need-urgent#.Y9SAoSayl6k>.link.

104. Magdalena Pasikowska-Schnass (Members’ Research Service), *European Cultural Heritage Days Russia’s Cultural War Against Ukraine*, at 5, (Sept. 2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733650/EPRS_BRI\(2022\)733650_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733650/EPRS_BRI(2022)733650_EN.pdf).

105. *Id.* at 9.

1. Defining “Cultural Identity”

“Cultural identity is increasingly seen as a more self-standing or substantive right to be enjoyed by individuals and by communities.”¹⁰⁶ With new caselaw and recognition, “cultural identity is indeed used to ‘color existing human rights provisions.’”¹⁰⁷ Further, protecting cultural identity is an important element of human dignity.¹⁰⁸ Defining cultural identity can help stigmatize cultural communities in the context of armed conflict, discrimination, and nationalism. Although cultural identity is not clearly defined in a treaty the way cultural property has been in the Hague Convention, the international legal community resides on the side of caution to give the concept a binding meaning.¹⁰⁹ On the other hand, the term ‘cultural heritage’ has been further refined by experts to be “about inter-generational memory and value transmission. It is geared toward identity, which is shaped by culture. Attacking the culture of a people disfigures their past, present and future and warps their reality, which in turn depletes world heritage.”¹¹⁰ Further, individual criminal responsibility (“ICR”) based jurisdictions “have linked” a tangible approach to a heritage-centered approach, which links attacks targeting culture that often aim at or result in altering cultural identities to attacks on cultural heritage.¹¹¹

“A right to cultural identity is considered by some as a ‘ . . . general form of all cultural rights,’” although it is not directly included in the International Bill of Human Rights.¹¹² Expert Yvonne Donders¹¹³ has “found that the concept of cultural

106. Yvonne Donders, *Towards a Right to Cultural Identity? Yes, Indeed!*, DIRITTI UMANI E DIRITTO INTERNAZIONALE 523, 524 (2018) (Neth.) [hereinafter Donders, *Towards a Right to Cultural Identity?*].

107. *Id.*

108. Donders, *A Right to Cultural Identity*, *supra* note 28, at 321.

109. *Id.* (“The concept of cultural identity is considered too vague to be transformed into a substantive legal right.”).

110. ABTAHI, *supra* note 17, 314–15 (2023).

111. *Id.* at 320.

112. Donders, *A Right to Cultural Identity*, *supra* note 28, at 320.

113. Yvonne Donders CV, OHCHR 16TH SESSION OF THE INTERGOVERNMENTAL WORKING GROUP ON THE EFFECTIVE IMPLEMENTATION OF THE DURBAN DECLARATION AND PROGRAMME OF ACTION, <https://www.ohchr.org/sites/default/files/Documents/Issues/Racism/IWG/Session16/YvonneDondersCV.pdf> (last visited Apr. 14, 2023). (“Yvonne Donders is a Professor of International Human Rights and Head of the Department of International and European Law at the University of Amsterdam . . . [holding] a PhD from the Law Faculty of

identity is too broad and vague to be translated into a separate human right.”¹¹⁴ Its vagueness poses dangers to the international law community because it could be interpreted as supporting questionable cultural identities, such as forced marriage, female roles, and other cultural practices that are in conflict with human dignity.¹¹⁵ Donders better suggests defining it through “the right to *freedom of cultural identity*,” noting that “one of the central claims of a right to cultural identity is the right to decide *freely* to have, develop and preserve it, as well as to change it,” further reflecting “the idea of cultural identity as a changeable process.”¹¹⁶ Although cultural identity has not been defined through a substantive right, some international instruments speak to its preservation and respect as a principal policy goal.¹¹⁷ The UN General Conference’s 1976 Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It attempts to provide a broad meaning of culture with explicit references to identity by “considering that participation in cultural life takes the form of an assertion of identity, authenticity and dignity” and “participating in the cultural life of the countries in which they find themselves in order to enrich it with their specific contributions, while safeguarding their right to preserve their cultural identity.”¹¹⁸ As shown here, the preservation of cultural identity is often tied to the cultural life and cultural rights. States who assert their identity participate in the preservation of their cultural life.

Another way that legal experts have attempted to define identity through the overarching meaning of self-determination under the human rights framework. The International Court of Justice has reaffirmed the right of peoples to self-determination as an obligation owed to the community as a whole (a right *erga*

Maastricht University on cultural human rights and the right to cultural identity. Her research and teaching focus on public international law; international human rights law, in particular economic, social and cultural rights, and human rights and cultural diversity. Yvonne Donders [has worked] as a Programme Specialist on human rights at the Secretariat of UNESCO in Paris . . . and is a regular consultant for UNESCO and for the UN Office of the High Commissioner for Human Rights. She is currently Chair of the Steering Committee of the Netherlands Network of Human Rights Research.”)

114. Donders, *Towards a Right to Cultural Identity?*, *supra* note 106, at 524.

115. *Id.* at 526–27.

116. Donders, *A Right to Cultural Identity*, *supra* note 28, at 324.

117. *Id.* at 326.

118. *Rec. on Participation by the People at Large*, *supra* note 30, prmb., art. 4(f).

omnes).¹¹⁹ It is synonymous to the language of the 1954 Hague Convention, making contributions to the culture of the world. The contribution of an identity is not limited to a specific State. It is part of humanity at large. UNESCO's continued involvement in cultural heritage and cultural identity explicitly demonstrated at the General Conference proclaimed the Declaration of the Principles of International Cultural Cooperation, enunciating principles concerning the right of peoples to develop their culture and each culture is part of a "common heritage belonging to all mankind."¹²⁰ There is an intersection between cultural heritage, human dignity, and cultural rights in the language used to describe cultural identity. This concept is further embedded in the Universal Declaration of Human Rights of the central notion of "human dignity."¹²¹ The drafters intended to safeguard individuals' "entitlement to the respect of their culture as part of their identity, history and thus dignity."¹²² To promote and implement cultural rights, the gap in cultural rights demands for a codification, including a separate right to cultural identity, to avoid serious human right violations and cultural right neglect. In the context of the Ukraine war, it would help serve a State's claim of separate identity from a power dominant attacker. The trauma of war is "felt" both in the physical properties of a nation and in its psyche - sense of identity.¹²³ Cultural identity can almost be defined through the memory of a culture, constructing its cultural knowledge as it weaves together past and present amid "socio-cultural contexts."¹²⁴ Recognizing these memories would allow States like Ukraine to present their stance, as a State that began its political life of the Ukrainian people dating all the way back to 1240.¹²⁵ The history, the language, the practices, and the

119. Ana Filipa Vrdoljak, *Self-Determination and Cultural Rights*, in CULTURAL HUMAN RIGHTS 41 (2008) (citing to East Timor (Port. v. Austl.), Judgement, 1995, I.C.J. 102, ¶ 29 (June 30)).

120. *Principles of International Cultural Co-Operation*, supra note 29, art. 1, ¶ 3 (emphasis added).

121. Francioni, *Culture Heritage and Human Rights*, supra note 37, at 8.

122. *Id.*

123. Danielle Drozdewski et al., *Cultural Memory and Identity in the Context of War: Experiential, Place-Based and Political Concerns*, 101 INT'L REV. OF THE RED CROSS 251, 252 (2019).

124. *Id.* at 253

125. Nicolai N. Petro, *Understanding the Other Ukraine: Identity and Allegiance in Russophone Ukraine*, E-INT'L REL. (Mar. 13, 2015) <https://www.e-ir.info/2015/03/13/understanding-the-other-ukraine-identity-and-allegiance-in-russophone-ukraine>.

religion collectively unite to give Ukraine its own separate identity from Russia.¹²⁶ The limiting international legal instruments to define the cultural identity provides Ukraine with less power to enforce and claim self-determination.

If settling on one definition is not on the horizon, the legal community should practice cultural exercise, which is portrayed by the three pillars that scholar Hiram Abtahi has set.¹²⁷ International law actors should: (1) Practice continuous interpretation of treaty law; (2) approach attacks targeting culture not from a formal standpoint but from a substantive one; (3) contemplate culture as a metaphorical triptych (or diptych), wherein tangible and intangible culture are considered in any of their local-national-international combinations.¹²⁸ These three pillars lead to the essential question we need to continue asking ourselves: What effects do attacks targeting tangible and intangible culture have on human collectives, whether locally, nationally or internationally?¹²⁹ International legislators, adjudicators and scholars have gradually answered this by determining that this targeting depletes world heritage and warps future generations' identity.¹³⁰

B. INTERNATIONAL CRIMINAL COURTS AND THEIR POTENTIAL TO ENFORCE CULTURAL IDENTITY VIOLATIONS

The definition of “cultural identity” is contingent upon historical interpretations of “cultural property” and the utilization of legal instruments in determining violations. Disagreements in States' obligation toward cultural property during armed conflict have stemmed from many factors, including whether States are parties to the instrument that conveys the obligation of the law.¹³¹ In the aftermath of the Bosnian War, the need to reinforce the criminalization of attacks on cultural heritage became painfully obvious in the context of

126. *Id.*

127. ABTAHI, *supra* note 17, at 323–24.

128. *Id.*

129. *Id.* at 325.

130. *Id.*

131. Elizabeth Varner, *Comparing Interpretations of States' and Non-State Actors' Obligations Toward Cultural Heritage in Armed Conflict and Occupation, Military Manuals and the Law Of War*, in INTERSECTIONS IN INTERNATIONAL CULTURAL HERITAGE LAW 56, 57 (Anne-Marie Carstens & Elizabeth Varner eds., 2020).

armed conflicts.¹³² The protection of cultural heritage needed to be recognized as an important human right when actors targeted culture cleansing and agonizing destruction of a culture's history.

The limits of international judicial enforcement for crimes against cultural heritage rely on the practicality of whether specific tribunals can adjudicate the crimes.¹³³ It is the symbolic and spiritual significance of cultural property that makes the act of destruction or willful damage directed against it particularly serious, amounting to damage to the very cultural and spiritual identity of the group that finds expression in that property.¹³⁴ In *Prosecutor v. Krstic*, even the ICTY struggled with perpetration against the acts of cultural destruction.¹³⁵ This type of crime is usually prosecuted under the term 'genocide' as a "crime against humanity." In *Strugar*, the crime of genocide was determined as "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."¹³⁶ A culture claiming its own distinct identity is not enough under the standards of genocide.

Genocide has been difficult to prove. Historic wars have barely scratched the full surface of prosecution under genocide. ICJ confirmed ICTY's stance on genocide in the *Krstic* case highlighting that "the destruction of historical, cultural and religious heritage cannot be considered . . . as falling within the categories of genocide . . . 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 . . ." ¹³⁷ This sets a higher standard to prove genocide under the *mens rea* element, which goes directly to the mental intent of the perpetrators.

The *Al Madhi* case in 2016 opened the door for charges of crimes against cultural heritage, recognizing the *mens rea*

132. Walasek, *supra* note 49 at 275.

133. Lenzerini, *supra* note 54, at 42.

134. *Id.* at 52.

135. *Prosecutor v. Krstic*, Case IT-98-33-T, Trial Chamber, Judgement of Aug. 2, 2001, ¶ 580.

136. *Id.*

137. Lenzerini, *supra* note 54, at 55 (citing the 2007 judgement concerning the case of the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v Serbia & Montenegro*)).

element through the intentional targeting of cultural sites.¹³⁸ Since cultural heritage is directly protected under Article 8 of the Rome Statute, discriminatory intent as evidence of intent would be qualified as genocide.¹³⁹ The international community discussed the need for a broader perspective to be implemented, requiring no statutory qualification of war crime to be applied.¹⁴⁰ The ICC set the principles and responsibility under *Al Mahdi* through the Reparation Order, which guided the granting of reparations formulated to cover the expenses of reconstructing destroyed heritage goods for the benefit of future generations, making the defendant liable for 2.7 million euros in expenses for individual and collective reparations.¹⁴¹ The present Convention states that any of the acts listed in the Convention must be “committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group” in order to be considered genocide.¹⁴² The ICTY, ECCC, and ICJ have confirmed that although cultural destruction does not fall within the categories of acts of genocide set out in Article II of the Genocide Convention, attacks on cultural and religious properties may help in establishing an intent to destroy the group physically through the *mens rea* of genocide, recognizing the links between the destruction of cultural heritage and persecution as crime against humanity.¹⁴³ This link helps the criminalization of attacks on cultural heritage, making it easier to prosecute these harms, as seen in *Al Mahdi*.¹⁴⁴

138. Karolina Wierczynska & Andrzej Jakubowski, *The Al Mahdi Case, in CULTURAL HERITAGE CRIMES IN INTERNATIONAL CRIMINAL LAW* 134 (2020) (explaining that “*Al Mahdi* was the first case brought before the ICC concerning the destruction of cultural property. Hence, it was perceived as a landmark case, paving the way for a more efficient enforcement of international justice with respect to cultural heritage crimes.”).

139. Carstens, *supra* note 56, at 144.

140. *Id.*

141. *Id.* at 153.

142. Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Jan. 12, 1951, 78 U.N.T.S. 277.

143. Carstens, *supra* note 56, at 209.

144. HIGGINS, *supra* note 35, at 32 (explaining that Al Madhi “is charged with a number of crimes against humanity and war crimes, including directing attacks against buildings dedicated to religion and historic monuments. However, while the ICTY discussed attacks on cultural heritage under the frameworks of crimes against humanity and genocide, in addition to a war crimes framework, this may not be the case with the ICC. Indeed, the Chamber commented that ‘the jurisprudence of the ICTY is of limited guidance given that, in contrast to the Statute, its applicable law does not govern “attacks” against cultural objects but rather punishes their “destruction or wilful

The lack of intersections among the various international legal instruments can be a challenge. Still, as the law continues to evolve and pinpoint limitations, countries are able to protect themselves against these serious crimes. ‘Cultural genocide’ was addressed in Article III of the Ad hoc Committee’s Draft but never made its way into the subsequent drafts or the Convention itself because it was too vague, and scholars discuss that there was too much difference between mass murder and destroying libraries.¹⁴⁵ That perception can be subjective because the pain of a destroyed mosque can be viewed as a murder of history. The mosques destroyed in *Al Mahdi* dated back over 1000 years, representing a part of humanity’s shared memory and collective consciousness.¹⁴⁶ Humanity lives through cultural heritage; therefore, it can be closely related to an execution of a culture’s identity. The Timbuktu mosques represented Islamic culture and values, passed generationally through its presence.¹⁴⁷ Therefore, the demolition represents a rejection of that culture’s existence.

‘Cultural genocide’ as such was not included in the Genocide Convention, nor did customary international law recognize it as a crime; however, a specific form of cultural genocide that discussions called ‘forcibly transferring children to another group’ was included in the definition of the crime.¹⁴⁸ This shows that cultural genocide is not widely accepted to be a permanent international legal crime, making it hard for States to prosecute cultural destruction. The hope is that digital evidence and acts of cultural identity rejection can be utilized as a form of showing the *mens rea* element. Although genocide holds the mental intent requisite, it is difficult to prove through acts of destructive impact. International law, thus, lacks a broader requirement for

damage”. The legal contexts thus differ.”).

145. Florian Jeßberger, *Part II The Definition of Genocide, 4 The Definition and the Elements of the Crime of Genocide*, in *THE UN GENOCIDE CONVENTION: A COMMENTARY* 89 (Paola Gaeta ed., 2009).

146. ABTAHI, *supra* note 17, at 160–61 (finding “that ‘a common heritage for the community’, the saints’ mausoleums and mosques ‘are an integral part of the religious life of [Timbuktu’s] inhabitants’. The mausoleums reflected the ‘commitment to Islam’ of ‘the people of Timbuktu’, as evidenced by the actual and symbolic maintenance of the sites of the Timbuktu community of all ages and genders . . . being among the ‘most cherished buildings’ by the population of Timbuktu who attached ‘symbolic and emotional value’ to them, the destruction ‘aimed at breaking the people of Timbuktu.’”).

147. Timbuktu, UNESCO, <https://whc.unesco.org/en/list/119/> (last visited Nov. 26, 2023).

148. Jeßberger, *supra* note 145, at 101.

“genocide” in order to hold perpetrators accountable for their intention to destroy a culture’s identity.

C. WHAT IS NEXT FOR UKRAINE AND LEGAL PRECEDENT?

Ukraine has prioritized protecting cultural heritage by gathering evidence that represents its sovereign identity. Ukraine has relied on volunteerism as the forefront method of preservation and inventory.¹⁴⁹ Digitization has been essential in safeguarding cultural property in the Ukraine War.¹⁵⁰ Initiatives such as SUCHO, ‘Saving Ukrainian Cultural Heritage Online,’ include over a thousand international volunteers who are collaborating online to digitize and preserve Ukrainian cultural heritage with a web archive of more than 5,000 websites and 50TB of data from Ukrainian cultural institutions.¹⁵¹ Volunteers are identifying and archiving “at-risk sites, digital content, and data in Ukrainian cultural heritage institutions.”¹⁵² For example, the SUCHO site features digital scans of rare books important to Ukraine’s cultural heritage.¹⁵³ Ukraine is acting through civic activist initiatives as volunteers assist in preserving collections through online surveys.¹⁵⁴ Countries can also send financial assistance for museums.¹⁵⁵ Aid has come in the form of packaging, conservation, and protective materials, securing collections from Western partners, and digitization.¹⁵⁶ Another effective method has been the ‘Backup Ukraine’ initiative, which uses 3D technology to equip the Ukrainian population with a smartphone to document a site or an artifact and generate a 3D model for a digital archive.¹⁵⁷ These methods have represented the ways modern technology

149. Heather Stephenson, *Preserving Ukraine’s Cultural Heritage Online*, TUFTS NOW (Mar. 22, 2022), <https://now.tufts.edu/2022/03/22/preserving-ukraines-cultural-heritage-online>.

150. *Id.*

151. SUCHO, <https://www.sucho.org/> (last visited Nov. 26, 2023).

152. *Saving Ukrainian Cultural Heritage Online (SUCHO) Initiative*, COALITION FOR NETWORKED INFORMATION, <https://www.cni.org/news/saving-ukrainian-cultural-heritage-online-sucho-initiative> (last updated Mar. 4, 2022).

153. Stephenson, *supra* note 149.

154. Hanna Bazhenova, *Protection of Ukraine’s Cultural Heritage during the War*, IES COMMENTARIES (Apr. 27, 2022), <https://ies.lublin.pl/wp-content/uploads/2022/04/ies-commentaries-595-107-2022.pdf>.

155. *Id.*

156. *Id.*

157. Pasikowska-Schnass, *supra* note 104, at 7.

plays a role in highlighting a culture's identity. Databases such as these can serve as digital evidence for Ukraine's future litigation. These resources allow the whole community to participate and witness the destruction of cultural heritage during the Ukraine war. As helpful as these databases are, the impact of extinct cultural property causes irreparable pain to cultural identity.

A press release from the ICJ was released on December 16, 2022, noting that Liechtenstein sought to intervene in the case, as Russia sought allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide in *Ukraine v Russia Federation*.¹⁵⁸ To conclude proper interpretation of the provisions of the Genocide Convention, Liechtenstein noted it "is necessary . . . to ensure strict compliance with the Convention, which is imperative for protecting human rights law . . ." ¹⁵⁹ Russia has jumped on switching the narrative, claiming that they have been a victim of genocide over the years.¹⁶⁰ In the application of this case, Ukraine states that "the dispute at issue concerns the falsity of allegations of genocide, and unlawful measures that have been undertaken on the basis of such false allegations" and "[i]n addition, pursuant to Article 74(4) of the Court, Ukraine requests the President of the Court to call upon the Russian Federation to immediately halt all military actions in Ukraine, to enable any order the Court may make on the Request for provisional measures to have its appropriate effects."¹⁶¹ In the "Application," Ukraine asserts the Russian Federation's "lie is all the more offensive, and ironic because it appears that it is Russia planning acts of genocide in Ukraine" and contends that

158. Press Release, Int'l Ct. of Just., Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ.), The Principality of Liechtenstein Files a Declaration of Intervention in the Proc. Under Article 63 of the Statute (Dec. 16, 2022), <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221216-PRE-01-00-EN.pdf>.

159. *Id.*

160. Allegations of Genocide Under the Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ.), Application Instituting Proceedings, at 4 (Feb. 26, 2022) (explaining that the "Russian Federation has falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, and on that basis recognized the so-called "Donetsk People's Republic" and "Luhansk People's Republic," and then declared and implemented a "special military operation" against Ukraine with the express purpose of preventing and punishing purported acts of genocide that have no basis in fact.").

161. *Id.* at 2.

“Russia is intentionally killing and inflicting serious injury on members of the Ukrainian nationality—the *actus reus* of genocide under Article II of the [Genocide] Convention.”¹⁶² In reality, genocide is very difficult to prove under the higher *mens rea* standard. Since Russia is not a party to the ICC, the best outcome is for Ukraine to develop its own *ad hoc* tribunal similar to the ICTY and ICTR. ICTY and ICTR have resolved complex issues by applying Article 38(1) of the Statute for the International Court of Justice, which requires the Court to apply: “(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and, failing the above, “(d) judicial decisions and the teachings of the most highly qualified publicists of the various nations.”¹⁶³ Ad hoc tribunals like the ICTY can be an effective way of prosecuting war crimes, crimes against humanity, and genocide. The benefit of a Ukraine tribunal is that it would operate independently, lower costs and be governed by its own rules of procedure and evidence, which are based on international law and practice.¹⁶⁴ It was easier to prosecute genocide under the ICTY statute because it was tailored to the specific context of those conflicts, and the specialization of the selected judges.¹⁶⁵

Some benefits include the overall success tribunal courts achieve that escape the International Criminal Court. For example, the Yugoslavia tribunal “has won 69 convictions, the Rwanda tribunal has won 47, and the Sierra Leone tribunal has won 16 convictions,” while “the ICC, costing about \$140 million annually, has thus far seen only one conviction.”¹⁶⁶ A hearing discussing a Syrian tribunal in response to the Syrian war pointed to five potential mechanisms in response to the war: “an *ad hoc* court created by the U.N.; second, a regional court

162. *Id.* at 14.

163. ICJ Statute, *supra* note 48, art. 38(1)(a)–(d).

164. Accountability Mechanisms for War Crimes Committed in Ukraine, PILPG 28–29 (July 2022) (describing the advantages of an ad hoc tribunal in Ukraine would include immunity, legitimacy and support, resources, and lowers costs).

165. See generally ICTY Statute, *supra* note 52.

166. See *Establishing a Syrian War Crimes Tribunal?: J. Hearing Before the Subcomm. On Afr., Glob. Health, Glob. Hum. Rts., & Int’l Orgs., & the Subcomm. On the Middle E. and N. Afr. Of the H. Comm. On Foreign Affs.*, 113th Cong. 2 (2014).

authorized by treaty with a regional body; an internationalized domestic court; a domestic court comprised by Syrian nationals within a Syrian justice system; and . . . fifth would be the ICC itself.”¹⁶⁷ Syria itself strives to implement justice through an *ad hoc* tribunal after witnessing the destruction of a war that still lingers today.¹⁶⁸ Yet, the challenges of creating an *ad hoc* tribunal have been described as a process that is “time consuming and politically exhausting.”¹⁶⁹ On average, a hybrid court can take three to four years to become fully operational.¹⁷⁰

Creating a permanent court tailored to the context’s issues can be more efficient for quicker investigations and prosecutions.¹⁷¹ A tribunal court has the ability to be developed in its specialized expertise to the crimes specific to the war in Ukraine. If Ukraine doesn’t gather enough resources, experts, and international support for an *ad hoc* tribunal, settlement might be the only outcome of a war that has faced an extreme number of casualties and cultural destruction. The complexity of accountability in international law is the realistic process that States can rely on. As much as we want to see perpetrators pay for their crimes, the threshold for genocide is a hard one to meet. Therefore, Ukraine should continue to shine an international light on the cultural devastations through media and awareness. These cultural devastations will likely not stop from happening after Ukraine, including the ongoing war in Syria and the potential future threats in Taiwan. If a smaller country can set a precedent by developing a strong *ad hoc* tribunal system, it can show the rest of the world that there are ways around the high standards of the ICC prosecutions.

167. *Id.* at 3.

168. *See id.* at 6.

169. John Seguin, *Denouncing the International Criminal Court: An Examination of U.S. Objection to the Rome Statute*, 18 B.U. INT’L L.J. 85, 86 (2000).

170. *See* Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals, International Center for Transitional Justice [ICTJ], at 15 (2018), https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

171. Seguin, *supra* note 169 (citing *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on Int’l Operations of the S. Comm. on Foreign Rels.*, 105th Cong. 11 (1998) (statement of David Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the UN Diplomatic Conference on the Establishment of a Permanent International Criminal Court)).

IV. CONCLUSION

Cultural identity is embedded within existing laws through certain terms such as cultural heritage, cultural property, human rights, and genocide. International law needs to adopt the ‘freedom of cultural identity’ in which a culture captures its memory and consciousness through transmission. It is that freedom that Ukraine seeks to encourage, and it is that freedom that Russia seeks to destroy. It is also important that international adjudicators and legal scholars continue to engage in culture exercise.

From stealing art to destroying world heritage sites, Russia has continuously trampled on Ukraine’s cultural identity during the current war. In addition to safeguarding during the present war, Ukraine is actively gathering information and evidence for future prosecution of those involved in crimes under Ukrainian and international law.¹⁷² Groups of “Ukrainian lawyers and art experts are working day and night to collect evidence for what they hope will be future prosecutions of cultural crimes.”¹⁷³ They do this by making “meticulous lists of missing objects, comb[ing] through museum records, and try[ing] to identify potential witnesses and local collaborators who might have helped the Russians steal.”¹⁷⁴ Through these efforts, Ukraine utilizes the Hague Convention in its safeguarding methods and international support. The cultural property treaties are valuable during war, imposing limits on actions that can lead to detrimental results. Cultural heritage is invaluable as much as it is destroyable. The treaties have their limitations, which is why it is important that the international legal community plays its role in safeguarding and expanding definitions. ‘Cultural identity’ is a concept that requires international attention. While Ukraine endures Russia’s rejection of its identity, it continues to fight these false statements through perseverance. The creation of an *ad hoc* tribunal can better serve the irreparable injuries a State experiences. Technology has been a conduit to endless possibilities for the legal community. It has empowered the whole world to connect and engage with what is at stake. All eyes are on the results. It is not only a War on Ukraine. It is a War on Culture.

172. Bazhenova, *supra* note 154.

173. Gettleman & Mykolyshyn, *supra* note 72.

174. *Id.*