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Stones of the Past: Intentional Peacetime Heritage Destruction and International Law

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Summary

The protection of cultural heritage first appeared in international conventions at the beginning of the 20th century. At the time, protection was only awarded in the event of an armed conflict. Traditionally, questions of heritage and its eventual destruction belonged within the national jurisdiction, but the emerge of internationalist ideas of a ‘common heritage of mankind’ changed the perception. This consequently gave rise to a conflict between the principle of sovereignty and the idea that all nations and peoples enjoy rights concerning some cultural heritage. The concept of ‘common heritage of mankind’ is closely tied to another, obligations of *erga omnes* character. Such obligations represent values considered inherent to the international community as a whole.

The purpose of this text is to investigate the current international norm concerning intentional damaging intervention by host states in cultural heritage of outstanding universal value on their territory. As no reference is made directly to such intentional destruction in relevant conventions, this text will investigate its substance under relevant peacetime conventions or under customary international law. By the help of four cases, all cultural heritage threatened in peacetime by the government of their host states, and the consequent reactions from other states and relevant international actors the aim is to analyse the legality of the destruction under international law. The method of analysis of legality by observing state reactions is based on the theory that states when evaluating the lawfulness of their actions observe state practice in relation to relevant incidents and that this gives rise to a body of norms. The analysis of these cases shows that intentional damaging intervention is a violation of a State Party’s responsibilities under the World Heritage Convention today and can be ground for legal remedies on the basis of *erga omnes*. It does not however, indicate that it would have given rise to a customary obligation to refrain from heritage destruction even if consensus is emerging.

Sammanfattning

Skydd för kulturarv under internationell rätt introducerades i internationella konventioner i början på 1900-talet. Ursprungligen behandlades ämnet uteslutande i förhållande till regler gällande väpnad konflikt. Frågor om kulturarv har traditionellt sett tillhört den nationella jurisdiktionen men framväxandet av idén om 'världsarv', kulturarv som på grund sitt värde tillhör alla folk och nationer, ändrade inställningen väsentligen. Detta gav upphov till en konflikt med suveränitetsprincipen rörande frågor om världsarv som är aktuell än idag. Världsarv är också starkt knuten till idén att vissa intressen och värden har sådan universell karaktär att de förpliktigar alla nationer lika, så kallade *erga omnes* förpliktelser.

Syftet med detta arbete är att utreda gällande internationell rätt rörande uppsåtlig skadande påverkan på kulturarv av utomstående universellt värde av stater på deras nationella territorium. Internationella konventioner saknar direkta referenser till detta förhållande och målet är således att identifiera normens innehåll utifrån internationella konventioner och internationell sedvanerätt. Med hjälp av fyra fallstudier som alla innefattar kulturarv som hotats i fredstid och de efterföljande reaktionerna från andra stater är målet att analysera lagligheten under internationell rätt. Metoden grundar sig i idén att stater observerar andra staters reaktioner på relevanta incidenter för att utvärdera lagligheten av ett förfarande och att detta ger upphov till en normer. Analysen av fallen visar att uppsåtlig skadlig påverkan utgör ett brott mot art. 4 Världsarvskonventionen och att detta kan adresseras som en *erga omnes* förpliktelse. Det finns dock inget som styrker att det i dagsläget skulle ha givit upphov till en internationell sedvaneregul även om indikationer till konsensus kan observeras i vissa fall.

Preface

In a suburb south of Stockholm, Botkyrka, a conflict involving a 12th century church and 100 million tons of gravel worries the local population. Botkyrka church, built in 1129 AD in honor of Saint Botvid, is classified as Swedish national patrimony. The church is part of a larger cultural landscape including Iron Age grave fields and archeological rests from the Vikings. Saint Botvid himself was born into Norse faith but was baptized on a journey to England. As such, the cultural landscape of Botkyrka symbolizes the end of Iron Age and beginning of the Middle ages around Stockholm. Today, the church is neighbored by large piles of gravel destined to become the fundament of a new industrial and residential area. This angers some of the locals and has raised some concern within the Swedish Länsstyrelsen. Yet, the communal authorities continue to exploit the culturally sensitive area.¹

The conflict in Botkyrka is not unique. Struggles between the values of preserving cultural sites and the need for development to match the changing society takes place all over the globe, involving heritage of all categories and inherent values. This text is an effort to clarify the premises of this struggle in the context of international law.

I would like to thank my supervisor Göran Melander for allowing me to share in your insight and for encouraging me to trust my instincts. To Yaron Gottlieb, for inspiring me to write this text. To my parents, for your unyielding love. To Victor – pour ta patience éternelle, merci.

Stockholm, 8th January 2020

¹ Sveriges Radio, Studio Ett P1, Reportage by Katarina Gunnarsson, 27 December 2019, accessed at <https://sverigesradio.se/sida/avsnitt/1434129?programid=1637>. (2019-12-27)

Abbreviations

EFTA	European Free Trade Association
ICCROM	International Centre for the Study of the Preservation and of the Restauration of Cultural Property
ICJ	International Court of Justice
ICOMOS	International Council on Monuments and Sites
ICTY	International Criminal Tribunal for the former Yugoslavia
NGO	Non-Governmental Organization
UN	United Nations
UNCLOS	United Nations Convention for the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organization
WTO	World Trade Organization
GATT	General Agreement on Tariffs and Trade

1. Introduction

1.1 Objective and Research Questions

The objective of this text is to investigate the conflict between the principle of state sovereignty and the idea of a 'common heritage of mankind'. More precisely, this text aims to identify if intentional peacetime destruction of cultural heritage of 'outstanding universal value'² by a state on their sovereign territory is lawful or unlawful under international law and customary international law. Should the study indicate that such a destruction would be unlawful, could it entail state responsibility under international law? The research has been conducted considering following research questions:

- Is there a norm³ which corresponds to peacetime destruction of cultural heritage of 'outstanding universal value' by a host state on their territory in codified international law or customary international law?
- Should the research indicate the existence of a norm, what is the content of said norm?
- If the norm should indicate that above mentioned destruction would be unlawful, what would be the possible legal remedies for a breach?

I will be studying four separate incidents of relevant threats to cultural heritage posed by the host state. These incidents adhere to two sets of underlying motives, threats posed to cultural heritage by economic development and threats deriving from the inherent symbolism of the heritage.

² See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 1 for the definition of 'outstanding universal value'.

³ 'Norm' will for the purpose of this text be understood as a binding legal rule, codified or customary, under international law.

1.2 Method

This text aims to discern international norms in cases of peacetime heritage destruction within a sovereign state. For the introductory part concerning the historical development and current state of cultural property law, I have used a legal doctrinal method. The legal dogmatic method is primarily used to discern the substance of legal rules by analysis of relevant sources of law.⁴ As the aim of the first part of this text⁵ is to describe the evolution and present legal regime on the field of cultural heritage, the use of a legal dogmatic method offer relevant tools. In the absence of specific rules within international conventions and treaties as to when heritage destruction is unlawful, I will analyse reactions from international actors to four incidents of heritage destruction. This method is constructed on the notion that international actors evaluate the lawfulness of actions based on reactions from other states and international actors⁶ to incidents.⁷ This closely relates to the formation of customary international obligations. The use of comparative studies can also be found within the legal doctrinal method.⁸ The purpose of the comparative element is to look for consistencies and inconsistencies in the conduct of states and relevant international organisations in the different cases. Based on the findings, the aim is to make conclusions on the existence of norms governing state responsibility and lawfulness of heritage destruction.

I have chosen to analyse two cases where the threat against cultural heritage stemmed mainly from infrastructural and economic development and two cases where the threat originated from the symbolisms of the heritage itself. The reason for this is to highlight types of threats relevant to society today and where the need for normative clarity seems the most urgent. The cases will be presented chronologically to allow for the reader to observe changes over time. When choosing which cases to include, the main consideration

⁴ See Hjertstedt, *Beskrivningar av rättsdogmatisk metod* p. 16.

⁵ Chapter 2 and 3.

⁶ 'International actors' for this purpose of this text should be understood as international organisations with authority on the field of cultural heritage.

⁷ See Reisman, *International Incidents* p. 3.

⁸ See Hjertstedt, *Beskrivningar av rättsdogmatisk metod* p. 170.

was that the profile of the incident correlated with the purpose of this text. The incident had to include a peacetime threat to cultural heritage of recognised transnational importance where the threat originated from the legal or *de facto* government of the territorial state. Additionally, to be able to analyse the claims of other international actors or states, the incident needed to have attracted certain attention from the world community. It is of course a default as it only allows for analysis of incidents of ‘exceptional’ proportions. Lack of international reaction should not lead automatically to a conclusion of the inexistence of a norm. Many factors govern how and when states act, which is why there is a value in investigating under what circumstances states *do* act. It is worth noting that although these cases share the requisites necessary for the purpose of this text, they are not comparable in all ways. Because of the recent rapid advances on the subject of cultural property and the ever turning wheel of time, it is necessary to observe these incidents within their historical context. A factual summary will therefore begin each case.

Because of the dependence on written statements or media material to analyse the reactions of states and organisations, the cases chosen for this text are neither representative of all types of peacetime threats nor all possible reactions. Nor is this text aimed to establish absolute certainty, but rather to offer an insight into the matter. As with many areas of international law and diplomatic relations, it is the case of working with what is publically provided. In some cases, the documentation of state reaction was rich and consistent. In others, the only opinions expressed by states were in the context of UNESCO and the World Heritage Committee. To balance the documentation, it has not been possible to include *all* state reactions but a selection has been made to reflect the general opinion and include an element of representativity to offer the widest understanding possible.

1.3 Material

1.3.1 Sources of law

Finding trusted and relevant material to answer the question on the existence of a norm where no apparent body of rule can be found is challenging. The primary sources of law are the international peacetime conventions addressing cultural property. Worth noting for its importance is here the World Heritage Convention. I have used extensively a published commentary on the provisions of the World Heritage Convention which is recognised to have a high credibility. In an area mostly consistent of ‘informal’ soft law, UNESCO’s influence on the interpretation of the sources of law should not be understated. Although UNESCO does not have the ability to create rules, states adhere in general to their recommendation and as such they command authority. The character of the World Heritage Convention as a ‘good faith’ instrument which provides many tools for international cooperation but lacks provisions governing when states disagree has also led to an absence of legal precedents. Instead, the Operative Guidelines connected to the Convention serves to clarify its implementation but as the Operational Guidelines is an internal administrative document connected to UNESCO it lacks legal certainty. This results in legal uncertainty also for the annexed state when evaluating their obligations and rights under the Convention.

Other types of ‘informal’ sources of law are soft law instruments and uniform customary state practice. Although customs can be binding, the element of uncertainty when evaluating the substance of such instruments are high. It is therefore important to attempt to separate rhetorical expressions or political statements from statements of law.

1.3.2 Published Material

To investigate the implementation and interpretation of the above mentioned sources of law I have used articles discussing the subject from various scientific journals, mainly journals of international law. The chosen articles vary in the outcome of their conclusions, allowing for a broader understanding when addressing a complex subject. The main default of the scientific articles is the lack of scholars addressing the subject of state responsibility for peacetime heritage destruction directly. The subject, when investigated, is usually only analysed from a single incident making the arguments weaker when used on larger scale. What is a reasonable conclusion in relation to one case, might not fit another. Some issues are left without comment in literature, such as the notion of delisting from the World Heritage List.⁹ My reliance on sources presented in English or French, which are generally written by French or English scholars, can also create a European bias which may inhibit a full understanding of every aspect of the matter. It can also create a sense of a ‘right’ connected to values traditionally important in European society framework, such as internationalism and globalism.

For the factual presentation of the case studies, I have to the extent possible relied on published material. This to aim for a higher quality and a correct presentation of the facts. The facts have an important role for the purpose of this text, as they need to be accurate to discern the reasons for action within the state where the cultural heritage has been threatened as well as correctly analysing the reactions of other states and international actors. I have consciously provided a rich context to allow for the reader to make her or his own conclusion upon the material.

⁹ See 3.1.5.

1.4 Delimitations

To understand how factors cooperate and create the existing norms, it was important to look at a limited group of incidents which although in no way were identical to each other, had some important similarities. I have therefore chosen to look at incidents of heritage destruction in ‘peacetime’. Peacetime should for the purpose of this text be understood as the absence of a context of international or non-international conflict and therefore outside the scope of application of the conventions regulating cultural property protection in the event of an armed conflict.¹⁰ In other words, the heritage cannot be a casualty of war. The second adopted criteria for inclusion was that the threat to the property must be stemming from and exercised by the territorial state. A state, for the purpose of this text is defined by subjectivity under international law¹¹ and not international recognised statehood.

The heritage threatened should be of transnational importance, for simplicity and clarity I have chosen to adopt the same definition as the World Heritage Convention which defines properties of ‘outstanding universal value’. World Heritage of ‘outstanding universal value’ differs significantly from cultural properties in the form of national patrimony. National patrimony means cultural artefacts of importance to a nation, but usually of limited interest for other states. Although questions relating to heritage destruction as a human rights issue will be briefly mentioned, this text will not further develop on the matter. For the purpose of this text the terms ‘cultural heritage’, ‘cultural property’, ‘monuments’, ‘relics’ and ‘sites’ will be used interchangeably. It is important to note that these terms in other context may have various meanings. ‘Heritage’ will also, in this text, only intend tangible, unmovable property.

¹⁰ See Convention (IV) respecting the Laws and Customs of War on Land, The Hague 18 October 1907; Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague 14 May 1954, SÖ 1985:7.

¹¹ See chapter 4.

1.5 State of research

The state of research covering state responsibility for heritage destruction on their territories consists of many different interpretations of the same rules and facts. The issue mainly consists of interpreting the will of states through practice, therefore it exists as many opinions as there are scholars. Worth noting are the Italian scholars Francesco Francioni and Federico Lenzerini, who jointly addressed the issue after the destruction of the Bamiyan statues.¹² They established that the incident and the following reactions have given rise to a customary rule which prohibits intentional destruction of cultural heritage, on the basis of human rights norms as well as an interpretation of practice from previous international tribunals, such as ICTY. Francioni and Lenzerini suggest that the value of state sovereignty in this matter is subsequent to the value of ‘common heritage of mankind’. Francioni has also written on the subject of state sovereignty and its inherent conflict with shared global rights to culture on other occasions as well as contributed largely to the commentary on the provisions of the World Heritage Convention, among others.

Another influential scholar is Roger O’Keefe. O’Keefe, sometimes together with UNESCO employed colleague Lyndell Prott, has written extensively on the subject of cultural heritage in general. O’Keefe addresses the specific question on state responsibility and the creation of customary international norms by also evaluating the incident in Bamiyan. He does however, arrive at a different conclusion and finds that all statements issued lacked the normative clarity needed for the establishment of *opinio juris* needed to give rise to a customary rule. He argues that the matter is better addressed through the rules of the binding conventions on the matter.

¹² See generally Francioni and Lenzerini, Destruction of the Bamiyan Buddhas.

1.6 Disposition

This text will begin with a brief overview of the evolution of protection for cultural property under international law and a description of the protection awarded under the World Heritage Convention. The 2003 UNESCO Declaration concerning intentional destruction of cultural heritage will also be presented. I will also account for the basic functions of UNESCO and some relevant criticism against the organisation. The following chapter will address the formation of customary international norms, international methods of enforcement and *erga omnes* obligations.

Using the presented information, this text will analyse the status of a norm using four case studies. The case studies will be presented with historical context, a description of the threat against cultural heritage, the consequent state reactions and an analysis of the claims. The text will be concluded with conclusions where all cases will be analysed comparatively and against the background of the information provided in the introductory chapters.

2. The Evolution of Cultural Property Protection in International Law

2.1 The first rules, the Lieber Code and consequent codification

To trace the origins of the international legal protection for cultural property we have to start with the laws of war. Although it had been in the opinion of scholars that cultural property should be awarded certain protection, it was not until 1863 that this notion was introduced in a body of law. Abraham Lincoln, president of the United States of America at the time issued the *Instructions for government of Armies of the United States in the Field*, a code of conduct for fighting American troops. It is better known as the Lieber Code, after the name of its author, Francis Lieber [hereinafter the Lieber Code].¹³ The Lieber Code was the first binding legal instrument that separated the type of property we today would call cultural property and awarded it enforced protection in the event of an armed conflict. Art. 34 of the Lieber Code states that some property attributed to churches, universities and museums shall be treated like private property and not considered public property and therefore enjoy more protection.¹⁴ Art. 35 proclaims protection for "classical works of art, libraries, scientific collections, or precious instruments [...] against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded."¹⁵

It is important to understand that the Lieber Code was only applicable to the fighting forces of the American Civil War, but has nonetheless had a great

¹³ Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Washington 24 April 1863.

¹⁴ Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Washington 24 April 1863 art. 34.

¹⁵ Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Washington 24 April 1863 art. 35.

impact on the development of the laws of war even on an international level.¹⁶ This concept of protection was later developed by ‘The Conference of Brussels’, a meeting in 1874 between representatives from fifteen European states in an effort to codify the laws of war.¹⁷ A declaration was adopted by the meeting, but none of the states later ratified it.¹⁸ The Lieber Code and subsequent attempts to codify existing customary norms served as an important inspiration for the international convention on the laws of war, Convention (IV) respecting the Laws and Customs of War on Land, [hereinafter The 1907 Hague Convention]¹⁹

2.2 The Hague Convention of 1907

The Hague Convention proved inefficient in preventing the outbreak of conflict as made clear by the following of, not only one but, two world wars but served the purpose of clarifying accepted methods of war.²⁰ As the Lieber Code, the 1907 Hague Convention does not use the term cultural property or heritage but aims to safeguard *useful* property in the event of a conflict. Several articles regulate issues such as pillaging, and attacks on abandoned property which could include cultural targets but two articles address the issue more specifically. Art. 27 and 56 of the 1907 Hague Convention, much like the Lieber Code awards some *useful* property a stronger protection. Art. 27 gives:

“In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals [...]”²¹

Much like the reasoning in the Lieber Code cultural property in the 1907 Hague Convention is to be treated like private property and therefore enjoy a more extensive protection compared to public property.²² The 1907 Hague Convention, although linguistically very similar to the provisions in

¹⁶ See Kornegay, *Destroying the Shrines of Unbelievers* p. 160.

¹⁷ See Kornegay, *Destroying the Shrines of Unbelievers* p. 160.

¹⁸ See Kornegay, *Destroying the Shrines of Unbelievers* p. 160.

¹⁹ See Kornegay, *Destroying the Shrines of Unbelievers* p. 160-161

²⁰ See Kornegay, *Destroying the Shrines of Unbelievers* p. 161

²¹ See Convention (IV) respecting the Laws and Customs of War on Land, The Hague 18 October 1907, art. 27.

²² See Convention (IV) respecting the Laws and Customs of War on Land, The Hague 18 October 1907, art. 56.

the previous Oxford Manual and Leiber Code, had a direct legal binding effect on the 46 engaged states who signed the international conventions to which the Hague regulations were annexed.²³ On this ground, the International Military Tribunal in Nuremberg 1946 established its jurisdiction and continued to find that The 1907 Hague Convention should be considered a part of customary international law and that no ratification by a State Party was needed for a state to be bound by its provisions.²⁴

2.3 The Hague Convention of 1954

During World War II, Nazi forces carried out deliberate attacks and acts of plundering of cultural property on a never before observed scale. A military unit in the Nazi armed forces *Einsatzstab Rosenberg*, with specific orders to destroy cultural property non-conform with the Nazi ideology, systematically targeted Jews in the effort to erase not only the Jewish people but also their cultural identity.²⁵

In the wake of the war, it was clear that the existing provisions did not adequately address the issue which gave rise to the initiative that would become the flagship of international conventions for the protection of cultural property in armed conflict, Convention for the Protection of Cultural Property in the Event of Armed Conflict [hereinafter the 1954 Hague Convention]. The 1954 Hague Convention was the first international convention which exclusively addressed the protection of cultural property.²⁶ The meeting in 1954 was not called by the contracting parties, as had been the previous cases, but was initiated by request of the newly formed UNESCO.²⁷ However, out of the signing parties, very few went on to ratify the convention. The contracting parties' signatures have however been observed as an acknowledgement of their acceptance of the

²³ See Kornegay, *Destroying the Shrines of Unbelievers* p. 162.

²⁴ See Judgment of 1 October 1946, *The Trial of German Major War Criminals*. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22nd August 1946 - 1st October 1946) p. 467.

²⁵ See Wangkeo, *Monumental Challenges* p. 195.

²⁶ See Kornegay, *Destroying the Shrines of Unbelievers* p. 163-164.

²⁷ See Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law* p. 353.

conventions provisions.²⁸

The new convention had a more internationalist tone, affirming the transnational importance of cultural heritage with the first use of the formulation “cultural heritage of all mankind”.²⁹ It can be found in the convention’s preamble:

“**Being convinced** that damage to cultural property belonging to any people whatsoever means damage to the *cultural heritage of all mankind* [authors emphasis], since each people makes its contribution to the culture of the world:

Considering that the preservation of the cultural heritage is of *great importance for all peoples of the world* [authors emphasis] and that it is important that this heritage should receive international protection.”³⁰

By legitimising a broader group of interested parties, the convention text strays from the traditional premise of the principle of sovereignty and suggests that other states enjoy rights concerning cultural property on foreign territory.³¹

The 1954 Hague Convention was also the first convention to use the term cultural property, and provide a definition of what should be considered as such.³² It abandoned the reasoning of cultural property as equivalent to private property first introduced in the Lieber Code for a more specific and yet extensive definition.³³ Art. 1 of the Hague Convention of 1954 defines cultural property in three different categories using a list including, *inter alia*, immovable property, libraries and museums.³⁴ It was the first time the drafter had chose to present a definition in form of a list which consequently led to criticism that the list was not comprehensive enough to serve as an adequate definition. It has even been argued that the list form is a weaker

²⁸ See Meyer, The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law p. 353.

²⁹ See Kornegay, Destroying the Shrines of Unbelievers p. 165.

³⁰ See Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague 14 May 1954, SÖ 1985:7 Preamble.

³¹ See Meyer, The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law p. 357.

³² See Meyer, The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law p. 355.

³³ See Kornegay, Destroying the Shrines of Unbelievers p. 164.

³⁴ Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague 14 May 1954, SÖ 1985:7 art. 1.

definition than the older, broader version from the 1907 Hague Convention.³⁵

The 1954 Hague Convention, like its predecessors, is a legal document generally only applicable in the event of an armed conflict. However, the wording of the document is interesting also in the study of protection of cultural property outside the scope of the convention. The Convention provides obligations for the contracting parties also in times of peace, expressed as the states obligation to 'respect' cultural property.³⁶ 'Respect', expressed in art. 4(1) of Hague 1954 is the obligation to protect cultural property on own and foreign territory and prohibits acts of deliberate hostility.³⁷

The greatest weakness of the convention was the lack of efficient enforcement methods. Only art. 28 concerns the enforcement of the convention but draws only a general obligation for the contracting parties to seek resolution to breaches within the framework of their ordinary jurisdiction.³⁸ Much like other areas of international law, the rules of enforcement in the protection of cultural property are insufficient.³⁹

³⁵ See Boylan, Review of the Convention for the Protection of Cultural Property in Event of Armed Conflict p. 47.

³⁶ See Kornegay, Destroying the Shrines of Unbelievers p. 165.

³⁷ See Kornegay, Destroying the Shrines of Unbelievers p. 165; Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague 14 May 1954, SÖ 1985:7 art. 4(1)

³⁸ See Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague 14 May 1954, SÖ 1985:7, art. 28.

³⁹ See Kornegay, Destroying the Shrines of Unbelievers p. 166.

3. UNESCO and the World Heritage Convention

UNESCO, United Nations Educational, Scientific and Cultural Organization, was formed in November 1945 at a meeting in London called by France and the United Kingdom. Representatives from 44 nations attended the meeting and the goal of the new organization was to prevent divisions which could cause yet another world war and promote cultural and social recognition between peoples.⁴⁰

3.1 The World Heritage Convention

In 1972, UNESCO presented the 1972 Convention concerning the Protection of the World Heritage and Natural Heritage [hereinafter the World Heritage Convention]. It is a peacetime convention and aims to identify and protect sites of ‘outstanding universal value’⁴¹. ‘Heritage’, understood as manifestations of accumulated human memory, knowledge and expressions, was hardly accepted as a legal term. The term ‘cultural property’ was preferred, mainly because the term heritage lacks legal precision.⁴² ‘Heritage’ has however, in spite of its weakness, gained ground exponentially. It effectively connects the history of humanity with its tangible and intangible expressions and separates them from the economic and private nature surrounding the term ‘property’.⁴³

3.1.1 The Preamble and ‘the common heritage of mankind’

Since the codification of the World Heritage Convention, the legal concepts governing the actions of states have undergone extensive changes. Rather than direct changes in codified text of treaties, states tend to interpret their obligations and rights in a different light with emphasis on common

⁴⁰ See Merryman, Cultural Property Internationalism p. 20.

⁴¹ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 1.

⁴² See Francioni, The 1972 World Heritage Convention: An Introduction, The 1972 World Heritage Convention: A Commentary s. 3.

⁴³ See Francioni, The 1972 World Heritage Convention: An Introduction, The 1972 World Heritage Convention: A Commentary p. 4.

interests of humanity. This made traditional ideas of state obligations and state sovereignty, although still valid, increasingly difficult in application.⁴⁴ Like the 1954 Hague Convention, the World Heritage Convention drew on the ‘common heritage of mankind’.⁴⁵ The concept can be found in other areas of international law and is especially developed in regimes governing environmental protection.⁴⁶ Where the earlier legal instruments defined cultural objects as belonging solely within the sphere of domestic jurisdiction, the World Heritage Convention places cultural heritage within a collective, universal interest. Following instruments, whether of binding or soft character, also consequently uses the term ‘heritage’ leading to an understanding that it has reached a level of acceptance within the international legal community.⁴⁷

The World Heritage Convention was also the first legal instrument to introduce a connection between cultural and natural heritage. Sites, considered worthy of enhanced and special protection because of their importance to humanity, whether natural or man made can under the convention be subject to an international conservation regime.⁴⁸

Evidence for the internationalized character of the World Heritage Convention can be found, *inter alia*, in the preamble. The first paragraph, speaking of the changing society’s effect on cultural heritage, says “the cultural heritage [...] are increasingly threatened with destruction not only by traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction”.⁴⁹ This formulation is considered to derive from two cases of extraordinary proportion which signified the increasing threats posed to cultural heritage by natural disasters and

⁴⁴ See Francioni, The 1972 World Heritage Convention: An Introduction, The 1972 World Heritage Convention: A Commentary p. 6.

⁴⁵ See Kornegay, Destroying the Shrines of Unbelievers p. 169.

⁴⁶ See Francioni, The 1972 World Heritage Convention: An Introduction, The 1972 World Heritage Convention: A Commentary p. 4.

⁴⁷ See Francioni, The 1972 World Heritage Convention: An Introduction, The 1972 World Heritage Convention: A Commentary p. 4.

⁴⁸ See Francioni, The 1972 World Heritage Convention: An Introduction, The 1972 World Heritage Convention: A Commentary p. 5; UNESCO, Operational Guidelines, WHC.19/01, 10 July 2019 art. 49.

⁴⁹ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, preamble.

economic development, the case of the Aswan high dam threatening to submerge many ancient Nubian sites to which we will return later and the great flood in Venice and Florence. From these incidents, it became clear to the international community that some challenges could not be addressed using the traditional basis of national jurisdiction.⁵⁰

The preamble further states that “deterioration and disappearance of any item of the cultural[...] heritage constitutes a harmful impoverishment of the heritage of all nations of the world”.⁵¹ By referring to the ‘heritage of all nations of the world’ the World Heritage Convention expresses that all humanity, no matter our nationality, share common roots in what is essentially *human*. All peoples contribute to the common cultural heritage of humanity, and all share equally the rights to enjoy the cultural diversity of the world.⁵²

3.1.2 Scope of application; Outstanding Universal Value

Like any legal instrument, the World Heritage Convention includes prerequisites to limit its scope of applicability. Art. 52 of its Operational Guidelines gives that just because a property is of local interest, like the example of national patrimony, it cannot be assumed to belong to the in the World Heritage Convention designated *World Heritage*.⁵³ The provisions of the World Heritage Convention are limited to properties considered to be of *Outstanding Universal Value*.⁵⁴ Art. 1 reads;

“For the purpose of this Convention, the following shall be considered as ‘cultural heritage’:

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of

⁵⁰ See Francioni, The Preamble, The 1972 World Heritage Convention: A Commentary commentary p. 13.

⁵¹ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, preamble.

⁵² See Francioni, The Preamble, The 1972 World Heritage Convention: A Commentary commentary p. 15.

⁵³ See UNESCO, Operational Guidelines, WHC.19/01, 10 July 2019, art. 52.

⁵⁴ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 1.

features, which are of outstanding universal value from the point of view of history, art or science;

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.”⁵⁵

Although no direct definition of the term is given in the text of the Convention, it is generally understood to be heritage which possesses a transnational and trans-generational appeal.⁵⁶ According to the Operational Guidelines, a property should be considered as of outstanding universal value if it has “cultural[...] significance which is so exceptional as to transcend national boundaries and to be of common interest for present and future generations of all humanity”.⁵⁷ The article also notes ten evaluation criteria of which at least one must be fulfilled for a site to be designated World Heritage.⁵⁸

3.1.3 The World Heritage Committee

The World Heritage Committee is the UNESCO-organ responsible for the collective interest of State Parties to the Convention. The Committee consists of representatives from State Parties and its main function is to manage the two World Heritage Lists and make evaluation of whether the by State Parties designated sites possess Outstanding Universal Value.⁵⁹ Should a site found to be suitable for designation as ‘World Heritage’, it will be introduced on the list maintained by the Committee called the World Heritage List.⁶⁰ As well as this, they function as regulators of international

⁵⁵ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 1.

⁵⁶ See Francioni, The Preamble, The 1972 World Heritage Convention: A Commentary commentary p. 19.

⁵⁷ See UNESCO, Operational Guidelines, WHC.19/01, 10 July 2019, art. 49.

⁵⁸ See UNESCO, Operational Guidelines, WHC.19/01, 10 July 2019, art. 49

⁵⁹ See Buzzini, Condorelli, Art. 11 List of World Heritage in Danger and Deletion of a Property from the World Heritage List, The 1972 World Heritage Convention: A Commentary p. 189.

⁶⁰ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 11(2).

assistance and to ensure the commitments made by the contracting parties to protect World Heritage sites are held.⁶¹

Art. 8 of the Convention, as well as establishing the grounds for the World Heritage Committee, also identifies three advisory bodies that are tasked to assist the World Heritage Committee with technical expertise.⁶² Two of them are relevant for cultural heritage and one for natural heritage. The two affiliated with questions on cultural heritage are; The Rome Centre, more known as ICCROM, International Centre for the Study of the Preservation and Restoration of Cultural Property and ICOMOS, International Council of Monuments and Sites.⁶³ ICCROM functions as a centre for research but also has the competence to organise public awareness campaigns as well as reviewing requests for international financial assistance.⁶⁴ ICOMOS is the advisory body which is responsible for evaluation of submitted applications to enlist sites on the World Heritage List and present their opinion on whether the site satisfies the criteria for outstanding universal value. They also conduct monitoring of existing sites and report on their ‘state of conservation’ to the World Heritage Committee. Normally, a representative from ICOMOS will be present at the Committees sessions to answer questions in an advisory function from delegates.⁶⁵

3.1.4 Art. 4, 5 and 6 State responsibility and Sovereignty

According to the World Heritage Convention, it is the responsibility of each State Party to identify sites within their national territory which they consider possess outstanding universal value.⁶⁶ After identifying these properties, the states prepare what is commonly known as ‘tentative lists’ which can be described as an inventory of which sites the state considers fulfils the requirements of art. 1 concerning outstanding universal value.⁶⁷

⁶¹ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art 8(1); 1972 World Heritage Convention: A Commentary. s 189

⁶² See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 8(3).

⁶³ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 8(3).

⁶⁴ See UNESCO, Operational Guidelines, WHC.19/01, 10 July 2019, art. 33.

⁶⁵ See UNESCO, Operational Guidelines, WHC.19/01, 10 July 2019, art. 35.

⁶⁶ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 3.

⁶⁷ See UNESCO, Operational Guidelines, WHC.19/01, 10 July 2019, art. 69.

To motivate the inscription, the State Party prepares an application dossier containing a ‘Statement of Outstanding Universal Value’ which is given to the World Heritage Committee.⁶⁸ After a property is placed on a tentative list and the application made, it is the Committee which decides whether to introduce the site on a list.⁶⁹ The tentative list renders certain legal effect, as the responsibility to identify sites of outstanding universal value falls within the State Parties right to exercise their sovereignty. Properties proposed on the tentative list is considered as being understood by the state to possess outstanding universal value and as such renders art. 4 and 5 which outlines State responsibilities applicable to the site.⁷⁰ When heritage of outstanding universal value has been identified on a State Party’s territory, even if it is not inscribed on the World Heritage List, the state has to conform with the responsibilities in art. 4 and 5 which are directly applicable.⁷¹ Art 4 reads;

“Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural [...] heritage referred to in Articles 1[...] situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.”⁷²

Art. 4 World Heritage Convention can be found in chapter II which is directly applicable to State Parties and outline their responsibility under the Convention. The prerequisites for applicability are, as mentioned, that a property on a State Party’s territory is of outstanding universal value.⁷³ Thus, the fact that such a property is not listed on a World Heritage List does not automatically rule out applicability of art. 4. State Parties are free to identify the sites they consider of outstanding universal value, making

⁶⁸ See Boer, Art. 3 Identification and Delineation of World Heritage Properties, The 1972 World Heritage Convention: A Commentary p. 89.

⁶⁹ See Boer, Art. 3 Identification and Delineation of World Heritage Properties, The 1972 World Heritage Convention: A Commentary p. 91.

⁷⁰ See Boer, Art. 3 Identification and Delineation of World Heritage Properties, The 1972 World Heritage Convention: A Commentary p. 91.

⁷¹ See Carducci, Art. 4-7 National and International Protection of the Cultural and Natural Heritage, The 1972 World Heritage Convention: A Commentary p. 107.

⁷² See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 4.

⁷³ See Carducci, Art. 4-7 National and International Protection of the Cultural and Natural Heritage, The 1972 World Heritage Convention: A Commentary p. 107.

identification both a duty of the territorial state and an example of the Convention's respect for state sovereignty. The duty to 'protect' is not closer defined by the Convention, despite its apparent importance. Neither is the duty of 'presentation'. 'Transmission to future generations' can be understood as the duty to secure that the values of the property are maintained as to be appreciated also by arriving generations. All in all, properties of outstanding universal value should be duly preserved and sheltered from damage and harmful alterations which could risk the value of the site.⁷⁴ The duty of transmission further emphasizes the idea of trans-generational responsibility, as the designated right holders in this clause are still unborn. The article also decides that these duties "belongs *primarily* [authors emphasis] to that [territorial] State"⁷⁵. This implies that although the Convention respects the traditional rules on state sovereignty, as expressed by art. 6 of the World Heritage Convention, and the fact that states as a rule would consider cultural properties on their territory to fall under their national jurisdiction some intervention by the international community is to be tolerated.⁷⁶ Art 6 reads;

"Whilst fully respecting the sovereignty of the States on whose territory the cultural [...] heritage mentioned in Articles 1[...] is situated, and without prejudice to property rights provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate."⁷⁷

Apart from the traditional statement of respect for state sovereignty, art. 6 evolves on the idea of world heritage belonging within the interest sphere of a much larger group of stakeholders than regular properties. By ratification of the Convention, State Parties must accept certain involvement from the international community concerning properties on their territory which is considered world heritage. The same actions by another state or

⁷⁴ See Carducci, Art. 4-7 National and International Protection of the Cultural and Natural Heritage, The 1972 World Heritage Convention: A Commentary p. 114.

⁷⁵ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 4.

⁷⁶ See Carducci, Art. 4-7 National and International Protection of the Cultural and Natural Heritage, The 1972 World Heritage Convention: A Commentary p. 119.

⁷⁷ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 6(1).

international organisation would possibly be considered a breach of the territorial state's right to non-intervention if the object was of mere regional interest, but is justified if the object of intervention is considered of outstanding universal value.⁷⁸

Art. 5 of the World Heritage Convention outlines the requirements placed on a State Party to fulfil the duties as described in art. 4. It includes, inter alia, provisions on basic domestic legal protection for World Heritage sites.⁷⁹

3.1.5 The World Heritage List in Danger

According to art. 11 of the World Heritage Convention the World Heritage Committee is responsible for establishing a list consistent of World Heritage in Danger. These sites inscribed should be “threatened by serious and specific dangers[...]”⁸⁰ and be in need of international assistance for conservation.⁸¹ Should a site be destroyed or lose its outstanding universal value, the possibility to remove a designated World Heritage property from the World Heritage List was discussed from the beginning of application of the Convention. Although the possibility to delete or delist a site is not described in the Convention text, it has been a part of the Operational Guidelines since 1977.⁸² According to art. 192 of the Operational Guidelines, a site risk being delisted if “the property has deteriorated to the extent that it has lost those characteristics which determined its inclusion in the World Heritage List[...]”⁸³ It is within reason that a property which has lost the outstanding universal value for what it was inscribed on the list also is taken off as a result.⁸⁴

⁷⁸ See Carducci, Art. 4-7 National and International Protection of the Cultural and Natural Heritage, The 1972 World Heritage Convention: A Commentary p. 120.

⁷⁹ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 5.

⁸⁰ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 11(4).

⁸¹ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 11(4).

⁸² See Buzzini, Condorelli, Art. 11 List of World Heritage in Danger and Deletion of a Property from the World Heritage List, The 1972 World Heritage Convention: A Commentary p. 196-197.

⁸³ See UNESCO, Operational Guidelines, WHC.19/01, 10 July 2019, art. 192(a).

⁸⁴ See Buzzini, Condorelli, Art. 11 List of World Heritage in Danger and Deletion of a Property from the World Heritage List, The 1972 World Heritage Convention: A Commentary p. 197.

As of the 31 January 2017, the World Heritage Convention has 193 ratified contracting State Parties⁸⁵ which far exceeds the collected signatures of the 1970 UNESCO convention or the 1954 Hague Convention. A reasonable explanation for the difference is that the World Heritage Convention imposes very few burdening obligations on a State Party, but outlines in that states shall endeavour to the best of their abilities. Much like previous conventions, the World Heritage Convention lacks efficient methods of enforcement in the event of a breach.⁸⁶

3.2 UNESCO Declaration concerning Intentional Destruction of Cultural Heritage

Following the destruction of the Buddha statues in Bamiyan Valley 2001, which will be discussed in detail later, UNESCO drafted a soft law instrument named ‘UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage’ [hereinafter the Declaration]. The Declaration does not have the binding effect of a treaty or a convention, rather it acts to define existing norms and to place substance into a matter which the international community rallies consensus for.⁸⁷ The Declaration applies to intentional destruction of cultural property, using a broad definition of what is to be considered such property. It applies to incidents of destruction both in peace- and wartime.⁸⁸ To apply the Declaration, the destruction must have been carried out “in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience[...].”⁸⁹ This formulation, a reference to the Martens clause, means that codification of binding treaty regulations does not limit the existence of customary norms governing the same area of international law. In other words, just because a norm cannot be found in a binding instrument of law does not mean it doesn’t exist.⁹⁰ It

⁸⁵ UNESCO, The State Parties, accessed at <https://whc.unesco.org/en/statesparties/stat/#sp3> (2019-10-11)

⁸⁶ See Kornegay, *Destroying the Shrines of Unbelievers* p. 170.

⁸⁷ See Hladik, *The UNESCO Declaration Concerning Intentional Destruction of Cultural Heritage* p. 217.

⁸⁸ See Carducci, Art. 4-7 National and International Protection of the Cultural and Natural Heritage, *The 1972 World Heritage Convention: A Commentary* p. 129.

⁸⁹ See UNESCO Declaration concerning Intentional Destruction of Cultural Heritage, 32C/Resolutions, Paris 29 September – 17 October 2003, art. 2.

⁹⁰ See Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience* p. 87.

expresses that for an incident of destruction to be lawful, it would need to be conducted within the legal framework governing protection for cultural property.⁹¹

State responsibility in the event of intentional destruction of cultural property is governed by art. 6 of the Declaration and dictates;

“A State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization, bears the responsibility for such destruction, to the extent provided for by international law.”⁹²

It has been argued that the last sentence was included to limit the scope of what is to be considered an unlawful destruction of cultural heritage and to not suggest the existence of a customary obligation to refrain from all types of intentional destruction. It is also possible to interpret as a reminder to assess each incident within the framework of international and customary international law.⁹³

3.3 Criticism

Even though UNESCO is recognised as the organisation with most authority on the field of international cooperation for cultural heritage and their importance for how we today view the matter cannot be understated, it also regularly receives strong criticism. The principles of UNESCO have been described as utopian, only transposable into reality should every member state act within the spirit of international understanding when handling questions of cultural heritage.⁹⁴ Over the last years, the eradication of Syrian heritage has given the critics new fuel for their fires. UNESCO is dubbed

⁹¹ See Hladik, *The UNESCO Declaration Concerning Intentional Destruction of Cultural Heritage* p. 225.

⁹² UNESCO Declaration concerning Intentional Destruction of Cultural Heritage, 32C/Resolutions, Paris 29 September – 17 October 2003, art. 6.

⁹³ See Carducci, Art. 4-7 National and International Protection of the Cultural and Natural Heritage, *The 1972 World Heritage Convention: A Commentary* p. 130.

⁹⁴ See Osborne, *Is UNESCO damaging the world's treasures?*, Independent, 29 April 2009 accessed at <https://www.independent.co.uk/travel/news-and-advice/is-unesco-damaging-the-worlds-treasures-1675637.html> (read 2019-11-26)

ultimately powerless in front of actual ongoing threats.⁹⁵ Jeff Morgan from the American NGO Global Heritage Fund expressed that “They [UNESCO] have only limited tools for scaring governments[...] and rarely use them.”⁹⁶ As many other international organisations, UNESCO also receives criticism for being largely under funded, over bureaucratic and influenced by the political agendas of member states.⁹⁷ Having a site enlisted on the World Heritage List has become a way for states to earn from the following influx of tourism, while the sites are crumbling under the increased pressure. A World Heritage listing, according to the critics, has become more about advertisement and money, rather than protection.⁹⁸

⁹⁵ See Wainwright, Unesco impotence takes shine off world heritage status, The Guardian, 2 July 2015 accessed at <https://www.theguardian.com/world/2015/jul/02/unesco-impotence-world-heritage-status> (read 2019-11-26)

⁹⁶ See Osborne, Is UNESCO damaging the world’s treasures?, Independent, 29 April 2009 accessed at <https://www.independent.co.uk/travel/news-and-advice/is-unesco-damaging-the-worlds-treasures-1675637.html> (read 2019-11-26)

⁹⁷ See Osborne, Is UNESCO damaging the world’s treasures?, Independent, 29 April 2009 accessed at <https://www.independent.co.uk/travel/news-and-advice/is-unesco-damaging-the-worlds-treasures-1675637.html> (read 2019-11-26)

⁹⁸ See Wainwright, Unesco impotence takes shine off world heritage status, The Guardian, 2 July 2015 accessed at <https://www.theguardian.com/world/2015/jul/02/unesco-impotence-world-heritage-status> (read 2019-11-26)

4. Customary International Law and Enforcement

The international community, unlike today's modern states, is a system still greatly reliant on customs. Out of these customs stem Customary International Law described as “the body of rules which emerge through constant and uniform State practice.”⁹⁹ Customary International Law, compared to national legislation and international treaties is not codified, but rather created by the actions of international actors. For this reason, the difference between application and norm is not always clear. Customary international norms are generally unwritten and do not share the formal character of traditional legislation.¹⁰⁰ Enforcement of international norms, generally customary norms but to some extent also treaty derived norms although this category may have special rules for enforcement, is typically realised with the help of countermeasures. A government or international organisation affected by another state's breach of international rules can adopt reprisals. Reprisals are acts which out of context themselves would constitute a violation of international law, but adopted as a response to a previous violation they become acceptable.¹⁰¹

If the reprisals are adopted on a collective level, for instance within an international organisation, they are considered to represent the international community as a whole and are therefore called sanctions.¹⁰² A collectively adopted reprisal can only be considered a sanction if two objective criteria are fulfilled; the addressor must be a subject of international law i.e. have legal personality under international law and capability of possessing international rights and obligations and the reason for sanctioning must have a legal basis in international law.¹⁰³ Today, the term sanctions can also

⁹⁹ See Mendelson, *The Formation of Customary International Law* p. 170.

¹⁰⁰ See Mendelson, *The Formation of Customary International Law* p. 172.

¹⁰¹ See Francioni, Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law* p. 628.

¹⁰² See Francioni, Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law* p. 629.

¹⁰³ See Francioni, Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law* p. 629.

include countermeasures adopted unilaterally by a state not directly affected by the violation. This type of sanction can only be placed if the breaching state has transgressed a norm considered to belong to the whole of the international community. The sanctioning state does not act within its own national interest but rather to safeguard values important to all states.¹⁰⁴ It is important to note that the legality of sanctions is subject to debate.

To take reprisals the addressor, as discussed, must be a subject of international law and the act must be considered a violation of a norm found in international law. This raises the question of which body can identify and confirm breaches of international norms. The most accepted of authorities is the UN and in particular the Security Council which is considered to convey the will of the world community unified. Their decisions are directly binding for members of the UN which provides a level of certain efficiency otherwise difficult to find within international law. For the Security Council to recommend sanctions there is however a strict condition that the breach must constitute a threat to the peace under art. 39 of the UN Charter.¹⁰⁵ Collective sanctions are preferable to unilateral sanctions as they minimize the risk of the countermeasure being used in the pursuit of other interests than the intended.¹⁰⁶

Some countermeasures have a softer character such as retorsion, which means that the adopting state withdraws their diplomatic relations with the violating state.¹⁰⁷ Retorsion itself is not considered a breach of international law and can therefore be installed without fulfilling the stricter criteria for adopting sanctions. Retorsion can also mean of suspension of trade relations with the breaching state if it is not a member of the World Trade Organisation. Should the violating state be a member of WTO any commercial countermeasures needs to be justified under the exceptions in article XX and article XXI GATT.¹⁰⁸

¹⁰⁴ See Francioni, Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law* p. 629.

¹⁰⁵ See Francioni, Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law* p. 629.

¹⁰⁶ See Francioni, Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law* p. 630.

¹⁰⁷ See Francioni, Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law* p. 629.

¹⁰⁸ See Francioni, Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law* p. 630-631.

4.1 Obligations *Erga Omnes*

Some norms are attributed to the international community as a whole, these obligations named *erga omnes* were first discussed by the ICJ in 1970 in relation to the famous Barcelona Traction case.¹⁰⁹ The court distinguished between two sets of international obligations, the ones of reciprocal character owed by one state to another and *erga omnes* obligations which are owed equally by all states to the collective international interest.¹¹⁰ *Erga omnes* obligations are usually found in relation to human rights and is most commonly portrayed by the outlawing the use of force, prohibition of genocide and other values considered superior to the sovereignty of a nation. *Erga omnes* obligations, to effectively be used as such, should be confirmed by a correlating norm in customary international law.¹¹¹ The use of phrases such as ‘common heritage of mankind’ is connected to possible *erga omnes* obligations if expressed in international legal documents. The international treaty of UNCLOS, where the seabed outside of national jurisdiction is “common heritage of mankind” is considered to give rise to such an *erga omnes* obligation.¹¹²

It is uncommon to find examples of when states have attempted to enforce an international obligation on the basis of *erga omnes* in an international tribunal but on 11 November 2019, Gambia applied to institute proceedings in ICJ against Myanmar for alleged genocide on the ethnic group Rohingya. Gambia writes in the application that the claims are made on the basis of the *erga omnes* character of the obligation to refrain from genocide.¹¹³ Gambia is not directly injured by the alleged breach of prohibition against genocide but invokes their legal right to proceedings based on the inherent legal rights of all states following the breach of an *erga omnes* obligation.¹¹⁴ Another case in the ICJ which was initiated on the basis of breach of an *erga omnes*

¹⁰⁹See generally ICJ, Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J Reports 1970, p. 3.

¹¹⁰ See De Wet, Invoking obligations erga omnes in the twenty-first century p. 2-3.

¹¹¹ See De Wet, Invoking obligations erga omnes in the twenty-first century p. 4.

¹¹² See De Wet, Invoking obligations erga omnes in the twenty-first century p. 4

¹¹³ See International Court of Justice, Application Instituting Proceedings, Rep. of Gambia v. Rep. of Myanmar, The Hague 11 November 2019 p. 6.

¹¹⁴ See International Court of Justice, Application Instituting Proceedings, Rep. of Gambia v. Rep. of Myanmar, The Hague 11 November 2019 p. 42.

obligation was *Belgium v. Senegal*, in this case the violated norm was the prohibition of torture. The court affirms in the judgement that

“[i]f a special interest were required for that [invocation of responsibility for the breach] purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*[...] and to bring that failure to an end.”¹¹⁵

The court concluded that Belgium had a standing to invoke state responsibility for the failure of the Senegalese government to comply with the international obligation not to engage in torture.¹¹⁶

4.2 Relevance for Cultural Heritage

In the attempt to apply the previous discussed sections to the subject of cultural heritage we must first understand that destruction of cultural property is an act with effect on a group of people to whom the the cultural property is a part of their cultural identity rather than just the destruction of an object. Rules on property, in the traditional sense, are therefore not very helpful in the discussion of destruction of cultural property.¹¹⁷ It can also be added that no civilized state under the definition of the term in article 38(c) Statute of ICJ¹¹⁸ allows for private owners of cultural heritage artefacts to destroy them in pursuit of their rights as property owners.¹¹⁹ The same kind of reasoning has been extended to implicate states. It would not likely be accepted by the international community for a state to destroy cultural heritage considered belonging the common heritage of mankind on the argument of rights to property. According to some scholars, states are not truly the owners of the cultural heritage present within their national territory but rather custodians designated to preserve important relics for

¹¹⁵ See Questions relating to the Obligation to Prosecute or Extradite, *Belgium v. Senegal*, Judgment, I.C.J. Reports 2012, p. 422, 450 paragraph 69

¹¹⁶ See Questions relating to the Obligation to Prosecute or Extradite, *Belgium v. Senegal*, Judgment, I.C.J. Reports 2012, p. 422, 450 paragraph 70

¹¹⁷ See Kornegay, *Destroying the Shrines of Unbelievers* p. 173.

¹¹⁸ The UN, Statute of the International Court of Justice, April 1946 art. 38(c).

¹¹⁹ See Francioni, Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law* p. 635.

future generations. Should a state with cultural heritage of significance to all humanity within their jurisdiction be unable to uphold its obligation to protect and preserve it, the international community should provide assistance with such matters.¹²⁰

Instinctively, most would agree with the idea that cultural heritage should be protected from intentional destruction but the question becomes more complex when considering other values such as poverty reduction and economic development. The World Bank is an organization with 189 nations associated, making it one of the most inclusive.¹²¹ Its role is to finance infrastructural projects in development countries to reduce poverty. According to the policy document on management of cultural heritage in relation to their funded projects the bank applies a ‘do not harm the heritage’ stance. All projects shall be evaluated to understand and account for the impact it might have on cultural property and should such property be endangered by the projects, all staff and the borrowers are obliged to take action to halt the proceedings until the cultural heritage can be safeguarded. The World Bank Policy document proposes relocation of the project if possible, otherwise in joint effort with the national government the removal of cultural property to another unaffected place.¹²²

Another important indication of consensus is that almost all of the world's nations have signed the World Heritage Convention, added the inherit authority UNESCO exercises on cultural heritage today it speaks strongly for that *opinio juris* exists within the international community that safeguarding cultural property is of importance.¹²³ Together with the *erga omnes* indicating formulation in several treaties appointing some cultural property as ‘cultural heritage of mankind’ and ‘of great importance to all peoples of the world’, such as the 1954 Hague Convention and the World Heritage Convention, it is possible that refraining from intentional

¹²⁰ See Fechner, *The Fundamental Aims of Cultural Property Law* p. 388.

¹²¹ See The World Bank, ‘Who we are’, accessed at <https://www.worldbank.org/en/who-we-are> (2019-10-13)

¹²² See The World Bank, *Cultural Heritage and Development*, Policy Document p. 30-31.

¹²³ See Francioni, Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law* p. 635.

destruction of cultural heritage can amount to a status of customary international law and *erga omnes* obligation. Even if so, cultural heritage is destroyed on the territory of contracting parties of the conventions on to this day, indicating that no consistent norm encapsulating all cases of destruction exists.

5. Case studies

5.1 The Aswan High dam and the Nubian Monuments

5.1.1 Context

The Nile, which flows through north east Africa is one of the major international rivers of the world. It transcends several nations before cumulating in a delta on the Mediterranean coast of Egypt. The landscape surrounding the river bed is mostly desert, making the river an essential factor for the possibility to cultivate the land. The Nile has two primary water sources, the White Nile and the Blue Nile. The White Nile provides for a steady but modest influx of water over the year, while the Blue Nile which stems from the Ethiopian highlands produces an annual monsoon flood.¹²⁴ The waters of the Blue Nile carries silt from volcanic areas in Ethiopia which when the river floods is spread as a natural fertilizer over the river banks.¹²⁵ Until 1964, the phenomena occurred in Egypt annually in the late summer making the Egyptian flood affected soil some of the most fertile on the planet.¹²⁶ However, the flooding was fickle and difficult to predict. Heavy rains led to over flooding which could flush away crops, livestock, buildings and claim human lives. Not enough rainfall would lead to low water levels in the stream, defaulted flooding and famine.¹²⁷

Nubia, directly south of Egypt situated between Aswan and Debba where Nubian languages are spoken, was a civilisation directly dependent on the river dating back to 3500 BC. The word Nubia most likely derives from the ancient Egyptian word *nwb*, meaning gold. Nubia had an important function on the Nile as the only continuously settled area connecting sub-Saharan Africa with the Mediterranean, therefore serving as an official trading route.¹²⁸ The Nubians transported goods on the Nile from the sub-Saharan

¹²⁴ See Reynolds, Building the Past, Water on Sand p. 182.

¹²⁵ See Reynolds, Building the Past, Water on Sand p. 183.

¹²⁶ See Reynolds, Building the Past, Water on Sand p. 182.

¹²⁷ See Reynolds, Building the Past, Water on Sand p. 183.

¹²⁸ See Betts, The Warden of World Heritage p. 102.

regions north and was through history in and out of Egyptian control.¹²⁹ Nubia was also an important region because of its richness in timber for shipbuilding, otherwise scarce in the dry desert landscape.¹³⁰ Its strategic position together with the resources of timber, gold and ivory led to the establishment of Egyptian sovereignty during the New Empire around 2000 BC. Nubia was incorporated into the empire and was administered by an Egyptian governor.¹³¹ After the fall of the Egyptian high civilisation, Nubia saw the first years of Christianity under Roman control until the rise of Islam.¹³²

At the turn of the 19th century, Egypt was under British colonial control and the need for irrigation rose significantly. The British colonial power built the Aswan Low Dam in 1902 to allow for a steadier water supply throughout the year and to provide irrigation for commercial plantations of mainly cotton for export.¹³³ Controlling the flow of the all important Nile has been a decisive political question in the region for millenniums and the exploitations of the river by the British fuelled nationalist agendas in Egypt in the 1930s and 1940s.¹³⁴ In the 1950s, the British control over Egypt came to an end and the new-old nation dubbed themselves ‘United Arab Republic’ and elected President Gamal Abdel-Nasser in 1952. Nasser announced the construction of a new dam in the Nile, the Aswan High Dam. The dam was to provide steady irrigation and supply of electricity to the Egyptian people through out the year and catapult the republic into a new age of agricultural self sufficiency and economic progress.¹³⁵ The construction of the Aswan High Dam was also an important political symbol of how the nation shed its colonial past and reclaimed control over the river within its borders. It became the flagship project of the new nationalist Egyptian government.¹³⁶ The state made substantial efforts to mobilize

¹²⁹ See Betts, *The Warden of World Heritage* p. 102.

¹³⁰ See Kirwan, *Land of Abu Simbel* p. 261.

¹³¹ See ICOMOS, *Nomination The Nubian monuments from Abu Simbel to Philae*, 9 March 1979 p. 1.

¹³² See ICOMOS, *Nomination The Nubian monuments from Abu Simbel to Philae*, 9 March 1979 p. 2.

¹³³ See Reynolds, *Building the Past, Water on Sand* p. 183.

¹³⁴ See Reynolds, *Building the Past, Water on Sand* p. 183.

¹³⁵ See Allais, *Integrities: The salvage of Abu Simbel* p. 11.

¹³⁶ See Reynolds, *Building the Past, Water on Sand* p. 181.

support for the construction of the dam with the population. A famous singer wrote a hit promoting the project and in general the support was solid.¹³⁷ At the same time, Nasser and his government put a tight lid on the sharp domestic criticism concerning the ecological and technical impact of the dam.¹³⁸ Nasser symbolically dubbed the project 'his pyramid' and in communication with the Egyptian public, references making comparisons between the old Egyptian monuments and the Aswan High Dam was frequently used. The ancient monuments, according to the state, represented the exploitation of the Egyptian people for the good of a wealthy few. The new monument, the Aswan High Dam, represented the nation as a whole and would serve its people continuously.¹³⁹

Initially Nasser sought support from the United States, United Kingdom and the World Bank to finance the project.¹⁴⁰ Aid with infrastructural projects was regularly used as a method to sway the political allegiance of non-aligned governments in the time of the Cold War and the West responded by offering the requested financing, trying to secure a geopolitical ally in the Middle East.¹⁴¹ After it became apparent that Nasser had no intention of declaring his allegiance the World Bank, United States and United Kingdom withdrew the offer of funding. A recently negotiated arms deal between the Egyptian government and Soviet controlled Czechoslovakia and the establishment of formal diplomatic relations with communist China also affected the Western decision to withdraw.¹⁴² Nasser defiantly announced the decision to nationalise the Suez-canal in July 1956 as a mean of obtaining revenue to build the dam and in 1958, the Soviet Union stepped in providing financial and technical support.¹⁴³

Nasser's decision to nationalise the important international canal would become one of the most influential incidents in the modern history of

¹³⁷ See Reynolds, *Building the Past, Water on Sand* p. 187.

¹³⁸ See Reynolds, *Building the Past, Water on Sand* p. 183.

¹³⁹ See Allais, *Integrities: The salvage of Abu Simbel* p. 12.

¹⁴⁰ See Betts, *The Warden of World Heritage* p. 103.

¹⁴¹ See Allais, *Integrities: The salvage of Abu Simbel* p. 11.

¹⁴² See Betts, *The Warden of World Heritage* p. 103.

¹⁴³ See Betts, *The Warden of World Heritage* p. 103.

Middle East. It represented the end of the colonial influence in Egyptian politics and the strife to reclaim complete sovereignty was an important factor in many ex-colonies.¹⁴⁴ Egypt would not content itself with sovereignty just by name but sought complete control over its national resources.¹⁴⁵ The decision to nationalise was taken by Nasser within hours of being informed of the Western rebuff of the Egyptian financial request, leading to understand the decision was not solely economically motivated but also meant a political point was made to the West.¹⁴⁶

5.1.2 Threat to Cultural Heritage

The Director of the Egyptian Antiquities Service, Mustafa Amer, was the first to openly address the issue of the impact the construction of the Aswan High Dam would have on the Nubian cultural heritage. Together with other concerned parties in form of Egyptologists and engineers from all over the world, Amer addressed a letter to the Egyptian government warning them of the devastating effect the dam would have on the Nubian monuments.¹⁴⁷

The Aswan High Dam would create an artificial lake, 25 km wide and extend along the Nile some 300 km into Egyptian Nubia and 200 km into Sudanese Nubia.¹⁴⁸ Two major sites of specific interest settled to be affected by the rising water levels was the Temples of Abu Simbel and Philae.

Abu Simbel, a temple complex constructed by Ramses II to show the Nubians the might of the Pharaoh was carved directly from the face of the rock and measured 63 meters deep. At the heart of the main temple were statues of Egyptian gods as well as one of Ramses himself. At 6.29 a.m., each spring and autumn equinox, the rising sun would penetrate the dark temple and illuminate the statue of Ramses II. The rising sun, which signified resurrection, ascended the Pharaoh to that of a god.¹⁴⁹ The temples Philae, dubbed the *Pearl of the Nile*, stood downstream from the planned

¹⁴⁴ See Dessouki, Nasser and the struggle for independence, Suez 1956 p. 31.

¹⁴⁵ See Dessouki, Nasser and the struggle for independence, Suez 1956 p. 33.

¹⁴⁶ See Dessouki, Nasser and the struggle for independence, Suez 1956 p. 38.

¹⁴⁷ See Betts, The Warden of World Heritage p. 104.

¹⁴⁸ See Mokhtar, Unesco and the ancient Egyptian Heritage p. 36.

¹⁴⁹ UNESCO video, Nubian Monuments from Abu Simbel to Philae, accessed at (<https://whc.unesco.org/en/list/88>) (2019-11-03)

High dam and was partially submerged by the old Aswan Low Dam. The temples, dedicated to the goddess of Isis, would not be directly affected by the rising water levels upstream but fluctuation in water level resulting from power generation in the dam posed a serious threat to its structure.¹⁵⁰

5.1.3 Response

The letter sent by Amer and his colleges initially received no reaction from the Egyptian government, Nasser was well known to care less about artefacts of the past and more about the future of his nation.¹⁵¹ As more and more concerns were raised, Nasser realized the the decision would likely negatively impact Egypt's international reputation and requested assistance from UNESCO to save the Nubian monuments in April 1959. At the end of the same year, UNESCO made an appeal for international cooperation to assist the government of Egypt to rescue the Nubian monuments. The Director General of UNESCO, who launched the appeal, was careful not to offend the Egyptian state emphasising the problematic question of choosing between temples or crops.¹⁵² A flurry of international and Egyptian archaeological missions began to canvas the known and unknown sites of Nubia.¹⁵³ By 1961, the work of cutting, dismantling and transferring temples from affected area to other locations or higher ground had begun. Egypt chose as their part of the project to cut and transfer the two main temples of Abu Simbel.¹⁵⁴ The great temple of Ramses II was cut into blocks and relocated 65 meters above its original location, maintaining its angle towards the rising sun.¹⁵⁵ In 1968, correlating with the end of the work in Abu Simbel, the Egyptian government decided to relocate the temples of Philae to the neighbouring island Agilka where they would be safe from the fluctuating water levels downstream from the dam. The work to dismantle

¹⁵⁰ See Mokhtar, *Unesco and the ancient Egyptian Heritage* p. 36.

¹⁵¹ See Betts, *The Warden of World Heritage* p. 104.

¹⁵² See Betts, *The Warden of World Heritage* p. 109.

¹⁵³ See generally UNESCO pdf, *Timeline: Salvage of the Monuments of Nubia*, accessed at <https://whc.unesco.org/en/activities/173/> (2019-11-03)

¹⁵⁴ See generally UNESCO pdf, *Timeline: Salvage of the Monuments of Nubia*, accessed at <https://whc.unesco.org/en/activities/173/> (2019-11-03)

¹⁵⁵ See Reynolds, *Building the Past, Water on Sand* p. 193.

and reconstruct the temples of Philae stretched into the 1970s and the international campaign ended in 1980.¹⁵⁶

UNESCO coordinated the international aid to the mission but it was not without gain for the aiding nations. Egypt offered international archaeological missions half of their findings during the pre-dating excavations, a valuable resource to fill museums all around the world.¹⁵⁷ The intervention to save the monuments offered a chance for governments to involve themselves with a commitment based on moral grounds in a territory which accepted Soviet technical and financial support.¹⁵⁸ While the Soviets involvement was limited to the economic development, the Western governments could base their argument on softer grounds of care for cultural heritage and the importance to maintain cultural diversity.¹⁵⁹ The campaign is hailed as an example of the success possible when nations decide to cooperate to save values transcending state borders. “Save the Nubian Monuments” would through its course engage dozens of nations, NGOs, thousands of volunteers and technical personnel.¹⁶⁰ The world, effectively divided by the Cold War, came together to safeguard heritage destined to belong to all of the world. The campaign was a beacon of common interest and can be considered proof that some values are of such great importance that they transcend the deepest of geopolitical and ideological rifts.

Shortly after the decision to build the Aswan High Dam was taken in 1955, the Egyptian Antiquities Service whose responsibility in the new government covered issues of cultural heritage wrote and distributed a report including descriptions of the rising threat to cultural heritage sites in Nubia as well as lists and inventories of areas which had not yet undergone needed excavation work. The report was transferred to relevant institutes

¹⁵⁶ See generally UNESCO pdf, Timeline: Salvage of the Monuments of Nubia, accessed at <https://whc.unesco.org/en/activities/173/> (2019-11-03)

¹⁵⁷ See Reynolds, Building the Past, Water on Sand p. 193.

¹⁵⁸ See Luke, A Pearl in Peril p. 114.

¹⁵⁹ See Luke, A Pearl in Peril p. 117.

¹⁶⁰ See Betts, The Warden of World Heritage p. 100.

globally and was an early attempt by the Egyptian government to raise international awareness and to gain international support to save the threatened monuments.¹⁶¹ The response was initially limited and by 1958, only Germany and Italy had sent archaeological teams to aid the Egyptians.¹⁶² UNESCO's involvement in the matter had been approved by the General Conference in 1954¹⁶³ and they aided the Egyptian government in creating a centre for documentation to hold all the scientific and archaeological recordings from the threatened monuments in Nubia.¹⁶⁴ It was clear that the task of salvaging the temples from the rising waters would prove both economically and technically impossible without international aid and the new director of the Egyptian Antiquities Service managed to secure the full necessary support from both President Nasser and UNESCO to expand the campaign in 1958.¹⁶⁵ The sheer magnitude of the project warranted an official request of assistance to save the monuments from Egypt to UNESCO in order for them to launch an international appeal to all of its member states, which was received on 6 April 1959.¹⁶⁶ The Executive Board for UNESCO at their 55th session 1959 took the final decision to launch the international campaign.¹⁶⁷

The international appeal received a massive response from nations and individuals from all over the world. Led by intense coverage by international media, petition for support on national level in UNESCO member states through National Committees and a traveling international exhibition on Egyptian history and art.¹⁶⁸ The implementation of UNESCO's promise to the Egyptian government to aid with raising awareness and interest within their member states was therefore a shining success. In early 1960, the Director-General of UNESCO and President Nasser met and discussed the matter, leading to a mutual confirmation on

¹⁶¹ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 64.

¹⁶² See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 64.

¹⁶³ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 66.

¹⁶⁴ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 65.

¹⁶⁵ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 67.

¹⁶⁶ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 68.

¹⁶⁷ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 73.

¹⁶⁸ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 77.

their resolution to safeguard the Nubian monuments. Nasser, as well, expressed the resolution of his government to construct the dam and the Director-General affirmed UNESCO's full commitment to ensuring international cooperation to rescue the monuments threatened.¹⁶⁹ At the time, the Campaign was an unusual ordeal. Cultural heritage was understood to belong firmly under national jurisdiction and interest, and as such, also be of exclusive national concern when threatened.¹⁷⁰ The international interest and the highflying formulations from UNESCO dubbing the temples situated in Egypt of as a part of the "cultural heritage of mankind"¹⁷¹ was unheard of and gave way to a new era in cultural heritage management which would have far-reaching consequences within international law on cultural property.

Even within UNESCO there was a feeling of uncertainty of whether the Campaign was truly within the objectives of the organisation and voices would occasionally be raised to proclaim that UNESCO's mission was to care for present and future education of peoples, rather than salvaging stones from the past.¹⁷² As a consequence, Egypt was expected to shoulder a proportionate amount of the costs for the campaign and comply with a number of commitments.¹⁷³ To finance some of their part, the Egyptian authorities funded some of the work costs assigned to them out of the budget for the construction of the Aswan High Dam.¹⁷⁴

As the monuments had been dubbed of international concern, in order to achieve legitimacy for this claim, UNESCO needed to rally the broadest support possible with its member states.¹⁷⁵ Sweden was the first nation to contribute with direct financial aid to the salvage, directed towards the temple of Abu Simbel.¹⁷⁶ A totality of 47 states contributed more than 25

¹⁶⁹ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 75.

¹⁷⁰ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 68.

¹⁷¹ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 68.

¹⁷² See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 68.

¹⁷³ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 68.

¹⁷⁴ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 69.

¹⁷⁵ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 80.

¹⁷⁶ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 74.

million US dollars and others sent governmentally funded excavation teams of archaeologists to aid the domestic efforts.¹⁷⁷ As previously noted, states where as well motivated by the knowledge that they would be allowed to take possession of half of their archaeological findings in the threatened area.

The main financial commitments to the Campaign was made by a few wealthy states but the many nations sought to contribute to the plight with what they had to offer.¹⁷⁸ The new founded UNESCO achieved a great impact in mustering what was called ‘international cultural solidarity’¹⁷⁹ and it has been named the main factor for motivating nations to join and aid the Campaign to rescue the monuments in Nubia. Even as such, many different motivations were available at the time of political, commercial or diplomatic character. As an example, it has been known that President Kennedy of the United States sought better relations with Egypt though a commitment to contribute financially to the salvage of the temples of Philae.¹⁸⁰

5.1.4 Analysis

The threat to the Nubian monuments was actualised long before the codification of the today most relevant international convention for protection of cultural heritage, the World Heritage Convention. The ideas of national and international interests differed substantially from those we see today. This case was chosen for this text because of the significance it had for the subsequent development of protection of cultural property under international law.

It is important to initially note that there is a significance in the fact that no state spoke against the construction of the dam, although it was publically known that it would have a devastating effect on the cultural heritage of Nubia. It must be understood to mean that the international community

¹⁷⁷ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 232-233.

¹⁷⁸ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 80.

¹⁷⁹ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 89.

¹⁸⁰ See Säve-Söderbergh, *Temples and Tombs of Ancient Nubia* p. 89.

accepted that Egypt had a right to build the dam and that the question of cultural heritage up to this point belonged solely within the national interest sphere. The reaction from the world nations was not to condemn the actions of the Egyptian government but to offer their solidarity and aid in salvaging the temples threatened by the rising waters. The motivation to build the dam was of economical nature. The need to provide a consistent water supply was crucial to the Egyptian governments to secure food and electricity for the population.

Although no states objected the construction, the consequential involvement to rescue the monuments speaks for a general opinion, even at this early time in the evolution of protection for cultural heritage, that some heritage possess a value which transcends national borders and interests. The very founding blocks of the World Heritage Convention can be found within the frame of the International Rescue Campaign in Nubia, international cooperation to safeguards sites of outstanding universal value. As with every case, the outcome here is surely dependent on the specifics. It is possible that nations deemed the construction of a dam for the reasons given by the Egyptian government as a legitimate cause to submerge the temples and therefore the reaction would have been different if the need in Egypt had not been considered proportionate to the destruction of the monuments. It is also possible that President Nasser's request and openness to cooperation with the international rescue campaign dulled the reasons for objecting.

It is also important to remember the tense political context mid-Cold War and the impact it might have had on the reasons for nations to support or object to projects threatening cultural heritage. Egypt was most likely a desirable ally as one of the few non-aligned nations in the Middle East and objecting could potentially have brought undesirable political consequences for the objector.

The case of the Nubian Monuments shows that the *opinio juris* at the time understood that some cultural property had transnational importance and therefore should be safeguarded. It also indicates that safeguarding, with the consent of the host state, could be a matter for the world community as a whole. The fact that President Nasser reached out for assistance to save the Nubian monuments although he was previously known to not place too much importance on heritage indicates that states might have considered the right to diplomatically intervene should Egypt not have acted to safeguard the heritage. Nothing, however, indicates the existence of a customary international rule at this point which would have made the destruction unlawful.

5.2 The Taliban and the Bamiyan Buddhas

5.2.1 Context

The Taliban, a Pashtun group of religious scholars, emerged in North Pakistan as a result of the withdrawal of Soviet troops from Afghanistan. The Taliban who quickly gained popularity in the northern rural provinces of Afghanistan promised to restore security and enforce their interpretation of Islamic law, Shari'ah.¹⁸¹ Afghanistan had been the scene of a shrouded international conflict for over a decade, starting with the Soviet invasion of 1979 to provide support to the Afghan communist government. On the other side of the conflict was a resistance movement, the Mujahedin, effectively supported by the United States to counteract the influence of the Soviet Republic in the Middle East. After ten years of conflict, the Soviet Union withdrew their troops in 1989 but the internal struggles between warlords in Afghanistan did not halt with the expulsion of foreign elements.¹⁸² It was in this context a group of religious scholars, the Taliban whose name means *the students* in Pashto, became a defining element in the rush for dominance of

¹⁸¹ See BBC, Who are the Talibans, 26 May 2016 accessed at <https://www.bbc.com/news/world-south-asia-11451718> (2019-09-11)

¹⁸² See BBC, Why is there a war in Afghanistan, 8 September 2019 accessed at <https://www.bbc.com/news/world-asia-49192495> (2019-09-11)

Afghanistan. Their leader Mullah Omar, a former Mujahedin fighter and serving as village religious leader, spearheaded the new movement which promised to restore security to the exhausted population of rural Afghanistan with the help of Islamic law.¹⁸³ The Taliban quickly gained support and legitimacy with the Afghan people and on 27 September 1997 the Taliban (*Taliban* refers to the political movement while *taliban* refers to the early religious composition) seized control over the capital, Kabul, and established the Islamic Emirate of Afghanistan.¹⁸⁴ The new founded Islamic Emirate struggled with international recognition and only Pakistan, Saudi-Arabia and the United Arab Emirate would officially recognise the Taliban as a legitimate regime. This left the new state internationally isolated and the discontent within the Taliban towards the international community grew.¹⁸⁵

The Taliban movement met resistance also internally, primarily from the Hazara population who lives in the central region of Afghanistan called Bamiyan. As the Islamic Emirate of Afghanistan was on the rise to complete territorial governance, the Taliban took the opportunity to strike against the dissident Hazara in the attempt to disarm them. This led to an incident in a town called Mazar which killed 600 Taliban and detained 1000 prisoners. The Taliban immediately launched a counter attack on the local population of Bamiyan in August 1998 which resulted in the death of 5000-8000 people belonging to the Hazara. After this incident, the Taliban effectively gained control over the Bamiyan region. Arriving at the year 2001, the Taliban controlled over 90% of Afghan territory.¹⁸⁶

The Taliban promoted a strict interpretation of Islamic law, *Shari'ah*, causing their popularity to dwindle after the occupation of the more secular capital, Kabul. The new leaders had no experience of central governance and struggled to obtain the same legitimacy in Kabul as they had in the

¹⁸³ See Nagamine, *The Legitimization Strategy of the Taliban's Code of Conduct* p. 13.

¹⁸⁴ See Nagamine, *The Legitimization Strategy of the Taliban's Code of Conduct* p. 14.

¹⁸⁵ See Power, *Lost Buddhas of Bamiyan*, *Harper's Magazine*, March 2005 p. 72.

¹⁸⁶ See Nagamine, *The Legitimization Strategy of the Taliban's Code of Conduct* p. 14.

traditional rural communities. To control the inhabitants, they instituted a governmental branch responsible for the enforcement of their interpretation of *Shari'ah* under the name of 'General Department for the Preservation of Virtue and the Elimination of Vice'. The Department consisted of 30.000 men who handled violations of dress code and unwanted cultural expressions such as music, cinema, television and the tradition of kite flying. Women could no longer move in public without being accompanied by a close male relative and had to wear fully covering garments. Girls was no longer allowed to attend school and the Department enforced these rules with the help of public punishments which could range from mutilation to execution depending on the violation, even if the most common punishment remained public beating.¹⁸⁷

Because of its close ties with Al Qaeda and the lack of international recognition the Taliban government struggled in diplomatic relations with the rest of the international community. Following the Al Qaeda bombings of the American embassies in Tanzania and Kenya in 1999 the UN imposed sanctions on Afghanistan without making a distinction between the Taliban state and Al Qaeda terror organisation.¹⁸⁸ The UN installed an air embargo and froze Taliban assets to force them to hand over Osama Bin Laden to the international community but the Taliban refused. The relations between the Islamic Emirate of Afghanistan and the international community never recovered from the Taliban protection of Bin Laden and Al Qaeda after the bombings. There was an increasing policy of international condemnation of the Taliban regime on the grounds of their internal social policies.¹⁸⁹

The Taliban had begun to lose the legitimacy of its governance with the Afghan people after years of strict enforcement of austere social policies but their unyielding position not to hand over Bin Laden to the international community in spite of the pressure of international sanctions gave the Taliban a status within some communities as the Islamic State who stood

¹⁸⁷ See Nagamine, *The Legitimization Strategy of the Taliban's Code of Conduct* p. 15.

¹⁸⁸ See Strick Van Linschoten, Kuehn, *The Taliban Reader* p. 45.

¹⁸⁹ See Strick Van Linschoten, Kuehn, *The Taliban Reader* p. 45.

tall and refused the edicts of the bullying West.¹⁹⁰ By 2001, the Taliban international relations was generally defined by hesitance and distrust from all sides. The UN was still present within the country to provide basic humanitarian aid to the struggling population following two devastating droughts which had decimated the internal sources of food. 1,15 million people was displaced by the threat of starvation.¹⁹¹ The Taliban systematically harassed and killed civil foreign NGO representatives to draw foreign sympathisers to travel to Afghanistan and join them.¹⁹² As a result, international NGOs started to pull out personnel and terminate their actions in Afghanistan partly because of the threat and restrictions posed by the Taliban government but also as a result of the international protests against the Taliban social policies.¹⁹³

5.2.2 Threat to Cultural Heritage

On 26 February 2001, the Taliban issued an edict ordering the destruction of all shrines not belonging to Islam and all statues.¹⁹⁴ This edict described as a '*fatwa*' was announced by the Taliban leader Mullah Omar and received immediate response from several states and the UN secretary at the time, Kofi Annan.¹⁹⁵ The edict targeted indiscriminate objects of art portraying creatures. According to the Taliban interpretation of *Shari'ah*, all art that could be considered an idol was to be destroyed, which led to the condemnation also of several important sites of Afghan Islamic heritage.¹⁹⁶ After the news of the Taliban edict spread around the world, the international community immediately started worrying about two ancient Buddha statues carved out of the rock in Afghanistan's central region, Bamiyan.

¹⁹⁰ See Nagamine, *The Legitimization Strategy of the Taliban's Code of Conduct* p. 16-17.

¹⁹¹ See Strick Van Linschoten, Kuehn, *The Taliban Reader* p. 46.

¹⁹² See Nagamine, *The Legitimization Strategy of the Taliban's Code of Conduct* p. 17.

¹⁹³ See Strick Van Linschoten, Kuehn, *The Taliban Reader* p. 46.

¹⁹⁴ United Nations, General Assembly 55th Session, A/55/PV.94, New York 9 March 2001, p. 1.

¹⁹⁵ Agence France-Presse, Pre-Islam Idols Being Broken Under Decree by Afghans, *The New York Times*, 2 March 2001.

¹⁹⁶ Hammond, *Cultural Terrorism*, *The Wall Street Journal*, 5 March 2001.

In the early centuries AD, the Kingdom of Bamiyan was a flourishing hub of religious and commercial influx situated in the Afghan Kush mountains with strategic control over important mountain passes which connected roads to China, Pakistan and India along the Silk Route.¹⁹⁷ The two Buddha statues guarding the Bamiyan valley were one of the earliest examples of Buddha portrayed in human form and dated from the 7th century AD. The style of the Buddhas have been characterized as Gandhara, an influential branch in Buddhist art with inspiration from Greek and Roman art.¹⁹⁸ For example, the Buddhas were wearing Greek style robes. The statues, 37 and 54 meters tall, looked out from the face of the cliff in Bamiyan Valley for over a thousand years.¹⁹⁹ Buddhism was replaced in Bamiyan but the statues remained and stayed culturally important to the local Hazara people.²⁰⁰ On 2 March 2001 the Taliban begun the destruction of the two Buddha statues, believed to be the largest example of standing Buddhas in the world. Due to the immense size of the statues, it took the Taliban several weeks to fully complete the demolition using artillery and explosives.²⁰¹ For ten trembling days the international community waited for information on what had happened to the Bamiyan Buddhas and on March 12 confirmation was given. The Buddhas had been destroyed.²⁰²

Afghanistan ratified the World Heritage Convention on the 20 March 1979.²⁰³ The statues had never been inscribed on the World Heritage List but UNESCO had received a nomination for inscription by Afghan governments in 1982.²⁰⁴ Because of administrative requests left unanswered, subscription was never followed through. The response from the international community including states and non-governmental institutions was unparalleled in questions of cultural property and UNESCO

¹⁹⁷ See Morgan, *The Path of Buddha* p. 43

¹⁹⁸ See Morgan, *The Path of Buddha* p. 43.

¹⁹⁹ See Morgan, *The Path of Buddha* p. 43.

²⁰⁰ See Power, *Lost Buddhas of Bamiyan*, Harper's Magazine, March 2005 p. 74.

²⁰¹ See Nordland, *2 Giant Buddhas Survived 1,500 Years.*, The New York Times, 18 June 2019 accessed at <https://www.nytimes.com/2019/06/18/world/asia/afghanistan-bamiyan-buddhas.html> (2019-10-22)

²⁰² See UNESCO, *The World Heritage Newsletter*, No. 30, May-June 2001.

²⁰³ See UNESCO, *World Heritage Committee 25th Session, WHC-01/CONF.208/23*, Helsinki 11-16 December 2001 p. 2.

²⁰⁴ See UNESCO, *World Heritage Committee 25th Session, WHC-01/CONF.208/23*, Helsinki 11-16 December 2001 p. 2.

received over a 1000 emails daily expressing support for their attempts to protect the statues and prevent their destruction.²⁰⁵

5.2.3 Response

Shortly after the confirmation that the Buddha sculptures in Bamiyan valley had been destroyed reached the international community, UNESCO started drafting a resolution on ‘the protection of cultural heritage of Afghanistan’²⁰⁶. The purpose of the resolution was to safeguard the remaining Afghan heritage still under threat from the Taliban edict. It was adopted by the General Assembly of the UN at its 13th session in October 2001 and expressed the unanimous condemnation of the ongoing cultural eradication. The text of the resolution affirmed the common interest in the Afghan cultural heritage and declared that the General Assembly

”**Condemns** the wilful destruction of the cultural heritage of Afghanistan by the Taliban forces, particularly the statues of Bamiyan, as a crime against the common heritage of humanity”²⁰⁷.

The resolution further appealed to States not yet parties to the international legal instruments for protection of cultural heritage to join them and invited the Director General of UNESCO to act as a liaison of information with the Secretary General of the UN when threats of wanton destruction arise so that he or she may act to safeguard the heritage.²⁰⁸ Although the language of the resolution undouble shows the communal dismay for the destruction within the represented nations at UNESCO, it does not mention a violation of an identifiable rule under international law. The use of the term ‘crime against common heritage of mankind’ speaks for the collective view that the statues of Bamiyan and the Afghan heritage are of universal concern and a

²⁰⁵ See UNESCO, The World Heritage Newsletter, No. 30, May-June 2001.

²⁰⁶ See UNESCO, World Heritage Committee 25th Session, WHC-01/CONF.208/23, Helsinki 11-16 December 2001 p. 2.

²⁰⁷ See UNESCO, World Heritage Committee 25th Session, WHC-01/CONF.208/23, Helsinki 11-16 December 2001 p. 12.

²⁰⁸ See UNESCO, World Heritage Committee 25th Session, WHC-01/CONF.208/23, Helsinki 11-16 December 2001 p. 12.

possibility to draw parallels to secondary rules such as ‘crimes against humanity’.

The General Conference of UNESCO 31st session in late October 2001 adopted yet another resolution concerning ‘Acts constituting crimes against the common heritage of humanity’²⁰⁹. The resolution invited the Director General of UNESCO to commence the drafting of a ‘Declaration against the Intentional Destruction of Cultural Heritage’ based on the fundamental principals laid out in the existing conventions concerning protection of cultural heritage, under which member states of UNESCO have to safeguard cultural property and prevent acts of destruction.²¹⁰ A resolution adopted by the General Assembly to the UN recalled the previous commitments made by the Taliban to refrain from harmful acts and protect the Afghan heritage as a part of the ‘common heritage of humanity’. The resolution notes the earlier efforts made by the Security Council, General Assembly, UNESCO and the UN special mission to Afghanistan to persuade the Taliban to halt the ongoing destruction of cultural properties and addresses the Taliban regime directly:

“1. *Strongly calls upon* the Taliban to abide by their previous commitments to protect the cultural heritage of Afghanistan from all acts of vandalism, damage and theft;

2. *Strongly urges* the Taliban to review their edict of 26 February 2001 and to stop its implementation;

3. *Also strongly urges* the Taliban to take immediate action to prevent the further destruction of the irreplaceable relics, monuments or artefacts of the cultural heritage of Afghanistan;”²¹¹

The last paragraph of the resolution introduces a potential possibility to shelter threatened cultural heritage;

²⁰⁹ See UNESCO, General Conference 31st Session, 31C/Resolutions, 15 October – 3 November 2001 p. 65.

²¹⁰ See UNESCO, General Conference 31st Session, 31C/Resolutions, 15 October – 3 November 2001 p. 65.

²¹¹ See UN, General Assembly 55th Session, A/RES/55/243, 1 May 2001.

“4. *Calls upon* Member States to help, through appropriate technical measures, to safeguard the sculptures, including, if necessary, their temporary relocation or removal from public view.”²¹²

The collective will to spare the Afghan heritage from destruction is evident from the appeal to member states to provide assistance with their removal from hostile environment. Not unlike the common effort to rescue the Nubian monuments from the rising Nile waters after the construction of the Aswan Dam, the resolution introduces the notion of possible relocation to shelter sculptures who were perceived as offensive by the Taliban. It must be assumed that this could only be realised in understanding with the territorial state, in accordance with the principle respect for state sovereignty expressed in art. 6 World Heritage Convention.²¹³ 80 nations, later joined by Argentina, Thailand, Slovenia, South Africa and Suriname, signed or cosponsored the resolution initiated by the German delegation.²¹⁴

The Swedish representative at UNESCO spoke on behalf of the European Union, the Central Eastern European countries associated with the EU, aligned Cyprus, Malta and Turkey as well as the EFTA-countries and expressed the European Unions “dismay and shock”²¹⁵ with the Taliban *fatwa*. The European Union collective condemned the decision to eradicate the cultural heritage of Afghanistan and affirmed its “vital importance not only to Afghanistan, but to the world as a whole”.²¹⁶

The Council of Europe released a press bulletin in early March 2001, just days after the news of the Taliban edict had become public and expressed; “No political or religious power has the right to deliberately destroy cultural property that belongs to humankind, or to deprive future generations of a heritage which is simply not the prerogative of a single group, ideology or

²¹² See UN Resolution, General Assembly 55th Session, A/RES/55/243, 1 May 2001.

²¹³ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 6(1).

²¹⁴ See UN, General Assembly 55th Session, A/55/PV.94, New York 9 March 2001 p. 1.

²¹⁵ See United Nations, General Assembly 55th Session, A/55/PV.94, New York 9 March 2001 s. 2.

²¹⁶ See United Nations, General Assembly 55th Session, A/55/PV.94, New York 9 March 2001 s. 2.

faith”.²¹⁷ The Asia Pacific group of countries represented at UNESCO joined the outcry, calling the Taliban edict an “act of cultural vandalism”.²¹⁸ Their message aligns with others of forceful condemnation and urging relevant international organisations, including the Director-General of UNESCO to seriously consider options of relocation to save the Afghan heritage. Like others, the Asia Pacific group called for further actions to align countries with diplomatic influence over the Taliban regime.²¹⁹ The nations referred to was the ones who had diplomatically recognised the Taliban rule, United Arab Emirate, Saudi-Arabia and most importantly, Pakistan. The Arab group of countries represented at UNESCO expressed the opinion that “the systematic destruction of Buddhist monuments by the Talibans [...] have to evoke, not only condemnation and disapproval, but as well command an international mobilisation around concrete actions, in order to put an end to this unprecedented undertaking which affects invaluable treasures of universal heritage [authors translation]”²²⁰ and “this barbaric attitude of the Talibans [...] shouldn’t be allowed, in any way, to stain the image of Islam, its values of tolerance and respect for all civilisations [authors translation]”.²²¹

Within hours of the announcement of the Taliban edict on 26 February 2001, the international community joined together in condemnation. The United States issued a press release stating that the United States was “distressed and baffled by the announcement”²²² and that “deliberate

²¹⁷ See Council of Europe, Le Secrétaire Général du Conseil de l’Europe consterné par la destruction du patrimoine culturel en Afghanistan, Strasbourg 2 March 2001 accessed at <https://rm.coe.int/090000168096234b> (2019-10-25)

²¹⁸ See Asia Pacific Group of countries present at UNESCO, Statement on Afghanistan, 9 March 2001 accessed at <http://web.archive.org/web/20010605073706/http://www.unesco.org/opi/eng/unescopress/2001/apac.shtml> (2019-10-25)

²¹⁹ See Asia Pacific Group of countries present at UNESCO, Statement on Afghanistan, 9 March 2001 accessed at <http://web.archive.org/web/20010605073706/http://www.unesco.org/opi/eng/unescopress/2001/apac.shtml> (2019-10-25)

²²⁰ See Groupe Arabe auprès de l’UNESCO, Communiqué, Paris 2 March 2001 accessed at <http://web.archive.org/web/20100413022943/http://www.unesco.org/bpi/eng/unescopress/2001/grouparabvf.shtml> (2019-10-25)

²²¹ See Groupe Arabe auprès de l’UNESCO, Communiqué, Paris 2 March 2001 accessed at <http://web.archive.org/web/20100413022943/http://www.unesco.org/bpi/eng/unescopress/2001/grouparabvf.shtml> (2019-10-25)

²²² See Deputy Spokesman Reeker, Afghanistan: Ordered Destruction of Cultural Treasures, Washington DC 27 February 2001 accessed at <http://web.archive.org/web/20090117044129/http://www.state.gov:80/r/pa/prs/ps/2001/960.htm> (2019-10-25)

destruction of statues and sculpture [...] is incomprehensible”.²²³ Later, after the destruction of the Buddhas had been confirmed, the subject was addressed at a press briefing where the spokes person was asked the question of the existence of an international law protecting cultural heritage from destruction to which the spokes person replied; “Along with many other countries, we would strongly condemn this destruction of the irreplaceable world heritage. Secretary Powell called it horrible, described it as a tragedy, a crime against humankind.”²²⁴ The French Ministry of Foreign Affairs addressed the situation in Afghanistan multiple times during March 2001 and expressed along with the rest of the international community their solemn condemnation but when asked what concrete measures could be taken to halt or prevent wilful destruction of the Buddha statues the spokes person answered; “Concretely? You saw that the President of the French Republic wrote to the Director General of UNESCO, and that a special emissary was sent by the Director General of UNESCO, our French Ambassador Pierre Lafrance, who is very familiar with the region.”²²⁵ The French Ministry of Foreign Affairs additionally pointed out that the conduct of the Taliban would only serve to drive a further wedge between them and the international community.²²⁶ The Australian government urged for the Taliban to safeguard the statues as ordered by UNESCO, stating that they where of “outstanding cultural and spiritual significance, not just for Afghanistan, but for the international community as a whole”.²²⁷ The Indian Ministry of External Affairs called the Taliban decision to destroy the statues “a grave wrong, indeed, a

²²³ See Deputy Spokesman Reeker, Afghanistan: Ordered Destruction of Cultural Treasures, Washington DC 27 February 2001 accessed at

<http://web.archive.org/web/20090117044129/http://www.state.gov:80/r/pa/prs/ps/2001/960.htm> (2019-10-25)

²²⁴ See Spokesman Boucher, Daily Briefing, Washington DC, 12 March 2001 accessed at

<http://web.archive.org/web/20050325063550/http://www.state.gov/r/pa/prs/dpb/2001/1191.htm> (2019-10-25)

²²⁵ See Ministry of Foreign Affairs, Destruction of pre-Islamic Statues in Afghanistan, Paris 2 March 2001 accessed at

<http://web.archive.org/web/20050616105954/http://www.diplomatie.gouv.fr/actu/article.GB.asp?art=10511> (2019-10-25)

²²⁶ See Ministry of Foreign Affairs, Destruction of pre-Islamic Statues in Afghanistan, Paris 1 March 2001 accessed at

<http://web.archive.org/web/20050616105954/http://www.diplomatie.gouv.fr/actu/article.GB.asp?art=10511> (2019-10-25)

²²⁷ See Minister for Foreign Affairs Downer, Destruction of Buddhist Statues in Afghanistan, 2 March 2001 accessed at

http://web.archive.org/web/20070612223447/www.dfat.gov.au/media/releases/foreign/2001/fa024_01.html (2019-10-25)

sacrilege to humanity, to the civilizational and cultural inheritance of all mankind.”²²⁸ They also offered to dismantle and transport the statues to India, in order to provide ample protection and conservation.²²⁹ Japan “strongly urge[d] those concerned to revoke the edict”²³⁰ and stated that “if these cultural heritages [the Bamiyan Buddhas], which ought to be preserved as common heritages of the Humanity, should be affected by this edict, the world would suffer an incalculable loss”.²³¹ Sri Lanka spearheaded a joint action by nations of primarily Buddhist faith and “urge[d] immediate preventative action”²³² from UNESCO.²³³ Even the neighbouring Pakistan issued a statement hoping “the Afghan Government will show the spirit of tolerance enjoined upon by Islam as well as respect for international sentiment in this regard.”²³⁴ The message from Pakistan was more lenient, as expected considering the close relations with the Taliban, and took the form of an appeal rather than a condemnation.²³⁵

5.2.4 Analysis

Afghanistan ratified the World Heritage Convention 20th March 1979, making the text applicable to properties situated on Afghan territory should the prerequisites for applicability set out in the convention text be fulfilled. Art. 1 of the World Heritage Convention defines what according to the Convention should be considered cultural heritage and notes monuments

²²⁸ See External Affairs Minister Singh, Statement in Parliament, 2 March 2001 accessed at <http://web.archive.org/web/20040314174557/http://www.meadev.nic.in/news/official/20010302/official.htm> (2019-10-25)

²²⁹ See External Affairs Minister Singh, Statement in Parliament, 2 March 2001 accessed at <http://web.archive.org/web/20040314174557/http://www.meadev.nic.in/news/official/20010302/official.htm> (2019-10-25)

²³⁰ See Ministry of Foreign Affairs of Japan, Response to Taliban’s Edict to Destroy Statues, 7 March 2001 accessed at <http://web.archive.org/web/20130412232926/www.mofa.go.jp/announce/announce/2001/3/0307.html> (2019-20-25)

²³¹ See Ministry of Foreign Affairs of Japan, Statement by the Press Secretary, 1 March 2001 accessed at <http://web.archive.org/web/20130302011825/www.mofa.go.jp/announce/announce/2001/3/0301.html> (2019-10-25)

²³² See Ministry of Foreign Affairs, Foreign minister expresses concern on the threat to the world famous Buddha statues in Afghanistan, 2 March 2001 accessed at <http://web.archive.org/web/20050312041640/http://www.lanka.net/lankaupdate/02%20March%202001.html> (2019-10-25)

²³³ See Ministry of Foreign Affairs, Foreign minister expresses concern on the threat to the world famous Buddha statues in Afghanistan, 2 March 2001 accessed at <http://web.archive.org/web/20050312041640/http://www.lanka.net/lankaupdate/02%20March%202001.html> (2019-10-25)

²³⁴ See Pakistan, Statement, Islamabad 1 March 2001 accessed at <http://web.archive.org/web/20030330205721/http://www.forisb.org/pr/2001/PR01-51.htm> (2019-10-25)

²³⁵ See Pakistan, Statement, Islamabad 1 March 2001 accessed at <http://web.archive.org/web/20030330205721/http://www.forisb.org/pr/2001/PR01-51.htm> (2019-10-25)

and “works of monumental sculpture [...] which are of outstanding universal value from the point of view of history, art and science.”²³⁶ The Bamiyan statues were undouble monumental works of sculpture and even though art. 3 of the World Heritage Convention places the responsibility on the territorial state to “identify and delineate such properties located within their territory”²³⁷, reactions from international actors confirm consensus in relation to the statues outstanding universal value. The Deputy Spokesman of United States of America, Philip T. Reeker, described the Buddha statues in a press release as “among the world’s greatest cultural treasures”.²³⁸ Another American spokesman, Richard Boucher, described them as “irreplaceable world heritage”²³⁹ The statues were consequently described by representatives of the world’s states as ‘unique’²⁴⁰ and the UN General Assembly noted “that the destruction of the statues in Afghanistan, in particular of the unique Buddhist sculptures in Bamiyan, would be an irreparable loss for humanity as a whole”²⁴¹. Together with legal effects of the previous attempts by Afghan governments to nominate the statues for inscription on the World Heritage List, placing the statues on a tentative list for inscription and the fact that the monuments were never inscribed for the sole reason that the Afghan governments could not fulfil the adequate administrative requirements for inscription makes the conclusion that the monuments indeed possessed an outstanding universal value, as described in art. 1 World Heritage Convention, unprovocative. Art. 12 of the Convention further states that the fact a property was never inscribed on the World Heritage List “shall in no way be construed to mean that it does not have an outstanding universal value other than those resulting from inclusion in these lists”²⁴². Effectively, this extends the obligations of article 4 World

²³⁶ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 1(1).

²³⁷ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 3.

²³⁸ See Deputy Spokesman Reeker, Afghanistan: Ordered Destruction of Cultural Treasures, Washington DC 27 February 2001 accessed at <http://web.archive.org/web/20090117044129/http://www.state.gov:80/r/pa/prs/ps/2001/960.htm> (2019-10-25)

²³⁹ See Spokesman Boucher, Daily Breifing, Washington DC, 12 March 2001 accessed at <http://web.archive.org/web/20050325063550/http://www.state.gov/r/pa/prs/dpb/2001/1191.htm> (2019-10-25)

²⁴⁰ See United Nations, General Assembly 55th Session, A/55/PV.94, New York 9 March 2001.

²⁴¹ See UN Resolution, General Assembly 55th Session, A/RES/55/243, 1 May 2001.

²⁴² See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 12.

Heritage Convention to include properties nominated by the territorial state in accordance with art. 3 even if the inscription on the World Heritage List was never completed and therefore placed on the so-called 'tentative list'.²⁴³ After the destruction of the Buddha sculptures, the site was later inscribed on the World Heritage List as a Cultural Landscape including in the motivation under the first criterion for inscription the Buddha statues as an "outstanding representation of the Gandharan school in Buddhist art[...]".²⁴⁴ Because of the presented facts, it is possible to conclude that the World Heritage Convention was applicable to the statues also at the time of their destruction. By this, it is possible to conclude that the destruction of the Bamiyan Buddhas was a violation of art. 4 of the World Heritage Convention.

It is important to note that despite the long lasting conflict on Afghan territory, it is not possible to assume applicability for the conventions governing armed conflict to the incident. Afghanistan is not a party to the 1954 Hague Convention which concludes that the rules of the convention are not binding for the actions of an Afghan government on a treaty basis. It is possible to discuss the applicability of the conventions protecting cultural properties during armed conflict based on their eventual status as customary international law but its relevance for this case is highly questionable. The sculptures were destroyed as an expression of defiance and iconoclasm from the Taliban government rather than as a casualty of conflict. It must be assumed for the applicability of the rules of armed conflict that the destruction has a coherent relation to the conflict itself such as the use of the cultural property as a military target or conflict in the immediate vicinity.²⁴⁵ Roger O'Keefe presents the opinion that the laws of armed conflict were not applicable to the Bamiyan incident based on the lacking connection between the destruction of the sculptures and the non-international conflict in Afghanistan.²⁴⁶ A dissident opinion is presented by Francesco Francioni and

²⁴³ See O'Keefe, World Cultural Heritage p. 189.

²⁴⁴ See UNESCO, Cultural Landscape and Archaeological Remains of the Bamiyan Valley accessed at <https://whc.unesco.org/en/list/208/> (2019-10-12)

²⁴⁵ See O'Keefe, World Cultural Heritage p. 195.

²⁴⁶ See O'Keefe, World Cultural Heritage p. 195.

Federico Lenzerini whom assume applicability of instruments governing rules of armed conflict based on their status as customary international law.²⁴⁷ Francioni and Lenzerini does not motivate on what grounds they find applicability for the customary international rules of armed conflicts to the situation in Bamiyan 2001. It is therefore not possible to conclude with certainty if the incident could adhere to the laws of war, but for the purpose of this text this incident will be analysed as a ‘peacetime’ destruction. The Buddhas were not destroyed as a immediate consequence of the conflict but by the regime which effectively governed the area and the destruction had no military objective. For the purpose of this text, this incident will be considered to fall outside the context of a non-international conflict following the reasoning of Roger O’Keefe.²⁴⁸

The Taliban regime has been questioned as a subject of international law because of the lack of international recognition for the regime. As previously noted, only three states recognised the Taliban rule as a legitimate government. It should be noted that while it is reasonable to question the legitimacy of the Taliban regime, for the purpose of this text, effective territorial control is sufficient to determine subjectivity under international law.²⁴⁹ The UN Security Council has previously ordered sanctions based on breaches of international law to unrecognised regimes²⁵⁰ which must be understood as evidence that it is the *de facto* governance of a territory and not international recognition of legitimacy which is necessary for subjectivity under relevant international norms.

The reactions from the international community as a whole, including individual states, groups of states and international organisations as the UN and UNESCO, are compared to other cases of heritage destruction overwhelming. This case was chosen because it is one of the very few cases where states uniformly condemned heritage destruction within a sovereign

²⁴⁷ See generally Francioni and Lenzerini, Destruction of the Bamiyan Buddhas.

²⁴⁸ See generally O’Keefe, World Cultural Heritage.

²⁴⁹ See Francioni, Lenzerini, The Destruction of the Buddhas of Bamiyan p. 630.

²⁵⁰ See generally Security Council Resolution 216, S/RES/216, 12 November 1965; Security Council Resolution 217, S/RES/217, 20 November 1965.

state. There are many reasons possible for the unusually large response and likely does motive play a significant part. The Taliban's motive was based on a largely rejected interpretation of Islam as well as being inheritably intolerant and provocative. The Taliban may have wished to provoke the international community as a result of its general unwillingness to recognize the Taliban state, or as a response to the sanctions placed on them. It is also possible that they wished to maintain the position as notoriously disobedient in face of the western establishment. For the international community, the destruction seemed senseless. The Buddhas had been protected by Muslim leaders in Afghanistan for hundreds of years, nations offered to support financially or to completely remove the statues to rebuild them elsewhere if the offence came indeed from the symbol they represented.

Yet, nothing in the immediate reaction of states and organisations in the wake of the reaction clearly confirms the existence of a customary obligation to spare the Buddhas. The vocabulary used was powerful with examples like 'crime against cultural heritage' and 'grave wrong' but lacks the normative character needed to identify a customary norm. Condemning states did not speak of 'international obligations' or 'duties' which would have more clearly expressed *opinio juris* for the existence of an obligation. It does however strengthen the idea of right to diplomatic interventions from other states if another states threaten their cultural heritage. The amount of state condemnation and their uniformity allows for the conclusion that states understood diplomatic pressure to be a lawful way of attempting to stop the destruction.

The destruction of the Buddhas led UNESCO to draft the previously discussed 'UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage'. The Declaration was a result of the global outcry in the wake of the destruction of the statues. Although not as powerful a message as had it been presented in treaty form, the Declaration still speaks for the member states to UNESCO's wishes to clarify existing norms on *this* type of intentional heritage destruction. As a requisite, the destruction must be a violation of a rule in international law or an "unjustifiable offence to the

principles of humanity”.²⁵¹ It is possible to understand the Declaration to apply to the destruction of the statues based on the breach of the obligation under art. 4 World Heritage Convention, but more likely would it be considered such “an unjustifiable offence to the principles of humanity and dictates of public conscience[...].”²⁵² The connection between destruction of cultural heritage and human rights crimes was first made at the Nuremberg trials and was evolved by the International Criminal Tribunal for Yugoslavia.²⁵³ It was recently again actualized by the process towards Al-Mehdi in the International Criminal Court for his participation in crimes against cultural property in Timbuktu, Mali.²⁵⁴ Although all of the above mentioned cases took place in relation to an armed conflict, it must be acknowledged that states can violate human rights also in peacetime.²⁵⁵ As shown by the statements made by states, the Buddha statues in Bamiyan represented an important cultural symbol for Buddhist communities around the world. It was also an important site for the people Hazara who lived in Bamiyan Valley. Cultural heritage destruction may therefore arise to a violation of the Universal Declaration of Human rights of which art. 27 which proclaims the rights to participate in cultural life.²⁵⁶ This indicated that the wanton destruction of cultural symbols belonging to a group, religion or to mankind as a whole may also entail state responsibility under International Human Rights law.²⁵⁷

²⁵¹ See UNESCO Declaration concerning Intentional Destruction of Cultural Heritage, 32C/Resolutions, Paris 29 September – 17 October 2003, art. 2.

²⁵² See UNESCO Declaration concerning Intentional Destruction of Cultural Heritage, 32C/Resolutions, Paris 29 September – 17 October 2003, art. 2.

²⁵³ See generally Gottlieb, *Criminalizing Destruction of Cultural Property* p. 873-877 for discussion on whether cultural heritage destruction can amount to an independent crime against humanity.

²⁵⁴ See generally International Criminal Court, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, 27 September 2016.

²⁵⁵ See Wangkeo, *Monumental Challenges* p. 271.

²⁵⁶ See UN, *The Universal Declaration of Human Rights*, General Assembly Res 217A (III), Paris 10 December 1948, art. 27.

²⁵⁷ See generally O’Keefe, *Beyond State Sovereignty* p. 1212-1215.

5.3 The Bridge and Dresden Elbe Valley

5.3.1 Context

Dresden Elbe Valley is located in Sachsen, Germany, and is a cultural landscape stretching around 18 km along the river Elbe.²⁵⁸ The city of Dresden was from the 15th century a important landmark who housed Saxon royalty and became during the 18th century a centre for European art, culture and economics.²⁵⁹ In spite of the city's rich history, it was a tragedy which would come to define its legacy to future generations. On the evening of the 13 February 1945 British bombers began the first of four air raids that would reduce Dresden to little more than rubble. The bombing did not only claim thousands of civilian lives but destroyed most of the city's cultural heritage. Dresden became a symbol for the total desolation of war and the devastation of military attacks against civilian targets.²⁶⁰ After the war, the city was slowly rebuilt and in 2004 it was inscribed on the World Heritage List as a cultural landscape encapsulating both the urban area of Dresden and its surroundings. The area, famed for its beauty, consists of meadows and soft hills in which you will find unique examples of domestic architecture and monuments from the 16th century forward. The city of Dresden is also home to many typical structures from the time of the industrial revolution such as the Blue Wonder steel bridge from 1893 and a single rail suspension cable railway, dating 1901.²⁶¹

The cultural landscape was the latest of World Heritage categories eligible for inscription on the World Heritage List and can be described as sites who portray the connected evolution of people and nature. Usually, these sites are associated with a traditional type of land use or customs which respects biodiversity and embodies social developments in symbiosis with nature.²⁶²

²⁵⁸ See UNESCO, World Heritage List Dresden Elbe Valley, accessed at <https://whc.unesco.org/en/list/1156/> (2019-11-02)

²⁵⁹ See Dresden.de, History of the City of Dresden, accessed at <https://www.dresden.de/en/city/history.php> (2019-11-02)

²⁶⁰ See Dresden.de, 13th February – Anniversary of the destruction of Dresden, accessed at <https://www.dresden.de/en/city/07/13th-of-February.php> (2019-11-02)

²⁶¹ See UNESCO, World Heritage List Dresden Elbe Valley, accessed at <https://whc.unesco.org/en/list/1156/> (2019-11-02)

²⁶² See UNESCO, Cultural Landscapes, accessed at <https://whc.unesco.org/en/culturallandscape/> website (2019-11-02)

Germany became a party to the World Heritage Convention in 1976 and has been known to promote international co-operation efforts on the field of cultural heritage.²⁶³

5.3.2 Threat to Cultural Heritage

After the inscription on the World Heritage List the World Heritage Centre in Germany, received information from local individuals and NGOs concerning a project to construct a four lane motor crossing of the Elbe river in the heart of the protected cultural landscape.²⁶⁴ An ICOMOS evaluation from 2003 stated that the application of the state noted possibility for construction of new crossings of the river but that no larger traffic crossings was planned. The municipality of Dresden, effectively responsible for the conservation of the World Heritage site expressed the need for an additional crossing of Elbe and had therefore conducted a referendum with the citizens of Dresden to investigate the local support. The referendum was answered by a majority of votes in favour of the planned bridge and hence, the local authorities initiated the project.²⁶⁵ In 2006 the detailed project plans was provided to ICOMOS which then stated that the construction of a bridge as planned would likely negatively affect the World Heritage Site and that the bridge did not resemble an urban crossing as expressed in the application but rather that of a motorway.²⁶⁶ After investigation into the matter, it was concluded that the original application made by Germany to inscribe the property did not contain correct information on the design and location of the planned crossing.²⁶⁷ Instead of providing the detailed project plans with the application dossier, the project was only described in an internal document in German. Upon application, all relevant documents need to be provided to UNESCO in one of its working languages, English or French. As the documents were never translated, they never became a part of the

²⁶³ See Strecker, *Landscape Protection in International Law* p. 89.

²⁶⁴ See UNESCO, *State of Conservation of World Heritage properties*, WHC-06/30.COM/7B, Vilnius 8-16 July 2006 p. 197.

²⁶⁵ See UNESCO, *State of Conservation of World Heritage properties*, WHC-06/30.COM/7B, Vilnius 8-16 July 2006 p. 198.

²⁶⁶ See UNESCO, *State of Conservation of World Heritage properties*, WHC-06/30.COM/7B, Vilnius 8-16 July 2006 p. 198.

²⁶⁷ See Strecker, *Landscape Protection in International Law* p. 86.

application dossier.²⁶⁸ The construction plans for the Waldschlösschen Bridge was approved by the Regional Council before the property was inscribed on the World Heritage List²⁶⁹ and the German authorities wrongly assumed that since the site was not inscribed at the time of the decision they did not have to account for how their State responsibilities under the World Heritage Convention might impact the project.²⁷⁰

A visual impact study concluded that the planned bridge did not integrate well with the existing crossings in Dresden and that the placement of the bridge, if constructed, would bisect the cohesive landscape at its most sensitive point. Effectively, it would render an irreversible impact on the view of the Dresden skyline and the surrounding landscape.²⁷¹

By the request of Germany, ICOMOS and UNESCO launched a Reinforced Monitoring Mission on the 4-5 February 2008 which noted that construction for the Waldschlösschen Bridge had already begun following the original plans. Excavations was underway to lay the foundations for the bridge and the mission noted that even though the will seemed to exist to try to mediate the impact of the bridge, the construction planned was essentially the same as the original design and would therefore have the same negative effect on the sites outstanding universal value.²⁷² The mission recommended further that Germany halted the ongoing construction to investigate further an alternative solution, preferably a tunnel which would have a significantly smaller visual impact and still maintain the desired functionality.²⁷³

In 2009, the Permanent German Delegation to UNESCO announced to the World Heritage Committee, in an update report, the establishment of a *Dresden Elbe Valley World Heritage Centre* and also informed on the

²⁶⁸ See Strecker, Landscape Protection in International Law p. 88.

²⁶⁹ See Strecker, Landscape Protection in International Law p. 87.

²⁷⁰ See Strecker, Landscape Protection in International Law p. 88.

²⁷¹ See UNESCO, State of Conservation of World Heritage properties, WHC-06/30.COM/7B, Vilnius 8-16 July 2006 p. 198.

²⁷² See UNESCO, State of Conservation of the properties inscribed on the List of World Heritage in Danger, WHC-08/32.COM/7A, Quebec City 2-10 July 2008 p. 76.

²⁷³ See UNESCO, State of Conservation of the properties inscribed on the List of World Heritage in Danger, WHC-08/32.COM/7A, Quebec City 2-10 July 2008 p. 77.

management of the site from February 2006 to January 2009. The report was overdue; a concerned World Heritage Committee had requested a progress report on the project in 2008 which Germany failed to provide. In the update report from 2009, Germany confirmed that construction of Wanschlössen Bridge had begun in August 2007 and that by November 2008 the foundations was completed. The report further noted that all legal remedies to halt or alter the project in national courts had been exhausted and concluded that the bridge would be constructed according to the original plan. The World Heritage Committee recognised that Germany through its decision to proceed with the construction had ignored the requests of both UNESCO and its advisory bodies presented at the 30th, 31st and 32nd Sessions²⁷⁴ and decided to delete Dresden Elbe Valley from the World Heritage List as a result.²⁷⁵ The Committee noted that Germany by ignoring repeated requests to halt the project had failed to protect and conserve the outstanding universal value of the inscribed property and therefore neglected its international obligations as defined by the 1972 World Heritage Convention.²⁷⁶

5.3.3 Response

The issue was first addressed at the 30th session of the World Heritage Committee in 2006. The plans to construct the bridge had already been in motion at the time of inscription and the Observer Delegation from Germany remarked that ICOMOS at the time of application had not remarked on the proposed construction. The German authorities was at that time willing to consider a restriction on heavy traffic on the bridge to conform with the Committees wishes.²⁷⁷ ICOMOS countered this argument made by Germany by informing the Committee that plans to build another river crossing had been proposed on various occasions from the 19th century forward and that they had not received information on any concrete plans at

²⁷⁴ See UNESCO, State of Conservation of the properties inscribed on the List of World Heritage in Danger, WHC-09/33.COM/7A, Seville 22-30 June 2009 p. 90.

²⁷⁵ See UNESCO, Decision World Heritage Committee 33d Session, 33 COM 7A.26, Seville 22-30 June 2009.

²⁷⁶ See UNESCO, Decision World Heritage Committee 33d Session, 33 COM 7A.26, Seville 22-30 June 2009.

²⁷⁷ See UNESCO, Summary Records World Heritage Committee 30th Session, WHC-06/30.COM.INF.19, Vilnius 8-16 July 2006 p. 136.

the time of application. According to the Operational Guidelines, a State Party has to inform the Committee of any plans for major construction with their application, something the German authorities had failed to do.²⁷⁸ The final decision to launch the project was to be taken by Dresden City Council within a short period of time after the 30th session. United States of America expressed their regret for the miscommunication or misinformation that had generated the issue. The Norwegian delegation called it “a very serious case”²⁷⁹ and if the construction would “irreversibly damage the values and integrity of the property”²⁸⁰ the site no longer held the qualifications required for World Heritage listing and should be removed from said list. Norway consequently proposed to include in the decision to be taken at the end of discussion that the site could be delisted should Germany go through with the construction.²⁸¹ Tunisia, adopting a more cautious approach suggested another reactive monitoring mission to conclude the impact of the bridge. It was their understanding that the Committee should allow Germany to adapt their plans according to the recommendations of UNESCO and ICOMOS. Japan and Madagascar aligned themselves with Tunisia, urging caution. Japan nonetheless concurred with the seriousness of the situation.²⁸² Peru, uncertain on the possibility to list a site on the World Heritage list of sites in danger without the consent of the State Party suggested the Committee institute a system to warn State Parties of possible danger-listing. The Peruvian delegation urged the Committee members to remember that delisting would be an extreme outcome.²⁸³ The Delegation from Canada reminded the members of the Committee of their responsibility to react to threats to cultural properties and inscribe them on the list in danger. According to art. 179 of the Operational Guidelines, such a threat now existed towards the cultural landscape in Dresden Elbe Valley.

²⁷⁸ See UNESCO, Summary Records World Heritage Committee 30th Session, WHC-06/30.COM.INF.19, Vilnius 8-16 July 2006 p. 137.

²⁷⁹ See UNESCO, Summary Records World Heritage Committee 30th Session, WHC-06/30.COM.INF.19, Vilnius 8-16 July 2006 p. 136.

²⁸⁰ See UNESCO, Summary Records World Heritage Committee 30th Session, WHC-06/30.COM.INF.19, Vilnius 8-16 July 2006 p. 136.

²⁸¹ See UNESCO, Summary Records World Heritage Committee 30th Session, WHC-06/30.COM.INF.19, Vilnius 8-16 July 2006 p. 136.

²⁸² See UNESCO, Summary Records World Heritage Committee 30th Session, WHC-06/30.COM.INF.19, Vilnius 8-16 July 2006 p. 137-138.

²⁸³ See UNESCO, Summary Records World Heritage Committee 30th Session, WHC-06/30.COM.INF.19, Vilnius 8-16 July 2006 p. 138.

They also agreed with the Norwegian proposal to flag for delisting should the project be carried out.²⁸⁴ Norway argued “the issue of the conflict between heritage and economy would undoubtedly recur but the Committee had a clear duty to protect the heritage [...] In the case now before the Committee it was clear that, if the work was carried out, the outstanding universal value would be lost. The State Party had to choose between the bridge and World Heritage status. The Committee had no other option.”²⁸⁵ Benin and the Netherlands aligned themselves with Norway and urged the committee to send a powerful message to Germany and the local population in support of the construction about the great concerns for the integrity of the property.²⁸⁶

As the Committee moved to inscribe the property on the list in danger without the consent of Germany, following relevant precedents, the German Observer Delegation advised it would inform the City Council of Dresden on the emerging seriousness of the matter.²⁸⁷ The Committee warned the State party that should the construction proceed as planned, the site risked deletion from the World Heritage List.²⁸⁸ When the local municipalities in Dresden was reached by the decision to place site on the list of World Heritage in Danger they decided to halt the project but the Regional government of Sachsen demanded that the construction would continue in accordance with the decision made by the earlier referendum. The tension between the City Council of Dresden and the Regional authorities led to a mediating hearing to try to find alternatives for the planned bridge which would satisfy the requests of the World Heritage Committee from the 30th session.²⁸⁹ A workshop consistent of experts nominated by ICOMOS and UNESCO under the supervision of the German delegate to the World

²⁸⁴ See UNESCO, Summary Records World Heritage Committee 30th Session, WHC-06/30.COM.INF.19, Vilnius 8-16 July 2006 p. 137.

²⁸⁵ See UNESCO, Summary Records World Heritage Committee 30th Session, WHC-06/30.COM.INF.19, Vilnius 8-16 July 2006 p. 138.

²⁸⁶ See UNESCO, Summary Records World Heritage Committee 30th Session, WHC-06/30.COM.INF.19, Vilnius 8-16 July 2006 p. 138.

²⁸⁷ See UNESCO, Summary Records World Heritage Committee 30th Session, WHC-06/30.COM.INF.19, Vilnius 8-16 July 2006 p. 139.

²⁸⁸ See UNESCO, Decision World Heritage Committee 30th Session, 30COM.7B.77, Vilnius 8-16 July 2006.

²⁸⁹ See UNESCO, State of Conservation of the properties inscribed on the List of World Heritage in Danger, WHC-07/31.COM/7A, Christchurch 23 June – 2 July 2007 p. 79.

Heritage Committee concluded that no bridge with the desired function, no matter if the design was altered from the original plans, would stand in accordance with the Outstanding Universal Value of the site. However, it speaks for the effort the parties made to try to reconcile the urban needs of Dresden with the protection of its World Heritage value. Ultimately, the city council of Dresden addressed the issue in the domestic Bautzen court which concluded on the 13 March 2007 that the outcome of the referendum had to be respected and the bridge constructed in accordance to its outcome.²⁹⁰ After the regional court hearings, the Dresden City Council referred the question to the Supreme Constitutional Court of Germany which, as previous instances, upheld the validity of the referendum and ordered the regional authorities to initiate construction immediately.²⁹¹

The issue at hand was then whether the decision would include the proposed amendment informing Germany that the site would be delisted, should they continue the planned construction. Israel and the Netherlands concurred. India expressed that the “proposal would send out a strong message. If that helped maintain the outstanding universal value the Committee would have achieved its objectives”²⁹². The Delegation from New Zealand “expressed its full support for the Delegation of Norway’s proposal and its belief that the credibility of the Committee and of the [World Heritage] Convention were at stake”²⁹³. The Committee reached consensus, adopting the decision as amended by the Norwegian proposal. United States of America asked to have their concerns about a danger listing recorded and Japan, although indicating agreement, noted its concerns for the speed of the process.²⁹⁴ The consequent decision urged the local German authorities to halt all construction and seek alternative solutions as well as adding;

“**Decides to inscribe the property on the List of World Heritage in Danger**, with a

²⁹⁰ See UNESCO, State of Conservation of the properties inscribed on the List of World Heritage in Danger, WHC-07/31.COM/7A, Christchurch 23 June – 2 July 2007 p. 80.

²⁹¹ See Strecker, Landscape Protection in International Law p. 88.

²⁹² See UNESCO, Summary Records World Heritage Committee 30th Session, WHC-06/30.COM.INF.19, Vilnius 8-16 July 2006 p. 139.

²⁹³ See UNESCO, Summary Records World Heritage Committee 30th Session, WHC-06/30.COM.INF.19, Vilnius 8-16 July 2006 p. 139.

²⁹⁴ See UNESCO, Summary Records World Heritage Committee 30th Session, WHC-06/30.COM.INF.19, Vilnius 8-16 July 2006 p. 140.

view to considering delisting the property from the World Heritage List at its 31st session in 2007, if the plans are carried out,”²⁹⁵

The news that Dresden Elbe Valley potentially would lose their World Heritage status after being inscribed on the list in just 2004 led to intense exchange between the local as well as federal authorities in Germany and UNESCO as well as several domestic court proceedings. At the 31st session, the World Heritage Centre informed on the updated situation. The local population of Dresden as well as the regional authorities drove a hard campaign to change the original construction plans to keep the sites World Heritage status but their petitions were rejected both by the local Saxon Higher Administrative Court and the Federal Constitutional Court which meant all legal resources to block the decision were exhausted. This led the World Heritage Centre to bring to the Committees attention the issues of implementing the World Heritage Convention in the federal system of Germany. Despite the setbacks, the local population and the city of Dresden continued their search for a mitigating solution which would allow them to retain the World Heritage Status and comply with the fallout of the court proceedings.²⁹⁶

The German federal authorities and State Chancellor Angela Merkel referred to the issue of a bridge construction in Dresden Elbe Valley a regional problem and did not try to change the decision politically even faced with the warnings from UNESCO that the property would be delisted should the project be completed.²⁹⁷ The decision to move forward with the construction despite the strong reactions from UNESCO seemed somewhat bewildering, as Germany previously had altered constructions in relation to World Heritage Sites due to concern for the outstanding universal value of the site. The German Foreign Federal Minister stated in relation to the threat

²⁹⁵ See UNESCO, Decision World Heritage Committee 30th Session, 30 COM 7B.77, Vilnius 8-16 July 2006.

²⁹⁶ See UNESCO, Summary Records World Heritage Committee 31st Session, WHC-07/31.COM/INF.24, Christchurch 23 June – 2 July 2008 p. 47.

²⁹⁷ See Blobel, Save Dresden Elbe Valley, The New York Times, 4 June 2009, accessed at <https://www.nytimes.com/2009/06/05/opinion/05iht-edblobel.html> (2019-11-04)

of delisting of Dresden Elbe Valley that it would constitute “a serious loss of credibility for Germany in the field of international co-operation”.²⁹⁸

The Observer Delegation from Germany at the 31st World Heritage Committee Session informed that although no legal remedies remained to halt the project “[t]he State Party was determined to find a solution to protect the property and at the same time meet the transport needs of the residents”²⁹⁹ but also the need for additional time to do so.³⁰⁰ The Committee members understood the willingness from Germany to comply with the provisions of their decision from the 30th session but also the difficulties of doing so within their federal system. The Delegation of Kenya argued the Committee should not move to delist the property before Germany was given the chance to find a remedy. Lithuania spoke in similar words, urging the Committee to stand by their strong message while encouraging the will to compromise from the German authorities.³⁰¹ The Moroccan and Tunisian delegations asked the members of the Committee to tread carefully and remain aware of the effects the unprecedented decision to delist a property would have. They both advocated for finding a compromise with German authorities. Israel and Canada were of a differing view. Israel “recalled that according to the [World Heritage] *Convention* and its *Operational Guidelines* the responsibility for adhering to its provisions lay with the State Party”³⁰². Canada “added that if that bridge were to be built, the property should, regrettably, be de-listed”.³⁰³

Madagascar aligned itself with Kenya but expressed “that the presence of a bridge is in any case unacceptable and implies the removal from the World

²⁹⁸ See Strecker, *Landscape Protection in International Law* p. 89.

²⁹⁹ See UNESCO, Summary Records World Heritage Committee 31st Session, WHC-07/31.COM/INF.24, Christchurch 23 June – 2 July 2008 p. 48.

³⁰⁰ See UNESCO, Summary Records World Heritage Committee 31st Session, WHC-07/31.COM/INF.24, Christchurch 23 June – 2 July 2008 p. 48.

³⁰¹ See UNESCO, Summary Records World Heritage Committee 31st Session, WHC-07/31.COM/INF.24, Christchurch 23 June – 2 July 2008 p. 48.

³⁰² See UNESCO, Summary Records World Heritage Committee 31st Session, WHC-07/31.COM/INF.24, Christchurch 23 June – 2 July 2008 p. 49.

³⁰³ See UNESCO, Summary Records World Heritage Committee 31st Session, WHC-07/31.COM/INF.24, Christchurch 23 June – 2 July 2008 p. 49.

Heritage list”.³⁰⁴ United States of America adopted a more lenient position and reminded the Committee that the goal was not only to identify and inscribe properties but also to act for their conservation. It seemed, according to the American delegation, counterintuitive to delist a property in a State Party obviously committed to its conservation. They also argued that the current actions of the Committee could be considered as intruding on the German sovereignty. New Zealand agreed with Canada, the property should only be delisted after the outstanding universal value was *de facto* lost.³⁰⁵ The delegation from Spain shared their view that the responsibility for protecting the outstanding universal value of a site lay with the Committee and that the property should be delisted if Germany did not alter the planned bridge construction. The consequent decision adopted, 31COM7A.27, retained the property on the list in danger and notified that the property would be delisted “in the event that the construction of the bridge has an irreversible impact on the outstanding universal value of the property”³⁰⁶. It also confirmed that another active monitoring mission would be launched by relevant advisory bodies.³⁰⁷

At the 32nd Session, The Mayor of Dresden transmitted, through ICOMOS, a plea to the Committee to allow yet more time before deciding to remove the site from the World Heritage List.³⁰⁸ Germany when given the parole “recalled that his country was a faithful supporter of the Convention and that it would accept any decision of the Committee. [authors translation]”³⁰⁹ On the other hand, Germany would not ask for the removal of the property itself from the World Heritage List. “As a World Heritage property, Dresden no longer belongs solely to Germany but to the whole world. [authors

³⁰⁴ See UNESCO, Summary Records World Heritage Committee 31st Session, WHC-07/31.COM/INF.24, Christchurch 23 June – 2 July 2008 p. 50. (authors translation)

³⁰⁵ See UNESCO, Summary Records World Heritage Committee 31st Session, WHC-07/31.COM/INF.24, Christchurch 23 June – 2 July 2008 p. 50.

³⁰⁶ See UNESCO, Decision World Heritage Committee 31st Session, 31 COM 7A.27, Christchurch 23 June – 2 July 2008.

³⁰⁷ See UNESCO, Decision World Heritage Committee 31st Session, 31 COM 7A.27, Christchurch 23 June – 2 July 2008.

³⁰⁸ See UNESCO, Summary Records World Heritage Committee 32nd Session, WHC-08/32.COM, Quebec City 2-10 July 2008 p. 29.

³⁰⁹ See UNESCO, Summary Records World Heritage Committee 32nd Session, WHC-08/32.COM, Quebec City 2-10 July 2008 p. 31.

translation]”³¹⁰ They asked that the property be retained on the list and that the Committee would urge the German state to halt all construction and remove all inappropriate changes made.

The Delegations of Kenya, Egypt and Nigeria noted that Germany was “a strong supporter”³¹¹ of the World Heritage Convention and that how regrettable it might be, the Committee should not move to delist before all options to keep the property on the list had been explored. The municipality in Saxony had ignored the wishes of the population in Dresden and UNESCO should not do the same.³¹² Spain added that the spirit of the World Heritage Convention entailed a collective failure should Germany proceed with the construction, as designated World Heritage is within the responsibility of the world community.³¹³ Brazil “said that it was the duty of the Committee not just to put sites on the list but also to maintain them on it”³¹⁴. The Committee reached consensus to allow the German state another extension of the deadline to revise the construction plans and reverse all work already put down for the bridge to maintain the outstanding universal value and World Heritage listing of the site.³¹⁵

In the months of March through May in 2009, the World Heritage Centre received countless letter from individuals and NGOs asking for help to halt the construction of the bridge or speaking of the local concern for the deteriorating value of Dresden Elbe Valley caused by the bridge construction. Dresden Administrative Court had dismissed all proposed alternative solutions due to environmental or financial obstacles so when the 33e session of the World Heritage Committee convened matters seemed

³¹⁰ See UNESCO, Summary Records World Heritage Committee 32nd Session, WHC-08/32.COM, Quebec City 2-10 July 2008 p. 31.

³¹¹ See UNESCO, Summary Records World Heritage Committee 32nd Session, WHC-08/32.COM, Quebec City 2-10 July 2008 p. 31.

³¹² See UNESCO, Summary Records World Heritage Committee 32nd Session, WHC-08/32.COM, Quebec City 2-10 July 2008 p. 31.

³¹³ See UNESCO, Summary Records World Heritage Committee 32nd Session, WHC-08/32.COM, Quebec City 2-10 July 2008 p. 32.

³¹⁴ See UNESCO, Summary Records World Heritage Committee 32nd Session, WHC-08/32.COM, Quebec City 2-10 July 2008 p. 32.

³¹⁵ See UNESCO, Decision World Heritage Committee 32nd Session, 32 COM 7A.26, Quebec City 2-10 July 2008.

even more troublesome than at their last session.³¹⁶ Construction had continued despite the repeated warnings from UNESCO at a faster pace than before and the federal funding set of for the World Heritage sites in Germany now benefited all other sites, except Dresden Elbe Valley. The Mayor of Dresden, present at the Committee meeting, addressed the members with a plea to allow the site to stay on the World Heritage List and encapsulated the dilemma with the words; “We want to preserve the World Heritage status. But we cannot ignore the law to do so”.³¹⁷

Bahrain called it a “crucial case involving the credibility of the World Heritage Committee”³¹⁸ for that “only one solution available if the credibility of the Convention was to be preserved”³¹⁹. Kenya appealed to Germany “as a leader under the convention, to set an example in matters relating to conservation”³²⁰ and maintained that time now had come for the Committee to take action. The delegation argued that should the Committee refrain to deleting the property it “could be interpreted as arrogance on the part of the Committee”³²¹. Others were less convinced that withdrawal was the right path. Morocco expressed their hesitance with a decision to delist the site and recalled the “serious consequences for the future, for the State Party, but also for the Convention [authors translation]”³²². Madagascar agreed, calling it a “serious case of conscience [authors translation]”³²³ and urged to committee to find a mediating solution.³²⁴ Israel, who early on was a supporter of deletion, argued that the case reached a “point of no return”³²⁵ and that the property consequently had to be delisted. Canada “considered

³¹⁶ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 89.

³¹⁷ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 91.

³¹⁸ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 92.

³¹⁹ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 92.

³²⁰ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 92.

³²¹ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 92.

³²² See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 92.

³²³ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 92.

³²⁴ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 92.

³²⁵ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 94.

the construction of the bridge to be incompatible with the conservation of the Outstanding Universal Value of the property”³²⁶ and as well “that the credibility of the World Heritage Committee was at stake”.³²⁷ United States of America noted that “deletion of this property from the World Heritage List would constitute a watershed moment in the history of the Convention. Never before has a property been deleted on the volition of the World Heritage Committee[...]”³²⁸ but as Germany showed no willingness to seek compromise with UNESCO, the credibility of the institution was at stake and therefore changed their minds and supported deletion.³²⁹

Egypt, Brazil and Republic of Korea strongly opposed delisting and Egypt added that removing the property from the World Heritage List was “not the best way to preserve heritage values embedded in the property”³³⁰ and suggested the Committee launched international assistance to Germany.³³¹

Decision 33COM7A.26 effectively deleting Dresden Elbe Valley from the World Heritage List was adopted after a secret vote, making Dresden Elbe Valley the first property to be delisted from the World Heritage List without the consent of the territorial state. The decision stated;

“4. Further recalling that, according to Article 6.1 of the *Convention*, the properties inscribed on the World Heritage List constitute World Heritage, the protection of which is the duty of the international community as a whole and recalling further the duty of the international community to assist and to cooperate with States Parties in their endeavour to conserve such heritage,

5. Recalling as well that States Parties have the obligation under the *Convention* to protect and conserve the World Cultural and Natural Heritage situated on their territory, notably to ensure that effective and active measures are taken for the protection and conservation of such heritage,

³²⁶ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 94.

³²⁷ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 94.

³²⁸ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 95.

³²⁹ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 95.

³³⁰ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 94.

³³¹ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM/Summary, Seville 22-30 June 2009 p. 94-95.

6. Notes with deep regret that the State Party was unable to fulfil its obligations defined in the *Convention*, in particular the obligation to protect and conserve the Outstanding Universal Value, as inscribed, of the World Heritage property of the Dresden Elbe Valley;³³²

5.3.4 Analysis

Dresden Elbe Valley became the first World Heritage Site to be taken off the list by decision of the Committee which is why this case has been chosen for this text. It is clear from the context and the discussions in the World Heritage Committee that the division is deepest within Germany itself. The city council of Dresden, who turned after realizing the project could cost them the World Heritage status, and the regional government in the State of Saxony differ in their view of the German obligations according to national and international law. Germany, as a federal system, is subject to issues concerning the implementation of the World Heritage Convention. The Convention text clearly states that the subject of obligations set out by article 4 is the State Party, which must be understood to mean the German federal government. The domestic court proceedings revealed the confusion and lack of clarity while implementing the Convention on a regional and local level leading to a scenario where national law was preferred. It is possible that the lack of action and control from the Federal government has further strengthened the conception that regional interventions in World Heritage sites is somehow exempt from Germany's state responsibility under chapter II of the World Heritage Convention. It would seem counterintuitive to assume that the actions of a regional state within a federal system could not be attributed to the federal governance. According to the International Law Commissions articles on Responsibility of States for Internationally Wrongful Acts;

1. "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and

³³² See UNESCO, Decision World Heritage Committee 33d Session, 33 COM 7A.26, Seville 22-30 June 2009.

whatever its character as an organ of the central Government or of a territorial unit of the State.”³³³

As the State of Saxony and the City Council of Dresden operates as organs of the German federal government, their action will also be considered such ‘an act of that State under international law’. According to the State Responsibilities outlined by art. 4 of the World Heritage Convention, the German state had a duty to ensure “protection, conservation... and transmission to future generations”³³⁴ of the World Heritage values embedded in Dresden Elbe Valley. Although a much relevant discussion on whether it could be concluded that the outstanding universal value would be wholly compromised by the construction of one bridge, the relevant advisory bodies found that the skyline was disturbed in such a way that the inscription criterion no longer was fulfilled. Based on the assumption that the outstanding universal value of the site was indeed fully compromised by the bridge construction, Germany has failed to uphold its state responsibilities according to art. 4 of the World Heritage Convention. This is also the view of the Committee as expressed by the decision to delist Dresden Elbe Valley. Decisions of the Committee are in the end just communication by UNESCO, not binding as provisions in the Convention, but the UNESCO and Committees authority in interpretation of the Convention is not to be underestimated either.

It is worth noting, that no states objected towards the construction of the bridge in any official channels outside of the UNESCO forum. This indicates that states did not identify the construction of the bridge as a violation of a customary obligation.

The underlying conflict in the case seems to stem from miscommunication or misinformation on the German part from the very beginning. It is possible that the proceeding would have had a different course or outcome if

³³³ See International Law Commission, Responsibility of States for Internationally Wrongful Acts, November 2001 art. 4.

³³⁴ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 4.

the German application dossier had included the correct information on the work planned. The member states of the World Heritage Committee weigh mostly two values against each other. Firstly, the will to maintain the credibility of the World Heritage Convention and the Committee. Secondly, the will to maintain the site on the list to encourage the search for remedies from the German state and to better protect the values of the site. In the end, the risk of loss of credibility became too urgent. By the lack of other effective enforcement methods for breaches of the Convention, the Committee's decision to delist Dresden Elbe Valley seems ultimately motivated by the need to reprimand the German conduct of the matter. Should UNESCO have condoned the German breach and allowed Dresden Elbe Valley to remain on the World Heritage List, all of the measures adopted so far would have proven toothless and UNESCO would have lost one of its few means to control the actions of the State Parties, their authority.

5.4 The Reconstruction and Bagrati Cathedral

5.4.1 Context

Georgia, bordering the Russian Federation and the Black Sea, has experienced independence but was never able to take it for granted. For many years, Georgia was under the influence of the Russian empire and only became the Republic of Georgia for three short years between 1918 and 1921 before being annexed again into the Soviet Union. During these years, Georgians cultured their national identity which included new independent ideas on how to preserve the nation's cultural heritage. The process was halted with the incorporation into the Soviet Union, but the nationalism laid ground for during their fleeting years of independence never abandoned Georgia. The conflict of ideals between Georgians and Soviet common ideology would only intensify with the years and peaked after the death of Josef Stalin, whom himself was born in Georgia. Before the death of Stalin, Soviet ideology controlled all official culture

expressions in the Soviet republics. As Georgia started to break away from the common ideology to create their own cultural and national identity, Soviet centralized government responded by a proposal to change the constitutional status of the Georgian language. The Georgian people, resisting their language official status being threatened, engaged in large protest that would become the national liberation movement whose demonstration was forcefully struck down by Soviet troops on the 9th of April 1989 resulting in the death of around 20 protesters.³³⁵

As one of the first Soviet republics to fight for independence, Georgia held elections in 1990 soon after the collapse of the union and elected President Gamsakhurdia. Symbolically, on the 9th of April 1990 Georgia declared its independence. The region remained instable and in 1993 the elected president was overthrown and replaced by pro-Russian Shevarnadze.³³⁶ War broke out in two Georgian provinces who had autonomy under the Soviet Union, Abkhazia and South Ossetia. The satellite regions had fully developed administrative systems and claimed independence. After the war, the regions became *de facto* independent but have never gained international recognition.³³⁷ In 2003, a non-violent revolution called the *Rose Revolution* and its leader Mikheil Saakashvili forced the ill-liked government from power and Saakashvili was soon after elected President.³³⁸

Georgia was early to adopt Christianity and evidence exists that Georgia first became Christian in the 4th century. After the fall of the Soviet Union, a surge of Christian culture expressions suppressed by the old regime grasped society and authorities quickly started renovating and restoring churches of all sizes to satisfy the growing need for ecclesiastical buildings. Finances was very limited, as the administrative experience of such projects, and yet

³³⁵ See Gunia-Kuznetsova, Country Profile Georgia p. 3.

³³⁶ See Gunia-Kuznetsova, Country Profile Georgia p. 3.

³³⁷ See Puto, A new Georgia? New Eastern Europe, 4 October 2017, accessed at <https://neweasterneurope.eu/2017/10/04/a-new-georgia/> (2019-10-21)

³³⁸ See Gunia-Kuznetsova, Country Profile Georgia p. 3.

Georgia's Cultural Monuments agency reports they carried out over 400 conservation projects between 2004 and 2010.³³⁹

Georgia's transformation from old Soviet Republic into their vision of a modern country of European standards began in 2003 with the Rose Revolution. Mikheil Saakashvili, a lawyer trained at Columbia in the U.S. won the confidence of the Georgian people with slogans expressing how Georgia would become more pro-European and distance themselves from the Russian heritage. Saakashvili expressed that west is Georgia's "destiny written in history", referring to the symbolic link between ancient European heritage and the medieval Georgian golden age. In a flurry to rid the nation of symbols of the oppressors, the new government removed statues of old Soviet personages ignoring the protests that a very large part of Georgia's Soviet modernism was eradicated. The efforts would not halt there, Saakashvili wanted to impress the the European countries in the hope of being allowed to ascend to membership in the EU or NATO and launched a campaign to modernize and upgrade the standards of the nations buildings. Old town in Tblisi, capital of Georgia, was largely affected. The city had stood through fires and earthquakes and was a patchwork of architectural styles where old building had been destroyed and replaced. This part of the city was also home to many of Georgia's different ethnic minorities and it has been said not even Stalin dared interfere with the city of Tblisi. Saakashvili, and his investors, had to get creative to remove the existent tenants from the old quarters to make space for new buildings but as old buildings where systematically torn down to be replaced by modern replicas almost no one could afford to move in to the new houses.³⁴⁰

After his re-election in 2008, Saakashvili took a spiritual oath in the Bagrati Cathedral outside and promised to restore the cathedral. The complex of Gelati Monastery and Bagrati Cathedral was erected in the golden age of

³³⁹ See The Economist, Rising defiantly from the ruins, 28 August 2010 accessed at <https://go-gale-com.ludwig.lub.lu.se/ps/i.do?p=ECON&u=lununi&v=2.1&it=r&id=GALE%7CGP4100904043> (2019-10-21)

³⁴⁰ See Puto, A new Georgia? New Eastern Europe, 4 October 2017 accessed at <https://neweasterneurope.eu/2017/10/04/a-new-georgia/> (2019-10-21)

Georgia's medieval history characterized by political and economic prosperity.³⁴¹ When the Georgian opposition also chose Bagrati Cathedral as their venue to announce their new presidential candidate they did so because the cathedral “represents a symbol of a united and powerful Georgia”.³⁴²

5.4.2 Threat to Cultural Heritage

The Bagrati Cathedral was built in early 11th century by King Bagrat III who also gave it its name. An inscription in the interior of the structure reads “cronicon 223” which would translate to year 1003 A.D. in modern calendar. It was partially destroyed during subsequent wars by Ottoman troops and in 1770 the Cathedral was bombed and the original dome collapsed which brought down the pillars and shattered the windows. A few years later, the cathedral was once again attacked by Russian forces and left in a ruin state.³⁴³ In the 1950s, conservation work was introduced to stabilize the structure of the still standing walls but it wasn't until after the fall of the Soviet Union the outlook for Georgia's most famous Cathedral would change. It was inscribed on the UNESCO World Heritage List in 1994 as an ‘outstanding example of medieval architecture’ in its ruin state together with the neighbouring Gelati Monastery. By a constitutional agreement between the Georgian Orthodox Church and the government in 2001, the church gained ownership to all ecclesiastical properties and the Patriarch instituted a Commission on Cultural Heritage, including representatives from the Orthodox church and experts. UNESCO and ICOMOS wrote in the Joint Mission Report from 2008 that World Heritage Sites Gelati Monastery and Bagrati Cathedral lacked apparent management and that the purpose of the Patriarchs commission remained unclear. The relevant governmental agency still had the legal responsibility for cultural heritage since the Church commission lacked legal power.³⁴⁴

³⁴¹ See Japarashvili, UNESCO to Scrutinize Georgia's Conservation Efforts on Gelati Monastery, Georgia Today, 7 July 2015 accessed at <http://georgiatoday.ge/news/558/UNESCO-to-Scrutinize-Georgia's-Conservation-Efforts-on-Gelati-Monastery> (2019-10-20)

³⁴² See Agenda.ge, Opposition coalition names UNM member Grigol Vashadze as presidential candidate, 18 July 2018 accessed at <https://agenda.ge/en/news/2018/1523> (2019-10-20)

³⁴³ See UNESCO, Report on the joint World Heritage Centre/ICOMOS reactive mission to Bagrati Cathedral and Gelati Monastery, Georgia 22-28 April 2012 p. 6.

³⁴⁴ See UNESCO, Joint World Heritage Centre/ICOMOS Expert Mission Report to historical monuments of Mtskheta and Bagrati Cathedral and Gelati Monastery, Georgia 2-10 June 2008 p. 14.

The stakeholders planned for the reconstruction of Bagrati Cathedral and was drawing up plans together with architects in 2003. In 2004 ICOMOS informed the Georgian government that the reconstruction must be carried out in such a way as to not damage the outstanding universal value and the authenticity of the cathedral. As it was inscribed in a ruin state, ICOMOS advised the government that it would be more appropriate to allow the property to remain a ruin.³⁴⁵ The goal of the Georgian Orthodox Church and the government was to restore the religious use of the cathedral, hence a study including technical, archaeological and architectural analysis of the structure to prepare it for the reconstruction was made in 2005. The Georgian authorities considered two options for the cathedral, one to install a glass and steel roof over the original structure and another to completely rebuild the cathedral in reinforced concrete. The option recommended by ICOMOS, to completely refrain from reconstruction and conserve the cathedral in its ruin state, was never considered.³⁴⁶ The idea to rebuild the cathedral was mostly welcomed by the people and president Saakashvili's defiance of UNESCO recommendation was in line with the popular ideas of unifying the country under strong religious patriotic symbols of Georgia's golden age. The implication being that the Georgian government, through Saakashvili, considered that the Georgian national interest in their World Heritage Sites trumps that of the international community.³⁴⁷

In January 2008, the reconstruction work on the Bagrati Cathedral was initiated. According to art. 86 of UNESCO Operating Guidelines, a State party is only allowed to reconstruct a monument under exceptional circumstances and only on the basis of complete documentation of the original structure.³⁴⁸ This information was transmitted to the Georgian authorities who assured that the final decision would only be taken after

³⁴⁵ See UNESCO, Report on the joint World Heritage Centre/ICOMOS reactive mission to Bagrati Cathedral and Gelati Monastery, Georgia 22-28 April 2012 p. 7.

³⁴⁶ See UNESCO, Report on the joint World Heritage Centre/ICOMOS reactive mission to Bagrati Cathedral and Gelati Monastery, Georgia 22-28 April 2012 p. 7.

³⁴⁷ See The Economist, Rising defiantly from the ruins, 28 August 2010 accessed at <https://go-gale-com.ludwig.lub.lu.se/ps/i.do?p=ECON&u=lununi&v=2.1&it=r&id=GALE%7CGP4100904043> (2019-10-21)

³⁴⁸ See UNESCO, Operational Guidelines, WHC.19/01, 10 July art. 86.

review of the reconstruction plans by ICOMOS and the World Heritage Committee.³⁴⁹

In 2010, Georgia informed the World Heritage Committee of their commitment to the conservation of Bagrati Cathedral but the Joint Mission from UNESCO and ICOMOS observed construction that posed serious threat to the integrity of the monument. A large underground ring of concrete had been placed around the original foundations and concrete columns had been raised where the original stone pillars had stood. The Joint Mission informed the World Heritage Committee of the alterations made at the site and expressed serious concern for the authenticity of the monument should the project continue. The mission also noted that no conservation efforts concerning original structure was made and it would likely deteriorate as a result. A statement by a Patriarchate Technical Office representative to the Joint Mission announced that the Bagrati Cathedral was inscribed on the World Heritage List as “a symbol of national identity and unity” when in fact the site was inscribed as an ‘outstanding example of medieval Georgian architecture’ in its ruined state led the Joint Mission to underline the importance of maintaining with the inscribed outstanding universal value. A hard reconstruction could not only be considered a violation of Georgia’s international obligations but lead to the property being placed on the World Heritage List of sites in Danger or possible delisting.³⁵⁰

An international architect was sent to the site to consult on the changes already implemented and to assess the possibility to reverse them. His findings were that most of the reconstruction made was in irreversible form but advised that a lightweight roof could be mounted on the placed concrete

³⁴⁹ See UNESCO, Report on the joint World Heritage Centre/ICOMOS reactive mission to Bagrati Cathedral and Gelati Monastery, Georgia 22-28 April 2012 p. 7.

³⁵⁰ See UNESCO, Report on the joint World Heritage Centre/ICOMOS reactive mission to Bagrati Cathedral and Gelati Monastery, Georgia 22-28 April 2012 p. 8.

columns to shelter the monument and allow for religious use without rebuilding the cathedral.³⁵¹

The Joint Mission from UNESCO and ICOMOS in 2004 had predicted the determination to reconstruct the cathedral so strong in the Georgian stakeholders mind that not even the idea of the site being removed from the World Heritage List would persuade them to abstain.³⁵² In 2011, Georgian authorities informed UNESCO of conservation efforts to stabilize the west wall was being made but when the Joint Mission arrived to the site it was apparent that the conservation efforts in fact was a continuation of the reconstruction. Georgia had continued a hard reconstruction under the cover of conservation work. Georgia informed the Joint Mission the inauguration was planned for September 2012.³⁵³ The Bagrati Cathedral was fitted with a reinforced concrete cupola and the original structure was completely integrated in the new walls. Gaps in the original fabric was filled with cement and all of it covered with concrete and stone slabs. The Georgian government had also ignored the advice to implement the 400 original stones found in and around the church and excavated the central part to place the foundations for the cupola, destroying several layers of archaeological interest, among them, newly discovered tombs under the cathedral floor.³⁵⁴

5.4.3 Response

At the 28th session of the World Heritage Committee, the plans to reconstruct the Bagrati Cathedral was brought to discussion by the Lebanese delegation. After learning about the Georgian plans to reconstruct, Lebanon stated in the discussions on the matter that the “committee should urgently seriously examine the state of conservation of this property, that was at risk

³⁵¹ See UNESCO, Report on the joint World Heritage Centre/ICOMOS reactive mission to Bagrati Cathedral and Gelati Monastery, Georgia 22-28 April 2012 p. 9.

³⁵² See UNESCO, Report on the joint World Heritage Centre/ICOMOS reactive mission to Bagrati Cathedral and Gelati Monastery, Georgia 22-28 April 2012 p. 10.

³⁵³ See UNESCO, Report on the joint World Heritage Centre/ICOMOS reactive mission to Bagrati Cathedral and Gelati Monastery, Georgia 22-28 April 2012 p. 11.

³⁵⁴ See UNESCO, Report on the joint World Heritage Centre/ICOMOS reactive mission to Bagrati Cathedral and Gelati Monastery, Georgia 22-28 April 2012 p. 12.

of being greatly damaged”³⁵⁵ and further encouraged the “committee not to be satisfied with simply taking note of this matter”.³⁵⁶ Saint Lucia spoke in support of the Lebanese words of caution and the delegation from the Netherlands proposed the inclusion of a request to Georgia not to commence a reconstruction before the Committee had the chance to review the plans and offer their considerations.³⁵⁷ The Secretariat of the World Heritage Committee informed that the reconstruction plans had been initiated by the Georgian Orthodox Church and that the Georgian government had not yet endorsed them.³⁵⁸ Throughout the early proceedings in the World Heritage Committee, the lack of real and transparent communication between the Georgian state and UNESCO is evident. At the 33e session, the Secretariat informed the Committee of an email from the Georgian authorities announcing the near completion of the restoration work on the monument. When the Canadian delegation asked for a clarification if the work carried out at Bagrati Cathedral should be considered ‘restauration’ or ‘reconstruction’, ICOMOS answered that it should be considered as a reconstruction but as of that moment, not enough information had been provided by the Georgian state to fully understand the extent of the works carried out.³⁵⁹

As a result of the confusion in the World Heritage Committee, an independent monitoring missions was launched and the discussion resumed at the 34th session. The Secretariat, having received the report from the monitoring mission, informed the Committee that the now underway reconstruction of the cathedral would have a serious negative impact on the outstanding universal value of the property and damage to a large extent the original standing structure. UNESCO had informed the Georgian state of their intentions to propose the site for enlistment on the World Heritage List

³⁵⁵ See UNESCO, Summary Records World Heritage Committee 28th Session, WHC-04/28.COM/INF.26, Sozhou 28 July – 7 July 2004 p. 272.

³⁵⁶ See UNESCO, Summary Records World Heritage Committee 28th Session, WHC-04/28.COM/INF.26, Sozhou 28 July – 7 July 2004 p. 272.

³⁵⁷ See UNESCO, Summary Records World Heritage Committee 28th Session, WHC-04/28.COM/INF.26, Sozhou 28 July – 7 July 2004 p. 273.

³⁵⁸ See UNESCO, Summary Records World Heritage Committee 28th Session, WHC-04/28.COM/INF.26, Sozhou 28 July – 7 July 2004 p. 272.

³⁵⁹ See UNESCO, Summary Records World Heritage Committee 33d Session, WHC-09/33.COM, Seville 22-30 June 2009 p. 243.

of sites in Danger which led to an intense debate with the Georgian authorities. Consequently, the Georgian state sent UNESCO a letter claiming that they would respect the critic given by the monitoring missions but also informed on their disagreement with the Secretariats wish to list the property on the list in Danger. As a mediation, Georgia wanted to explore the possibility to re-enlist the property under alternative criteria should the original reasons for nomination no longer be fulfilled after the reconstruction. They also asked for international financial assistance to stabilize the authentic structure as well as admitting to the growing importance of the Georgian Orthodox Church in the management of the property. Lastly, the Georgian state asked the committee to consider the “highly symbolical and spiritual significance of the cathedral”.³⁶⁰

ICOMOS, who had carried the independent monitoring missions on behalf of the committee was not pleased by the reaction or plans of the Georgian state and stated their unacceptability. As there were no exceptional circumstances which could justify the full reconstruction of the monument and the planned replica of the cathedral would consist of new materials which would starkly contrast the historic, aesthetic and scientific values of the original structure and therefore not satisfy the criteria under which the property was enlisted, as an exceptional specimen of medieval Georgian architecture. ICOMOS further added that should the property after reconstruction be considered for re-nomination under alternative criteria, it would have to do so on its own merit and hence a discussion was irrelevant for the protection of the existing outstanding universal value of the site.³⁶¹

When asked, no other state party wished to address the issue in the discussion. As a delegation from Georgia attended the meeting exceptionally, they were allowed to give their statement to the Committee. The Georgian delegation affirmed their commitment to the implementation

³⁶⁰ See UNESCO, Summary Records World Heritage Committee 34th Session, WHC-10/34.COM/INF.20, Brasilia 25 July – 3 August 2010 p. 319-320.

³⁶¹ See UNESCO, Summary Records World Heritage Committee 34th Session, WHC-10/34.COM/INF.20, Brasilia 25 July – 3 August 2010 p. 320-321.

of the World Heritage Convention and noted that the Georgian state had a deep respect for the decisions of the Committee. According to Georgia, the site was in urgent need for conservation efforts and they asked the Committee for continued cooperation and international assistance to find solutions that could mitigate the wishes of both national and international interests.³⁶² As a response, the Australian delegation requested Georgia should be obligated to draft an additional ‘Statement of Outstanding Universal Value’ for the property as well as expressing their view of the seriousness of the issues concerned.³⁶³ The Bagrati Cathedral was consequently listed on the World Heritage list of sites in danger.³⁶⁴

Georgia, reacting to the decisions taken in the World Heritage Committee, drafted a state of conservation report for UNESCO in which alternatives to a full reconstruction was presented. The report was welcomed by ICOMOS and led to the delegations from Sweden and Switzerland to congratulate Georgia for their cooperation. Georgia further confirmed the measures they had taken to appease the critic by UNESCO and that they had enlisted the Italian architect Professor Bruno to chair the work.³⁶⁵

By 2012 it became apparent to the Committee that the efforts to reconcile the international requests had been left without regard despite the Georgian affirmations of their willingness to cooperate. The German delegation advised caution after a draft decision was presented to the Committee which harshly opposed the restoration carried out by the Georgian state without the approval from UNESCO. The draft decision further indicated that the property should be excluded from the World Heritage List as a result of loss of authenticity.³⁶⁶ Germany expressed their shared view of the seriousness of the situation but urged the Committee to adjourn to adopt the decision

³⁶² See UNESCO, Summary Records World Heritage Committee 34th Session, WHC-10/34.COM/INF.20, Brasilia 25 July – 3 August 2010 p. 321.

³⁶³ See UNESCO, Summary Records World Heritage Committee 34th Session, WHC-10/34.COM/INF.20, Brasilia 25 July – 3 August 2010 p. 322.

³⁶⁴ See UNESCO, Decision World Heritage Committee 34th Session, 34COM7B.88, Brasilia 25 July – 3 August 2010 p. 130-133.

³⁶⁵ See UNESCO, Summary Records World Heritage Committee 35th Session, WHC-11/35.COM.INF.20, Paris 19-29 June 2011 p. 65.

³⁶⁶ See UNESCO, State of Conservation of the properties inscribed on the List of World Heritage in Danger, WHC-12/36.COM.7A.Add, S:t Petersburg 24 June – 6 July 2012 p. 69.

until the next session as “any decision at this moment might have effects going beyond World Heritage issues”.³⁶⁷ The proposed postponement was made with the understanding that Georgia during the extended time would cooperate to full extent with ICOMOS. The proposal was supported by India, Colombia, Japan, Cambodia, Algeria and Switzerland. Although the Chair noted consensus for the decision to postpone the decision, the delegation from Switzerland remarked that it would not affect the current nature of the property in which the outstanding universal value already seemed to be lost.³⁶⁸ At the 37th session, the decision adopted stated;

1. “Expresses its deep regret that despite previous decisions the re-building of Bagrati Cathedral has been completed and considers that the Bagrati Cathedral has been altered to such an extent that its authenticity has been irreversibly compromised and that it no longer contributes to the justification for the criterion for which the property was inscribed;
2. Requests the State Party to submit, by **1 February 2014**, a request for a major boundary modification for the property to allow Gelati Monastery to justify the criterion on its own.”³⁶⁹

It was decided that the property be retained on the list in Danger until a satisfactory limitation of the new World Heritage site containing only Gelati Monastery could be effectuated. At the 38th session, the Committee noted that Georgia had submitted a proposed boundary modification and decided to retain the property on the list in Danger during the evaluation.³⁷⁰ Arriving at the 41st session of the World Heritage Committee, the adequate material had been provided to limit the site and Bagrati Cathedral was removed from the World Heritage List as a result of the irreversible changes made by the state.³⁷¹

³⁶⁷ See UNESCO, Summary Records World Heritage Committee 36th Session, WHC-12/36.COM.INF.19, S:t Petersburg 24 June – 6 July 2012 p. 49.

³⁶⁸ See UNESCO, Summary Records World Heritage Committee 36th Session, WHC-12/36.COM.INF.19, S:t Petersburg 24 June – 6 July 2012 p. 49.

³⁶⁹ See UNESCO, State of Conservation of the properties inscribed on the List of World Heritage in Danger, WHC-13/37.COM/7A, Phnom Penh 16-27 June 2013 p. 66.

³⁷⁰ See UNESCO, Decision World Heritage Committee 34th Session, 38 COM /A.16, Doha 15-25 June 2014.

³⁷¹ See UNESCO, Decision World Heritage Committee 41th Session, 41 COM 8B.31, Krakow 2-12 July 2017

5.4.4 Analysis

Georgia ratified the World Heritage Convention, together with the 1954 Hague Convention, its first Protocol and the 1970 UNESCO Convention, on the 4th November 1992.³⁷² The ratification rendered the obligations set out by the World Heritage Convention binding for the Georgian state. The subject of reconstruction is not mentioned in the Convention text but appears in the Operational Guidelines under art. 86 which states that reconstruction “is justifiable only in exceptional circumstances”³⁷³ and “is acceptable only on the basis of complete and detailed documentation and to no extent on conjecture.”³⁷⁴ The reconstruction of Bagrati Cathedral was not considered by ICOMOS to be justified by such an ‘exceptional circumstance’ and it is clear that even though the new construction is a replica, much of the actual documentation and available original fabric was ignored.

According to art. 4 of the World Heritage Convention, it is the duty of Georgia to ensure “protection, conservation, presentation and transmission to future generations”³⁷⁵ of properties of Outstanding Universal Value situated on their territory. By identifying the Bagrati Cathedral as of outstanding universal value and submitting it for inscription on the World Heritage List, Georgia has acted within their sovereignty and freely designated this monument as not only a national property of the Georgian state – but of humanity as a whole. Their actions in reconstructing the cathedral, against the provisions in the UNESCO Operational Guidelines and the expressed wishes of the World Heritage Committee, must be considered a breach of the obligations in art. 4 World Heritage Convention. Yet, a discussion on state responsibility is remarkably absent. It is possible to attribute this to another absence, namely of enforcement mechanisms in the World Heritage Convention. Instead, the World Heritage Committee uses what is available to control the actions of states in relation to their

³⁷² See UNESCO, Country Information Georgia, accessed at <https://en.unesco.org/countries/georgia> (2019-10-20)

³⁷³ See UNESCO, Operational Guidelines, WHC.19/01, 10 July 2019 art. 86.

³⁷⁴ See UNESCO, Operational Guidelines, WHC.19/01, 10 July 2019 art. 86.

³⁷⁵ See Convention for the protection of the world cultural heritage, Paris 16 November 1972, UNTS volume 1037 p. 151, art. 4.

territorial World Heritage sites, and listed the property on the list in Danger before delisting it.

Although the reconstruction of Bagrati Cathedral is contrary the Georgian duties under the World Heritage Convention, the World Heritage Committee recognises the need to compromise with the Georgian government. The reason for reconstruction to restore the liturgical use of the cathedral and the need to change some features to accommodate this wish is not rejected by the Committee. This speaks for the Committees, and the member states to the Convention, understanding that World Heritage sites cannot remain untouched by the evolution of nations and societies. Had the Georgian authorities contented themselves with a less intrusive solution to restore the use of Bagrati, the property would have likely remained on the World Heritage List. Yet the cathedral is more than a church, as a forceful national symbol of unification and glory it has a political importance which exceeds the need of the church to have a place to hold service. It is evident from the political conviction within Georgian authorities to proceed with the reconstruction despite the threats of Danger-listing and delisting. The cathedral was chosen on several occasions by political leaders to affirm the connection between their leadership and that of the golden age of Georgia. Together with the repeated statements from officials from the Georgian state as well as religious leaders referring to the symbolic meaning of the cathedral, it is possible to conclude that the reconstruction served the purpose of a political message conveying that Georgia, like the cathedral, was risen from the ruins and restored in its former glory.

Apart from the UNESCO delisting, which is both rare and must be considered one of the most drastic reprimands within the international cultural community, no individual states addressed the issue outside of the World Heritage Committee. This indicates, like the previous case in Dresden, that states did not identify the reconstruction of the cathedral as a violation of a customary obligation. The delisting is not only directed towards Georgia as a consequence of their negligence towards the advice of UNESCO, but also to maintain the legitimacy of the World Heritage

Committee and Convention. UNESCO does not have, at this point, any other effective way to halt damaging interventions by states on World Heritage situated on their territory.

6. Conclusions

Codified legal provisions and documents governing the protection of cultural heritage as well as state practice as observed in the four case studies has evolved substantially from the starting point in the late 19th century to what we see today. Cultural heritage has emerged from a firm place within the national states exclusive sovereignty to a common interest of all states. The World Heritage Convention with 193 bound State Parties exercise influence on cultural heritage policies all over the globe through UNESCO and in particular The World Heritage Committee, which speaks for a general global understanding that cultural heritage should enjoy elevated protection. The basic concept of the Convention is to establish a platform for international cooperation promoting heritage conservation and clearly states that such designated heritage is of global interest. Ratifying the Convention means a state's acceptance of its provisions which with such a vast majority of states choosing to be bound must be understood to give rise to also a customary norm that destruction or damaging of cultural heritage of outstanding universal value can only be lawful in accordance with the provisions of the Convention. Where this limitation of lawfulness in reality is a more difficult question.

By observing state practice in relation to the building of the Aswan dam in Egypt it is possible to conclude that states, at the time, accepted that the right to develop for economic prosperity was inherent to the sovereign state. Even if the developments threatened cultural values of great importance. The focus was placed on cooperation in mitigation of the cultural losses, as portrayed by the global rescue campaign. This did not mean other states did not care about what would happen to the cultural sites in Nubia. On the contrary, it is unlikely states would have engaged themselves to the presented extent should a norm, that cultural heritage of global importance should be safeguarded as a matter of international interest, not have been in

place. It is easy to see how this incident affected the consequent drafting of the World Heritage Convention, which aims largely at international cooperation and omits the question of state responsibility for intentional destruction. This also correlates well with the presented policy from the World Bank, which does not rule out financing of projects which could cause damage to cultural property but rather focuses on mitigation of harm. The World Bank, as an international organ of great authority, must be understood to follow policies deemed acceptable for most states and their position is therefore interesting when examining state reactions to threats towards cultural heritage.

The situation of the 21st century is vastly different. As presented by the Dresden Elbe Valley case, states today tend to intervene before the harm is done. Through the practice of the World Heritage Committee, issues concerning heritage conservation is addressed early and the territorial state is expected to seek 'approval' from the Committee before intervening in sites of outstanding universal value. Although states still recognise the right to develop, the state has to submit to extensive international intervention if the development threatens cultural heritage. Compared to the Egyptian case, the German case shows that today the territorial state is expected to develop in such a way that it does not cause harm.

The difference in these cases can also be attributed to the character of the incident. The Aswan Dam was deemed necessary to combat poverty in Egypt and the Egyptian government, although reluctant at first, reached out for international help. In this situation, if the assumption that the norm at the time allowed for economic development at the cost of cultural sites is correct, there would be little use in punishing the Egyptian government for being good world citizens. Egypt was a developing nation and as expressed by the Director-General of UNESCO at the time, one cannot expect leaders to choose to preserve temples on the cost of their starving populations. In the German case, international actors were significantly more mystified by the motivation for interfering with the site. Germany has an international

reputation as a nation which stands up for collective values and respects the decisions of international organisations. The need for the bridge at all costs was simply not recognised with other states. The threshold to attain acceptance of an economic development at the cost of cultural heritage of outstanding universal value, must therefore be understood as high.

Comparing with the case of Bagrati Cathedral in Georgia, the importance of the motivation causing the threat is elaborated. The cathedral was reconstructed to resurrect a national symbol of strength and unity, which of course is in stark contrast with the idea of a 'common heritage of mankind'. There was no 'need' to rebuild the cathedral, apart from the need for church buildings which could easily have been satisfied alternatively. No state expressed anything which could be interpreted as a conclusion that the Georgian state had the right to intervene with the heritage in this way. The same goes for the Buddha statues in Bamiyan valley. There was no objectively understandable need for the Talibans to rid themselves of 'idols'. The interpretation of Islam they based their edict on was internationally rejected and the action was deemed intolerant and contrary to common values. The motive behind the threat posed to cultural heritage therefore seems like a determining factor also when assessing the lawfulness under international norms. States will generally accept interventions which they deem have a higher value than heritage protection, such as poverty reduction. It should however be mentioned that this criterion appears to be strict and become stricter as advances in societies creates new methods for mitigating harm.

One issue remains consistent within the international cultural heritage regime, the lack of efficient enforcement methods. As discussed, states can take countermeasures following another states breach of an international norm. Under most circumstances, a state is only allowed to take countermeasures if they are injured by the breach of the other state. Effectively, this would mean that no state would be allowed to take action against another state for destroying cultural heritage on their sovereign

territory. The states have however by their ratification of the World Heritage Convention and the designation of a site as of outstanding universal value used their sovereignty, for which the Convention expresses its respect in art. 6, to give away the absolute right to non-intervention. A site designated world heritage is no longer of unique national interest, but becomes a part of the 'common heritage of mankind'. This means the states acceptance to comply with the provisions of the World Heritage Convention in governance of the designated site.

The collective character of the World Heritage Convention and the consequent references to some cultural heritage as belonging to the 'cultural heritage of mankind' invites to understand the existence of an *erga omnes* obligation in relation to safeguarding certain cultural heritage. It is however impossible to discern with certainty whether such an obligation exists under international law today. Although the World Heritage Convention contracts almost a totality of the world's nations and legitimises the whole of humanity as stakeholders in questions concerning safeguarding of cultural heritage of 'outstanding universal value', it is not clear what would be the exact content of such an *erga omnes* obligation. Because of this uncertainty it is unclear whether addressing intentional destruction of cultural heritage of all mankind in an international court would be successful. Should an *erga omnes* obligation to refrain from destruction of cultural property which belongs to 'all mankind' exist, all states would owe it equally to the common interest. A state would therefore not need to be directly injured by a breach to be able to address it in an international court as seen by the recent case of *Gambia v. Myanmar*. In the existence of an *erga omnes* obligation, all states would also have the possibility to adopt countermeasures for a breach. As of this day, no such proceedings have been initiated and its therefore not possible to conclude whether the an *erga omnes* claim could remedy the lack of enforcement inherent to the international conventions on cultural property.

In the absence of evident legal remedies and enforcement methods, the World Heritage Committee applies the possibility provided by the Operational Guidelines to delist sites from the World Heritage List if the territorial state refuses to comply with the directives. This is by no means a sanction, but rather seems a frustrated response from an international organisation not given the proper means to enforce the Convention. Although it has certain effect, mainly attracting attention to the matter and placing a certain amount of international ‘shame’ on the noncompliant state, it does not actually address the issue of breach. The objective of UNESCO is global cooperation to safeguard cultural heritage for which delisting seems rather counterintuitive. On the other hand, the Committee is left with very few other options when addressing unacceptable state interventions in World Heritage sites. The delisting itself is not evidence of a norm prohibiting destruction of cultural heritage as only state practice can provide information on the *opinio juris* of states. It does, however, indicate that state parties within the framework of UNESCO are looking to exert influence over noncompliant states and provide consequences for unaccepted actions. States also expressed in relation that the delisting had consequences exceeding those of legal formalities of the World Heritage Convention. A site was only delisted as a last resort, when all other methods of influence had been exhausted.

The cases presented indicate that no consistent norm encapsulating all types of heritage destruction exists internationally today. The 2003 Declaration, drafted in the aftermath of the destruction of the Bamiyan Buddhas, as well as the overwhelming response from international actors and states indicate that a norm exists that heritage destruction based on cultural or religious intolerance is considered worthy of diplomatic condemnation, but does that make it unlawful? The lack of references to binding legal provisions and the vague formulations in statements from states and soft law instruments indicates hesitance towards recognizing a customary norm prohibiting intentional heritage destruction by states. The 2003 Declaration does however indicate an emerging consensus that some

cases of heritage destruction should be outlawed. Some cases of heritage destruction can be observed to resonate deeper with the peoples of the world and, as so, also with their governments. The international reactions in the Egyptian and Afghan cases were loud and extended globally, while the Georgian and German cases attracted significantly less attention. This indicates the existence of different ‘types’ of heritage within the definition ‘cultural heritage of outstanding universal value’ which leads to the conclusion that the norm functions differently depending on the ‘type’ of heritage threatened. For example, should the Egyptian government today destroy the pyramids to build a motorway or the Italian government reconstruct the Colosseum in concrete, the international community would likely not accept it no matter how ‘justified’ the motivation. It is therefore possible that today, although untested, a customary norm exists which prohibits destruction of this ‘type’ of cultural heritage which is to be considered of greatest importance to humanity.

The ‘outstanding universal value’ as presented by UNESCO and the World Heritage Convention has lost its edge. The World Heritage List includes many sites which simply does not resonate enough with the rest of the world to mobilize for their protection such as Dresden Elbe Valley and the Bagrati Cathedral. The inclusiveness of UNESCO has rendered the Convention weak in protection of world heritage, as states and public opinion does not consider all inscribed sites of the same inherent value. The concept on which UNESCO’s regime for heritage protection is built is utopian, all states shall come together in cooperation for cultural diversity and peace. Changes in time and society is a constantly ongoing process and the idea of UNESCO to live in a global museum is not viable, there is a need to clarify when states can lawfully develop within world heritage sites and when they can not. To remedy this, the World Heritage Convention would need to be amended with subcategories indicating world heritage of ‘absolute importance’ to which provisions prohibiting their destruction also within the territorial state could be attached. Such heritage could not be designated by states but would have to be selected independently on the basis of their

global appeal. It would further allow for states to designate heritage of 'lower importance', which without conflict could be subject to some interventions by the state. The extent of such interventions could be regulated in another set of provisions adhering to the 'lower' categories of world heritage.

From this, it is possible to conclude that the intentional damaging intervention by a State Party in sites of outstanding universal value on their territory amounts to a violation of the obligations presented in art. 4 of the World Heritage Convention which could entail state responsibility on the basis of the obligation taking the form of an *erga omnes* obligation. As of this day, there is no clear indication for the existence of a customary international norm which prohibits damaging intervention but developments such as the the 2003 Declaration indicates that the international community is rallying consensus to outlaw some types of intentional destruction, such as the one in Bamiyan. All the presented information also indicates consistently that while states do not yet recognise the existence of a customary obligation to refrain from intentional heritage destruction, they do recognise the right to intervene diplomatically to prevent such damage.

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