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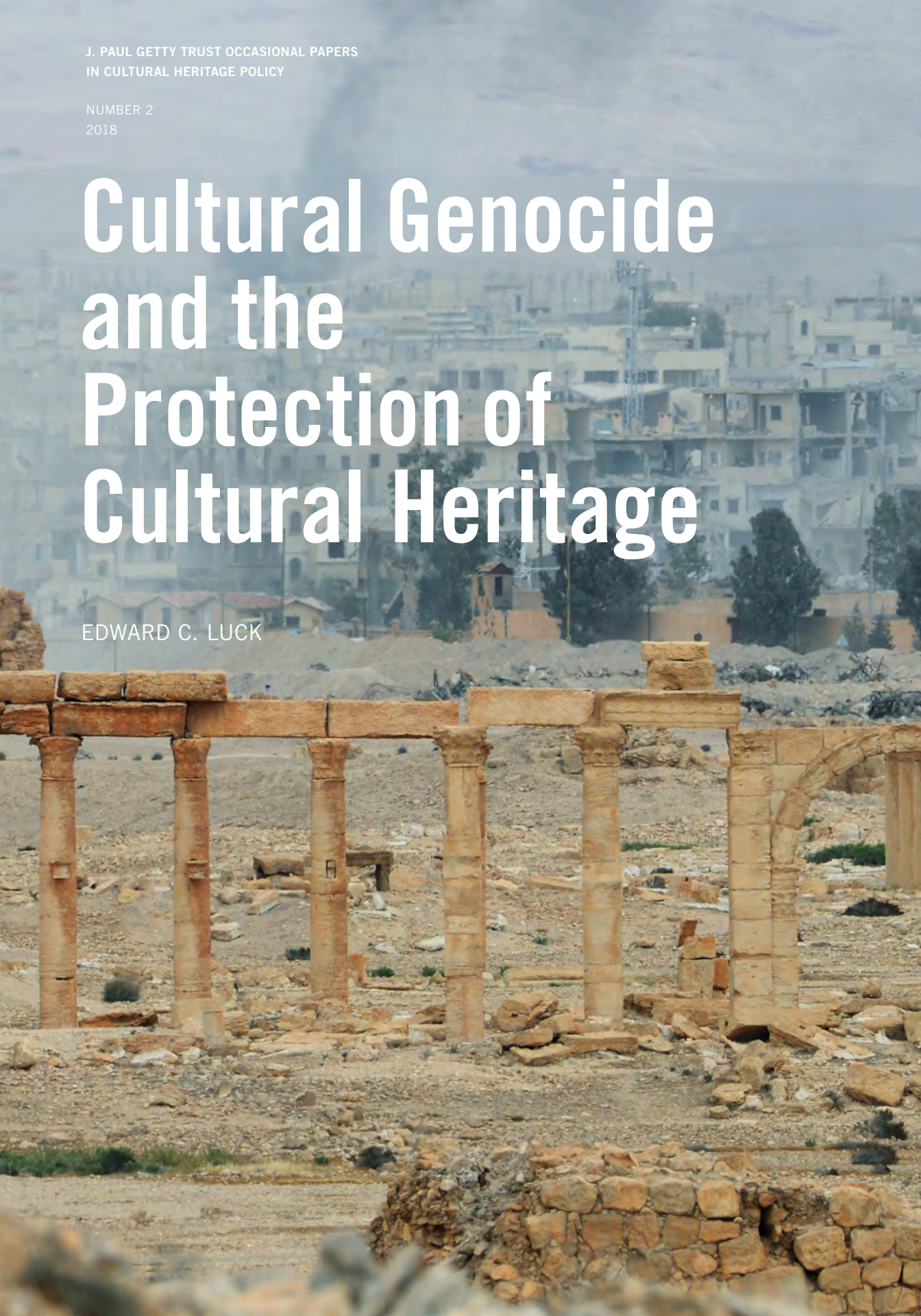
EDWARD C. LUCK



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Los Angeles
J. Paul Getty Trust

The J. Paul Getty Trust

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FOREWORD

The link between the mass slaughter of human beings and attacks on cultural heritage was famously made in 1821 by the German Jewish poet Heinrich Heine when he wrote, "Where they have burned books, they will end in burning human beings." More than a century later, in 1933, Heine's books were among those burned on Berlin's Opernplatz, presaging the murder of more than six million Jews in a vicious and calculated campaign of genocide.

In this, the second paper in the J. Paul Getty Trust Occasional Papers in Cultural Heritage Policy, Edward C. Luck examines five lenses through which the international community defines the nature and scope of attacks on cultural heritage—legal, accountability, security, counterterrorism, and atrocity prevention—and proposes a sixth, cultural genocide, as a first step toward recasting the debate in a more productive way.

Throughout, Luck draws on the seminal work of Raphael Lemkin, a lawyer of Polish Jewish descent who coined the term "genocide" and, in the shadow of World War II and the Nazi regime, applied it to "the destruction of a nation or of an ethnic group." More recently, Irina Bokova, while director-general of UNESCO, used a similar term, "cultural cleansing," which, although not a legal term, as noted by Thomas Weiss and Nina Connelly in the first paper in the Occasional Papers series, resonates with "ethnic cleansing." Luck argues here that "genocide" is more to the point, given its place in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

This publication has been funded by the President's International Council, J. Paul Getty Trust. Our thanks go to the author, Edward Luck, and to the working group with whom we have been discussing these questions for more than two years, especially Simon Adams, Lloyd Axworthy, Vishakha Desai, Hugh Eakin, Karl Eikenberry, Jonathan Fanton, Richard Goldstone, Sunil Khilnani, Luis Monreal, Thomas Weiss, and Tim Whalen.

James Cuno
President and CEO
J. Paul Getty Trust

INTRODUCTION

In recent years, threats to the world's cultural heritage have become increasingly brazen. Non-state armed groups, often advocating some variant of violent extremism, have sought to destroy some of the world's most cherished antiquities, whether in Syria, Mali, Iraq, or Afghanistan. The international reaction has been energetic but scattered. As James Cuno has underscored, what has been missing is "a broad legal and diplomatic framework that draws upon precedents to which the international community is committed."[1] So in late 2016 the J. Paul Getty Trust, in collaboration with the American Academy of Arts and Sciences, opened an inquiry into possible international frameworks for the protection of cultural heritage in zones of armed conflict. This is a timely initiative given strategic shifts both in the nature of the threat and in the scope of the response. The threat to cultural heritage is emerging as a first-tier challenge to the established international order, yet it has been treated until now as a second- or third-tier policy priority. Unless this gap is narrowed, efforts to protect cultural heritage against these growing threats will fall tragically short.

This paper, the second in the Getty's Occasional Papers in Cultural Heritage Policy, contends that the first step is to develop a conceptual framework for meeting the challenge of protecting cultural heritage that will provide a context in which an international consensus on a more vigorous policy response can be forged.[2] How such a challenge to public order is framed can matter a great deal to the prospects of developing sensible, practical, and timely responses at the local, national, regional, and global levels. It makes an enormous difference whether this is seen chiefly as a problem of law, accountability, security, counterterrorism, or atrocity prevention—the five lenses employed most extensively to date. This paper also introduces cultural genocide as an intriguing, if problematic, sixth possible way to frame the policy challenge. The ultimate goal, though it is well beyond the ambitions of this work, would be to articulate an international strategy that draws on elements of all six approaches and that could command broad international legitimacy and authority.

Before opening this inquiry into framing, two observations are worth recording. One, there is remarkably little international support or sympathy for attacks on the world's cultural heritage. They are properly understood to be assaults on shared values by groups that seek to undermine governments, the inter-state system, and the established norms and institutions on which they depend. Two, nevertheless, the search for a coherent response

has been largely elusive. It has been difficult for states to agree on or to mount an effective, coherent, and sustained protection campaign. Though media coverage and the courageous testimonies of those who have sought to preserve this heritage have brought wide attention to the issue, the international community still has not converged on a legal, political, or institutional framework for pursuing effective protection efforts. Policy actions have been sporadic, even hesitant. As in other areas of public policy, practical or operational shortfalls often stem from the lack of convergence on larger principles, concepts, and strategy—all things that flow from a shared framing or understanding of the challenges at hand. These core elements remain unsettled, this paper suggests, in part because of underlying political questions that have been insufficiently examined since the initial discussions of cultural genocide seven decades ago.

This paper has two purposes and two corresponding sections. The first section addresses the matter of framing or of selecting which policy lens or lenses through which to view the threats to cultural protection. (The narrative uses the terms "frames" and "lenses" interchangeably.) It addresses briefly the five lenses, noted above, that have already been considered. The second section focuses on the notion of cultural genocide and considers how it might, or might not, be applicable to contemporary policy dilemmas.

Section 1 opens with a brief explanation of why the framing of the nature of policy challenges is—to those who make and carry out policy choices—much more than a labeling exercise. Framing a policy issue has lasting implications for which actors, institutions, stakeholders, and policy tools are likely to be invoked. It influences the setting of priorities and helps shape perceptions about how collective action dilemmas should be resolved, that is, who has the authority and responsibility to act. The section introduces—rather quickly—the five lenses that have been employed in the realm of cultural heritage protection. While each has some merit, the very range of frames already utilized illustrates the difficulty of finding the perfect fit.

Section 2 lays out the origins and initial conception of cultural genocide as developed by Raphael Lemkin in the 1930s and early 1940s. It then turns to the political dynamics that shaped and ultimately frustrated efforts to include the cultural dimensions of genocide in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The

political divisions apparent in those debates have never fully healed. They are still applicable to current attempts to add further legal or policy restraints to the destruction of cultural heritage. Section 2 then considers the mini-revival of the term "cultural genocide" in the context of the rights of indigenous peoples and how that might affect its utility for the broader protection of cultural heritage.

In conclusion, the paper addresses the balance sheet regarding the political viability and practical applicability of the concept of cultural genocide to the framing of the quest to protect the world's cultural heritage from the non-state actors who threaten it. It calls for an eclectic approach that utilizes the most relevant features offered by all six lenses, with their distinct but interrelated features, rather than the selection of a single frame for public policy.

This is not an advocacy tract for the revival of the notion of cultural genocide. Because it has never been codified, cultural genocide has come to mean quite different things to different people. This is both an asset and a liability. The analysis weighs the pros and cons of employing cultural genocide as a possible lens for viewing the legal and political challenges of protecting the world's cultural heritage. It draws attention both to the readily apparent disadvantages of adopting such a perspective and to the subtler ways in which considering such a lens could bring fresh insights to the quest for a more effective strategy for countering assaults on cultural heritage. Adding the label "cultural genocide" to such acts is certainly not the answer, but assessing the appropriateness of such an approach may suggest a series of questions from the realm of international politics that have received too little attention in the international dialogue to date.

1
FRAMING

Why Framing Matters

It is not by accident that political leaders and policy makers spend a great deal of time and effort branding their policy initiatives. They understand that words and labels matter—politically, institutionally, legislatively, operationally, and legally. This is as true globally as nationally. The United Nations is regularly accused of caring more about words than deeds. In its daily work, it needs to determine whether a situation is a matter of justice or peace, of upholding international standards or preserving national sovereignty, of individual rights or collective welfare, of saving money or helping people. Whose lives or treasures are at risk, and who will benefit? The pursuit of collective goods such as the protection of cultural heritage—especially on a global scale—will necessarily raise pointed judgments about equity, burden sharing, and collective responsibility. Efforts to protect the world's cultural heritage have already demonstrated the importance of building broad and sustainable North-South and East-West coalitions. As these efforts deepen and intensify, basic questions, such as who will save what, how, and why, will need to be addressed on a more urgent basis.

The international community—whose dimensions and composition vary with each new transnational challenge—has ample experience in redefining itself to meet new collective action dilemmas. This is becoming more difficult, however, given the rise of nativism and narrow brands of nationalism in key countries, not least the United States. Finding burden-sharing formulas was never a simple task, but now even well-established institutions—including the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the United Nations more generally—are confronting existential political challenges related to collective action dilemmas. Member States are more likely to ask what is in it for them individually, as well as collectively. Increasingly, the premium will be on what are perceived to be short-term gains rather than on long-term investments in building international norms and institutions. There may be some political space in this environment for considering relatively fresh initiatives, such as those that might be contemplated for the protection of cultural heritage, but for the foreseeable future international political trust will be in short supply and international norms and institutions will be under stress. So the framing of the task will be

doubly important in an increasingly divided world in which international cooperation is regarded with suspicion by some political leaders and movements.

Framing—or more crudely, branding—is not just a matter of finding attractive words to describe unattractive policies and practices, but one of tailoring the message and the categorization in a way that appeals to particular constituencies and invokes visceral responses. The appeal may be to certain groups in certain places, not to the larger public. What may look like an unpopular pronouncement or initiative may reflect a politically astute reading of the preferences, priorities, and perceptions of critical groups and stakeholders. Linking one set of policy concerns to others that have positive or negative associations may help shape perceptions of what is being sought, why it is being pursued, and what the costs, risks, and benefits are likely to be. Historical analogies, however tenuous, may come in handy for political figures seeking to redefine the political context, the ensuing policy dialogue, and the choices that result. In a politically amorphous sphere, such as cultural heritage, tailoring the message and getting the framing right will depend critically on one's understanding of who are the essential constituencies. Who needs to be on board to produce the kind of effective and sustained actions that are needed? Who cares enough to see this through to the end?

Less understood is that the framing of policy questions may have institutional, as well as political, consequences. Bureaucracies are not dysfunctional solely because of redundancy and turf wars—though there are plenty of those—but also because of muddled framing and flawed diagnosis of the malady being addressed. Too often, issues are given labels and assigned to particular agencies, programs, or departments before their causes, dynamics, and implications are fully assessed and analyzed. The political rationales for adopting a particular framing, as noted above, may not coincide with what is actually needed to resolve the underlying issues. There are frequently pressures to find "answers" that sound quick and cheap and safe to complex and stubborn matters, as well as incentives at all levels to declare premature victories. In the realm of world cultural heritage, we should ask, who identifies what needs protection, who sets priorities, and who assigns the tasks required to enhance protection, especially in situations of acute distress? Should cultural, legal, political, or security bodies make such determinations? If all of the above, then how could synergies and coherence among them be obtained?

Framing needs to consider not only who is willing, but who is capable. There are always volunteers willing to champion a particular policy challenge. Some may prove to be valuable advocates, yet lack the policy tools, assets, and authority to do much on an operational level. These sorts of mismatches are common when it comes to tackling global agendas. The UN General Assembly is adept at pronouncing grand goals, norms, and action plans in any number of issue areas. Those can be critical and essential functions, especially in the normative realm. But the Assembly, more than any other body, has given the UN the reputation of being much better at words than deeds. In that regard, it should be borne in mind that most of the 193 Member States are prone to seeking causes to champion. Too often, the loudest

voices lack the capacity for carrying much of the implementation burden. The Assembly has critical powers in terms of authorizing the organization's budgets, appointments, and administrative arrangements, but those are the only areas in which its decisions are binding. The United Nations Economic and Social Council (ECOSOC) has an ambiguous status under the Charter: it is named as one of the UN's six principal organs and then cast as little more than a subsidiary body reporting to the Assembly. The Security Council has historically unprecedented enforcement powers, but over the past two decades it has been criticized by Russia, China, and some developing countries for taking on too many issues beyond traditional security concerns and for assuming normative functions better reserved for the Assembly. Regional and subregional arrangements are generally closer to the action, but their capacities vary enormously, with the weakest ones often positioned where they are needed the most. Global-regional partnerships are often essential for effective action, but building and sustaining them is never a simple matter.

Framing also invokes critical questions of law and authority. From what national legislation, international decisions, international conventions, and/or common law traditions do actors draw the authority to undertake specific measures to protect world cultural heritage? This matters because it affects political legitimacy and the possibilities for effective and sustainable action on both the national and international levels. Framing may determine the likelihood of attaining consent from national authorities, their neighbors, and other critical stakeholders, as well as the active engagement and approval of local, national, and international populations and civil society groups. It may also influence the manner in which media cover the efforts undertaken. Since non-state armed groups are responsible for many of the recent assaults on world cultural heritage, it is essential that those trying to protect it maintain and strengthen their comparative advantage in terms of legal authority and political legitimacy. As addressed below, different framings of the issues involved can affect public and governmental perceptions of both authority and legitimacy.

Alternative Frames

Those seeking to protect world cultural heritage have already adopted a number of distinct frames for defining the nature and scope of the problem. On the one hand, this disparate attention reflects the vitality of the issue. A number of institutions and individuals have been searching for ways to conceptualize the challenges involved and possible paths to meeting them. On the other hand, the variety of possible frames that have been proposed suggests that none of them has proven completely satisfactory. Each raises political and institutional hurdles that would need to be addressed and overcome. The search, therefore, continues. Its path, as suggested later in this paper, may lead to an amalgam that incorporates some of the positive attributes of each of these approaches.

The five frames, or lenses, that have already been proposed are described briefly here.

- **The legal lens.** This perspective focuses on the existing legal framework related to the protection of cultural property and its illegal trafficking, as largely developed by UNESCO.
- **The accountability lens.** This approach focuses on prosecuting these acts as war crimes, whether through international tribunals or complementary national legal processes (or preferably both).
- **The security lens.** This lens views the destruction of cultural heritage more broadly as a threat to peace and security, for instance, by labeling such acts "cultural cleansing." This approach was championed by Irina Bokova as director-general of UNESCO until the end of 2017.
- **The counterterrorism lens.** This perspective has been adopted by the UN Security Council, whose Resolution 2347 (2017) treated this phenomenon as a manifestation of terrorism.
- **The atrocity prevention lens.** Viewed through this lens, the linkages between the destruction of cultural heritage and the commission of atrocity crimes are emphasized, for example, by applying responsibility to protect (R2P) principles to these policy challenges.

These five approaches are not mutually exclusive. There could well be symbiotic elements among them. Moreover, the notion of cultural genocide shares conceptual ground—as well as political liabilities—with each of them.

The **legal lens** offers the path of least resistance, as it is the most firmly established of the five frames. The nine most critical legal instruments related to the protection of cultural property or to their illegal trafficking are the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; the Hague Convention's 1954 Protocol and 1999 Second Protocol; the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage; the 1995 International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects; the 2001 Convention on the Protection of the Underwater Cultural Heritage; the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage; and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Clearly the problem lies not in the quantity of international legal instruments. They all fall short, however, when it comes to enforcement and monitoring measures, and national implementation has been decidedly uneven. The 1999 Second Protocol was intended to provide a new system of enhanced protection for those properties deemed to be of "the greatest importance for humanity."[3] Yet as of late 2017, only

73 states had ratified the Protocol. Just as significantly, among the five permanent members of the Security Council, China, Russia, and the United States are not states parties.

The 1954 Hague Convention and its Protocols apply only to acts committed during armed conflict. The destruction of cultural heritage, however, is not limited to times and places of armed conflict. Non-state armed groups, which appear to have been responsible for much of the spike in attacks on cultural heritage, are obviously not parties to any of these intergovernmental instruments. The actions of these groups, especially their efforts to profit from the illicit transfer and sale of heritage objects, could be significantly affected by fuller and more consistent implementation of each of these conventions by their states parties, of course, but it is difficult to hold these groups fully accountable under conventions to which they are not parties. Having this legal foundation for efforts to protect cultural heritage is an important asset that needs to be strengthened and deepened, but clearly it has been a necessary but not sufficient condition to getting the job done. The problem has been getting worse in recent years despite the existing legal instruments and machinery.

A related but distinct lens focuses on obtaining **accountability** for those who lead assaults on cultural heritage. Under the Rome Statute of the International Criminal Court (ICC), "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," is considered a war crime.[4] In an unprecedented step, on September 27, 2016, the ICC convicted Ahmad al-Faqi al-Mahdi of war crimes for intentionally directing attacks on nine of Timbuktu's mausoleums and the centuries-old door of its Sidi Yahia mosque in 2012.[5] Al-Mahdi pled guilty and was sentenced to nine years in prison. The presiding judge declared that the sentence would have "a deterrent effect on others tempted to carry out similar acts in Mali or elsewhere."[6]

The al-Mahdi verdict certainly was an important step for justice and accountability, as well as an affirmation of the gravity of assaults on cultural heritage under international law. The UNESCO-based legal instruments noted above have not been able to provide such direct and visible accountability. It is to be hoped that the judge was correct about the deterrent effect of the decision, though legal and political analysts have been divided about whether the advent of the ICC has deterred genocide, war crimes, and crimes against humanity in general.[7] Though accountability is an essential way of framing the quest to protect cultural heritage, a few caveats should be borne in mind. As noted above, such assaults do not occur only in wartime. Deterrence serves the purposes of prevention, but protection is still needed when deterrence and prevention fail. The ICC faces a host of political challenges, and the world's three largest military powers—the United States, China, and Russia—are not states parties to the Rome Statute. Neither are Iraq and Syria, places where protection has been most needed. The ICC also lacks enforcement capacity.

For those seeking a more robust international response to attacks on cultural heritage, there is a strong inclination to label such assaults a matter of international peace and security. Through the years, the tendency to adopt a **security perspective** has been visible on any

number of issues on the UN agenda. This is understandable given the Security Council's historically unprecedented enforcement powers and the desire to place these questions higher on the agendas of its five permanent members. So when Irina Bokova, then director-general of UNESCO, started to employ the term "cultural cleansing" in 2014 and 2015, she put it squarely in a security context. Referring to events in Iraq and Syria, she wrote in 2015, "Cultural cleansing is an attack on cultural diversity that combines the destruction of monuments and the persecution of people. In today's new conflicts, those two dimensions cannot be separated."[8] She described it both as "a tactic of war, used to destabilize populations and weaken social defenses," and as an assault on human security, since "there is no need to choose between saving lives and preserving cultural heritage: the two are inseparable."[9] In 2017, she told the Security Council that "defending cultural heritage is more than a cultural issue; it is a security imperative that cannot be separated from the protection of human lives."[10]

A security lens can bring substantive, conceptual, and political benefits to the consideration of ways to counter the destruction of the world's cultural heritage. Indeed, as discussed in the next section, the notion of cultural genocide stresses the linkages between cultural and physical violence. The introduction of the term "cultural cleansing" was an evocative and compelling way to engage the issue, but its use appears to be fading, including by UNESCO since Bokova completed her tenure there. The phrase was not employed by her UN colleagues from New York and Vienna in the March 2017 Security Council debate on cultural heritage and terrorism, in the related Council Resolution (2347 [2017]), or by the secretary-general in his implementation report six months later.[11] The phrase lacks a consistent definition, Member State approval, and legal authority.[12] It appears to have been derived from the notion of ethnic cleansing, which also has not gained legal definition or authority. The evocative quality of the term "cultural cleansing," however, has been attested by the fact that defenders of Confederate monuments in the United States have accused those who would give them less prominence of practicing cultural cleansing.

Of all the ways to frame the protection of cultural heritage, perhaps the most compelling and yet most problematic is that of putting it under a **counterterrorism** umbrella. This is precisely what the UN Security Council did when it addressed the question directly for the first time in March 2017 under the rubric "the destruction and trafficking of cultural heritage by terrorist groups and in situations of armed conflict."[13] The Council unanimously adopted Resolution 2347 (2017), with France and Italy serving as co-penholders, after considerable internal debate.[14] The resolution "deplores and condemns the unlawful destruction of cultural heritage, inter alia destruction of religious sites and artefacts, as well as the looting and smuggling of cultural property from archaeological sites, museums, libraries, archives, and other sites, in the context of armed conflicts, notably by terrorist groups."[15] It notes with concern the trafficking of illicitly traded cultural property to fund terrorist activities. The resolution, however, was not taken under Chapter VII of the Charter and hence lacks its enforcement measures. Its operative paragraphs encourage, invite, call upon, and

request the Member States to do various things while also stressing that Member States themselves have the "primary responsibility in protecting their cultural heritage."[16]

It is undoubtedly useful to have the Council consider the security ramifications of assaults on cultural heritage. This is a potentially important precedent. A reading of the explanations of the vote, however, reveals continuing fissures in how Member States view these matters, particularly along North-South lines. Bolivia noted "the special and specific importance of protecting cultural property in areas under foreign occupation," blamed "the interventionist policies and invasions of recent years that led to the emergence and rise of terrorist groups that the international community is now facing," and claimed that "many of the museums that now exhibit historic cultural property from other countries in their galleries, were also acquired through invasion, looting and other illegal means.… Consequently," Bolivia stated, "we are calling for enhanced policies for the restoration and return of that property."[17] Egypt enumerated a series of principles and restrictions without which it could not have voted for the draft resolution. Among these were noninterference in internal affairs, state consent, restoring heritage to their original countries, "protection of cultural goods and heritage in areas under foreign occupation," and limiting Council consideration of cultural heritage to "situations where there is a threat to international peace and security, international counter-terrorism activities or an international conflict that figures on the agenda of the Council."[18] Uruguay, China, and Senegal underscored the importance of respecting national ownership.[19] Ukraine charged Russia with destroying, looting, and trafficking its cultural heritage, a claim that Russia vigorously refuted.[20] In the deliberations over the draft, Egypt and Russia, among others, insisted on keeping the scope as narrow and as focused on terrorism as possible, while concerns about proposed safe havens in third countries led to the wording noted above regarding the primary responsibility of the state on whose territory the cultural heritage resides.[21]

These interventions make it clear that while counterterrorism framing may get the Council's attention, it cannot guarantee a convergence of views among its members. Every Member State professes its firm opposition to terrorism and violent extremism, but there has always been a range of views about how to go about countering it. In that regard, the Council's reluctance to adopt Resolution 2347 (2017) under Chapter VII is worrisome. More broadly, it is not obvious that layering the politics of counterterrorism on the politics of protecting cultural heritage will always be a net plus. The record suggests that the motivating force behind Resolution 2347 (2017) was to cut off one avenue of terrorist financing, not the intrinsic value of protecting cultural heritage. Attaching the fate of a lower-profile issue, such as cultural heritage, to the ups and downs of a higher-order political and strategic concern, such as counterterrorism, seems highly risky. Violent extremists, moreover, are not the only potential threats to cultural heritage, as the actions or neglect of governments, commercial enterprises, organized crime, or other parties can also pose a threat under some circumstances.

Employing a **mass atrocity lens**, like the other four frames, also offers interesting possibilities. The Getty initiative has already given considerable thought to relevant lessons learned from the experience of developing the principle of the responsibility to protect. The path R2P has taken since the term was coined seventeen years ago by an independent international commission is instructive.[22] The core thesis of the commission's report—that there is an international and national responsibility to protect populations from existential threats—has taken root and proven to be remarkably resilient. This speaks to how valuable the innovative and timely framing of an issue can be. Yet neither the theoretical construct nor few, if any, of the commission's recommendations have been accepted by the Member States. The 2005 World Summit endorsed a quite different version of R2P. Then, a few years later, this author, as the UN secretary-general's first special adviser for R2P, had to design, articulate, and defend a third iteration that both reflected the intent of the World Summit and translated it into a doctrine and strategy that could be implemented in a sustainable and effective manner.[23] It is laid out in a 2009 report of the secretary-general (drafted by this author), *Implementing the Responsibility to Protect*.[24] Through annual reports by the secretary-general detailing aspects of the subject and subsequent debates and dialogues in the General Assembly, the 2009 conception of R2P has been sustained and has gained deeper ownership by the Member States despite controversies about how it has been applied in some situations, particularly Libya.

The R2P experience has illustrated the strengths and weaknesses of independent commissions. They tend to be good at launching fresh ideas and coining appealing phrases, but their products usually lack the kind of tempering and rigor that comes from being tested in intergovernmental political forums or through application in the field. Turning ideas and principles into sustainable policy and practice is never easy. It requires time, patience, determination, and the flexibility to accept the need for an iterative process in which different formulations are tested both politically and practically over time. The initial iteration is only the beginning of the process. In terms of process, then, R2P may offer a good model for the protection of cultural heritage.

Substantively, R2P offers a more mixed framework for thinking about how to protect cultural heritage. On the plus side, the notions of responsibility and protection are central to both tasks. That responsibility should be individual as well as collective, encompassing peoples, groups, civil society, and the private sector as well as governments and international institutions.[25] Member States have been much readier to accept the preventive and assistance dimensions of R2P than those that might entail the use of force. They have resisted the initial conception of R2P in part because of the lack of specificity about what acts might trigger its application. This could be a hurdle for cultural protection as well. As this author, as UN special adviser, had to repeatedly reassure the Member States, R2P would only apply to the four crimes specified at the 2005 World Summit and to no other matters. There would be great resistance to extending R2P principles directly to the protection of cultural heritage.

From the outset, R2P has confronted the same sort of collective action dilemmas that have repeatedly constrained efforts to protect cultural heritage. So while its experience is instructive, R2P cannot offer a panacea for the challenges cultural protection must overcome.

Each of these five lenses provides a piece of the puzzle in terms of finding better and more reliable ways of protecting the world's cultural heritage. None should be discarded. This paper now turns to cultural genocide as another, complementary, way to frame the task of protecting cultural heritage.

2
CULTURAL GENOCIDE

Origins and Scope of Cultural Genocide

There is no dispute that the credit for the conception of genocide, including its cultural component, belongs to one man, Raphael Lemkin.[26] A Pole, a Jew, and a lawyer, Lemkin began to recognize the need for an international legal regime for holding individuals and governments accountable for crimes against persecuted groups in the late 1920s and early 1930s. In his words, "the advent of Hitler" led him in 1933 to submit a set of proposals to that end to the Fifth International Conference for the Unification of Criminal Law, convened in Madrid under the auspices of the League of Nations.[27] His submission included a report and draft articles on "*barbarity*, conceived as oppressive and destructive acts directed against individuals as members of a national, religious, or racial group, and the crime of *vandalism*, conceived as malicious destruction of works of art and culture because they represent the specific creations of the genius of such groups."[28] As controversial as they were prescient, Lemkin's proposals on barbarity and vandalism were not accepted by the participating states in Madrid in 1933. Tellingly, he could not be there in person to defend his initiatives—though others did—as the Polish government had refused him a visa to attend the conference, lest he spread "anti-German propaganda."[29]

Though never accepted politically or codified legally, Lemkin's eighty-five-year-old definition of *vandalism* sounds eerily relevant to the current assaults on world cultural heritage. As he put it when explaining his conception of vandalism in 1933, 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 humanity, even while exhibiting unique characteristics."[30] This was a theme—sounding much like an early version of multiculturalism—to which he would often return in the ensuing years.

At this early stage of his thinking, Lemkin was already drawing attention to the prominence of assaults on a group's culture as an essential element of what he would later call genocide. With the subsequent German occupation of his native Poland, he saw his theories

turn into brutal practice. In particular, he came to witness how horribly symbiotic the combination of barbarity and vandalism—physical and cultural destruction—could become, especially in the hands of a ruthless occupying power. Early on, Lemkin was forced to join the ranks of the internally displaced. Like many urban dwellers, in 1939 he fled to the forests and a life of extreme deprivation before he found a way to flee the country.[31] Meanwhile, almost all of the members of his extended family were exterminated over the course of the occupation.[32] His personal experience deepened his understanding of the intimate connections between cultural and physical destruction, for the aggressors recognized that the annihilation of a culture or way of life was a more daunting task than mass murder. He also came to recognize that there were many interdependent elements or techniques of genocide.

Lemkin introduced the notion of genocide in his opus *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, and Proposals for Redress*, published in Washington, DC, by the Carnegie Endowment for International Peace in 1944. The ninth chapter, comprising a scant 17 pages of a 640-page volume, is the only one devoted to an explication of this new concept. The core purpose of the volume was, instead, to document in considerable detail how the Nazi regime had carried out its occupation of much of Europe. It contained evidence and documentation of substantial value to postwar prosecutors as well as administrators. At that point, Lemkin was more interested in accountability than legal theory building, though it was his novel notion of genocide—"the destruction of a nation or of an ethnic group"—that would be his most profound legacy.[33] This collective approach was a substantial departure from the long tradition in international law of focusing on crimes committed against individuals, not groups.[34] According to Lemkin, "The actions involved are directed against individuals, not in their individual capacity, but as members of the national group."[35] "New conceptions," he asserted, "require new terms."[36] He coined the term "genocide" as a derivation "from the Greek word *genos* (tribe, race) and the Latin *cide* (by way of analogy, see homicide, fratricide)."[37]

Genocide was distinguished not only because of its collective target but also because of its multifaceted character. It was a comprehensive and systematic undertaking. As Lemkin put it, "Genocide is effected through a synchronized attack on different aspects of life of the captive peoples."[38] He enumerated the "techniques of genocide" in eight "fields": political, social, cultural, economic, biological, physical, religious, and moral.[39] In the cultural field, he mentioned, among other steps, "prohibiting or destroying cultural institutions and cultural activities; by substituting vocational education for education in the liberal arts, in order to prevent humanistic thinking, which the occupant considers dangerous because it promotes national thinking."[40] Under cultural techniques, he also mentioned forbidding use of a group's language; substituting German education; banning or discouraging liberal arts education in preference for trade schools; rigid control of all cultural activities, including arts of all kinds; and destruction of national monuments, libraries, archives, museums, and galleries.[41] These eight techniques of genocide, he concluded, "represent an elaborate, almost scientific, system developed to an extent never before achieved by any nation" (though he

had cited a long list of "wars of extermination" since the destruction of Carthage in 146 BC).[42] In Lemkin's view, "genocide is . . . a composite of different acts of persecution or destruction."[43]

In part due to its comprehensive nature, genocide tended to unfold over time, according to Lemkin's thesis. He posited that "genocide has two phases: one, the destruction of the national pattern of the oppressed group, the other, the imposition of the national pattern of the oppressor."[44] He suggested:

> Generally speaking, genocide does not necessarily mean the immediate destruction of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.[45]

For Lemkin, therefore, genocide could show a number of faces over time. The totality of the German occupation, as he documented, permitted the manifestation of genocide in its most comprehensive, extreme, and layered form. Under other circumstances, genocide's components might unfold differently, whether in terms of which fields or techniques come into play or of how their sequencing occurs over time. What distinguished genocide was the intent to destroy a group in whole or in part, as the Convention later phrased it.

Given Lemkin's holistic understanding of the scope of genocide, two questions arise about the place of cultural genocide in his larger conception. One is whether genocide must have a significant cultural component. The other is whether cultural genocide can be considered a stand-alone crime. Lemkin's actions, comments, and writings were suggestive, but not definitive, on these matters. Over time, references to five of the eight fields or techniques of genocide tended to fade from his commentaries, perhaps because they gained less attention from others, even as references to genocide's cultural, biological, and physical components came to the forefront. As discussed in more detail below, these three fields featured prominently in the negotiation of the Genocide Convention, to which Lemkin served as both an expert and an advocate. His initial theory of genocide did not privilege one field or technique over another. As he increasingly assumed the roles of policy adviser and public advocate, however, he tended to emphasize this trio of techniques over the others. Understanding how they related to and complemented each other is therefore essential to understanding the scope and dimensions of genocide.

In Lemkin's conception, at least, cultural destruction appeared to be on a par with physical and biological destruction. As he put it in a 1945 meeting with representatives of civil society:

> The history of genocide, especially in antiquity, is written in the pages of archeology. The murder of civilizations was not yet a fully told story. The impact of the concept of genocide could be greatly enriched if the cultural losses that occurred through assassination of civilizations could be brought before the eyes of the world.[46]

The intent to destroy a group had to include the destruction of their way of life. Otherwise, the horrific task would be incomplete. Attacks on culture, in his view, usually came first. As he put it, borrowing from the nineteenth-century German poet Heinrich Heine, "First they burn books and then they start burning bodies."[47] A. Dirk Moses quotes Lemkin as having asserted that "physical and biological genocide are always preceded by cultural genocide or by an attack on the symbols of the group or by violent interference with religious or cultural activities."[48] (If this assertion were literally and consistently true, then the implications for policy making in respect to preventing genocide would be enormous. It would make little sense for practitioners to downgrade the status of cultural genocide if it is, in fact, the most reliable sign of coming physical and biological genocide. This is another reason, of course, to be alarmed by recent assaults on the world's cultural heritage.)

Likewise, it would have been difficult for Lemkin to conceive of concerted attacks on the culture of a group as a stand-alone crime. Destruction of a group in whole or in part had to include biological and physical destruction as well. Lemkin did refer to "cultural genocide" from time to time, and he expressed regret that certain related provisions were not retained in the Genocide Convention as it was adopted in 1948.[49] Yet these references sound like a convenient shorthand. They may well have been in response to the statements and formulations of others, who found it convenient, for journalistic or political purposes, to segregate the notion of cultural genocide. But that did not seem to be Lemkin's preference. He saw genocide as a much more systematic and strategic crime, one with many dimensions and layers (the notion of a layered or multifaceted crime might apply to cultural destruction as well).

In 1946, several years after publicly articulating the notion of genocide, Lemkin wrote that "the last war has focused our attention on the phenomenon of the destruction of whole populations—of national, racial and religious groups—both biologically and culturally."[50] Though he often paired these two aspects of genocide, he did not unequivocally equate them, nor did he articulate a binary theory of genocide. Indeed, as noted above, biological and cultural destruction were only two of the eight techniques of genocide he identified. (Moreover, his initial list made a distinction between biological and physical destruction, though later he sometimes seemed to refer to the two techniques almost interchangeably.) Yet there is little doubt that in his conception genocide required efforts to destroy a group both biologically and culturally. Placing cultural assault on the same level as physical assault was a significant departure from more traditional strands of thinking about and codification of the crimes of war and other mass atrocities.[51] Lemkin, however, had witnessed in his native Poland the tragic results of the intrinsic connection between the cultural and physical

annihilation of groups made both in the ideology of National Socialism and in the actions of the Nazis and their collaborators.

Lemkin appreciated—as the Nazis had as well—the significance of nations (or groups) defined by culture and identity in shaping values and affiliations of populations, often across state borders.[52] State governments could provide order but not culture. He believed deeply in what would now be called multiculturalism, something anathema to those seeking to destroy any sense of a common cultural heritage across religions and races, whether in the 1930s and 1940s or today. In *Axis Rule*, Lemkin put it this way:

> Nations are essential elements of the world community. The world represents only so much culture and intellectual vigor as are created by its component national groups. Essentially the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture, and a well-developed national psychology. The destruction of a nation, therefore, results in the loss of its future contributions to the world. . . . Among the basic features which have marked progress in civilization are the respect for and appreciation of the national characteristics and qualities contributed to world culture by the different nations—characteristics and qualities which, as illustrated in the contributions made by nations weak in defense and poor in economic resources, are not to be measured in terms of national power and wealth.[53]

Writing in his new home, the United States, a country completely consumed with mobilizing whatever power and wealth it could muster to defeat the Axis powers and keenly aware of the urgency of defeating the "total war" launched by the latter, Lemkin was surely not denigrating such assets.[54] But he may well have feared that a preoccupation with military capacity and geopolitical considerations, particularly in the reshaping of the postwar world order, could lead to an underappreciation of the real and potential contributions of small countries with distinct cultures. In 1946, he wrote:

> Cultural considerations speak for international protection of national, religious and cultural groups. Our whole heritage is a product of the contributions of all nations. We can best understand this when we realize how impoverished our culture would be if the peoples doomed by Germany, such as the Jews, had not been permitted to create the Bible, or to give birth to an Einstein, a Spinoza; if the Poles had not had the opportunity to give to the world a Copernicus, a Chopin, a Curie; the Czechs, a Huss, a Dvorak; the Greeks, a Plato and a Socrates; the Russians, a Tolstoy and a Shostakovich.[55]

These were passionate and compelling words, and Lemkin was a determined advocate. However, as discussed more fully below, Lemkin failed to gain explicit endorsement of his notion of cultural genocide by any intergovernmental body.

As rich and nuanced as Lemkin's conception of genocide was, it was never matched by a comparable understanding of the measures and institutions that would be required to curb it. He tended to put too much faith in legal remedies while giving too little thought to compliance mechanisms. Always a promoter, Lemkin contended that his 1933 Madrid proposals could have altered the course of history. His proposals, he later suggested, would have provided for universal jurisdiction for the prosecution of "acts of persecution amounting to what is now called genocide."[56] Moreover, he asserted that they "would also provide an adequate machinery for the international protection of national and ethnic groups against extermination attempts and oppression in times of peace," given that they would have included procedural machinery for the extradition of such criminals.[57] "We should not overlook," he noted, "the fact that genocide is a problem not only of war but also of peace."[58] Though he acknowledged some evolution in the coverage of international law, he faulted the Hague conventions for their inapplicability to times of peace and because they "deal with the sovereignty of a state, but they are silent regarding the preservation of the integrity of a people."[59] He also favored a more proactive approach, for if one waits for "the actual moment of liberation," then "it is too late for remedies, for after liberation such populations can at best obtain only reparation of damages but never restoration of those values which have been destroyed and which cannot be restored, such as human life, treasures of art, and historical archives."[60] Yet he offered few ideas about actual protection of vulnerable populations, a concept apparently outside his comfort zone.[61]

Lemkin was a legal scholar, not a student of politics or of international enforcement machinery. As this author has commented elsewhere and will be addressing in a longer piece, Lemkin demonstrated remarkably little interest in the development of the United Nations and its Security Council.[62] His remedies lay in the legal realm. It follows, then, that the Genocide Convention he so passionately nurtured speaks of prevention and punishment, not of protection. The narrow scope of the tools for response he advocated contrasts unfavorably to the strikingly comprehensive and foreboding picture he painted of genocide as the systematic destruction of a nation or people. How could he be so confident that an enterprise of such scope, intensity, and passion could be deterred by the uncertain prospect of criminal indictments by an unreliable international system down the road? Though *Axis Rule* briefly touches on proposals for redress, centered on restitution, reporting on the treatment of populations under military occupation, and strengthening the legal protection of minorities, it is the power of Lemkin's dispassionate dissection of the scope of the genocidal enterprise that has proven so unsettling and so compelling.[63] At its core, as addressed above, is the inseparable link between cultural and physical destruction. That connection is every bit as relevant today as it was when written seventy-five years ago.

Political Headwinds

The story of the postwar struggle to include the cultural components of genocide in the Convention on the Prevention and Punishment of the Crime of Genocide, as adopted by the UN General Assembly on December 9, 1948, is telling. The political lessons of that time remain relevant to the current effort to strengthen the international legal, political, and institutional regime for protecting world cultural heritage. The war had changed many things, among them, Lemkin's status. He had become widely recognized for his prescience about the dangers of the persecution of groups. His persistent advocacy was instrumental in building support for UN General Assembly Resolution 96 (I) of December 11, 1946, requesting "the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly." The resolution declared that "genocide is a denial of the right of existence of entire human groups." Though it did not refer directly to any of the eight fields or techniques of genocide enumerated by Lemkin, it did note that genocide "results in great losses to humanity in the form of cultural and other contributions represented by these human groups."[64]

The following spring, Lemkin was appointed by UN Secretary-General Trygve Lie as one of three independent experts mandated to produce a Secretariat draft of a genocide convention. It is noteworthy, given Lemkin's holistic approach, that their draft made no mention of physical, biological, and cultural genocide as distinct categories. Instead, it included three points in a single article, II, listing genocidal acts: "causing the death of members of a group or injuring their health or physical integrity," "restricting births," or "destroying the specific characteristics of the group."[65] These points, of course, roughly corresponded to the physical, biological, and cultural dimensions of genocide, as articulated by Lemkin.[66] A subsequent intergovernmental draft did break the acts into two separate articles, one on "'physical' and 'biological genocide'" and the second on "'cultural' genocide."[67] At the time, the Soviet delegate charged that placing the cultural genocide provisions in a separate article—at the alleged insistence of the U.S. delegation—had been done to make it easier to drop it from the draft when the Sixth Committee of the General Assembly considered it.[68] Lemkin reports that once it became clear that there was not sufficient support to include certain provisions related to cultural genocide in the draft convention, he considered the possibility of an additional protocol to the Convention on these matters down the road, but this was not something he pursued vigorously.[69] Throughout, his primary quest seemed to be to convince others to recognize how integral the destruction of culture was to the whole genocide project, not to see it treated as a distinct crime.

The debate in the Sixth Committee over the draft provisions on cultural genocide is instructive. As noted above, the intergovernmental Ad Hoc Committee had edited and rearranged the Secretariat draft to include a separate section—Article III—on "cultural" genocide.[70] The question before the Sixth Committee was not whether cultural genocide was a

valid notion or an appropriate topic for the eventual convention but whether the draft Article III should be retained. The debate in the Sixth Committee was lively and polarized, but no delegate suggested that cultural genocide did not exist or should not be addressed by some organ of the United Nations. The representatives of a dozen Member States contended that the matter should be referred to the Third Committee of the Assembly as a human rights issue or that a separate convention should be considered to deal with cultural genocide.[71] Brazil, Peru, and the Netherlands contended that the notion of cultural genocide was too new and too vague to be included in the draft convention.[72] Sweden, Denmark, Iran, and the United States questioned whether cultural genocide should be placed on the same level as physical genocide, with the U.S. delegate suggesting that the former did not shock "the conscience of mankind" to the same degree as the latter.[73] Denmark was blunt: "It would show a lack of logic and of a sense of proportion to include in the same convention both mass murders in gas chambers and the closing of libraries."[74]

Nine Member States—all from the developing world or the Soviet bloc—argued for the inclusion of Article III given that assaults on cultural heritage were an integral component of genocide.[75] The Pakistani delegate was especially passionate on the subject, helping to explain the Indian opposition to including Article III.[76] The delegates from Eastern European countries, particularly Byelorussia and Czechoslovakia, emphasized their own experience of suffering the destruction of cultural heritage under German occupation.[77] Their accounts echoed those detailed by Lemkin in *Axis Rule*.

The final vote was 25 in favor of deletion, 16 opposed, and 4 abstentions. So many delegations were absent—13—that Egypt tried unsuccessfully to get the vote postponed.[78] The decision to delete Article III was decisive but hardly overwhelming. For our current purposes, the numbers matter less than the political considerations that shaped the vote. Decolonization was becoming a divisive issue in the early days of the world body. Current or former colonial powers—Belgium, Denmark, France, Netherlands, and the United Kingdom—opposed the retention of references to cultural genocide in the draft convention. So did settler countries that had displaced indigenous peoples but otherwise were champions of the development of international human rights standards, including the United States, Canada, Sweden, Brazil, New Zealand, and Australia. The political dynamics within the General Assembly, of course, shifted markedly with the influx of new Member States, many of them former colonies, in the 1960s and 1970s. There is every reason to believe that support for the retention of Article III would have been much greater in the 1970s or 1980s, when North-South and East-West divides redefined the power balance in the Assembly.

During the debate in 1948, however, the concerns of colonial and settler countries carried the day. The Swedish delegate asked whether "the fact that Sweden had converted the Lapps to Christianity might not lay her open to the accusation that she had committed an act of cultural genocide."[79] Denmark cautioned that if the convention included references to cultural genocide, "it might even become a tool for political propaganda instead of an international legal instrument."[80] According to an insightful article by Payam Akhavan, the

Canadian representative was under instructions to oppose the emerging genocide convention in its entirety if Article III was retained.[81] Leaving out the contributions of its indigenous populations, the Canadian delegate underscored that "the people of his country were deeply attached to their cultural heritage, which was made up mainly of a combination of Anglo-Saxon and French elements, and they would strongly oppose any attempt to undermine the influence of these two cultures in Canada."[82] The Brazilian representative commented that "through the amalgamation of local cultures, a State might be justified in its endeavor to achieve by legal means a certain degree of homogeneity and culture within its boundaries."[83] In different ways, New Zealand, India, the Netherlands, and Belgium also raised concerns about whether the implementation of the provisions of Article III would involve an infringement of national sovereignty.[84] The delegate from South Africa, which was on the verge of adopting its infamous apartheid policy, was a bit cruder: "Like the representative of New Zealand, he wished to point to the danger latent in the provisions of Article III where primitive or backwards groups were concerned. No one could, for example, approve the inclusion in the convention of provisions for the protection of such customs as cannibalism."[85]

Some of the advocates for Article III were not shy about raising issues related to colonialism or the treatment of domestic minorities. In a thinly veiled reference to India, the Pakistani representative lamented that "thirty-five million people, bound to Pakistan by ties of religion, culture and feeling but living outside its frontiers, faced cultural extinction at the hands of ruthless and hostile forces."[86] The delegate from Egypt referred to fears inspired "by the behavior of certain metropolitan Powers in Non-Self-Governing Territories, which were attempting to substitute their own culture for the ancient one respected by the population." In his view, "the crime of cultural genocide was at present being committed in the Holy Land and elsewhere."[87] Though the Soviet bloc countries did not raise the sensitive issues of colonialism and settler countries in their defense of Article III, and this debate occurred before the Cold War became full blown, undoubtedly many Western diplomats could see the political handwriting on the wall. Even at that early point in the UN's development, when the West largely got its way in the Assembly, the prospect of a coalition of southern and eastern countries on these matters would have been troubling. Whatever the merits of the case for including cultural genocide in the emerging convention, it must have looked to many Western capitals as a potential opening for international discussions of their histories and domestic practices that would be decidedly uncomfortable. Their united opposition to the inclusion of Article III may help explain why Lemkin decided not to pursue the matter once he determined that "on this issue the wind was not blowing in my direction."[88] He questioned whether this pursuit could "endanger the passage of the convention[.] Dr. Evatt [the Australian president of the General Assembly] was also against the inclusion of cultural genocide. So with a heavy heart I decided not to press for it."[89]

This spelled the end of Article III but not of efforts to include some elements of cultural genocide in the draft convention. The original draft prepared by the three independent

experts, including Lemkin, had placed the "forced transfer of children to another human group" as the first of the crimes under the "destroying the specific characteristics of the group" category, which corresponded to cultural genocide.[90] In the view of the experts, "The separation of children from their parents results in forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents'. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time."[91] With persistent lobbying by the Greek delegation, this provision was retained in the Convention despite the deletion of Article III.[92] It has also been argued persuasively that the wording of Article II (b)—"causing serious bodily or mental harm to members of the group"—suggests that the drafters of the Convention did not limit their conception of genocide to physical and biological destruction.[93] Social and cultural factors also matter, as Lemkin's holistic analysis had confirmed. Nevertheless, there is no doubt that the notion of cultural genocide faded from international attention for several decades after the rejection of Article III.

The Return of the Notion of Cultural Genocide

With the defeat of Article III, interest in cultural genocide ebbed, but it did not disappear. The increasing political activism of indigenous peoples in the 1970s and early 1980s provided a political opening for the return of cultural genocide to international discourse, though in a somewhat altered form. In 1982, the United Nations established the Working Group on Indigenous Populations as a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights.[94] It meets annually and includes a combination of independent experts and members of the intergovernmental Sub-Commission from different regions. (In 2001, the UN Commission on Human Rights also appointed a special rapporteur on the rights of indigenous peoples.) It is a bit ironic that the return of cultural genocide—at least as the object of international debate—took place in the sphere of human rights, not the Genocide Convention, just as many Western countries had urged in 1948. However, substantively and politically, this was hardly what they had in mind in those early days.

In 1993, the Working Group produced the Draft Declaration on the Rights of Indigenous Peoples.[95] According to Article 7, "indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide." It then called for the "prevention of and redress for" a number of acts, beginning with "any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities."[96] Not unexpectedly, these proved to be contentious assertions. The Draft Declaration was debated and amended a number of times over the next decade and a half, resulting in, among other things, the deletion of the reference to cultural genocide.[97] Nevertheless, consensus proved elusive. When the General Assembly finally adopted the Declaration in 2007 by a vote of 143 to 4 (with 11 abstentions), the four holdouts came from the settler countries that had opposed Article III almost sixty years earlier (Australia,

Canada, New Zealand, and the United States).[98] According to the UN Secretariat, however, all four have since reversed course and decided to support the Declaration.[99] Though the Declaration does not refer explicitly to cultural genocide, it does offer a backdoor to the concept in a manner that is relevant to current concerns with protecting the world's cultural heritage.

According to Article 7(2) of the Declaration, "indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group." As discussed above, this was the one aspect of cultural genocide that was retained in the Genocide Convention. In Australia and Canada, among other places, historical practices of removing indigenous children from their families and communities for purposes of reeducation and cultural assimilation have proven enormously controversial and have elicited charges of cultural genocide.[100] These controversies have brought the notion of cultural genocide back into the policy as well as academic spotlight, though they have done little to lessen its contentiousness. At the same time, however, it should be noted that some of the armed groups that have sought to destroy priceless pieces of the world's cultural heritage have also engaged in the abduction of children in an attempt to sever their cultural and/or religious ties.[101] It is quite possible too that armed groups and criminal networks that have engaged in the trafficking of cultural property might also have engaged in the trafficking of children or other persons. Clearly, the political dynamics that have accompanied the return of cultural genocide are proving both complicated and layered. They are, as yet, underexplored and little understood.

Cultural Genocide and Cultural Protection: A Sixth Lens?

It would be more distorting than clarifying to view contemporary threats to cultural heritage solely through a cultural genocide lens. The deficits are obvious. Cultural genocide lacks a clear or accepted definition. The notion of cultural genocide has never been defined, accepted, or codified by the world's governments. It was controversial when first raised in the 1940s and remains so today. There have been recent situations, such as the Da'esh assaults on the Yazidi population in Iraq, in which it appeared that the cultural, physical, and biological elements of genocide were all being pursued simultaneously.[102] The armed groups intent on destroying cultural heritage in Afghanistan, Mali, and Nigeria were also committing assaults on local populations, so there appeared to be a link between cultural and physical destruction in those cases. But the motivations may have been closer to politicide than genocide.[103] It is doubtful that all of the incidents of cultural destruction in recent years have been associated with genocide or that the commission of physical genocide has always been closely tied to campaigns of cultural extinction. Clearly more research and analysis of these connections are needed. In the meantime, there is a case to be made for adding cultural genocide as a sixth lens—alongside the five mentioned at the outset of this paper—for

thinking about how to frame a strategic, political, normative, and institutional effort to protect the world's cultural heritage.

The lack of codification of cultural genocide might make it a bit easier to reshape and adapt it to the task of cultural protection. (R2P, because it has been so narrowly defined and intensively deliberated by the UN Secretariat and Member States, respectively, has a much more rigid and less flexible conceptual and legal structure.) It is also telling that public, scholarly, and, to a lesser extent, governmental attention to cultural genocide has been growing in recent decades.[104] The concept is showing new life seven decades after it was declared dead. This persistence suggests that Lemkin was on to something when he sought to weave cultural, physical, and biological destruction into a larger pattern or strategy. These linkages, though not always well understood, also speak to the outspoken desire of many advocates of cultural protection to underscore its international security and/or human security implications.

Differences in context are critical here. Lemkin's theory of genocide grew out of his direct observation and extensive research into the practices of a conquering and occupying power, which was then capable of pursuing its genocidal aims—in all eight fields or techniques—without much fear of interruption or physical resistance, at least over the short run. As he acknowledged, this was the most extreme manifestation of genocidal intent. The armed groups carrying out much of the cultural destruction in recent years either do not control territory or can only do so for limited periods. The groups and cultures they are targeting are not necessarily minority populations that they could hope to eliminate in any foreseeable time period (the Yazidis were a chilling exception). In some cases, there may be a gap between intent and capacity for destruction, though such a judgment would be well beyond the scope of this discussion and research. What would be critical, however, would be to reimagine the 1940s conception of cultural genocide in a contemporary context. It would look quite different today.

As a number of scholars have argued (see note 100 below), however, the experience of colonial or settler societies comes closer to that of an occupying force that manages, at some point historically, to obtain a virtual monopoly on power and authority within a territory. As discussed above, this is uncomfortable territory for many governments, including Western ones, whether viewed politically or legally, particularly if the emotionally charged term "cultural genocide" is employed. At first glance, this might seem an apt reason not to consider making this a sixth way to frame these questions. Most of these countries, however, have been coming to grips with their histories for some time and are a lot less sensitive to these matters than they were seventy years ago. Also, a willingness to discuss cultural heritage through this frame might make that discussion more engaging for key potential partners in the Global South, as suggested by the stances taken in the 2017 Security Council debate. The differences on display in that debate will not disappear for inattention.

There is a deeper reason to consider cultural genocide as a further lens on the protection of cultural heritage agenda. And that is the core question of what and whose cultural

heritage needs protection. As this conception expands, so too will the potential breadth of international political support for this enterprise. If the protection of indigenous cultures comes under the umbrella, then the political dynamic becomes more layered and more promising. The clauses in UN documents referring to the "primary responsibility" of the state could ease concerns among Western governments as well as southern ones. The conversation could become both richer and more inclusive, and the results more sustainable. This could be a first step toward recasting the debate in a way that builds on the connections among the six lenses and that seeks to engage all of their respective stakeholders in a common and productive search for better ways to protect everyone's cultural heritage.

NOTES

1. James Cuno, "The Responsibility to Protect the World's Cultural Heritage," *Brown Journal of World Affairs* 23, no. 1 (Fall–Winter 2016): 104.
2. The first in the series is Thomas G. Weiss and Nina Connelly, "Cultural Cleansing and Mass Atrocities: Protecting Cultural Heritage in Armed Conflict Zones," J. Paul Getty Trust Occasional Papers in Cultural Heritage Policy, no. 1 (Los Angeles, December 2017), http://www.getty.edu/publications/occasional-papers/.
3. Irina Bokova, "Fighting Cultural Cleansing: Harnessing the Law to Preserve Cultural Heritage," *Harvard International Review* (August 24, 2015): 5.
4. Rome Statute of the International Criminal Court, UN document, A/CONF.183/9, 17 July 1998, as corrected. See Article 8, 2 (b), (ix) on situations of international armed conflict and Article 8, 2 (e), (iv) on situations of armed conflicts not of an international character. The Mali case was considered by the Court to be the latter.
5. For summaries of the case, see "Prosecutor v. Ahmad Al Faqi Al Mahdi: International Criminal Court Imposes First Sentence for War Crime of Attacking Cultural Heritage," Recent Cases, *Harvard Law Review* 130 (May 10, 2017): 1978–85; and Uzma S. Bishop-Burney, "Prosecutor v. Ahmad Al Faqi Al Mahdi," *American Journal of International Law* 111, no. 1 (January 2017): 126–32.
6. Jason Burke, "ICC Ruling for Timbuktu Destruction 'Should Be Deterrent to Others,'" *Guardian*, September 27, 2016.
7. For contrasting perspectives, see Kathryn Sinkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W. W. Norton, 2011); and Sheri P. Rosenberg, "Audacity of Hope: International Criminal Law, Mass Atrocity Crimes, and Prevention," in *Reconstructing Atrocity Prevention*, ed. Sheri P. Rosenberg, Tibi Galis, and Alex Zucker (Cambridge: Cambridge University Press, 2016), 151–74.
8. Irina Bokova, "Culture on the Front Line of New Wars," *Brown Journal of World Affairs* 22, no. 1 (Fall–Winter 2015): 289.
9. Ibid., 291 and 294, respectively.
10. UN document, S/PV.7907, provisional verbatim records of the Security Council, 7907th meeting, 24 March 2017, p. 4.
11. For the latter, see UN document, Report of the Secretary-General on the Implementation of Security Council Resolution 2347 (2017), S/2017/969, 17 November 2017.
12. As UNESCO acknowledged in 2015, the term "cultural cleansing" has "been used in public statements, speeches and interviews to raise awareness on the systematic and deliberate nature of attacks on cultural heritage and diversity perpetrated by violent extremist groups in Iraq and Syria. The notion of 'cultural cleansing' is not a legal term." UN document, 38 C/49, UNESCO General Conference, Reinforcement of UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict, 2 November 2015, 2n2.
13. The Council had previously included the protection of cultural heritage as one of the multiple mandates of its peace operations in Mali. The 25 April 2013 mandate for the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) included assisting "the transitional authorities of Mali, as necessary and feasible, in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO." UN document, Security Council Resolution 2100 (2013), op. para. 16 (f).
14. Security Council Report, "Briefing and Draft Resolution on Protection of Cultural Heritage in Armed Conflicts,"

What's in Blue, 23 March 2017.

15. UN document, Security Council Resolution 2347 (2017), 24 March 2017, op. para. 1.
16. Ibid., op. para. 5 and passim.
17. UN document, S/PV.7907, p. 10.
18. Ibid., 15.
19. Ibid., 14, 17, and 20, respectively.
20. Ibid., 12, 17.
21. Security Council Report, "Briefing and Draft Resolution."
22. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001).
23. There is an enormous and growing literature on R2P, including a dedicated journal. For a succinct narrative on the roots and evolution of R2P, see Alex J. Bellamy and Edward C. Luck, *The Responsibility to Protect: From Promise to Practice* (Cambridge: Polity Books, 2018), chap. 1.
24. UN document, Report of the Secretary-General, *Implementing the Responsibility to Protect*, A/63/677, 12 January 2009.
25. Edward C. Luck and Dana Zaret Luck, "The Individual Responsibilty to Protect," in Rosenberg et al., *Reconstructing Atrocity Prevention*, 207–48.
26. There has been a marked expansion of the literature on Lemkin and his theory of genocide. See, for instance, Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide* (Philadelphia: University of Pennsylvania Press, 2017); John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (New York: Palgrave Macmillan, 2008); and William Korey, *An Epitaph for Raphael Lemkin* (New York: Jacob Blaustein Institute for the Advancement of Human Rights, 2001).
27. Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, and Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944), xiii. For a discussion of his Madrid proposals, see James Waller, *Confronting Evil: Engaging Our Responsibility to Prevent Genocide* (Oxford: Oxford University Press, 2016), 7–8. By 1933, Lemkin later commented, "Hitler had already promulgated his blueprint for destruction. Many people thought he was bragging, but I believed that he would carry out his program if permitted." Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin*, ed. Donna-Lee Frieze (New Haven, CT: Yale University Press, 2013), 22.
28. Lemkin, *Axis Rule*, 91; emphasis in original.
29. Waller, *Confronting Evil*, 6–7.
30. Lemkin, *Totally Unofficial*, 241n1.
31. Ibid., chap. 2, 25–40. He found an academic position in Sweden before gaining a post at Duke University in 1941 and then one at Yale Law School.
32. Irvin-Erickson, *Raphaël Lemkin*, 73–74.
33. Lemkin, *Axis Rule*, 79.
34. See, for instance, Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (New York: Alfred A. Knopf, 2016); and William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2016).
35. Lemkin, *Axis Rule*, 79.
36. Ibid.

37. Ibid., xi; emphasis in original.
38. Ibid.
39. Ibid., 82–90.
40. Ibid., xii.
41. Ibid., 84–85.
42. Ibid., quote from 90, list of past wars of extermination from 80n.
43. Ibid., 92.
44 Ibid., 79.
45. Ibid.
46. Lemkin, *Totally Unofficial*, 125.
47. Ibid., 172.
48. A. Dirk Moses, "Raphael Lemkin, Culture, and the Concept of Genocide," in *The Oxford Handbook of Genocide Studies*, ed. Donald Bloxham and A. Dirk Moses (Oxford: Oxford University Press, 2010), 34.
49. On the latter, see Lemkin, *Totally Unofficial*, 172–73.
50. Raphael Lemkin, "Genocide," *American Scholar* 15, no. 2 (April 1946): 227.
51. As noted above, the deliberate destruction of tangible cultural heritage has since become the subject of the 1954 Hague Convention and the 1998 Rome Statute of the ICC (the latter as a war crime). Elisa Novic asserts that this has become "part of customary international law." She notes, however, that the instruments do not cover attacks on intangible cultural heritage and, as pointed out above, do not apply to situations where there is no armed conflict. Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford: Oxford University Press, 2016), 129–30.
52. In Lemkin's view: "According to the doctrine of National Socialism, the nation, not the state, is the predominant factor. In this German conception the nation provides the biological element for the state." Lemkin, *Axis Rule*, 80.
53. Ibid., 91.
54. Ibid., 80.
55. Raphael Lemkin, "Genocide," *American Scholar* 15, no. 2 (April 1946): 228.
56. Ibid.
57. Lemkin, *Axis Rule*, xiii.
58. Ibid., 93.
59. Ibid., 90.
60. Ibid., 95.
61. At one point, he did note in passing that the Security Council could seek an advisory opinion from the International Court of Justice "to determine whether a state of genocide exists within a given country before invoking, among other things, sanctions to be leveled against the offending country." Lemkin, "Genocide," 230.
62. Edward C. Luck, "Roots of Ambivalence: The United Nations, Genocide, and Mass Atrocity Prevention," in *Preventing Mass Atrocities: Policies and Practice*, ed. Barbara Harff and Ted Robert Gurr (London: Routledge, 2018).
63. Lemkin, *Axis Rule*, xii, 93, 94.
64. UN document, General Assembly, Fifty-Fifth Plenary Meeting, Resolution 96 (I), 11 December 1946.
65. For the draft, UN document E/447 (1947), see Christian J. Tams, Lars Berster, and Björn Schiffbauer, *Convention*

on the Prevention and Punishment of the Crime of Genocide: A Commentary (Munich: C. H. Beck, 2014), Annex 2, 419–23.

66. William Schabas relates that the other two independent experts and the Secretary-General had reservations about including the crimes associated with cultural genocide in the draft, but decided that it was better to leave that decision to the Member States in ECOSOC and the General Assembly. Schabas, *Genocide in International Law*, 61.
67. Ad Hoc Committee Draft, UN document E/AC.25/12; see Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide*, 424.
68. See the debate in the Sixth Committee of the UN General Assembly, Paris, 25 October 1948, UN document, A/C.6/SR.83, p. 204.
69. Lemkin, *Totally Unofficial*, 173.
70. The draft Article III read, "In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members such as: 1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group; 2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group." Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide*, 424.
71. These included Sweden, Brazil, Denmark, Canada, New Zealand, India, Peru, South Africa, the Netherlands, the United States, Belgium, and France. France did not participate in the debate over Article III, but it had already proposed that the question be referred to the Third Committee. Sixth Committee, UN document, A/C.6/SR.83, pp. 197–204.
72. Ibid., 198, 202, and 203, respectively.
73. Ibid., 197, 199, 200, and 203, respectively.
74. Ibid., 199.
75. These included Pakistan, Venezuela, China, Egypt, Syria, Byelorussia, Ecuador, USSR, and Czechoslovakia. Ibid., 193–206.
76. Ibid., 193–95 and 201, respectively.
77. Ibid., 201–2 and 205–6, respectively.
78. Ibid., 206.
79. Ibid., 197.
80. Ibid., 198.
81. Payam Akhavan, "Cultural Genocide: Legal Label or Mourning Metaphor?," *McGill Law Journal* 61, no. 4 (2016): 260.
82. Sixth Committee, UN document, A/C.6/SR.83, pp. 199–200.
83. Ibid., 197.
84. Ibid., 201, 201, 203, and 204, respectively.
85. Ibid., 202.
86. Ibid., 193.
87. Ibid., 199.
88. Lemkin, *Totally Unofficial*, 172.

89. Ibid., 173.
90. UN document, E/447.
91. Quoted in Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide*, 91–92.
92. Ibid., 92–93; and Akhavan, "Cultural Genocide," 258–63. Article II (e) of the Convention reads, "forcibly transferring children of the group to another group."
93. Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide*, 81–83.
94. UN Document, ECOSOC Resolution 1982/34 on the Study of the Problem of Discrimination against Indigenous Populations, 28th Plenary Meeting, 7 May 1982.
95. UN Document, E/CN.4/Sub.2/1993/29. The Draft Declaration is included as Annex I of the Report of the Working Group on Indigenous Populations on its Eleventh Session, 23 August 1993, UN Commission on Human Rights, 45th Session, Agenda Item 14.
96. Ibid., 52.
97. It is uncertain what Lemkin would have thought of this application of his concept of cultural genocide. He had long been concerned about minority rights and, as noted above, called in *Axis Rule* for the enhancement of protections for minorities in Europe. Yet A. Dirk Moses quotes Lemkin as making a distinction that would be quite relevant to the debate on preserving indigenous cultures: "Obviously throughout history we have witnessed decline of nations and races. We will meet this phenomenon in the future too, but there is an entirely different situation when nations or races fade away after having exhausted their spiritual and physical energies, and there is a different contingency when they are murdered on the highway of world history. Dying of age or disease is a disaster but genocide is a crime." Moses, "Raphael Lemkin, Culture, and the Concept of Genocide," 28.
98. UN document, UN General Assembly Resolution 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Annex, 13 September 2007. For the vote tally and explanations of votes, see A/61/PV.107, 13 September 2007. Those abstaining included the Russian Federation, Ukraine, Georgia, and eight developing countries.
99. Website of the UN Department of Economic and Social Affairs (DESA), Division for the Inclusive Social Development of Indigenous Peoples. Accessed June 14, 2018.
100. There is a large and diverse literature on these and similar situations elsewhere. See, for instance, Akhavan, "Cultural Genocide"; Moses, "Raphael Lemkin, Culture, and the Concept of Genocide"; Johannes Morsink, "Cultural Genocide, the Universal Declaration, and Minority Rights," *Human Rights Quarterly* 21 (1999): 1009–60; Shamiran Mako, "Cultural Genocide and Key International Instruments: Framing the Indigenous Experience," *International Journal on Minority and Group Rights* 19 (2012): 175–94; Francesco Francioni, "Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity," *Michigan Journal of International Law* 25 (Summer 2004): 1209–28; and Damien Short, "Cultural Genocide and Indigenous Peoples: A Sociological Approach," *International Journal of Human Rights* 14, no. 6 (November 2010): 831–46.
101. This appears to have been the case with Da'esh in Iraq and Boko Haram in Nigeria, as both groups engaged in the abduction of children, apparently targeted by religion.
102. In 2014, U.S. president Barack Obama accused Da'esh of genocidal intent in its destruction of Yazidi communities, and in 2016 Secretary of State John Kerry included cultural genocide among the charges against Da'esh. Kerry asserted that "we know that in areas under its control, Daesh has made a systematic effort to destroy the

cultural heritage of ancient communities," mentioning several of them. See White House, Office of the Press Secretary, Statement by the President, August 7, 2014; and U.S. Department of State, Statement of Secretary of State John Kerry, March 17, 2016, respectively.

103. In developing the term "politicide" as a supplement to genocide, Barbara Harff has pointed out that the Genocide Convention does not cover mass violence "with politically defined victims." Some of the situations producing very high levels of violence over the past century would qualify as politicides more readily than as genocides. Barbara Harff, "No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955," *American Political Science Review* 97, no. 1 (February 2003): 58.
104. William Schabas, for instance, has come to regret the exclusion of cultural genocide from the Convention, noting that "the normative protection of ethnic and national minorities against cultural persecution remains an underdeveloped zone within the overall scheme of international human rights." Schabas, *Genocide in International Law*, 646.

ABOUT THE AUTHOR

Edward C. Luck is Arnold A. Saltzman Professor of Professional Practice and Director of the Specialization in International Conflict Resolution, School of International and Public Affairs (SIPA), Columbia University. From 2008 to 2012, he served as United Nations assistant secretary-general and as the first special adviser to the UN secretary-general for the responsibility to protect (R2P). In that capacity, he was responsible for the conceptual, political, institutional, and operational development of R2P and for its application to a number of situations in which atrocity crimes appeared to be imminent or were underway. He was the architect of the secretary-general's 2009 three-pillar strategy for implementing R2P that remains the accepted formulation of R2P principles and practice, and he drafted all of the secretary-general's related reports, speeches, and statements over those years. Luck is coauthor, with Alex J. Bellamy, of *The Responsibility to Protect: From Promise to Practice* (Cambridge: Polity Books, 2018). A prolific author, Luck has written extensively on the origins, evolution, and reform of the United Nations, on U.S.–UN relations, and on the UN Security Council, as well as a range of other international security and humanitarian issues. In addition to holding a number of academic posts, he served for a decade as president and CEO of the United Nations Association of the USA. He graduated from Dartmouth College with high distinction in international relations and has a series of graduate degrees from Columbia University, including a PhD in political science.

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