

RESEARCH ARTICLES

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Considerations on the Legitimacy of Organizing a Humanitarian Intervention Aimed at Stopping the Intentional Destruction of Cultural Heritage

Abstract: Since its inception in Iraq, ISIS has been responsible for the pillaging and destruction of numerous cultural sites, notwithstanding the protests of the international community. None of the solutions proposed and implemented to stop this devastation have so far obtained adequate results. This article analyzes the legitimacy of organizing a humanitarian intervention aimed at preserving cultural heritage from such kinds of destructive actions. Two critical issues are addressed: first, the legitimacy of using armed force to preserve cultural heritage on the behalf of the international community; second, the technical difficulties associated with the development of such a practice.

Keywords: cultural heritage, intentional destruction, humanitarian intervention, responsibility to protect

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Introduction

During a meeting held on 29 September 2014 Irina Bokova, the Director-General of UNESCO, stated that “Islamic, Christian, Kurdish and Jewish heritage, among others, is being intentionally destroyed or attacked in what is clearly a form of cultural cleansing”.¹ In an attempt to get media coverage, recruit new members and find antiquities to be sold on the black market, the militia of the so-called Islamic State of Iraq and Syria (ISIS) has pursued an escalating campaign of cultural devastation. ISIS has intentionally targeted historical monuments (such as the Assyrian Green Church in Tikrit and Jonah’s Tomb in Mosul), archaeological remains (such as the ancient cities of Nimrod and Hatra), and works of art (for example, several rare manuscripts from the Mosul Library and two original items, the Winged Bull and the God of Rozhan, from the Mosul Museum) which it perceives as blasphemous and contrary to the tenets of its radical faith.²

Although the international community has firmly condemned these actions and UNESCO has established an Emergency Response Action Plan (ERAP), so far diplomatic and technical measures have not been sufficient to stop the injurious activity of ISIS against the Iraqi cultural heritage. In spite of enormous progress made at the legislative level, “the influence of international law in effectively mitigating the destructive capacity of a certain actor is less than reassuring”.³ Therefore it may be assumed that this devastation might well continue unabated without more resolute action(s).

This article critically assesses the legitimacy of organizing a humanitarian intervention specifically aimed at stopping the intentional destruction of cultural heritage. The first part of the article analyzes the possibility to rethink the doctrine of humanitarian intervention in order to suppress discriminatory acts of cultural heritage destruction. The second part identifies the basic conditions for arranging and establishing a legitimate and consistent humanitarian intervention. The third part examines the major risks related to the advent and consolidation of such a practice, while the fourth part examines the traps and pitfalls that can arise and, therefore, the need for a thorough *a priori* assessment and careful planning of any intervention. The fifth part summarizes the key points and offers critical conclusions.

¹ *A call to save Iraq’s cultural heritage*, a call by Irina Bokova, UNESCO’s Director-General, UNESCO Press, 2014, http://www.unesco.org/new/en/communication-and-information/resources/news-and-in-focus-articles/all-news/news/a_call_to_save_iraqs_cultural_heritage/ [accessed: 30.11.2015].

² Most of the statues destroyed in February at the Mosul Museum were actually reproductions. For more information on this event, read the interview to Atheel Njaifi (exiled governor of Mosul) at: *Most destroyed artifacts were copies*, <http://rudaw.net/english/Kurdistan/28022015> [accessed: 6.11.2015].

³ A. Milligan, *Targeting Cultural Property: The Role of International Law*, “Journal of Public and International Affairs” 2008, Vol. 19, p. 101.

Rethinking Humanitarian Intervention as a Response to the Intentional Destruction of Cultural Heritage

A humanitarian intervention is generally defined as “an uninvited intervention of external actors into the domestic affairs of a State with the primary motive of ending or preventing violations of human rights”.⁴ In the last twenty-five years a substantial number of humanitarian interventions have been deployed in different countries. The officially proclaimed objectives have included: establishing a secure environment (Somalia, Iraq and East Timor); aiding the peace process (Rwanda); upholding democracy (Haiti); stopping a massive violation of human rights (Kosovo); ending attacks against civilians (Libya); and promoting peace and security (Sierra Leone). Some of these interventions have been quite successful, while others can be deemed total failures. This section considers whether, from a legal perspective, the intentional destruction of cultural heritage might be a valid reason for engaging in a humanitarian intervention.

The first key point is to clarify whether the intentional destruction of cultural heritage is a violation of human rights, and one which can justify a humanitarian intervention. The 1948 Universal Declaration of Human Rights (UDHR) identifies a list of inalienable rights that belong to individuals as human beings. In the international legal framework a declaration is a non-binding document, which means that States are not legally required to act in accordance with the principles enunciated in such a document. However, considering its universal adoption, its influence on binding international legal texts (such as, for example, the International Covenant on Civil and Political Rights⁵ or the International Covenant on Economic, Social and Cultural Rights⁶), and its significant impact on numerous national laws and constitutions, the UDHR stands out as something more than a “tool of soft law”. According to some legal experts, the fundamental principles of the UDHR have progressively gained such a widespread and binding acceptance within the international community that they are nowadays viewed as principles of customary international law.⁷

With respect to the issue here examined, Articles 1, 2, 18, 19, 22 and 27 of the Universal Declaration of Human Rights are particularly relevant. Article 1 states that “all human beings are born free and equal in dignity and rights”; Article 2 prohibits any forms of discrimination based, for example, on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth

⁴ K.L. Shimko, *International Relations: perspectives & controversies*, 3rd edn., Cengage Learning, Wadsworth 2010, p. 247.

⁵ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

⁶ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

⁷ For more on the status of the human rights doctrine, see for example, H. Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, “The Georgia Journal of International and Comparative Law” 1995/1996, Vol. 25, pp. 287-398, and P.G. Lauren, *The Evolution of International Human Rights*, 3rd edn., Pennsylvania University Press, Philadelphia 2011.

or other status”; Article 18 affirms freedom of thought, conscience and religion; Article 19 supports freedom of opinion and expression; Article 22 establishes the right to social security (realization of economic, social and cultural rights); and Article 27 asserts the right to freely participate in the cultural life of the community, enjoy the arts and share scientific advancement. As a result, any intentional destruction of cultural heritage for discriminatory reasons or aimed to constrain the freedom of thought, conscience, religion, opinion and expression of people could be interpreted as a serious violation of human rights.⁸

On the other hand, because of the risks of further destruction and disruption of human lives associated with any form of armed intervention, humanitarian interventions are “exceptional practices”, limited to those circumstances where severe atrocities have been committed. Hence the critical question is whether systemic acts of intentional destruction of cultural heritage are grave enough to justify the risks of an armed humanitarian intervention? Based on interpretation of the opinions expressed by the International Criminal Tribunal for the Former Yugoslavia (ICTY), it would seem that they are. In the trial of Kordić and Cerkez, for example, the Court explicitly affirmed that the intentional destruction of cultural heritage is “criminalized under customary international law” and it added that “this act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of ‘crimes against humanity’, for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects. The Trial Chamber therefore finds that the destruction and wilful damage of institutions dedicated to Muslim religion or education, coupled with the requisite discriminatory intent, may amount to an act of persecution”.⁹

In a similar vein, in the trial of Jokić the Court declared that “the whole of the Old Town of Dubrovnik was considered, at the time of the events contained in the Indictment, an especially important part of the world cultural heritage. It was, among other things, an outstanding architectural ensemble illustrating a significant stage in human history. The shelling attack on the Old Town was an attack not only against the history and the heritage of the region, but also against the cultural heritage of humankind.”¹⁰

In the case against Blaskić the Court, taking into account the acts of destruction and plunder of property (especially institutions dedicated to religion and education) ordered by the defendant against the village of Ahmići, declared that “persecution may take forms other than injury to the human person, in particular those

⁸ Universal Declaration of Human Rights (adopted on 10 December 1948) UNGA Res 217 A(III) (UDHR) Arts. 1, 2, 18, 19, 22 and 27.

⁹ *Prosecutor v. Kordić and Čerkez*, ICTY Case No. IT-95-14/2-T, Judgment of the Trial Chamber, 26 February 2001, para. 207.

¹⁰ *Prosecutor v. M. Jokić*, ICTY Case No. IT-01-42, Judgment of the Trial Chamber, 18 March 2004, para. 51.

acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind”.¹¹

In the trial against Strugar, the judging Chamber affirmed that the offences under Article 3(b) (“wanton destruction of cities, towns or villages, or devastation not justified by military necessity”) and 3(d) (“seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”) of the Statute of the ICTY “are serious violations of international humanitarian law”.¹²

The illegitimacy of intentionally targeting cultural properties has also been confirmed within other adjudicative frameworks. For example, in assessing the destruction of the Stela of Matara, the Claims Commission for Eritrea and Ethiopia specifically declared “that the felling of the stela was a violation of customary international law”.¹³

Indeed, during the war in the former Yugoslavia, as well as in many other conflicts (like Afghanistan, Iraq, Libya, Mali and Syria, to mention just the most recent cases), those criminals who perpetuated massive discriminatory campaigns of destruction of cultural property have also been held responsible for cruelty against the civilian population. In the case of *Krstić*, for example, the Trial Chamber pointed out that “where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group”.¹⁴ Thus the intentional destruction of cultural heritage is frequently accompanied by a more widespread violation of human rights which might further justify the need for a humanitarian intervention, as would certainly seem to be the case with ISIS’s actions. However, the most interesting aspect of the matter (for the purposes of this article) is that, according to the considerations and the examples mentioned above, the organization of a humanitarian intervention might also be formally legitimized by the sole objective to stop an intentionally (discriminatory) destruction of cultural heritage, even without the occurrence of other types of abuses. A different matter (which will be examined in the following sections) is whether such a humanitarian intervention is also morally and politically desirable, feasible and justifiable.

¹¹ *Prosecutor v. Blaskić*, ICTY Case No. IT-95-13, Judgment of the Trial Chamber, 3 March 2000, para. 227.

¹² *Prosecutor v. P. Strugar*, ICTY Case No. IT-01-42, Judgment of the Trial Chamber, 31 January 2005, para. 232; see also the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993, UN Doc. S/RES/827 (1992), as amended on 17 May 2005, Articles 3(b) and 3(d).

¹³ Claims Commission for Eritrea and Ethiopia, ‘Partial Award, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 & 22, 28’ (2004), 43 I.L.M. 1249 (2004) par. 113.

¹⁴ *Prosecutor v. Krstić*, ICTY Case No. IT-98-33, Judgment of the Trial Chamber, 2 August 2001, para. 580. Interestingly, in this case the Court took into account the deliberate destruction of mosques and houses belonging to members of the opposite group as evidence of an intent to commit the crime of genocide.

In connection with the foregoing considerations, another important question needs to be clarified: whether humanitarian interventions are lawful. This is one of the most debated issues in international affairs, primarily because it entails a clash between the recognition of individual rights and the respect for national sovereignty. Divergent positions have been expressed on this issue.

On one hand, since the Kellogg-Briand Pact (1928)¹⁵ recourse to the use of force in the international context has been subject to restrictions. These constraints are nowadays codified within the United Nations Charter (1945).¹⁶ Consistent with its Article 2(4), States Parties of the United Nations should refrain from the threat and use of force against the territorial integrity or political independence of any State. The sole admitted exceptions are related to the use of force in order to maintain international peace and security (Chapter VII), and the right of individual or collective self-defence in the case of armed attack (Article 51). The principle of non-intervention in States' internal affairs expressed in Article 2(7) adds a further constraint to the enforcement of humanitarian interventions. As a result, some researchers have criticized the growing support for humanitarian interventions, because in their view this practice is contrary to fundamental principles of international law and, therefore, recognizing its legitimacy would seriously put at risk the preservation of the entire international legal system. As affirmed by Henkin, "these pressures eroding the prohibition on the use of force are deplorable, and the arguments to legitimize the use of force in those circumstances are unpersuasive and dangerous [...] Violations of human rights are indeed all too common, and if it were permissible to remedy them by external use of force, there would be no law to forbid the use of force by almost any State against almost any other".¹⁷

On the other hand, some scholars insist that the concept of absolute sovereignty has been substituted by the idea of sovereignty as responsibility, which legitimizes humanitarian interventions in cases of extensive violations of human rights.¹⁸ The incapacity of the international community to organize a prompt and effective response to stop the gross violations of human rights that took place during the genocide in Rwanda (1994) and the war in the former Yugoslavia (1991-1995) raised serious doubts about the concepts of legal and moral justice underlying the international normative system. It was primarily in response to such traumatic

¹⁵ Treaty between the United States and other Powers Providing for the Renunciation of War as an Instrument of National Policy, 27 August 1928, 94 LNTS 57.

¹⁶ 26 June 1945, 1 UNTS XVI, amended in 1963 (557 UNTS 143), in 1965 (638 UNTS 308), and in 1971 (892 UNTS 119).

¹⁷ L. Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd edn., Columbia University Press, New York 1979, pp. 144-145.

¹⁸ Researchers on pro-humanitarian interventions (in the framework of the responsibility to protect) include, e.g., G. Evans, *The Responsibility to Protect. Ending Mass Atrocities Crimes Once for All*, Brookings Institution Press, Washington 2008, and C.G. Badescu, *Humanitarian Intervention and the Responsibility to Protect. Security and human rights*, Routledge, London - New York 2011.

events that the International Commission on Intervention and State Sovereignty (ICISS) introduced, in 2001, the notion of 'responsibility to protect', i.e. that States have the responsibility to protect their citizens from avoidable catastrophes, and when they are unable or unwilling to fulfil this duty, then such responsibility shifts to the international community.¹⁹ Subsequently, in a 2005 report for the General Assembly then-UN Secretary-General Kofi Annan affirmed that:

It cannot be right, when the international community is faced by genocide or massive human rights abuses, for the United Nations to stand by and let them unfold to the end [...] if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may, out of necessity, decide to take action under the Charter of the United Nations, including enforcement action, if so required.²⁰

These principles were subsequently officially adopted by the United Nations General Assembly at the 2005 World Summit and, more recently, have been reaffirmed by current UN Secretary-General Ban Ki-moon.²¹ Therefore according to the pro-humanitarian perspective "international law still protects sovereignty, but – not surprisingly – it is the people's sovereignty rather than sovereign's sovereignty".²² In the end, as suggested by Orford, international law "has traditionally oscillated between emphasizing the consent of States and the collective good as the foundation of its authority".²³

Both interpretations are based on valid arguments. The main question is whether international law should be strictly interpreted according to the original intent of the legislator (the classicist view), or whether it should also be examined in the light of current attitudes (the realist view). According to Article 31(1) of the 1969 Vienna Convention on the Law of Treaties,²⁴ a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". However, the same Article 31 states in paragraph 3(b) that, together with the context, treaty interpretation must take into account "any subsequent practice in the application of

¹⁹ *The Responsibility to Protect*, report of the International Commission on Intervention and State Sovereignty, ICISS, December 2001.

²⁰ *In larger freedom: towards development, security and human rights for all*, report of the Secretary-General, 21 March 2005, UN Doc. A/59/2005.

²¹ See *2005 World Summit Outcome*, 15 September 2005, UN Doc. A/60/L. 1, and *Implementing the responsibility to protect*, report of the Secretary-General, 12 January 2009, UN Doc. A/63/677.

²² W.M. Reisman, *Sovereignty and Human Rights in Contemporary International Law*, "American Journal of International Law" 1990, Vol. 84, p. 869.

²³ A. Orford, *International Authority and the Responsibility to Protect*, Cambridge University Press, Cambridge 2011, p. 209.

²⁴ 1155 UNTS 331.

the treaty which establishes the agreement of the parties regarding its interpretation". Therefore, as Holzgrefe states, "[I]f one accepts the classicist view, the illegality of unauthorized humanitarian interventions is patent. If one adopts the legal realist view, however, its legal status depends in large measure on the attitude of the international community towards it."²⁵ In other words, in adopting the second interpretative approach attention should be focused on the evolving practice of States rather than on the original interpretations of the norms. The organization of humanitarian interventions in Darfur (2006), Kenya (2008), Ivory Coast (2011), Libya (2011), and the Central African Republic (2013) seem to validate the idea that the international community has progressively recognized and accepted this new practice in cases of grave and widespread violations of human rights.

However, circumstances like the intervention in Libya and the non-intervention in Syria raise some doubts about the consistency of this doctrine.²⁶ For instance – Do States, as original members of the international community, have a right or a duty to intervene to end massive violations of human rights? Natural law theorists view humanitarian interventions as “imperfect duties” for which there is no corresponding right and, therefore, “States may discharge it at their own discretion and in the manner of their own choosing.”²⁷ This argument raises some scepticism about humanitarian interventions. Walzer, for example, maintains that “clear examples of what is called ‘humanitarian intervention’ are very rare”, taking into consideration that most of the time “the humanitarian motive is one among several”.²⁸ Even more critical is the position of Cunliffe, who argues that “for power to be truly responsible, it need to be at least potentially accountable. Sovereignty as responsibility, however, makes the exercise of power unaccountable, and therefore ultimately irresponsible”.²⁹

As can be seen, the doubts and problems related to humanitarian interventions are so many that their comprehensive and definitive analysis is beyond the space and scope of this article. It suffices to note that a relevant group of scholars and States (at least considering the recent practices in the field) consider humanitarian interventions as a morally and legally justified response to massive violations of human rights, although their enforcement might be in contrast with other recognized normative paradigms. Even if we assume these issues as being resolved, we still need to clarify who – and under what conditions – may enforce a humanitarian intervention aimed to stop the intentional destruction of cultural heritage.

²⁵ J.L. Holzgrefe, *The Humanitarian Intervention Debate*, in: J.L. Holzgrefe, R.O. Keohane (eds.), *Humanitarian Intervention. Ethical, Legal and Political Dilemmas*, Cambridge University Press, Cambridge 2003, p. 39.

²⁶ F. Türkmen, *From Libya to Syria: The Rise and Fall of Humanitarian Intervention*, “German Review on the United Nations” 2015, Vol. 63, pp. 3-9.

²⁷ J.L. Holzgrefe, op. cit., pp. 26-27.

²⁸ M. Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations*, 4th edn., Basic Books, New York 2006, p. 101.

²⁹ P. Cunliffe, *Sovereignty and the politics of responsibility*, in: C.J. Bickerton, P. Cunliffe, A. Gourevitch (eds.), *Politics without Sovereignty. A critique of contemporary international relations*, UCL Press, London 2007, p. 29.

Conditions for a Legitimate and Consistent Humanitarian Intervention

From a purely ethical perspective, the distinction between a unilateral or multi-lateral humanitarian intervention may appear as a quite irrelevant matter. If I see a group of people trying to destroy a monument, I might feel the moral duty to intervene (for example, ordering them to stop or calling the police), notwithstanding the possible indifference of other bystanders. However, an international humanitarian intervention is generally viewed as legitimate when it is based on legitimate goals and is enforced according to a legitimate path. In other words, the approach adopted to achieve a specific goal through international action matters as much as its purpose. At the moment, and even more so after the doubts raised by NATO's intervention in Kosovo (1999), it may be said that "a right of unilateral humanitarian intervention does not yet exist and is unlikely to develop".³⁰ Therefore, although from a moral perspective it may sound odd that a valuable and constructive solution should depend from the (often too slow) response of the international community, a multilateral intervention, preferably conducted with the approval of the United Nations Security Council, is certainly the best option available. As maintained by Farer, "imputing authorizing power to a large coalition of States in a condition of voluntary association offers a very important guarantee that intervention is not designed to serve interests incompatible with the principles and purposes of the Charter".³¹ In addition, the Preambles to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (2003) affirm that the entire international community has a direct interest in the preservation of cultural heritage because "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world".³² Francioni points out that "this statement speaks of 'people' and not States, and of 'the cultural heritage of all mankind', so as to underscore its connection to human rights and to foreshadow the idea of an integral obligation owed to the international community as a whole (*erga omnes*) rather than to individual States on a contractual basis".³³

³⁰ M. Byers, S. Chesterman, *Changing the rules about the rules? Unilateral humanitarian intervention and the future of international law*, in: J.L. Holzgrefe, R.O. Keohane (eds.), *op. cit.*, p. 178.

³¹ T.J. Farer, *Humanitarian Intervention before and after 9/11: Legality and Legitimacy*, in: J.L. Holzgrefe, R.O. Keohane (eds.), *op. cit.*, p. 76.

³² Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240, Preamble, and the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, 17 October 2003, UNESCO Doc. 32 C/Res. 33 (2003), Preamble.

³³ F. Francioni, *The Humanitarian Dimension of International Cultural Heritage Law: An Introduction*, "European Journal of International Law" 2011, Vol. 22, p. 13.

A further challenge to the evolving doctrine is that, by definition, a humanitarian intervention is organized without the consent of the receiving State. As correctly stated by Shimko, “the right of intervention derives not from the target State’s loss of sovereignty but from the right of those who are being abused”.³⁴ However, some researchers refute this interpretation, because in their view this is only a clever way to legitimize acts of imperialism disguised as altruistic actions, while others highlight the risk of double standards: the unbalanced distribution of power among States will be, in practice, the core determinant in assessing the concrete chances of intervention in cases of grave violations of human rights.³⁵ As a result, a seemingly similar right of intervention into the internal affairs of States will just increase the normative gap between the most powerful and least powerful countries.

Overall, these must be deemed serious and reasonable concerns. However, they are partially mitigated by the demand for widespread consensus for the organization of multilateral interventions, as well as by the need to respect the “last resort” principle and the principle of proportionality. According to the last resort principle, an armed intervention should be used only after all peaceful and viable alternatives have been seriously attempted and exhausted. In other words, all reasonable soft power solutions (e.g. diplomatic pressure) should be comprehensively attempted before considering the implementation of a hard power solution involving the use of armed force. Furthermore, the principle of proportionality limits the enforcement of a military intervention to one in which the estimated benefits must be proportionate to the expected costs or harm. As stated by the ICISS report on the *Responsibility to Protect*, “military intervention is not justified if actual protection cannot be achieved, or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all”.³⁶ Therefore, the intentional destruction of a single statue for discriminatory reasons, while constituting an outrageous and deplorable act, would be hardly enough to justify an intervention on site.

The main problem is the lack of any valid standard model that would clearly express when an intervention is legitimate. For example, how many episodes of intentional destruction are required in order to legitimize an intervention: one, ten, fifty, or hundreds? Should movable and immovable cultural properties, or listed and non-listed cultural sites, be taken into account in the same way? These questions are difficult to answer. In general terms, it seems plausible to consider as legitimate only those humanitarian interventions aimed at stopping discriminatory, systemic and repeated cases of intentional destruction. However, clarifying and specifying

³⁴ K.L. Shimko, op. cit., p. 249.

³⁵ See, for example, N. Chomsky, *Humanitarian Imperialism: The New Doctrine of Imperial Right*, “Monthly Review” 2008, Vol. 60, and E. McSweeney, *The Doctrine of Humanitarian Intervention: A Double Standard?*, “Cork Online Law Review” 2003.

³⁶ *The Responsibility to Protect*, op. cit., p. 37.

these parameters is problematic and the moral legitimacy of this approach is questionable (what about the destruction of a single, but very important, monument?).

Finally, humanitarian interventions are designed to stop a massive violation of human rights. As a result, the fair treatment of the civilian population would be the priority issue, even with respect to an intervention originally aimed at protecting cultural heritage from acts of intentional destruction. A situation whereby the destruction of cultural heritage is terminated, but individuals are still persecuted, would be illogical and indefensible.

Opening a Pandora's Box: the Complexity Involved in Moving from Theory to Practice

Although from a theoretical perspective a humanitarian intervention aimed at stopping the intentional destruction of cultural heritage seems to be a reasonable (last resort) plan of action, its practical implementation raises some serious challenges, which are briefly examined herein.

From a legal and political perspective, several problems are associated with the lack of precise criteria for assessing compliance with the principle of proportionality. First, a State could exploit this ambiguous condition in order to achieve purely national interests. For instance, let's consider the toppling of the Lenin's statue in Kharkiv (Ukraine) in 2014. What if, after such an incident, the Russian Federation had decided to organize a humanitarian intervention officially aimed at preserving the Russian cultural heritage in Ukraine? Could such an intervention be viewed as a legitimate action? Although most persons would presumably deny such a possibility, this hypothetical case shows that the risk of opportunistic interventions is quite realistic.

Second, the absence of precise parameters guiding humanitarian interventions inevitably leads to a concrete risk of inconsistency and double standards, i.e. under similar circumstances a humanitarian intervention might be organized in country A, but not in country B, primarily owing to practical and political reasons. In relation to the humanitarian intervention in Libya, for instance, Labonte argues that this intervention highlights the fact "that the skeptics who claim aspirational norms only influence policy when vital national interest operates, may have a point".³⁷

Mendacious invocations and the risk of inconsistency are critical conditions because they may spread scepticism about the legitimacy and consistency of humanitarian interventions, thus inhibiting their use in response to real humanitarian catastrophes. Paradoxically, the same condition of flexibility could also lead to a never-ending procrastination of the final decision. The destruction of the Buddhas of Bamiyan in 2001 showed both the impotence of the international commu-

³⁷ M. Labonte, *Human Rights and Humanitarian Norms, Strategic Framing and Intervention. Lessons for the responsibility to protect*, Routledge, London - New York 2013, p. 157.

nity as well as its slowness before coming to a shared decision. Moreover, in the framework of the UN Security Council, the veto power can be used potentially to block any humanitarian initiative.³⁸ Therefore, the risk is that the laborious and time-consuming process required to gain a widespread international consensus will inexorably lead to a too-late intervention.

From a moral perspective the dilemma is whether the preservation of cultural heritage is worth the sacrifice of people. Resolution of this dilemma is very difficult because various arguments and emotional considerations can be raised in order to support the divergent positions. On one hand, the international community is seriously and legitimately concerned about the intentional destruction of cultural heritage occurring in different parts of the world. The common belief is that cultural heritage – as the highest representation of human history as well as a fundamental source of identity for local communities – deserves maximum international protection. On the other hand, a humanitarian intervention inevitably puts at risk the lives of those who are directly involved in the operation, and therefore States may be justifiably unwilling to risk their troops in order to stop the intentional destruction of cultural heritage in Iraq, Syria or in any other country.³⁹ Hence, while the preservation of cultural heritage is morally desirable, its feasibility is rather problematic.

From a practical perspective, a serious issue concerns how to determine whether a humanitarian intervention would be more beneficial or more harmful. Assessing *a priori* the effects of a humanitarian intervention is a challenging operation, for the obvious reason that certain consequences are unpredictable. As noted by Gibbs, “Direct military action – however well intended – may intensify rather than reduce ethnic tensions, and it may serve to heighten violence, including possibly genocidal violence.”⁴⁰ As a result, cultural heritage (as well as local populations) could actually be even more threatened during a humanitarian intervention than before. However, the blasting of the Buddhas of Bamiyan and other similar cases have also illustrated the difficulties involved in dealing with certain fundamentalist groups through diplomacy. It may be concluded that a cautious approach in the pre-assessment and preparation of such an intervention is strictly required in order to reduce as far as possible the risk of unintended and dire consequences.

A further complex issue is the decision concerning which kind of cultural sites and properties need to be protected: should all cultural sites potentially at risk be secured, or only a selected group like, for example, those included in the UNESCO

³⁸ A. Blätter and P.D. Williams have proposed the introduction of some limits to the veto power in those cases concerning the responsibility to protect, but the practical implementation of this solution seems unlikely. See A. Blätter, P.D. Williams, *The Responsibility Not To Veto: A Way Forward*, Citizens for Global Solutions, Washington, DC 2010.

³⁹ See M. Walzer, *op. cit.*, pp. 101-102.

⁴⁰ D.N. Gibbs, *First Do No Harm. Humanitarian Intervention and the Destruction of Yugoslavia*, Vanderbilt University Press, Nashville 2009, p. 8.

List of World Heritage in Danger? Both these possible conditions raise ponderous problems. In the first case the number of cultural sites and properties could be so huge that it would be practically unmanageable; while in the latter case the risk would be the choice of a discriminatory process of selection of the sites that deserve protection, thus violating the very moral principles underpinning the humanitarian mission itself.

Another controversial aspect is how to effectively protect cultural heritage once a humanitarian intervention has been enforced. Getting control and defending the sites at risk from intentional attacks would hardly be enough. Preventive, curative and rehabilitative measures are required for an efficient and effective intervention. Hence, there are several precautionary procedures that must be planned before the intervention (e.g. the formation and long-term maintenance of an adequate number of skilled “monuments men” who could be deployed in this kind of mission), enforced during the operation (for instance, the creation of a constructive relationship between the local heritage community and the intervening military troops), and granted in the post-intervention (such as, for example, facilitating access to required materials, expertise and technology).⁴¹

All these conditions make a humanitarian intervention aimed at stopping the intentional destruction of cultural heritage a risky and costly process that, without a careful *a priori* assessment of the consequences of the operation and a scrupulous arrangement of the mission, may miserably fail or even exacerbate the situation.

Conclusions

Since the destruction of the Buddhas of Bamiyan in 2001, the international community has been debating what can be done in order to avoid the repetition of similar catastrophes. Fourteen years later, the question still remains unresolved, as testified to by the widespread destruction of cultural sites in Iraq.

From a purely legal perspective, the international legislation on the protection of cultural heritage is nowadays quite comprehensive and well developed, but its efficacy is imperfect. One of the main problems is that fundamentalist groups, like Al Qaeda and ISIS, often operate in weak or failed States which, due to the lack of order and governmental control over the territory, make the enforcement of legal provisions and the enforcement of applicable sanctions unfeasible.⁴² To make matters more complicated, as demonstrated by the destructions which took place in Afghanistan, Mali, Syria and Iraq, the power of diplomacy in these vulnerable frameworks is quite limited.

⁴¹ For more on this topic see, for example, P.G. Stone, *A four-tier approach to the protection of cultural property in the event of armed conflict*, “Antiquity” 2013, Vol. 87, pp. 166-177.

⁴² See S. Van der Auwera, *Contemporary Conflict, Nationalism, and the Destruction of Cultural Property During Armed Conflict: A Theoretical Framework*, “Journal of Conflict Archaeology” 2012, Vol. 7, p. 60.

Although raising legal and moral issues difficult of interpretation and resolution, the organization of a humanitarian intervention aimed to stop the intentional destruction of cultural heritage is, at least theoretically, an option that should not be discarded. As explained above, this intervention would be legitimate only in cases of grave discrimination, where prevention and mitigation failed. In such a context a humanitarian intervention could provide a prompt and resolute response to an ongoing threat. Nevertheless, the affirmation of such a practice could also involve a wide range of unconvincing and exacerbating side effects. On one hand, the main risk would be that this new condition might be exploited as a pretext for justifying illegitimate interferences into the internal affairs of other countries; while on the other hand the efficacy of such a solution would be strictly related to the willingness of the international community to effectively organize and enforce a humanitarian intervention whenever and wherever required, a willingness which may well be considered doubtful.

Therefore, rethinking humanitarian intervention as a morally justifiable, normatively legitimate and practically valuable solution for stopping and preventing the intentional destruction of cultural heritage is, at one and the same time, both a plausible solution as well as a potential hazard. A core problem is that a zero-sum game perspective still dominates the international framework. As a result, a full legitimization of humanitarian interventions directed at stopping the intentional destruction of cultural heritage can be viewed as entailing more risks than benefits, unless preceded by a more comprehensive reform of the core pillars (*in primis* the composition and system of voting of the United Nations Security Council) sustaining the current international legal framework.

In the meantime, the international community needs to decide whether it has, beyond a general feeling of discontent, the political will to take concrete steps for the preservation of cultural heritage in the world. If so, than a humanitarian intervention aimed at stopping the systemic and intentional destructions of cultural heritage could be viewed (under the specific conditions elaborated in section three) as an exceptional act of *Lawfulness Justification*: i.e. the intervention might be procedurally illegal, but morally and normatively legitimate, serving the core values of the legal system and the interests of the international community as a whole.⁴³ This condition is certainly far from ideal, but it may overcome the current paralysis, thus offering the possibility of formulating a concrete, prompt and resolute response in those extreme situations when doing nothing will only lead to worse consequences.

⁴³ The terminology *Lawfulness Justification* has been borrowed by A. Buchanan, *Reforming the Law of Humanitarian Intervention*, in: J.L. Holzgrefe, R.O. Keohane (eds.), op. cit., pp. 132-133.

References

- 2005 World Summit Outcome, 15 September 2005, UN Doc. A/60/L. 1.
- A call to save Iraq's cultural heritage*, a call by Irina Bokova, UNESCO's Director-General, UNESCO Press, 2014, http://www.unesco.org/new/en/communication-and-information/resources/news-and-in-focus-articles/all-news/news/a_call_to_save_iraqs_cultural_heritage/ [accessed: 30.11.2015].
- Badescu C.G., *Humanitarian Intervention and the Responsibility to Protect. Security and human rights*, Routledge, London – New York 2011.
- Blätter A., Williams P.D., *The Responsibility Not To Veto: A Way Forward*, Citizens for Global Solutions, Washington, DC 2010.
- Buchanan A., *Reforming the Law of Humanitarian Intervention*, in: J.L. Holzgrefe, R.O. Keohane (eds.), *Humanitarian Intervention. Ethical, Legal and Political Dilemmas*, Cambridge University Press, Cambridge 2003.
- Byers M., Chesterman S., *Changing the rules about the rules? Unilateral humanitarian intervention and the future of international law*, in: J.L. Holzgrefe, R.O. Keohane (eds.), *Humanitarian Intervention. Ethical, Legal and Political Dilemmas*, Cambridge University Press, Cambridge 2003.
- Charter of the United Nations, 26 June 1945, 1 UNTS XVI, amended in 1963 (557 UNTS 143), in 1965 (638 UNTS 308), and in 1971 (892 UNTS 119).
- Chomsky N., *Humanitarian Imperialism: The New Doctrine of Imperial Right*, "Monthly Review" 2008, Vol. 60.
- Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240.
- Cunliffe P., *Sovereignty and the politics of responsibility*, in: C.J. Bickerton, P. Cunliffe, A. Gourevitch (eds.), *Politics without Sovereignty. A critique of contemporary international relations*, UCL Press, London 2007.
- Evans G., *The Responsibility to Protect. Ending Mass Atrocities Crimes Once for All*, Brookings Institution Press, Washington 2008.
- Farer T.J., *Humanitarian Intervention before and after 9/11: Legality and Legitimacy*, in: J.L. Holzgrefe, R.O. Keohane (eds.), *Humanitarian Intervention. Ethical, Legal and Political Dilemmas*, Cambridge University Press, Cambridge 2003.
- Francioni F., *The Humanitarian Dimension of International Cultural Heritage Law: An Introduction*, "European Journal of International Law" 2011, Vol. 22.
- Gibbs D.N., *First Do No Harm. Humanitarian Intervention and the Destruction of Yugoslavia*, Vanderbilt University Press, Nashville 2009.
- Hannum H., *The Status of the Universal Declaration of Human Rights in National and International Law*, "The Georgia Journal of International and Comparative Law" 1995/1996, Vol. 25.
- Henkin L., *How Nations Behave: Law and Foreign Policy*, 2nd edn., Columbia University Press, New York 1979.
- Holzgrefe J.L., *The Humanitarian Intervention Debate*, in: J.L. Holzgrefe, R.O. Keohane (eds.), *Humanitarian Intervention. Ethical, Legal and Political Dilemmas*, Cambridge University Press, Cambridge 2003.
- Implementing the responsibility to protect*, report of the Secretary-General, 12 January 2009, UN Doc. A/63/677.

RESEARCH ARTICLES

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- In larger freedom: towards development, security and human rights for all*, report of the Secretary-General, 21 March 2005, UN Doc. A/59/2005.
- International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.
- International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.
- Labonte M., *Human Rights and Humanitarian Norms, Strategic Framing and Intervention. Lessons for the responsibility to protect*, Routledge, London – New York 2013.
- Lauren P.G., *The Evolution of International Human Rights*, 3rd edn., Pennsylvania University Press, Philadelphia 2011.
- McSweeney E., *The Doctrine of Humanitarian Intervention: A Double Standard?*, “Cork Online Law Review” 2003.
- Milligan A., *Targeting Cultural Property: The Role of International Law*, “Journal of Public and International Affairs” 2008, Vol. 19.
- Most destroyed artifacts were copies*, the interview to Atheel Njaifi (Mosul Governor), <http://rudaw.net/english/Kurdistan/28022015> [accessed: 6.11.2015].
- Orford A., *International Authority and the Responsibility to Protect*, Cambridge University Press, Cambridge 2011.
- Reisman W.M., *Sovereignty and Human Rights in Contemporary International Law*, “American Journal of International Law” 1990, Vol. 84.
- Shimko K.L., *International Relations: perspectives & controversies*, 3rd edn., Cengage Learning, Wadsworth 2010.
- Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993, UN Doc. S/RES/827 (1992).
- Stone P.G., *A four-tier approach to the protection of cultural property in the event of armed conflict*, “Antiquity” 2013, Vol. 87.
- The Responsibility to Protect*, report of the International Commission on Intervention and State Sovereignty, ICISS, December 2001.
- Treaty between the United States and other Powers Providing for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), 27 August 1928, 94 LNTS 57.
- Türkmen F., *From Libya to Syria: The Rise and Fall of Humanitarian Intervention*, “German Review on the United Nations” 2015, Vol. 63.
- UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, 17 October 2003, UNESCO Doc. 32 C/Res. 33 (2003).
- Universal Declaration of Human Rights, 10 December 1948, UNGA Res 217 A(III).
- Van der Auwera S., *Contemporary Conflict, Nationalism, and the Destruction of Cultural Property During Armed Conflict: A Theoretical Framework*, “Journal of Conflict Archaeology” 2012, Vol. 7.
- Vienna Convention on the Law of Treaties, 23 March 1969, 1155 UNTS 331.
- Walzer M., *Just and Unjust Wars. A Moral Argument with Historical Illustrations*, 4th edn., Basic Books, New York 2006.