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FORM OR SUBSTANCE?
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WHAT NEXT FOR ENDANGERED CULTURAL TREASURES? THE TIMBUKTU CRISIS AND THE RESPONSIBILITY TO PROTECT

*Jadranka Petrovic**

On 6 April 2012, the National Movement for the Liberation of Azawad (MNLA), an organisation fighting to make Azawad (Northern Mali) an independent state for the secessionist Tuareg people, proclaimed that region's independence from Mali. The MNLA were initially backed up by the Islamist Ansar Dine (Defenders of the Faith). However, the Islamist militants began imposing strict Sharia law and, by the end of June 2012, took over the largest cities in the region, including the ancient city of Timbuktu, a United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage site. On 11 January 2013, the French military began operations against the Islamists, and together with Malian and African Union forces, by 8 February 2013, took control of the Ansar Dine-held territory. During their occupation of Timbuktu, Islamist militants destroyed centuries old mausoleums and mosques (reportedly, the departing forces also set fire to an institute housing precious historical documents). Just a few days before the destruction of these monuments, UNESCO listed the city on its "World Heritage in Danger" list, but there was no direct international action to this acknowledged threat to the city's treasures. Although the "responsibility to protect" (R2P) concept, or principle, or doctrine, or a developing norm as some prefer to characterise it, is arguably evolving in a way that weakens the state sovereignty principle in order to permit international intervention in cases of gross human rights abuses, R2P is limited to human protection exclusively. Based on this and other similar cases, this article argues for a more expansive reading

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of R2P so that it also encompasses cultural property. Justification for this proposition lies with the "international" and shared character of cultural property. At the same time, R2P is warranted because cultural property is indivisible from people's identity and dignity, and for the reason that such property's wilful destruction is usually a precursor to human tragedy. In order to save humanity's past as embodied in precious tangible cultural objects, the international community should be under an obligation to override the principle of non-interference in the internal affairs of another state and step in where a state is unable or unwilling to protect its cultural treasures.

I INTRODUCTION

On 21 March 2012, a group of soldiers in Mali, West Africa, displeased with the management of the Tuareg rebellion, overthrew the elected government.¹ On 6 April 2012, the National Movement for the Liberation of Azawad (MNLA), an organisation fighting to make Azawad (Northern Mali) an independent state for the secessionist Tuareg people, proclaimed this region's independence from Mali.² The MNLA was initially backed up by Ansar Dine (Defenders of the Faith), an Islamist militant group. However, contrary to the Tuaregs' wish, the Islamist militants began imposing strict Sharia law and, by the end of June 2012, took over the largest cities in this region, including the ancient city of Timbuktu, a United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage site.³ On 11 January 2013, the French military began operations against the Islamists, and together with Malian and African Union forces,⁴ and also with the MNLA's help, took over Timbuktu on 28 January 2013.⁵ By 8 February 2013, they had taken control of the remaining Ansar Dine-held territory in Northern Mali.⁶

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- 1 See Adam Nossiter "Soldiers Overthrow Mali Government in Setback for Democracy in Africa" *The New York Times* (online ed, New York, 22 March 2012).
 - 2 See Lydia Polgreen "Rebels in Mali Declare their Independence, but Winning Recognition is an Uphill Push" *The New York Times* (New York, 7 April 2012) at A4(L); and "Mali: A Timeline of Northern Conflict" (6 April 2012) IRIN Africa English Service <www.irinnews.org>.
 - 3 See Iyad ag Ghali "Can the Jihadists be Stopped? Mali and Al-Qaeda" *The Economist* (United States, 10 November 2012) at 51.
 - 4 See Edward Cody "French Warplanes Hit Central Mali in Fierce Fighting" *The Washington Post* (online ed, Washington, 14 January 2013); and Margaret Besheer "Mali, ECOWAS, AU Urge UN to Send Force to Mali" *States News Service* (5 December 2012).
 - 5 See Xan Rice "They Celebrate by Doing the Things They Were Denied under Islamic Rule" *The Financial Times* (London, 2 February 2013) at 5.
 - 6 For a timeline of the Mali conflict, see generally reporting by *The New York Times* and *The Guardian* (London). For a chronology of events relating to cultural property, see generally United Nations Educational, Scientific and Cultural Organization [UNESCO] <www.unesco.org> and World Heritage Committee <http://whc.unesco.org> sites. For the 2012 and 2013 human rights situation in Mali, see reporting by Amnesty International <www.amnesty.org> and Human Rights Watch <www.hrw.org>.

During their occupation of Timbuktu, the Islamist militants destroyed sacred mausoleums and centuries old mosques (reportedly, the departing forces also set fire to the institute that housed precious historical documents).⁷ On 28 June 2012, just a few days before the destruction of these monuments, UNESCO had listed the city on its "World Heritage in Danger" List, but there was no direct international action against this acknowledged threat to the city's treasures.⁸

Even though the so-called "responsibility to protect" (R2P) concept⁹ potentially weakens state sovereignty since it permits international intervention in cases of gross human rights abuses, the concept is narrow in its scope. Currently, R2P concerns human protection exclusively.¹⁰ According to R2P, a state has the primary responsibility to protect its citizens from serious violations of international humanitarian law and human rights law, but where a state is unable or unwilling to provide such protection, the international community has an obligation to step in and protect those citizens.¹¹

Based on the Timbuktu case and other similar events, this article argues for a more expansive reading of R2P to encompass cultural property as well. Justification for this proposition lies with the "international" and shared character of cultural property. At the same time, R2P is warranted because cultural property is indivisible from a person's identity and dignity. Furthermore, such

7 See Luke Harding "Timbuktu Mayor: Mali Rebels Torched Library of Historic Manuscripts" *The Guardian* (online ed, London, 29 January 2013).

8 See UNESCO *State of Conservation (SOC): Timbuktu* (2012) [*SOC Report* (2012)]; and UNESCO *State of Conservation (SOC): Timbuktu* (2013) [*SOC Report* (2013)]. See also "Heritage Sites in Northern Mali Placed on List of World Heritage in Danger" (28 June 2012) UNESCOPRESS <www.unesco.org>.

9 The concept is also characterised as "principle", "doctrine" or "developing norm". See for example the Report of the International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (International Development Research Centre, Ottawa, 2001) [ICISS Report]; United Nations General Assembly *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change A/59/565* (2004) [*High Level Panel Report*]; United Nations Secretary-General *In Larger Freedom: Towards Development, Security and Human Rights for All A/59/2005* (2005) [*In Larger Freedom*]; and *2005 World Summit Outcome* GA Res 60/1, A/Res/60/1 (2005) [*2005 World Summit Outcome*] at [138] and [139]. See also Jeremy Sarkin "Dealing with Africa's Human Rights Problems: The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect" (2009) JAL 1; Anne Peters "Security Council's Responsibility to Protect" (2011) 8 IOLR 1 at 10–12; and Anne Orford *International Authority and the Responsibility to Protect* (Cambridge University Press, Cambridge, 2011) at 22–27.

10 For a discussion about the current scope of the responsibility to protect concept, see for example Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press, New York, 2011) at 71–80.

11 See for example *2005 World Summit Outcome*, above n 9, at [139].

property's wilful destruction is usually a precursor to human tragedy.¹² As François Bugnion from the International Committee of the Red Cross (ICRC) cautions, "the deliberate destruction of monuments, places of worship and works of art is a sign of degeneration into total war. It is sometimes the other face of genocide."¹³ Equally, more than a century before the Nazi takeover of Germany, which led to the burning of books and to the subsequent burning of people, German author Heinrich Heine warned that the burning of books was "mere foreplay. Where books are burned, in the end people will be burned too".¹⁴ Cultural devastation during the two world wars, cultural tragedy in the territory of the former Yugoslavia during the 1990s conflicts, cultural catastrophes in Iraq both in the 1990s and in 2003 as well as cultural vandalism in Afghanistan in 2001 draw attention to the need for the international community to protect cultural property.¹⁵

Under international law, the right to cultural property,¹⁶ as part of the right to culture, is one of the fundamental human rights.¹⁷ Cultural property is priceless domestically, regionally and

12 See Irina Bokova, Director-General of UNESCO "Culture in the Cross Hairs" *The New York Times* (online ed, New York, 2 December 2012) ["Culture in the Cross Hairs"].

13 See François Bugnion "The origins and developments of the legal protection of cultural property in the event of armed conflict" (14 November 2004) International Committee of the Red Cross <www.icrc.org>.

14 "Das war Vorspiel nur. Dort, wo man Bücher verbrennt, verbrennt man am Ende auch Menschen": see Heinrich Heine *Almansor* (1823) as translated by Graham Ward in *True Religion* (Blackwell Publishing, Oxford, 2003) at 142.

15 Examples of deliberate destruction and looting of cultural property include the 1914 burning of the Louvain University Library in Belgium by the German army, the World War II massive art seizure by the Nazi "Einsatzstab Rosenberg", the 1991 deliberate shelling of the Old City of Dubrovnik in Croatia, a World Heritage site, and the 1992 destruction of the Sarajevo Library in Bosnia and Herzegovina, by the Serb forces, the 1993 wilful blowing up of the Old Bridge of Mostar in Bosnia and Herzegovina, by the Croat forces, the 2001 dynamiting of two sixth century statues of Buddha carved into a cliff in Bamiyan in central Afghanistan, by the Taliban, and the infamous 2003 looting of Iraq's museums.

16 For a discussion about the definition of cultural property, see Part IV.A.

17 See International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 27 [ICCPR] ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right ... to enjoy their own culture ..."); International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 15 [ICESCR] ("The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life"); and *Universal Declaration of Human Rights* GA Res 217A, III (1948) at art 27 ("Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits"). Based on the International Committee of the Red Cross study on international customary law, the prohibition to attack cultural property in times of armed conflict is reflected in the rules of customary international law. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds) *Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2005) ch 12. See generally *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Cambodia v Thailand) (Provisional measures)* [2011] ICJ Rep 537 and in particular [25]–[27], [47]–[49], [50] and [106].

internationally. Its protection is premised on the concept of the common heritage stemming from the present generation's self-interest, future generations' interests and the intrinsic value of cultural property.¹⁸ States have an obligation to protect cultural property situated within their borders and that of other states during both peacetime and times of armed conflict.¹⁹ Yet, although it is precious to all humanity, and *because* it is precious to so many, cultural property is often wilfully targeted. This is particularly evident in inter-ethnic conflict. Ample examples prove that cultural objects are usually among the first innocent victims of warfare.²⁰

Although cultural property forms part of the common heritage of all humankind and every state is under an obligation to protect its survival, under current international law, no state or organisation has a right to interfere in the territorial jurisdiction of another state in order to protect endangered cultural objects situated in that other state, in the absence of the latter's consent. State sovereignty and the principle of non-interference in the internal affairs of another state pose a major hurdle in achieving effective cultural property protection.²¹ This is particularly apparent in crisis situations. However, in order to save humanity's past as embodied in precious tangible cultural objects, the international community should be under an obligation to override the principle of non-interference and step in where a state is unable or unwilling to protect its cultural treasures.

In the remainder of this article, I first briefly survey the facts and issues emanating from the Timbuktu cultural crisis and then canvass the imperative of preservation of cultural property. This is followed by some consideration of the state-centric approach to cultural property and an examination of the concept of R2P and its applicability to the cultural property context. I then

18 See generally Jadranka Petrovic *The Old Bridge of Mostar and Increasing Respect for Cultural Property in Armed Conflict* (Martinus Nijhoff Publishers, Leiden, 2013) [*The Old Bridge*]; and Jadranka Petrovic "A Monument, Identity and Nationhood: The Case of the Old Bridge of Mostar" in Duncan French (ed) *Statehood, Self-Determination and Minorities: Reconciling Tradition and Modernity in International Law* (Cambridge University Press, Cambridge (UK), 2013) 429 ["A Monument"].

19 See for example Convention for the Protection of Cultural Property in the Event of Armed Conflict 249 UNTS 240 (opened for signature 14 May 1954, entered into force 7 August 1956), preamble [1954 Convention]; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 823 UNTS 231 (opened for signature 14 November 1970, entered into force 24 April 1972), preamble [1970 Convention]; and Convention concerning the Protection of the World Cultural and Natural Heritage 1037 UNTS 151 (opened for signature 16 November 1972, entered into force 17 December 1975) [World Heritage Convention].

20 See for example Bokova "Culture in the Cross Hairs", above n 12; Robert Bevan *The Destruction of Memory: Architecture at War* (Reaktion Books, London, 2006); András Riedlmayer "From the Ashes: The Past and Future of Bosnia's Cultural Heritage" in Maya Shatzmiller (ed) *Islam and Bosnia: Conflict Resolution and Foreign Policy in Multiethnic States* (McGill Queen's University Press, London, 2002) 98; Branka Šulc "The Protection of Croatia's Cultural Heritage during War 1991–1995" in Robert Layton and others (eds) *Destruction and Conservation of Cultural Property* (Routledge, London, 2001) 157; Petrovic *The Old Bridge*, above n 18; and Petrovic "A Monument", above n 18.

21 Charter of the United Nations, art 2(7).

address the most obvious hurdle to the applicability of R2P, enshrined in the United Nations Charter, namely, the principle of non-interference in the domestic affairs of another state, together with the need to re-characterise the principle of state sovereignty.²² Finally, relying on non-coercive, non-military measures, this article sketches ways in which the concept could be applied to cultural property. The article concludes that if the survival of irreplaceable cultural treasures is threatened, R2P could be the adequate mechanism for protecting humanity's heritage and group identity and the relevant cultural rights of its members in situations where a state is unable or unwilling to provide such protection.

II THE TIMBUKTU CRISIS

Timbuktu is a fabled historic city of captivating beauty, situated in Northern Mali, dating back to the fifth century. It was founded by Tuaregs. The Tuaregs have for decades claimed autonomy for their traditional homeland in Mali and Niger.²³ Timbuktu functioned as an ancient desert trading crossroads and centre of learning. It blossomed both economically and culturally in the 16th century. Timbuktu is often referred to as the "City of 333 saints".²⁴ It is renowned for its 16 cemeteries and mausoleums where Sufi saints are buried, which are of special religious and cultural significance to its residents. The city is also rich in other cultural property that is of outstanding value, including exquisite earthen architecture, such as the eponymous mosque of Djingareyber built from mud in 1327 and the mosques of Sankore and Sidi Yahia, also built centuries ago.²⁵ In 1988, UNESCO deemed the three mosques and the mausoleums to be "outstanding witnesses to the urban establishment of Timbuktu, its important role of commercial, spiritual and cultural centre on the southern trans-Saharan trading route, and its traditional characteristic construction techniques"²⁶ and inscribed this city on its World Heritage List.²⁷

For a long time, Mali was one of West Africa's most stable democracies. Recently, however, it has been the scene of deadly chaos. Following the March 2012 coup in Bamako, Tuareg separatist rebels – descendants of the founders of Timbuktu – took over by armed force a large area of Mali

22 Article 2(7).

23 For a brief description of the Tuareg people, see Andrew Meldrum "Tuareg: 5 Things You Need to Know about the Tuareg People of North Africa" (29 October 2011) *Global Post* <www.globalpost.com>.

24 Pascal Fletcher "Analysis: Timbuktu Tomb Destroyers Pulverize Islam's History" *Reuters* (online ed, 3 July 2012). See also UNESCO *Report of the 12th Session of the World Heritage Committee SC88/CONF001/13* (1988) at 17 [*WHC Report*].

25 See UNESCO *SOC Report* (2012), above n 8, at 1–2.

26 See UNESCO "World Heritage List – Timbuktu" <<http://whc.unesco.org>> (including links, inter alia, to documents, maps and assistance).

27 Date of inscription: 1988. UNESCO World Heritage List, above n 26. See UNESCO *WHC Report*, above n 24, at 17.

they considered to be their homeland.²⁸ However, the Islamist Ansar Dine group, openly allied with Al-Qaeda, who initially fought on their side, took the upper hand and removed the separatist Tuaregs from all positions of power.²⁹ The Ansar Dine militants occupied Timbuktu for more than half a year until ousted by a combined force of Malian and French troops (also backed by the MNLA) on 28 January 2013.³⁰

During the period that the Ansar Dine militants held Timbuktu, they destroyed several tombs and mausoleums of ancient Muslim saints which were of exceptional cultural importance. The Islamists also destroyed earthenware jars and other artefacts around the tombs and did not spare the ancient mosques either.³¹ Ansar Dine issued an open threat that if there were saints inside the mosques, they would also destroy these mosques,³² which they did as several saints were in fact buried inside the city's historic mosques.³³ Allegedly, it was only a small group of 30 or so armed Islamists who destroyed Timbuktu's monuments and other artefacts while the unarmed and distressed residents of this city watched helplessly.³⁴ The international community condemned Ansar Dine's actions³⁵ but did not take any action to stop this cultural disaster, except including Mali's cultural property on the "World Heritage in Danger" List.

28 See Polgreen, above n 2, at A4(L); and "Mali: Timbuktu's Cultural Heritage More Damaged than First Estimated, UN Agency Says" (7 June 2013) United Nations News Centre <www.un.org>.

29 See UNESCO *SOC Report* (2012), above n 8, at 1; UNESCO *SOC Report* (2013), above n 8, at 1; Harding above n 7; and "Mali Extremists Destroy Holy Timbuktu Sites" *Today's Zaman* (online ed, Istanbul, 1 July 2011).

30 See UNESCO *SOC Report* (2013), above n 8, 1–3; and Harding, above n 7.

31 See UNESCO *SOC Report* (2012), above n 8, at 1–2. See also Irina Bokova, UNESCO Director-General "Timbuktu Tomb Attack is an Attack on our Humanity" (2 July 2012) CNN <<http://edition.cnn.com>> ["Timbuktu Tomb"]; Bokova "Culture in the Cross Hairs", above n 12; "Mali: Timbuktu's Cultural Heritage more Damaged than first Estimated, UN Agency Says", above n 28; and Fletcher, above n 24.

32 See Mark John "Mali Muslims destroy holy Timbuktu sites: witnesses" (30 June 2012) <<http://atlashrugs2000.typepad.com>>.

33 See Baba Ahmed and Rukmini Callimachi "Islamists continue destroying Timbuktu heritage" (2 July 2012) *The Associated Press* <<http://bigstory.ap.org>>. See also UNESCO *SOC Report* (2012), above n 8, at 1–2.

34 See Amir Ahmed "Mali Islamists destroy tombs in Timbuktu" (19 October 2012) CNN <<http://edition.cnn.com>>; and John, above n 32. This is not to suggest that at other times of the Mali crisis the number of Islamists involved was the same. See also Bokova "Timbuktu Tomb", above n 31.

35 See Bokova "Culture in the Cross Hairs", above n 12; *Statement by the President of the Security Council S/PRST/2012/9* (2012); SC Res 2056, S/Res/2056 (2012); United Nations "Press conference on Mali by Assistant Secretary-General for Human Rights" (10 October 2012) <www.un.org>; "Ban Voices Concern by Worsening Humanitarian Situation in Mali" *States News Service* (1 July 2012); and Nancy Palus "Timbuktu Residents Reject Islamists' Reason for Destroying Shrines" *States News Service* (3 July 2012).

In fact, the attack on Timbuktu's cultural property by Ansar Dine Islamists took place just days after UNESCO (being prompted by Ansar Dine's presence in Timbuktu and continued violence in the region, due to which cultural property located there had become very vulnerable), at the request of the Malian government, placed Timbuktu on the "World Heritage in Danger" List on 28 June 2012.³⁶ UNESCO's World Heritage Committee also asked states neighbouring Mali for help to prevent the trafficking in cultural objects from these sites due to the risk of looting.³⁷ Malians particularly feared for the safety of hundreds of thousands of ancient manuscripts and books on family histories, religious and other subjects, which are passed from one generation to another and which are of an exceptional value to their cultural heritage.³⁸ If these precious documents met the same fate as the monuments, the loss would be irreplaceable.³⁹ While it is still unclear how much damage was done to the ancient manuscripts, there is evidence that Ansar Dine burned some boxes housing the manuscripts in the Ahmed Baba Institute, the primary central repository for these treasures, and there is also evidence that the manuscripts from boxes that were unaffected by fire are now missing.⁴⁰

When asked about the overwhelming public shock and anger over the destruction of the mausoleums, an Ansar Dine spokesman said: "All of this is haram (or forbidden in Islam). We are all Muslims. UNESCO is what?"⁴¹ The spokesman went on to declare that "there is no world heritage. It does not exist. Infidels must not get involved in our business."⁴² He also noted that the group was acting in the name of God and that it would destroy every mausoleum in the city.⁴³ In Ansar Dine's version of Islam, no one but God is to be worshiped. According to their reading of Islamic texts, nothing is allowed to be built above tombs. The attacks on Timbuktu's religious

36 See UNESCO *SOC Report* (2012), above n 8, at 3–6 (including reference to the government of Mali's request to include Timbuktu on the "World Heritage in Danger" List). See also UNESCO "World Heritage List – Timbuktu", above n 26; and "Mali's Timbuktu and Askia Tomb Put on UNESCO Danger List" (28 June 2012) BBC News <www.bbc.co.uk>.

37 See "Mali Extremists Destroy Holy Timbuktu Sites", above n 29. See also Irina Bokova, Director-General of UNESCO, Aurélie Filippetti, Minister of Culture and Communication of France, and Bruno Maïga, Minister of Culture of Mali "Nous reconstruirons les mausolées de Tombouctou" *Libération* (online ed, France, 18 February 2013).

38 See "Islamists Continue Destroying Timbuktu Heritage" (2 July 2012) *The Associated Press* <<http://bigstory.ap.org>>.

39 See Harding, above n 7; and David Smith "Reaction: It's an Absolute Tragedy" *The Guardian* (online ed, London, 29 January 2013).

40 See UNESCO *SOC Report* (2012), above n 8 at 2; UNESCO *SOC Report* (2013), above n 8, at 1–4; and Bokova, Filippetti and Maïga, above n 37.

41 See "Ansar Dine fighters destroy Timbuktu shrines" (1 July 2012) Al-Jazeera <<http://www.aljazeera.com>>.

42 See Bokova "Culture in the Cross Hairs", above n 12.

43 See "Ansar Dine fighters destroy Timbuktu shrines", above n 41.

cultural heritage sites were carried out by a desire "to disabuse people of the local legend and to teach them to put their whole faith in the Qur'an".⁴⁴ To locals, on the other hand, the tombs and the destroyed mosque doors that led to the tombs situated inside the mosques are sacred. As one Timbuktu resident lamented, referring to the Sharia laws imposed by Ansar Dine in April 2012:⁴⁵

... nobody here can stop the Islamists. They just want to destroy everything that is important to us and they are not stopping. ... First they took our liberties ... [,] now they want to break up our history.

Reaction to the damage done to the precious manuscripts was similar because the manuscripts embodied the history of the African continent. To Seydou Traoré, who has worked at the Ahmed Baba Institute which housed a large collection of the manuscripts, the manuscripts "exploded the myth that Africa had only an oral history".⁴⁶ They were considered an "intellectual treasure".⁴⁷ The writings are forward-looking and wide-ranging. In the words of Essop Pahad, who chaired the Timbuktu manuscript project for the South African government, it is difficult to imagine:⁴⁸

... how anybody, whatever their political or ideological leanings, could destroy some of the most precious heritage of [the African] continent. They could not be in their right minds It's one of our greatest cultural treasure houses.

Ansar Dine's view of culture, as an exclusive and static notion, differs from the international community's view, pursuant to which culture is a universal and ever-evolving concept.⁴⁹ Irina Bokova, UNESCO Director-General, explains that warlords target cultural property "because it strikes to the heart and because it has powerful media value in an increasingly connected world".⁵⁰ In the Director-General's opinion, "[i]n Timbuktu, extremists [were] attacking the symbols of a tolerant and erudite Islam to impose their own narrow, fraudulent vision."⁵¹

It is worth noting that in condemning attacks on cultural property in Timbuktu, the international community has emphasised the political nature of the destruction as opposed to the cultural loss

44 See "Islamists Continue Destroying Timbuktu Heritage", above n 38. See also Fletcher, above n 24.

45 See "Destruction of Ancient Sites Continues in Northern Mali" (3 July 2012) Business Ghana <www.businessghana.com>.

46 See Harding, above n 7.

47 See Afua Hirsch "Mali: Timbuktu's Literary Gems Face Islamists and Decay in Fight for Survival" *The Guardian* (online ed, London, 20 May 2013), noting that ancient manuscripts are so important for citizens of Timbuktu that there is a proverb in this medieval city that says: "The ink of a scholar is more precious than the blood of a martyr."

48 See Smith, above n 39.

49 See Bokova "Culture in the Cross Hairs", above n 12.

50 Bokova "Culture in the Cross Hairs", above n 12.

51 Bokova "Culture in the Cross Hairs", above n 12.

involved (which was highlighted by the international community in its condemnation of the 2001 destruction of the two giant Buddha statues in Afghanistan), which terrorists have exploited to achieve personal objectives.⁵² In the opinion of Jean Ping, Chairman of the African Union, the destruction of Timbuktu's cultural property was "criminal and unacceptable".⁵³ In his view, the Mali government has to find a solution to its political dilemma. Similarly, the United States has condemned the fighting in the north of Mali and called on all groups to cease fire. Victoria Nuland, a spokesperson for the United States State Department, stressed that "the Tuareg rebellion is fundamentally a political problem, that requires addressing their legitimate grievances but it also requires strong cooperation by all players".⁵⁴ Despite this specific reference to the Tuareg rebellion, Guinean President Alpha Condé classified the destruction as an act of terrorism which had little to do with it.⁵⁵

While the responsibility for the destruction of Timbuktu treasures has yet to be individualised, it is clear that the destruction was not militarily necessary.⁵⁶ As it has been observed, "it was entirely avoidable; the reason for it was simply to wipe out any and all cultural traditions that contradicted with Ansar Dine's narrow world view".⁵⁷ Explaining why the Ansar Dine fighters would risk offending local sensibilities by destroying revered shrines like those in Timbuktu, Souleymane Bachir Diagne notes that to these Islamists, who practise Salafism, the *Wahhabi* puritanical branch of Sunni Islam found in Saudi Arabia, the Sufi tradition of worshipping at the shrines (seeking the intercession of the holy individuals as was the case with the local people in Timbuktu) is anathema: "They are more worried about purity than about being unpopular."⁵⁸

III THE NATURE OF THE MALI CONFLICT

The conflict in Mali is complex in character. While the fighting that broke out in January 2012 was between government forces and Tuareg rebels, the subsequent involvement of radical Islamists

52 See "Mausoleum Destruction in Timbuktu: A Throwback to the Buddhas of Bamiyan?" (3 July 2012) Citizen Side <www.citizenside.com>.

53 "Mausoleum Destruction in Timbuktu: A Throwback to the Buddhas of Bamiyan?", above n 52.

54 "Mausoleum Destruction in Timbuktu: A Throwback to the Buddhas of Bamiyan?", above n 52.

55 "Mausoleum Destruction in Timbuktu: A Throwback to the Buddhas of Bamiyan?", above n 52.

56 At the request of the government of Mali, the case was forwarded to the International Criminal Court: see below nn 207–208.

57 See Kimberly J Curtis "Timbuktu's Cultural Treasures and the ICC" (29 January 2013) <www.kimberlyjcurtis.com>.

58 Professor Souleymane Bachir Diagne, Columbia University, expert African Islamic philosophy, as quoted in Fletcher, above n 24.

tells of the threat of new, non-state actors.⁵⁹ At the time of publication, it is not clear whether there was any fighting between government forces and the rebels and their supporters on the days when the destruction took place. This highlights the question of the existence of armed conflict in Mali generally, and at the time of the destruction of Timbuktu's mausoleums and other objects in particular.

International law does not define the concept of "armed conflict". However, it is useful to look at the jurisprudence of international tribunals in relation to this question. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) found in the *Tadić* case that:⁶⁰

... an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.

The Appeals Chamber further held that absence of actual combat does not affect the existence of an armed conflict and the application of the norms of international humanitarian law. International humanitarian law applies from the beginning to the end of the conflict, that is:⁶¹

... from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.

It is not necessary that actual combat takes place in a particular part of the territory affected by the conflict nor that the combat takes place in a particular area all the time.⁶² It is sufficient that the context of an armed conflict can be established. Based on the above information, the Timbuktu situation satisfies the *Tadić* test. In other words, there was a resort to force between Mali's armed forces and separatist Tuareg rebels who were backed by Ansar Dine militants throughout 2012. By the end of June 2012, Ansar Dine took control of Timbuktu and held it until the end of January 2013

59 In a discussion at the United Nations Security Council surrounding the adoption of SC Res 2086, S/Res/2086 (2013) on 21 January 2013 and relating to the importance of a multidimensional approach to peacekeeping, for instance, the representative of Côte d'Ivoire spoke about the complexity of the situation in Mali, including the recent offensive by terrorists groups in the south of Mali. See "Security Council Endorses Importance of 'Multidimensional' Approach to Peacekeeping" SC/10888 (2013) at 21. And in an open debate on the protection of civilians in armed conflict in the Security Council on 12 February 2013, a number of speakers made reference to armed conflict in Mali: "Security Council Says States Have Primary Responsibility for Protecting Civilians in Conflict, Reaffirms Peacekeeping Missions Need Protection Mandate, Resources" *States News Service* (12 February 2013). See also "Mali: Timbuktu's Cultural Heritage more Damaged than first Estimated, UN Agency Says", above n 28.

60 See *Prosecutor v Tadić (Judgment)* ICTY Appeals Chamber IT-94-1-A, 15 July 1999 at [70].

61 At [70].

62 At [70].

when ousted by French forces. The destruction of cultural property in Timbuktu took place within this period. Even if there was no actual combat in Timbuktu when it occurred, the destruction did take place in the context of an armed conflict in Northern Mali. Thus, the Tuareg rebels and the Ansar Dine combatants were under an obligation to respect the norms of international humanitarian law, including those concerning the protection of cultural property. Which international humanitarian law norms exactly were applicable would depend on the nature of armed conflict.

In terms of the nature of armed conflict, a distinction is generally made between international and non-international armed conflicts. According to the above definition of armed conflict in *Tadić*, a resort to armed force between states falls under the former category, whereas protracted armed violence between governmental authorities and organised armed groups or between such groups within a state belongs to the latter category. Based on available information, the Mali conflict appears to be non-international. It is worth noting that the nature of a conflict can change. Where there is third-party intervention into an initially internal armed conflict (that is, "another state intervenes in that conflict through its troops or ... some of the participants in the internal armed conflict act on behalf of that other State"),⁶³ an internal armed conflict can become an international conflict. For this change to occur, it is essential that the direct intervention and overall control tests are satisfied. While the former fairly straightforwardly converts an internal armed conflict into an international one, namely, through the direct participation of foreign troops on the territory of a state, the latter requires:⁶⁴

... control by a State over subordinate armed forces or militias or paramilitary units [to] be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training).

Currently, the International Criminal Court, as discussed below, is investigating the Mali situation. The Court will, inter alia, determine the nature of the conflict and the concomitant application of the norms of international humanitarian law. Such determination is relevant as generally, international armed conflicts are more comprehensively covered by international law than non-international armed conflicts. Notwithstanding this difference in the scope of application,

63 At [84].

64 At [137]. The "overall control test" needs to be distinguished from the "effective control test" in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at [105]–[115] [*Nicaragua case*], which deals with state responsibility (as opposed to individual criminal responsibility). For a discussion about the direct control test, see *Prosecutor v Kordić (Judgment)* ICTY Trial Chamber III IT-97-14/2-T, 26 February 2001 at [38]–[45], [65]–[102], [108]–[146]; and *Prosecutor v Kordić (Judgment)* ICTY Appeals Chamber IT-95-14/2-A, 17 December 2004 at [295]–[321], [342]–[374].

cultural property enjoys protection in both types of conflict at all times, provided it is not being turned into a legitimate military target.⁶⁵

IV CULTURAL PROPERTY AND THE PRESERVATION IMPERATIVE

The Timbuktu case raises a complex set of questions: were the destroyed architectural structures in Timbuktu cultural property? However, whose cultural heritage is endangered: is it the heritage of the residents of Timbuktu and citizens of Mali or is it Ansar Dine's heritage which is worthy of protection? Should the international community intervene in order to prevent or avert such destruction? The last question, in turn, raises another set of questions, starting with the issue of state sovereignty and domestic jurisdiction spelt out in art 2(7) of the United Nations Charter, which proscribes such intervention except in instances where the Security Council of the United Nations is acting under Chapter VII, that is, dealing with matters posing threats to international peace and security.⁶⁶ But is Chapter VII an appropriate basis to act upon where cultural property is concerned? Given the Council's mandate of maintenance of international peace and security, the question is whether the deliberate destruction of cultural property can be deemed to be endangering peace and security. If so, what kind of action would be appropriate? The following sections analyse these questions.

A Were Timbuktu's Destroyed and Damaged Objects Cultural Property?

Cultural property is an aspect of cultural heritage manifested in material, human-made products, movable or immovable, religious or secular, that embody a tangible expression of a culture. Various international legal instruments provide definitions of cultural property for the purpose of those instruments.⁶⁷ Among them, the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (1954 Convention) provides the most comprehensive definition. Because

65 See generally Roger O'Keefe *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press, Cambridge (UK), 2006); and Petrovic *The Old Bridge*, above n 18.

66 See Georg Nolte "Article 2(7)" in Bruno Simma and others (eds) *The Charter of the United Nations: A Commentary* (3rd ed, Oxford University Press, Oxford, 2012) 148 at 148; David Harris *Cases and Materials on International Law* (7th ed, Sweet & Maxwell, London, 2012) at 826–827; and Gillian Triggs *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, Sydney, 2006) at 889.

67 Article 1 of the 1970 Convention, above n 19, lists categories of movable cultural property specifically designated by each state party based on the importance of such property for archaeology, prehistory, history, literature, art or science. The International Institute for the Unification of Private Law [UNIDROIT] Convention on Stolen or Illegally Exported Cultural Objects 2421 UNTS 457 (opened for signature 24 June 1995, entered into force 1 July 1998) [UNIDROIT Convention], art 2 refers to a list of movable cultural objects annexed to the Convention. The World Heritage Convention, above n 19, uses the term "cultural heritage", which is defined, at art 1, as encompassing monuments, groups of buildings or sites which are of outstanding universal value from the point of view of history, art or science.

the 2012 situation in Mali amounts to an armed conflict, which appears to be non-international in character,⁶⁸ the emphasis will be put on the 1954 Convention, a specialist treaty, whose application encompasses this type of armed conflict.⁶⁹ The Convention defines "cultural property" in art 1, which stipulates that:

For the purpose of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:

- (a) Movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) Buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
- (c) Centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments".

Article 1 provides the states parties with an illustrative but non-exhaustive list of objects and sites that qualify as cultural property within the meaning of the Convention.⁷⁰ This provision also specifies the criteria pursuant to which some objects are protected because of their nature and others because of their purpose. In order to enjoy protection, a monument (listed in art 1(a)) needs to be of architectural, artistic or historic significance. It is irrelevant whether a monument is of a religious or secular character. Its origin or ownership does not matter either. What matters is that a monument

68 Note that according to the 1977 Protocol II Additional to the Geneva Conventions of 12 August 1949, armed conflicts need to be distinguished from "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature": see Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1125 UNTS 609 (opened for signature 6 June 1977, entered into force 7 December 1978), art 1(2) [Additional Protocol II].

69 1954 Convention, above n 19, art 19.

70 See Gregory Mose "The Destruction of Churches and Mosques in Bosnia-Herzegovina: Seeking a Rights-Based Approach to the Protection of Religious Cultural Property" (1996) 3 *Buff Jour Int'l L* 180 at 185.

has importance from the point of view of architecture, art or history and that it is deemed to be "of great importance to the cultural heritage of every people".⁷¹

In regard to an object's purpose, examples of buildings listed in art 1(b) of the 1954 Convention illustrate that the protection can be accorded because of an object's "main and effective purpose" rather than its nature. For instance, a museum or a library is protected within the meaning of art 1(b) as long as it shelters cultural property defined in art 1(a). When the content is removed from museum or library buildings, these buildings lose protection under the 1954 Convention unless they are themselves (in their own right) considered objects of cultural property within the meaning of art 1(a).

The third category of cultural property, referred to in art 1(c), comprises "centres containing monuments", which are protected as a whole. The Vatican City is one such example: it is in its entirety protected by the 1954 Convention. Similarly, cultural property situated within the walls of the Old City of Dubrovnik, Croatia, or cultural property located in the Old City of Mostar precinct, Bosnia and Herzegovina, is protected altogether.

Mali is party to the 1954 Convention and, thereby, has a responsibility to uphold, and also the right to protection of, cultural property within its territory.⁷² Timbuktu's centuries old earthen architectural structures, including 16 cemeteries, form a centre within the meaning of art 1(c) of the Convention. In addition to immovable cultural property, the centre and Mali, generally, contain thousands of handwritten manuscripts and books of historical interest, as well as other objects of artistic, archaeological or historic value which fall within the definition of cultural property provided in art 1(a). Importantly, citizens of Timbuktu consider the mentioned objects to be an important part of their cultural heritage.⁷³ The fact that they have made a great effort in preserving them for centuries, and the fact that they mourn the loss of, and damage to, cultural treasures incurred by the Ansar Dine rebels, is important evidence in this regard. Finally, Timbuktu has been on the World Heritage List since 1988. This, together with its inscription on the "World Heritage in

71 1954 Convention, above n 19, art 1(a). For a discussion on the definition of cultural property in art 1 of the 1954 Convention, see Roger O'Keefe "The Meaning of 'Cultural Property' under the 1954 Hague Convention" (1999) 46 NILR 26.

72 Mali acceded to the 1954 Convention on 18 May 1961. A list of states parties is available at <www.unesco.org>.

73 For the Malian national cultural heritage law, see Arrêté No 93-5699 fixant l'organisation et les modalités de fonctionnement des missions culturelles de Tombouctou, Djenne et Bandiagara (1993); Décret No 93-203 portant création des missions culturelles à Tombouctou, Djenne et Bandiagara (1993); Décret No 03-440 portant classement du tombeau des Askia dans le patrimoine culture national (2003); Loi No 06-041 du 11 août 2006 autorisant la ratification de la Convention sur la protection et la promotion de la diversité des expressions culturelles, adoptée à Paris le 20 octobre 2005 par la 33ième session de la Conférence générale de l'UNESCO (2006). These and other national law instruments are available at the UNESCO database at <www.unesco.org>.

Danger" List in 2012, reinforces its exceptional value. Therefore, Timbuktu is a historic city containing cultural property of great importance to the cultural heritage of Mali and, as such, it was clearly eligible for protection under the rubric of "cultural property" within the meaning of art 1 of the 1954 Convention at the time of the Ansar Dine incursion.⁷⁴

B The Value of Cultural Property

From time immemorial, people have made and cared for cultural objects.⁷⁵ As John Merryman observes, today, the existence of numerous museums around the world, countless museum visitors, an impressively large number of dealers, collectors, university departments of art, archaeology and ethnology, national arts ministries and national and international law protecting cultural property, all testify to the various ways in which the present generation cares about cultural objects inherited from past generations for their own benefit and for that of future generations.⁷⁶

Under international law, protection of cultural property is extended to both times of peace and armed conflict. The World Heritage Convention, applicable to peacetime, underlines the uniqueness of cultural property and importance of its preservation. The existing international legal instruments concerning cultural property "demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong".⁷⁷ Similarly, the UNESCO Convention on the Means Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 Convention), also applicable to peacetime, spells out that:⁷⁸

74 While it is beyond the scope of this article to provide detailed analysis of applicable principles of international law concerning cultural property, it is sufficient to note that Timbuktu's cultural property was also protected by other treaties (including the World Heritage Convention, above n 19, art 1; Additional Protocol II, above n 68, art 16; and the Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), art 8(2)(e)(iv) [Rome Statute]) as well as by customary international law: 1907 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (opened for signature 18 October 1907, entered into force 26 January 1910) [Convention (IV)]. This Convention forms part of customary international law and as such applies to all states. Convention (IV) is specifically referred to in the report of the Secretary-General on the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) as constitutive of international customary law: see *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 S/25704* (1993) at [41]–[42]. For a discussion on the protection of cultural property in armed conflict under customary international law, see generally Jean-Marie Henckaerts "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict" (2005) 87 IRRC 175.

75 See John Henry Merryman *Thinking about Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (Kluwer Law International, Boston, 2000) at 98 [*Elgin Marbles*].

76 At 98.

77 See World Heritage Convention, above n 19, preamble at [5].

78 See 1970 Convention, above n 19, preamble at [2]–[4].

... cultural property ... increases the knowledge of the civilization ... , enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations ... [and] constitutes one of the basic elements of civilization and national culture.

This Convention also stresses that "it is incumbent upon every State to protect the cultural property existing within its territory".⁷⁹ The 1954 Convention, which applies in both armed conflict and peacetime, makes clear that "the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection".⁸⁰

But why should people care about piles of stones or tubes of oil paint spread on canvas, generally, and in armed conflict in particular, when precious human lives are at risk?⁸¹ When one considers enormous human misery in the form of death, injury, loss of home and loss of livelihoods, for instance, even thinking about cultural property might seem to be inappropriate. However, as Patrick Boylan explains, it would be wrong to think that people care only about their own physical survival: "their heart, their soul and their memory have also been wounded" and thus warrant close attention.⁸² Cultural property is an important, inseparable part of human life.⁸³ In Miguel Corzo's words:⁸⁴

Art is in fact as useless to society as the spirit is to body. The human species as a biological organism *can* survive without art and culture. But the definition of what it is to be human cannot. Culture is to human civilisation as trees are to the environment. That is our preoccupation with its survival.

79 Preamble at [4].

80 1954 Convention, above n 19, preamble at [3].

81 See Jadranka Petrovic "Cultural Context of Peace Operations" in Jessica Howard and Bruce Oswald (eds) *The Rule of Law on Peace Operations: A "Challenges of Peace Operations" Project Conference* (Kluwer Law International, The Hague, 2002) 213 at 219.

82 See Patrick J Boylan "Come Hell or High Water" *UNESCO Sources* (No 117, November 1999) 10 at 10.

83 At 11.

84 Miguel Corzo "The Hague Convention of 1954: History, Significance and Compliance" in Pamela Vandiver and others (eds) *Materials Issues in Art and Archaeology III: Symposium held April 27–1 May 1 1992, San Francisco, California, USA* (Cambridge University Press, New York, 1993) 5 at 6.

People care about cultural property for a variety of reasons. Cultural property links the present to the past.⁸⁵ Cultural objects are unique and thus an "irreplenishable" resource.⁸⁶ They embody memory. Stephen Humphreys wisely reminds that memory is essential to a human life.⁸⁷ Cultural objects are also powerful symbols which bind people together, giving them, inter alia, a sense of identity.⁸⁸ They are also an aesthetic, intellectual, educational and economic resource, an inspiration for new creations and a unifying force and a promoter of peace and harmony among nations.⁸⁹ In the words of the UNESCO Director-General, while "culture alone is not enough to build peace ... [,] without culture, peace cannot be lasting".⁹⁰ Although it is sometimes seen as a luxury, protecting culture is in fact about protecting people: "it is about protecting their way of life and providing them with essential resources to rebuild when war ends."⁹¹

C Whose Rights? Whose Heritage?

Cultural property is dual in nature. It is made by humans, and its meaning in society is also constructed by humans. Its importance derives from a group's or nation's attachment to cultural objects.⁹² But in addition to its "identificatory" function, cultural property is also an important marker of humanity's development. In other words, while it recognises the cultural specificity of a people or a nation, international law concerning cultural property is premised on the idea that

85 See John Moustakas "Group Rights in Cultural Property: Justifying Strict Inalienability" (1989) 74 CLR 1179 at 1195.

86 At 1223. See also *Prosecutor v Jokić (Sentencing)* ICTY Trial Chamber I IT-01-42/1-S, 18 March 2004 at [52]:

Restoration of buildings of this kind, when possible, can never return the buildings to their state prior to the attack because a certain amount of original, historically authentic, material will have been destroyed, thus affecting the inherent value of the buildings.

87 See Stephen Humphreys "The Destruction of Cultural Memory" *Middle East Studies Association Bulletin* (2001 presidential address, Summer 2002) at [5].

88 Merryman *Elgin Marbles*, above n 75, at 105; Moustakas, above n 85, at 1195; and Paul Bator "An Essay on the International Trade in Art" (1982) 34 Stan L Rev 275 at 304.

89 Bator, above n 88, at 306. For a more detailed discussion on utility of cultural property, see Merryman *Elgin Marbles*, above n 75; Stephanie Forbes "Securing the Future of Our Past: Current Efforts to Protect Cultural Property" (1996) 9 Transnational Lawyer 235; and Petrovic *The Old Bridge*, above n 18, at 25–31.

90 See Bokova "Culture in the Cross Hairs", above n 12.

91 See Bokova "Culture in the Cross Hairs", above n 12.

92 See generally Moustakas, above n 85.

cultural property, irrespective of its origin or ownership, is valuable to all humanity.⁹³ The universal value of cultural property is clearly stated in the 1954 Convention:⁹⁴

Damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all [hu]mankind, since each people makes its contribution to the culture of the world.

Through cultural property, all humanity is interrelated to so great an extent that when one people's cultural property is destroyed, the concern about cultural property spills across national borders since the entire international community is disinherited, as exemplified by the worldwide outrage and condemnation of the events relating to cultural property in the former Yugoslavia during the armed conflicts in the 1990s and in Afghanistan in the first decade of this century.

The ultimate rationale for such concern lies with the present generation's responsibility to respect cultural property and to transmit it to future generations.⁹⁵ To this end, international law imposes "the duty [on each state] of ensuring the ... transmission [of cultural heritage] to future generations".⁹⁶ This duty is based on the notion of inter-generational justice⁹⁷ and on an infinite duty to protect cultural property which emanates from the special value of such property.⁹⁸

Turning back to the Timbuktu crisis, due to their attachment to mosques and mausoleums, the attack on these objects of cultural property was an attack on Timbuktu citizens' religious rights, on their cultural identity and history. Under international law, every person has the right to culture

93 John Merryman "International Art Law: From Cultural Nationalism to a Common Cultural Heritage" (1983) 15 NYU J Int'l L & P 757 ["From Cultural Nationalism to a Common Cultural Heritage"]; and John Merryman "Two Ways of Thinking about Cultural Property" (1986) 80 AJIL 831 ["Two Ways"].

94 1954 Convention, above n 19, preamble at [2].

95 Frank Fechner "The Fundamental Aims of Cultural Property Law" (1998) 7 International Journal of Cultural Property 376 at 382; Markus Müller "Cultural Heritage Protection: Legitimacy, Property, and Functionalism" (1998) 7 International Journal of Cultural Property 395 at 405; World Heritage Convention, above n 19, art 4; and UNESCO *Universal Declaration on Cultural Diversity* Res 25, 31C/Res25 (2001) annex I at arts 4 and 5.

96 World Heritage Convention, above n 19, art 4.

97 See generally Edith Brown-Weiss *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (United Nations University, Tokyo, 1989).

98 See Sarah Harding "Value, Obligation and Cultural Heritage" (1999) 31 ASLJ 291 at 324.

(including cultural property) and is also free to exercise their religion.⁹⁹ Peoples are also guaranteed the right to exercise their cultural expression as a collective – part of self-determination.¹⁰⁰ However, Ansar Dine's version of Islam clearly conflicts with the version practised by Timbuktu citizens, where religious cultural property is concerned. This begs an answer to the question of whose rights in relation to such property in Timbuktu should take precedence.

In considering this question, it is crucial to keep in mind that Timbuktu is not only part of the cultural patrimony of Mali, but also a World Heritage site, which clearly indicates that its importance transcends Malian borders. Like the Bamiyan Buddhas, or the Old Bridge of Mostar, both World Heritage sites, these treasures are a valuable part of the common human heritage, an idea expressed in the preamble to the 1954 Convention.¹⁰¹

This brings the "internationalist"¹⁰² or cosmopolitan¹⁰³ argument into play: cultural property belonging to any people ultimately belongs to the cultural heritage of all humankind. Under this argument, every human being has an interest in preservation of cultural heritage. The 1954

99 See *Universal Declaration of Human Rights*, above n 17, arts 18 and 27; and ICESCR, above n 17, art 15. For a discussion on a rights-based approach to the protection of religious cultural property, see for example Mose, above n 70; and KJ Patel "Culture Wars: Protection of Cultural Monuments in a Human Rights Context" (2001) 14 Harv Hum Rts J 1. While the assertion that every person has the right to culture (including cultural property) under international law may be perceived as a broad-brush approach, it is important to keep in mind that the right to culture is one of the universal human rights. Numerous international human rights instruments have affirmed the importance and the indivisibility of all human rights, thus, including the right to culture. See *2005 World Summit Outcome*, above n 9, at [121] and [123].

100 See ICCPR, above n 17, arts 1 and 27; and ICESCR, above n 17, art 1. See also the *Declaration on the Granting of Independence to Colonial Countries and Peoples* GA Res 1514, XV (1960) at [2]; *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* GA Res 2625, XXV (1970) annex at principle (e). In his report on the historical and current development of the right to self-determination, United Nations Special Rapporteur Aureliu Cristescu noted that the right to self-determination as it referred to cultural matters is the "right of peoples to choose their cultural system and freely pursue their cultural development [and] regain, enjoy and enrich their cultural heritage": see Aureliu Cristescu, Special Rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments* E/CN4/Sub2/L625 (1981) at [31].

101 1954 Convention, above n 19, preamble at [2] (when one people's cultural property is damaged, the cultural heritage of all humankind is ultimately affected "since each people makes its contribution to the culture of the world"). For a discussion on this paragraph of the preamble to the 1954 Convention, see Jiří Toman *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international law concerning such protection* (UNESCO Publishing, Paris, 1996) at 40–41.

102 See Merryman "Two Ways", above n 93.

103 See Kwame Appiah "Whose Culture Is It, Anyway?" in Kwame Appiah *Cosmopolitanism: Ethics in a World of Strangers* (Norton & Company, New York, 2006) ch 8.

Convention clarifies that "the preservation of the cultural heritage is of great importance for all peoples of the world".¹⁰⁴ In addition to its intrinsic value, objects of cultural property have the aura of uniqueness¹⁰⁵ and the connection to both a local identity and, through that, to humanity. Under international law, it is imperative that this connection is not lost in peacetime or in times of armed conflict. To this end, the 1954 Convention obligates states to safeguard cultural property situated within their own territory against the foreseeable effects of an armed conflict by taking various measures aimed at preventing structural collapse of an object of cultural property.¹⁰⁶ In the event of armed conflict, art 4 prohibits states to direct military attacks against cultural property or to use such property for military purposes. This prohibition can only be waived in instances of military necessity. As noted, the obligation to respect cultural property stands notwithstanding the nature of armed conflict, that is, irrespective of whether a conflict is international or non-international.¹⁰⁷

Other international legal instruments also impose obligations on states to respect cultural treasures situated in their own territory and those situated in the territories of other states.¹⁰⁸ Because of universal interest in cultural property, where such property is endangered, states have a duty "to take all possible steps to protect cultural property"¹⁰⁹ irrespective of its location.¹¹⁰ But can states really protect cultural property situated in another state?

V THE STATE-CENTRIC APPROACH TO CULTURAL PROPERTY

International law highlights the central importance of state sovereignty and non-interference in the internal affairs of another state. In Malcolm Shaw's words, these are considered "the linchpins of

104 1954 Convention, above n 19, preamble at [3].

105 See Harold Nicolson "Marginal Comments" *Spectator* (London, February 1944) at 95 as cited in Merryman "Two Ways", above n 93, at 831. See also *Prosecutor v Jokić*, above n 86, at [52].

106 1954 Convention, above n 19, art 3.

107 Article 19(1).

108 As the 1970 Convention, above n 19, preamble at [3] and [5] stipulates, "cultural property constitutes one of the basic elements of civilization and national culture", and "it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations". See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1978) [Additional Protocol I], art 53; Additional Protocol II, above n 68, art 16; and Rome Statute, above n 74, arts 8(2)(b)(ix) and 8(2)(c)(iv). Because of universal interest in cultural property, where such property is endangered, states have a duty to take all possible steps to protect cultural property irrespective of its location.

109 1954 Convention, above n 19, preamble at [6]. See also Toman, above n 101, at 43.

110 For a discussion on the need for protective intervention, see M Catherine Vernon "Common Cultural Property: The Search for Rights of Protective Intervention" (1994) 26 Case W Res J Int'l L 435; and Alan Marchisotto "The Protection of Art in Transnational Law" (1974) 7 Vand J Transnat'l L 689 at 717.

the international system".¹¹¹ The United Nations Charter proclaims "the sovereign equality of all its Members" as its leading principle.¹¹² The Charter specifically proscribes "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations".¹¹³ It explicitly forbids interference in matters "which are essentially within the domestic jurisdiction of any state".¹¹⁴

The principle of non-intervention is further reinforced by a United Nations General Assembly resolution, the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, which was unanimously adopted in 1965.¹¹⁵ The following paragraph of this Declaration is particularly worth noting:¹¹⁶

No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and *cultural elements*, are condemned.

Similarly, art 3 of the 1977 Additional Protocol II to the Geneva Conventions of 12 August 1949, applicable to non-international armed conflicts, stipulates that: "Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State"¹¹⁷ and:¹¹⁸

Nothing ... shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

State sovereignty is inviolable as it has been elevated to the level of a *jus cogens* norm.¹¹⁹ However, wilful destruction of cultural property can represent a serious violation of international

111 Malcolm N Shaw *International Law* (6th ed, Cambridge University Press, Cambridge (UK), 2008) at 488.

112 Charter of the United Nations, art 2(1).

113 Article 2(4).

114 Article 2(7).

115 See *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty* GA Res 2131, XX (1965); and *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, above n 100.

116 *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, above n 115, at [1] (emphasis added). See also *Definition of Aggression* GA Res 3314, XXIX (1974) annex at art 1.

117 See Additional Protocol II, above n 68, art 3(1).

118 Article 3(2).

119 See Sarkin, above n 9, at 7.

humanitarian law and amount to a war crime and a crime against humanity,¹²⁰ which also qualify as peremptory norms.¹²¹ Thus, the two rights must be balanced, although there is an increasing tendency to give precedence to human rights in certain situations. Gillian Triggs notes that:¹²²

It is a measure of the consensus within the international community to adopt universal human rights that a state may no longer legitimately deny the application of these principles within the domestic sphere.

In the same way, Jeremy Sarkin observes that:¹²³

Regardless of the validity of technical legal arguments, sovereignty is increasingly ceding moral ground to the rights and needs of groups and individuals within states, particularly in cases where gross human rights violations are being committed.

However, the prohibition of interference in the internal affairs of another state is amplified by explicit prohibition of the use of force pursuant to art 2(4) of the United Nations Charter, except in self-defence as envisaged in its art 51. This was clearly upheld by the International Court of Justice in 1986, when it rejected the use of force as a human rights tool.¹²⁴ The only exception is the application of enforcement measures under Chapter VII of the United Nations Charter, namely in situations where the Security Council is taking action with respect to threats to the peace, breaches of the peace and acts of aggression.¹²⁵

120 See for example *Prosecutor v Blaškić (Judgment)* ICTY Trial Chamber I IT-95-14-T, 3 March 2000; *Prosecutor v Jokić*, above n 86; *Prosecutor v Krstić (Judgment)* ICTY Trial Chamber I IT-98-33-T, 2 August 2001; *Prosecutor v Naletilić (Judgment)* ICTY Trial Chamber IT-98-34-T, 31 March 2003; and *Prosecutor v Prlić (Amended Indictment)* IT-04-74-AL17, 16 November 2005.

121 See Stacy Humes-Schulz "Limiting Sovereign Immunity in the Age of Human Rights" (2008) 21 Harv Hum Rts J 105 at 110–111.

122 See Triggs, above n 66, at 889.

123 See Sarkin, above n 9, at 7. But see Shaw, above n 111, at 488.

124 See *Nicaragua case*, above n 64, at [187]–[201]. However, it has been argued that the *Nicaragua case* applied art 2(4) narrowly as this decision did not examine the use of force in relation to gross violations of human rights and international humanitarian law: see Sarkin, above n 9, at 9. But see Rein Mullerson *Human Rights Diplomacy* (Routledge, London, 1997) at 150; and Eve Massingham "Military Intervention for Humanitarian Purposes: Does the Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?" (2009) 91 IRRC 803 at 814.

125 See Charter of the United Nations, art 2(7).

In this context, it is worth recalling the dual nature of cultural property, namely, the cultural patrimony and the common heritage arguments.¹²⁶ Under the first mentioned argument, cultural property belongs to a people most immediately concerned. This is often read to mean that cultural property belongs to a state.¹²⁷ Pursuant to this reading of cultural property, cultural treasures located within state boundaries are part of the national patrimony. The cultural patrimony claims are particularly significant in less developed states and are especially highlighted in the process of self-determination. Cultural objects are seen as part of the national cultural patrimony due to "the special relationship between that state's people and their cultural artifacts".¹²⁸ Based on this approach to cultural property preservation, cultural objects can only be fully appreciated in the geographical, historical and traditional context. Looked at that way, cultural property gives identity to a people and represents an "identity card" towards statehood as demonstrated in the process of decolonisation and in numerous repatriation claims.¹²⁹ However, as Alan Marchisotto observes, cultural patrimony claims are often based on the mere physical presence of a cultural object in the claiming state, without exclusive cultural attachment.¹³⁰ To the proponents of the common heritage – who view cultural property as belonging to all humanity, where everyone should have access to the cultural heritage notwithstanding its origins – the cultural patrimony approach to cultural property could effectively cut off the bulk of humanity from exposure to great civilisations and prevent states from influencing the fate of universally outstanding cultural property as was the case with Chinese cultural property during the Cultural Revolution, for example.¹³¹

It is true that cultural property has both an identificatory and a unificatory function for a people and a state concerned: "It is something deeply rooted in the country's very existence, and constitutes almost a moral and spiritual necessity."¹³² However, as Catherine Vernon cautions, cultural

126 See generally Richard Handler "Who Owns the Past?: History, Cultural Property, and the Logic of Possessive Individualism" in Bernard Williams (ed) *The Politics of Culture* (Smithsonian Institution Press, Washington, 1991) 63; Moustakas, above n 85; Lyndel Prott "The International Movement of Cultural Objects" (2005) 12 *International Journal of Cultural Property* 225; Merryman "From Cultural Nationalism to a Common Cultural Heritage", above n 93; and Fechner, above n 95.

127 See Vernon, above n 110, at 449–450, nn 67–70 and surrounding text.

128 Douglas Thomason "Rolling Back History: The United Nations General Assembly and the Right to Cultural Property" (1990) 22 *Case W Res J Int'l L* 47 at 47.

129 During the United Nations General Assembly discussion of the 1970 Convention, above n 19, then Zaire's President Mobutu declared: "During the colonial period ... the rich countries appropriated our best, our unique works of art, and we are therefore poor not only economically but also culturally": quoted in Lyndel Prott and Patrick O'Keefe *Law and the Cultural Heritage: Discovery and Excavation* (Professional Books, Abingdon (UK), 1984) vol 1 at v.

130 Marchisotto, above n 110, at 690.

131 Vernon, above n 110, at 450. See generally Merryman *Elgin Marbles*, above n 75.

132 Prott and O'Keefe, above n 129, at 23–24.

patrimony can sometimes be manipulated.¹³³ The concept of *Kulturkreis* invoked by the National Socialist Regime in Germany under Hitler's Third Reich illustrates this proposition. Besides, attributing cultural property to a "people" has its flaws, as the concept of "people" is not easy to define. In fact, this concept poses one of the major hurdles in the area of self-determination law. As a "people" does not necessarily coincide with state borders, this questions the validity of "cultural patrimony" and "state" ownership side of the cultural property argument.

In a world comprised of nation-states it is understandable that international law puts an emphasis on its principal subject – the state. But the conditions in international fora are changing, and with it the centrality of the state.¹³⁴ As noted, this is particularly evident in the area of human rights protection and also as concerns international criminal prosecution of individuals who have committed international crimes. A slighter emphasis on cultural patrimony is consistent with the relative decline of national sovereignty that characterises modern international law,¹³⁵ correctly captured in the preamble to the 1954 Convention, which emphasises that cultural property forms part of a larger whole – the cultural heritage of all humankind. Thus, everyone has interest in, and a duty to preserve, cultural property.¹³⁶

VI DAMAGE TO CULTURAL PROPERTY AND THREAT TO INTERNATIONAL PEACE AND SECURITY

Because cultural property is of global significance, the United Nations Security Council, as the world's de facto executive body, should be acting upon all matters that concern the entire international community, thus including cultural property-related matters. In light of the Security Council's mandate to maintain international peace and security and remove threats to peace and security, this raises the question whether Chapter VII of the United Nations Charter is an appropriate basis to act upon where cultural property is concerned. In other words, can the deliberate

133 See Vernon, above n 110, at 452.

134 This warrants some caution, however. It has been argued that by acknowledging that states are best positioned to protect their own citizens, the third pillar of the responsibility to protect, in effect, promotes state sovereignty, and with that the centrality of the state. See the annual General Assembly's informal interactive dialogue on the responsibility to protect held at the United Nations Headquarters on Wednesday, 5 September 2012. The dialogue was based on the *Responsibility to Protect: Timely and Decisive Response - Report of the Secretary-General A/66/874* (2012), on which occasion the Secretary-General noted that the third pillar did not contradict state sovereignty, but reaffirmed it into the "positive responsibility" of governments to protect their citizens. Similarly, the General Assembly President, on 5 September 2012, stressed that the international community could only act when a state "manifestly" failed to protect its citizens, which response was "intended to reinforce, not undermine, national sovereignty". See "World not fulfilling 'never again' vow, Secretary-General tells General Assembly meeting on responsibility to protect" GA/11270 (2012) at 1 and 2 ["World Not Fulfilling 'Never Again' Vow"].

135 See generally Merryman "Two Ways", above n 93.

136 See Harding, above n 98, at 291.

destruction of cultural property endanger international peace and security? If so, what kind of action would be appropriate?

Even if one correctly assumes that cultural property belongs and is ultimately invaluable to the cultural heritage of all humankind, under existing international law, no state or international organisation is authorised to intervene in a state's domestic matters in order to guarantee the protection of cultural property without the consent of the host state. As a result, a state can do whatever it pleases with cultural property to which it is territorially linked. The demolition of the world's largest Buddha statues by the Taliban in 2001 demonstrates that even if cultural property of exceptional value to humanity is deliberately destroyed, no one outside a given state can ultimately prevent this.¹³⁷ Had it deemed the Timbuktu cultural crisis to be a threat to international peace and security, the Security Council could have authorised intervention into the domestic jurisdiction in order to save this particular portion of humanity's cultural heritage. But this did not take place. In fact, this type of intervention has never been authorised by the Council for the *exclusive* purpose of cultural property protection. As a result, havoc was created among the cultural artefacts in Timbuktu in mid-2012. It could be argued that the situation in Mali might be classified as self-defence or as putting down an internal conflict, either of which allows the home state to continue to act as the principal custodian of its own cultural heritage. However, this state was desperate for the international community's assistance vis-à-vis cultural property located there.¹³⁸ Besides, such cultural property formed part of the cultural heritage of all humankind, which was formally acknowledged by its inscription on the World Heritage List, and which was an additional reason for the international community to take more proactive steps in order to prevent the damage.

Sadly, there are countless other examples of the failure to protect common cultural property, both in times of armed conflict and in peacetime.¹³⁹ Sometimes, the destruction of cultural objects may lead to the rupture of links between communities and cause serious violence, as occurred in India in 1992 when the Babri mosque in Ayodhya was destroyed.¹⁴⁰ This kind of violence can easily spill over borders and affect other states. Another example, the 1993 deliberate destruction of

137 Petrovic "A Monument", above n 18, at 18 and 190–191. See also Simon Chesterman "No More Rwandas v No More Kosovos: Intervention and Prevention" in Ana Covarrubias Velasco and Daniel Ortega Nieto (eds) *The Protection of Human Rights: A Challenge in the XXI Century* (El Colegio de México, Mexico, 2007) 175.

138 See *SOC Report* (2012), above n 8, at 1 and 2. See also Fletcher, above n 24; and Ahmed, above n 34.

139 The failure of the government of El Salvador to prevent the United States from building an USD80 million embassy on a Mayan village protected site is one such example: see Vernon, above n 110, at 440, n 18. Another example is Iraq during the Gulf War, where cultural sites were used as military installations (Vernon, above n 110, at 443, n 28 and the surrounding text) or the deliberate shelling of the Old City of Dubrovnik (Petrovic *The Old Bridge*, above n 18, at 145, 151, 164, 185 and 218–219).

140 See generally Sarvepalli Gopal (ed) *Anatomy of a Confrontation* (Penguin Books, India, 1991); and D Mandal *Ayodhya: Archaeology after Demolition* (Orient Longman, New Delhi, 1993).

the Old Bridge of Mostar in Bosnia and Herzegovina, demonstrates that the loss of cultural objects can be mourned as much as the loss of human life and may prolong the process of reconciliation, which can also ultimately endanger international peace and security.¹⁴¹

However, in the light of cultural catastrophes such as that which occurred in the Balkans in the 1990s, where cultural property was damaged on such a horrendous scale that the terms "cultural genocide" and "cultural cleansing" have been coined,¹⁴² some, though modest, steps towards the protection of the common heritage have been taken by the Security Council.¹⁴³ The cultural crisis in Kosovo, Syria (especially the Syrian city of Aleppo, which is particularly rich in cultural sites) and Mali (Timbuktu in particular) are the most recent reminders that "we must start seeing cultural heritage as an international security issue".¹⁴⁴ I submit that extension of the R2P concept to the cultural property context could be an opportunity to do this.

VII THE RESPONSIBILITY TO PROTECT

A What is R2P?

The concept of R2P was conceived as a response to legal ambiguities surrounding the concept of humanitarian intervention.¹⁴⁵ The 1999 NATO Kosovo intervention raised the question of whether a norm of humanitarian intervention existed and, if so, whether it could be invoked only by the

141 Petrovic *The Old Bridge*, above n 18, at 29.

142 See the statements by Colin Kaiser, UNESCO expert on cultural property "Crimes against Culture" *UNESCO Courier* (France, September 2000) at 41. It should be noted that although the concept of genocide, as originally fashioned by Raphael Lemkin in 1944, did include cultural destruction, "cultural genocide" is not considered to be part of the legal definition of genocide in art II of the Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (opened for signature 9 December 1948, entered into force 12 January 1951), as is the case for the Rome Statute, above n 74, art 6. According to the ICTY as well as the International Court of Justice jurisprudence, the definition of acts of genocide is limited to those seeking the physical or biological destruction of a group, but destruction of cultural property may serve as evidence of genocidal intent: see Raphael Lemkin *Axis Rule in Occupied Europe* (The Lawbook Exchange, Clark (New Jersey), 2005) at 79 and 87–89; *Report of the International Law Commission on the work of its forty-eight session* [1996] vol II, pt 2 YICL 1 at 45–46; *Prosecutor v Krstić*, above n 120, at [580]; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits)* [2007] ICJ Rep 43 at [344].

143 See SC Res 9851, S/Res/9851 (2010) (concerning Kosovo); and SC Res 2056, above n 35 (concerning Mali). See also "Security Council President Says Delegation Will Visit Kosovo This Month" (4 April 2007) United Nations News Centre <www.un.org>.

144 See Bokova "Culture in the Cross Hairs" above n 12.

145 See for example Jutta Brunée and Stephen Toope "Norms, Institutions and UN Reform: The Responsibility to Protect" (2010) 2 JILIR 121. See also Adam Roberts "The United Nations and Humanitarian Intervention" in J Welsh (ed) *Humanitarian Intervention and International Relations* (Oxford Scholarship Online, 2004 (first published 2003)) 71 at 71. But see Ciarán Burke "Replacing the Responsibility to Protect: The Equitable Theory of Humanitarian Intervention" (2009) 1 Amsterdam Law Forum 61.

Security Council or by individual states as well. While there are fears, for example, that the concept might be exploited by powerful states to advance their interests and that intervention in weaker states can lead to neo-imperialism,¹⁴⁶ there are compelling reasons as to why to rescue population from oppression and mass suffering.¹⁴⁷ Nicholas Wheeler argues for a "moral responsibility for others across borders."¹⁴⁸ Where saving fellow human beings is concerned, sovereign boundaries are, as Martha Nussbaum posits, "morally irrelevant".¹⁴⁹ Therefore, the concept lies in the premise that there are some limits to national sovereignty¹⁵⁰ and that ultimately national sovereignty should be seen as "an ever-evolving concept as opposed to having the fossilized status it was once thought to have".¹⁵¹

The idea of "sovereignty as a responsibility", where a state is responsible both internally and externally, namely to its own citizens and to other fellow states,¹⁵² was espoused in 1995 by Francis Deng, former Sudanese Minister of State for Foreign Affairs and later the United Nations Secretary-General's special representative on internally displaced persons.¹⁵³ Four years later, this idea was picked up by the then United Nations Secretary-General Kofi Annan in his speech at the General Assembly in which he appealed to the world to formulate a response to gross human rights

146 See Gareth Evans *The Responsibility to Protect* (Brookings Institution, Washington, 2008) at 55, quoting the head of the United Nations mission of a major G-77 country: "The concept of the responsibility to protect does not exist except in the minds of Western imperialists"; and Luke Glanville "Christianity and the Responsibility to Protect" (2012) 25 *Studies in Christian Ethics* 312 at 322. See also debates within the Security Council on the subjects of the intervention in Libya and the crisis in Syria: United Nations Security Council S/PV6528 (2011); and United Nations Security Council S/PV6627 (2011). See generally Noam Chomsky *The New Military Humanism: Lessons from Kosovo* (Pluto Press, London, 1999); Jonathan Graubart "R2P and Pragmatic Liberal Interventionism: Values in the Service of Interests" (2013) 35 *Hum Rts Q* 69; and Jeremy Moses "Sovereignty as Irresponsibility? A Realist Critique of the Responsibility to Protect" (2013) 39 *Review of International Studies* 113.

147 See Glanville, above n 146, at 321.

148 See Nicholas Wheeler *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, Oxford, 2000) at 307–310.

149 See Martha C Nussbaum "Patriotism and Cosmopolitanism" in Joshua Cohen (ed) *For Love of Country: Debating the Limits of Patriotism* (Beacon Press, Boston, 2002) 1 at 5.

150 For a discussion of the limits to state sovereignty, see William Magnuson "The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection under International Law" (2010) 43 *Vand J Transnat'l L* 255. For the origins and evolution of the principle of "responsibility to protect", see William Burke-White "Adoption of the Responsibility to Protect" in Jared Genser and Irwin Cotler (eds) *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time* (Oxford University Press, New York, 2012) 17; Saira Mohamed "Taking Stock of the Responsibility to Protect" (2012) 48 *Stan J Int'l L* 63; and Johnstone, above n 10.

151 See Sarkin, above n 9, at 3.

152 See Moses, above n 146, at 133.

153 See Francis Deng "Frontiers of Sovereignty" (1995) 8 *LJIL* 249.

violations.¹⁵⁴ In 2000, pointing to the tension between state sovereignty and humanitarian intervention, the Secretary-General reasoned that "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights".¹⁵⁵ In his view, the claims of national sovereignty should be weighed against the claims of individual sovereignty.¹⁵⁶ The idea developed into a concept of "responsibility to protect" in 2001 in the Report of the International Commission on Intervention and State Sovereignty (ICISS Report).¹⁵⁷

The ICISS Report argues in favour of intervention for human protection purposes only: "the debate about intervention for human protection purposes should focus not on 'the right to intervene' but on 'the responsibility to protect'".¹⁵⁸ According to the Report, there are two levels of protection from gross violations of human rights and international humanitarian law. At the first level, it is the responsibility of a sovereign state to protect its citizens from these violations. However, when that state is unwilling or unable to do so, this responsibility shifts to the second level, namely, to the international community as a whole.¹⁵⁹ Where the latter is concerned, consistent with the ICISS Report, the authority for intervention must be obtained from the United Nations Security Council.¹⁶⁰ If such authorisation is missing, due to what the Report has characterised as the "capricious use of the veto",¹⁶¹ other venues, namely the United Nations General Assembly and regional

154 See Kofi Annan "Balance state sovereignty with individual sovereignty" (speech at the United Nations General Assembly, 20 September 1999).

155 See *Millennium Report of the Secretary-General, We the People: The Role of the United Nations in the 21st Century* A/54/2000 (2000) at 48.

156 At 48. See also Kofi Annan "Two Concepts of Sovereignty" *The Economist* (London, 16 September 1999) at 49.

157 See ICISS Report, above n 9.

158 At [2.29].

159 At [10].

160 See RJ Hamilton "Responsibility to Protect: From Document to Doctrine – But What of Implementation?" (2006) 19 *Harv Hum Rts J* 289 at 289. But see Sarkin, above n 9, at 8, noting that "many believe that UN primacy to determine when intervention occurs is on decline". Note that Sarkin's observation relates to the situation before the Libya intervention and the post-2005 World Summit developments relating to the responsibility to protect, and is largely based on interventions without Security Council authorisation in Kosovo in 1999 and Iraq in 2003. However, the 2011 Libya "intervention" was explicitly authorised by the United Nations Security Council: see SC Res 1973, S/Res/1973 (2011) preamble at [2] and [6]. See also subsequently adopted Security Council Resolution 1975 concerning the post-electoral crisis in Côte d'Ivoire: SC Res 1975, S/Res/1975 (2011) preamble at [3], [6] and [7]. For a discussion about these resolutions, see Peters, above n 9, at 3; and Monica Serrano "The Responsibility to Protect: Libya and Côte D'Ivoire" (2011) 3 *Amsterdam Law Review* 92.

161 ICISS Report, above n 9, at [6.20].

organisations,¹⁶² should be considered, for "it is unconscionable that one veto can override the rest of humanity on matters of grave humanitarian concern".¹⁶³

The R2P concept as originally envisioned comprises three components: responsibility to prevent, responsibility to react and responsibility to rebuild. Whereas the first and third components predominantly concern the causes of conflict and assistance in reconstruction after the conflict, the second component involves various coercive measures taken in response to a crisis, encompassing political, economic or judicial measures, and in extreme cases even military action.¹⁶⁴ Where military action is contemplated, in the ICISS' view, "[o]nly the UN can authorise military action on behalf of the entire international community, instead of a select few".¹⁶⁵ If the Security Council fails to provide such authorisation, then, as noted, the General Assembly and regional organisations come into play.¹⁶⁶

The ICISS Report was followed by a report of the United Nations Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World, Our Shared Responsibility*, in 2004.¹⁶⁷ This Report included 101 recommendations on how the international community must

162 At [6.28]–[6.35].

163 At [6.20].

164 At [3.1]–[3.42], [4.1]–[4.43] and [5.1]–[5.31]. For the question of how to implement the responsibility to protect, see generally *Implementing the Responsibility to Protect: Report of the Secretary-General A/63/677* (2009); Christoph Mikulaschek *Implementing the Responsibility to Protect* (Report from the Stanley Foundation Conference in Tarrytown, New York, 15–17 January 2010); Christoph Mikulaschek "The United Nations Security Council and the Responsibility to Protect: Policy, Process, and Practice: Report from the 39th International Peace Institute Vienna Seminar on Peacemaking and Peacekeeping" (2010) "Favorita Papers" of the Diplomatic Academy of Vienna <www.da_vienna.ac.at>; Johnstone, above n 10; Glanville, above n 146; Graubart, above n 146; debate during the sixty-sixth United Nations General Assembly meeting of 5 September 2012 where the United Nations Secretary-General presented his fourth report on the responsibility to protect, which addressed the third pillar concept of "timely and decisive response" ("World Not Fulfilling 'Never Again' Vow", above n 134); and the debate in the United Nations Security Council on the protection of civilians in armed conflict ("Security Council Says States Have Primary Responsibility for Protecting Civilians in Conflict, Reaffirms Peacekeeping Missions Need Protection Mandate, above n 59). See also Antonio *World Summit Outcome "Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?"* (1999) 10 *Eur J Int'l L* 23 at 27; Christine Chinkin "The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) Under International Law" (2000) 49 *ICLQ* 910 at 920–921; Suyash Paliwal "The Primacy of Regional Organizations in International Peacekeeping: The African Example" (2010) 51 *Va J Int'l L* 185 at 222; and Esther Reed "Responsibility to Protect and Militarized Humanitarian Intervention" (2012) 41 *Journal of Religious Ethics* 183 at 190–203.

165 See ICISS Report, above n 9, at [6.27].

166 At [6.28]–[6.35].

167 *High-Level Panel Report*, above n 9.

meet the global security challenges collectively, including by embracing the concept of R2P, which it described as an "emerging norm".¹⁶⁸

In the following year, the United Nations Secretary-General prepared a report to the World Summit 2005, entitled *In Larger Freedom: Towards Development, Security and Human Rights for All*, which endorsed the concept and recommended that states embrace the emerging norm of R2P.¹⁶⁹ On 15 September 2005, the concept was affirmed by the United Nations General Assembly in the *2005 World Summit Outcome*.¹⁷⁰ This document removed a direct reference to the "alternative venues" referred to in the ICISS Report, and it limited the principle to only two short paragraphs placed in the section dealing with human rights and the rule of law. They state:

[138] Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise and support the United Nations in establishing an early warning capability.

[139] The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their population from genocide, war crime, ethnic cleansing and crime against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crime against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

Paragraph 138 of the *2005 World Summit Outcome* deals with the obligation of states to protect their citizens from serious violations of international humanitarian law and from massive abuses of human rights. It specifies the four crimes from which each state has the responsibility to protect its population. Pursuant to this paragraph, the responsibility to protect a population from these crimes also entails the prevention of such crimes. The international community is expected to encourage

168 At [9].

169 *In Larger Freedom*, above n 9, at [132].

170 *2005 World Summit Outcome*, above n 9.

and help states to exercise this responsibility to protect and to support the United Nations in establishing an early warning capability.¹⁷¹

Paragraph 139 points to the responsibility of the international community to primarily use peaceful means through the United Nations, in accordance with Chapters VI and VIII of the United Nations Charter. Although it generally allows for the role of the General Assembly and regional organisations, this paragraph, unlike the ICISS Report, does not provide an option of resorting to these two "alternative venues" in situations involving enforcement action in case of Security Council paralysis caused by the veto. It is through the Security Council – and the Security Council only – that authorisation to intervene is to be obtained.¹⁷²

Therefore, the *2005 World Summit Outcome* places the primary responsibility on the territorial state to protect its citizens from the four listed crimes. Where appropriate, the international community must encourage and help states to exercise this responsibility. The international community also has a responsibility to use peaceful means to protect populations from the four crimes. Where peaceful means are inadequate and national authorities manifestly fail to protect their populations, then the international community can take collective action, in a timely and decisive manner, through the Security Council, in accordance with Chapter VII of the United Nations Charter, which is to be assessed on a case-by-case basis. In other words, R2P has been modified. Initially, the concept comprised three types of responsibility: the responsibility to prevent, the responsibility to react and responsibility to rebuild. In 2005, the states espoused a three-pillar approach to the concept: pillar one: the protection responsibilities of the states; pillar two: international assistance and capacity-building; and pillar three: timely and decisive response.

This was confirmed by the 2009 Report of the Secretary-General.¹⁷³ This Report clarifies the scope of R2P and outlines measures and actors involved in implementing the concept.¹⁷⁴ The scope of R2P is to be kept "narrow" (applying only to the four specified crimes), but the response is to be "deep" (involving any of the broad range of tools envisaged by Chapters VI, VII and VIII of the

171 At [138].

172 At [139]. See also Charter of the United Nations, art 53(1). Ian Johnstone argues that the *2005 World Summit Outcome* and subsequent developments rule out the case for unilateral coercive humanitarian intervention: "Agreement among 192 states that it is permissible with SC authorization implies it is not permissible without": see Johnstone, above n 10, at 77.

173 *Implementing the Responsibility to Protect: Report of the Secretary-General*, above n 164. The Report was endorsed by the General Assembly: *The responsibility to protect* GA Res 63/308, A/Res/63/308 (2009) at [1].

174 The 2009 Report reiterates and expands upon the key points made by the Secretary-General in a speech in Berlin on 15 July 2008: "Secretary-General Defends, Clarifies 'Responsibility to Protect' at Berlin Event on 'Responsible Sovereignty: International Cooperation for a Changed World'" SG/SM/11701 (2008).

United Nations Charter).¹⁷⁵ Where the third pillar is specifically concerned, the 2009 Report stresses that the *2005 World Summit Outcome* underscores a wide range of collective actions, either coercive or non-coercive, but their application is conditioned by the inadequacy of peaceful means and national authorities manifestly failing to protect their populations from the four specified crimes and violations.¹⁷⁶ According to the 2009 Report:¹⁷⁷

In a rapidly unfolding emergency situation ... decision-makers must remain focused on saving lives through "timely and decisive" action (para 139 of the Summit Outcome), not on following arbitrary, sequential or graduated policy ladders that prize procedure over substance and process over results.

However, due to fear of selective implementation of R2P, the Secretary-General's claim that there is no sequencing of the three pillars has been the subject of heated debates at the United Nations. For example, during the annual informal thematic debate in the General Assembly on R2P, held on 5 September 2012, which was based on the Secretary-General's Report on the *Responsibility to Protect: Timely and Decisive Response*,¹⁷⁸ India's representative characterised the Secretary-General's claim as "wrong and misleading".¹⁷⁹ Some states cautioned that international intervention might be used as a means for regime change by those pursuing political agendas.¹⁸⁰

At the same time, many states expressed support for R2P (some pointing to the need of "responsibility while protecting"¹⁸¹ and highlighting "prevention"¹⁸² as a primary element of R2P).¹⁸³ Hence, despite some opposition,¹⁸⁴ R2P, for human protection purposes, "is receiving

175 See *Implementing the Responsibility to Protect: Report of the Secretary-General*, above n 164, at [10(c)] and [11(c)].

176 At [49].

177 At [50].

178 See *Responsibility to Protect: Timely and Decisive Response - Report of the Secretary-General*, above n 134.

179 See "World Not Fulfilling 'Never Again' Vow", above n 134, at 2.

180 At 2 (statement of South Africa's representative).

181 At 2 (introduced by Brazil).

182 For a discussion on the importance of prevention in the context of the responsibility to protect, see generally, Graubart, above n 146; Moses, above n 146; and Glanville, above n 146.

183 See "World Not Fulfilling 'Never Again' Vow", above n 134, at 6–7. Note that in addition to the 2009 and 2012 Reports on the responsibility to protect, the United Nations Secretary-General prepared two more reports on this subject, which also served as basis for annual informal debates in the General Assembly: *Early warning, assessment and the responsibility to protect A/64/864* (2010); and *The role of regional and subregional arrangements in implementing the responsibility to protect A/65/877-S/2011/393* (2011).

increasing support".¹⁸⁵ It is a fast-evolving concept that has been described as "the most significant adjustment to national sovereignty in 360 years".¹⁸⁶ I argue that its application should be extended to cultural property as protecting such property is indivisible from protecting human life.¹⁸⁷

B Why Should R2P Extend to the Cultural Property Protection Context?

In view of the dual appeal of cultural property as the cultural heritage of both a particular people and that of humankind more generally, there is a corresponding "dual accountability" of the state. Where higher, universal interests are at stake, what is taking place within state borders should no longer be viewed exclusively as a matter of domestic jurisdiction. A state should be accountable to both its own citizens and to its fellow states. The notion of "sovereignty as responsibility" is a significant shift in the way sovereignty itself is traditionally viewed in international law.¹⁸⁸ As with situations involving human protection, where a state is unwilling or unable to protect cultural property situated within its borders, the international community should be entitled to step in. Intervention for cultural protection purposes should not be an option but the "responsibility" of the international community.¹⁸⁹ This is especially the case in situations involving deliberate destruction of cultural property on a massive scale and situations where the survival of cultural objects of an exceptional importance to humanity's cultural heritage is threatened.¹⁹⁰ As discussed, R2P concerns the issue of intervention in the territorial sovereignty of a state. This concept was tested in the Libya crisis in 2011. Despite the difficulties surrounding the Libya "intervention" (resulting in loss of

184 See for example Robert Pape "Humanitarian Intervention and the Responsibility to Protect: Reply to Gareth Evans and Ramesh Thakur" (2013) 37 *International Security* 208 at 208; Burke, above n 145, at 62; Sarkin, above n 9, at 10; Ramesh Thakur *The Responsibility to Protect: Norms, Laws, and the Use of Force in International Politics* (Routledge, New York, 2011); and Ramesh Thakur "R2P and the North-South Divide" (paper presented to the annual meeting of the International Studies Association Conference "Global Governance: Political Authority in Transition", Montreal, 16 March 2011).

185 See for example *Responsibility to Protect: Timely and Decisive Response - Report of the Secretary-General*, above n 134, at [1]; Sarkin, above n 9, at 12; and Stuart Ford "Is the Failure to Respond Appropriately to a Natural Disaster a Crime against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis" (2010) 38 *Denv J Int'l L & Pol'y* 227 at 275. But see generally Robert Pape "When Duty Calls: A Pragmatic Standard of Humanitarian Intervention" (2012) 37 *International Security* 4; Graubart, above n 146; and Burke, above n 145.

186 See Martin Gilbert "The Terrible 20th Century" *Globe and Mail* (online ed, Toronto, 31 January 2007) as cited in Gareth Evans, Ramesh Thakur and Robert Pape "Correspondence: Humanitarian Intervention and the Responsibility to Protect" (2013) 37 *International Security* 199 at 202. See also Carsten Stahn "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" (2007) 101 *AJIL* 99 at 99, describing the evolution of the responsibility to protect concept as "almost like a fairy tale".

187 See Bokova "Culture in the Cross Hairs", above n 12.

188 See generally Gareth Evans and M Sahnoun "The Responsibility to Protect" (2002) 81 *Foreign Affairs* 99.

189 See Petrovic "A Monument", above n 18, at 431–432.

190 At 432.

consensus at the Security Council due to the charge by some states that NATO-led forces exceeded their mandate),¹⁹¹ the importance of the concept cannot be undermined. The intervention in Libya focused on human protection purposes.

However, the concept that the international community has a "responsibility to protect" could, and should, extend to cultural property as well. While means of intervention for cultural property protection purposes should differ to some extent from those pertinent to human protection purposes, the necessity of re-characterising state sovereignty remains applicable to both contexts. Cultural property is precious to all humanity and it is inseparable from human dignity and identity. Sadly, history provides ample examples which prove true that where cultural property is destroyed, people too will suffer.¹⁹² The fact that protecting cultural property is inseparable from protecting people is recognised by the existence of numerous norms of international humanitarian law¹⁹³ devised to protect such property along with the protection of people in armed conflict.¹⁹⁴ But these norms have been inseparable from the concept of state sovereignty as well; namely, the vast majority of these rules have been emphasising "international" armed conflicts because of the notion of state sovereignty. "Non-international" armed conflicts have for a long time been considered internal matters of a state and are dealt with to a much lesser degree in international law than international armed conflicts.¹⁹⁵

The first multilateral treaties – internationally legally binding instruments – that accorded protection to cultural objects in (international) armed conflict were adopted at the Peace Conferences held at The Hague in 1899 and 1907. Convention (II) with Respect to the Laws and Customs of War on Land, with the annexed Regulations Concerning the Laws and Customs of War on Land, adopted at the First Peace Conference, and Convention (IV) Respecting the Laws and Customs of War on Land, with its annexed Regulations Respecting the Laws and Customs of War on Land, and Convention (IX) Concerning Bombardment by Naval Forces in Time of War contain

191 See Evans, Thakur and Pape, above n 186, at 200, pointing to the "BRICS" countries, that is, Brazil, Russia, India, China and South Africa.

192 The burning of the Sarajevo Library is an example of deliberate destruction of cultural property which preceded or was accompanied by a massive loss in human life during the 1990s conflict in the former Yugoslavia.

193 For the meaning of the term "international humanitarian law", see Yves Sandoz and others (eds) *Commentary on the Additional Protocols I and II of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, Geneva, 1987) at xxvii.

194 In *Tadić*, the ICTY Appeals Chamber held that an armed conflict exists where "there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State": *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* ICTY Appeals Chamber IT-94-1-AP72, 2 October 1995 at [70].

195 See William Fenrick "Humanitarian Law and Criminal Trials" (1997) 7 *Transnat'l L & Contemp Probs* 23 at 27.

an obligation to protect, inter alia, buildings dedicated to religion, art, science or charitable purposes as well as historic monuments from seizure, destruction or wilful damage.¹⁹⁶ The failure to abide by this obligation could result in legal proceedings.¹⁹⁷ However, the extent of the destruction of, and damage to, cultural property during World War I and World War II, during which the 1899 and 1907 Conventions were the only applicable international instruments that contained provisions dealing with cultural property, proved that those provisions were ineffective.

As a response to these events and "by reason of the developments in the technique of warfare", it was recognised that cultural property was in increasing danger of destruction.¹⁹⁸ A new international legal instrument, namely the 1954 Convention was adopted. This specialist treaty, dealing with cultural property exclusively, together with its Regulations and two Protocols (of 1954 and 1999), is considered to be the "Red Cross" for cultural property. The 1977 Additional Protocols I and II affirm the principles espoused in the 1954 Convention and amplify the special status of cultural treasures in times of armed conflict.¹⁹⁹ Despite this comprehensive protection of cultural property at the normative level, there has been a failure at the enforcement level. In more than 300 armed conflicts that have taken place since the end of World War II, more than 100 million people have been killed and countless numbers of cultural objects have been destroyed – much more than in both world wars put together.²⁰⁰ This proves that the laws protecting cultural property in armed conflict have been ineffective.

One of the ways to improve the effectiveness of the law protecting cultural property in armed conflict is through resort to international justice. Recalling the ICISS Report and the *2005 World Summit Outcome* (as well as the subsequently adopted documents affirming the R2P concept), states and the international community as a whole have a responsibility to protect citizens from war crimes, crimes against humanity, genocide and from ethnic cleansing. In order to extend R2P to the

196 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land (opened for signature 29 July 1899, entered into force 4 September 1900), arts 27 and 56; Convention (IV), above n 74, arts 27 and 56. See also Convention (IX) Concerning Bombardment by Naval Forces in Time of War (opened for signature 18 October 1907, entered into force 26 January 1910) art 5. For a discussion on the evolution of international humanitarian law concerning cultural property, see O'Keefe, above n 65, at 5–92; Toman, above n 101, at 3–36; and Petrovic *The Old Bridge*, above n 18, at 89–118.

197 Convention (IV), above n 74, art 56.

198 1954 Convention, above n 19, preamble at [1].

199 Additional Protocol I, above n 108, art 53; Additional Protocol II, above n 68, art 16.

200 See M Cherif Bassiouni "Wolfgang Friedmann Memorial Award Address" (2012) 51 *Colum J Transnat'l L* 1 at 5, noting that:

... a total of 313 conflicts ... had taken place between 1945 and 2008 [and that these] conflicts resulted in ninety-two to 101 million people killed [which is] twice as many as in both of the World Wars put together.

cultural property context, it is necessary to determine whether damage to, and destruction of, cultural property can constitute these crimes.

Under both customary international law and treaty international law, attacks on cultural property may amount to war crimes:²⁰¹

All seizure of, destruction of or wilful damage done to institutions [dedicated to religion, charity and education, the arts and sciences], historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

Article 28 of the 1954 Convention goes a step further by envisaging individual criminal responsibility and universal jurisdiction for crimes involving cultural property. This provision requires the high contracting parties to:

... undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal and disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

This obligation is further specified by the relevant provisions of the 1999 Protocol to the 1954 Convention, which indicate the circumstances under which acts against cultural property may constitute serious violations of this protocol and incur criminal responsibility.²⁰²

Furthermore, according to the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute),²⁰³ "seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science" constitutes war crimes – precisely, "violations of the laws or customs of war". Article 5(h) of that Statute empowers the Tribunal to prosecute persons responsible for the crimes of persecution on political, racial and religious grounds – a crime against humanity. The jurisprudence of the ICTY shows that a number of individuals have been prosecuted and convicted for war crimes and crimes against humanity involving cultural property.²⁰⁴ In many instances, those crimes have been part of the campaign of ethnic cleansing. While the ICTY Statute does not criminalise acts

201 Convention (IV), above n 74, art 56. The 1907 Regulations form part of customary international law.

202 See Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 2253 UNTS 172 (opened for signature 26 March 1999, entered into force 9 March 2004), art 15.

203 *Statute of the International Criminal Tribunal for the Former Yugoslavia* SC Res 827, S/Res/827 (1993) annex at art 3(d) [ICTY Statute].

204 See the cases cited above, n 120. See also Roger O'Keefe "Protection of Cultural Property Under International Criminal Law" (2010) 13 MJIL 339.

against cultural property under the rubric of the crime of genocide, the ICTY jurisprudence acknowledges the evidentiary value of such acts in determining an intent to commit this crime.²⁰⁵

Similarly to the ICTY Statute, the Rome Statute of the International Criminal Court (Rome Statute) also envisages individual criminal responsibility for unlawful acts against cultural property. Article 8(2)(b)(ix) gives jurisdiction to the Court in respect of war crimes committed in international armed conflict and concerning:

... intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.

Article 8(2)(e)(iv) provides for the same kind of protection to cultural property in armed conflict non-international in character. Irrespective of the nature of armed conflict (and irrespective of the existence of armed conflict), the Rome Statute enlists persecution "against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious [and other] grounds that are universally recognized as impermissible under international law".²⁰⁶

At the time of publication, the International Criminal Court was investigating the situation in Mali. On 13 July 2012, by virtue of art 14 of the Rome Statute, the Republic of Mali, as a party to this Statute, referred the situation to the Office of the Prosecutor of the International Criminal Court, asking that the Prosecutor investigate crimes committed on the territory of Mali since January 2012, including those relating to cultural property.²⁰⁷ In accordance with r 45 of the Regulations of the Court, Ms Fatou Bensouda, the International Criminal Court Prosecutor, notified Judge Sang-Hyun Song, the President of the Court, about this referral and, on 16 January 2013, opened an investigation into alleged crimes.²⁰⁸ Shortly after the receipt of the referral, the Office of the Prosecutor sent its investigating team to Mali.²⁰⁹ The Timbuktu crisis might be the Court's first cultural property-related case.

205 See *Prosecutor v Krstić*, above n 120, at [580]. This view was endorsed by the International Court of Justice in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, above 142, at [344].

206 Rome Statute, above n 74, art 7(1)(h).

207 See Letter from Malick Coulibaly (Minister of Justice, Republic of Mali) to Fatou Bensouda (Prosecutor of the International Criminal Court) (No 0076, 13 July 2012).

208 See Letter from Fatou Bensouda (Prosecutor of the International Criminal Court) to Judge Sang-Hyun Song (President of the International Criminal Court) (2012/008/FB/JCCD-er, 18 July 2012). See also SC Res 2100, S/Res/2100 (2013) preamble at [10], which refers to the Malian authorities' "13 July 2012 letter" and to 16 January 2013 as the date when the International Criminal Court opened an investigation into alleged crimes committed on the territory of Mali since January 2012.

209 See "ICC Team in Mali to Investigate Potential War Crimes" (31 August 2012) *Agence France Presse* <www.afp.com>.

Returning to the Mali crisis, the destruction of Timbuktu's shrines has added a cultural element to the humanitarian crisis.²¹⁰ As the UNESCO Director-General has observed, "[t]hese are not accident, nor the unfortunate side effects of conflict".²¹¹ The attack on Timbuktu's cultural heritage was more than the physical smashing of the mausoleums and mosque doors: "it is an attack against this people's history and the values it embodies and against the material evidence that tolerance, exchange, peace and dialogue are possible".²¹² Timbuktu's mausoleums, tombs and other mud structures might be viewed as modest when compared with the architectural grandeur of Europe, "[b]ut rather than visual splendour, it is what the tombs represent for Africa's history ... that concerns historians and scholars".²¹³ This is the destruction of evidence that could tell us, for example, how people in this area of the world lived centuries ago, what their architecture looked like, what was the level of engineering, what kind of building material was used in construction of various structures and how people practiced their religion.

Religious leaders across the world have condemned the violent imposition of one version of the Islamic faith over another version of the same faith at the expense of cultural property in Timbuktu.²¹⁴ Similar condemnation has been echoed at the secular level. United Nations Secretary-General Ban Ki Moon deplored the destruction of sacred tombs in this part of West Africa. He characterised the attacks on the mausoleums as "totally unjustified" and urged all sides to preserve Mali's cultural heritage.²¹⁵ The UNESCO Director-General has provided a salutary reminder that "[o]ur common heritage must be protected as one of our most precious assets to build peace and foster mutual understanding in a globalized world".²¹⁶ Attacks against cultural heritage are attacks against the identity of peoples and are also a violation of their collective right to cultural self-determination. Consequences of these attacks can be devastating and long-lasting. Cases where the destruction of a monument has deepened the division between people of various ethnic affiliations exemplify that attacks on the past may slow down the process of reconciliation.²¹⁷

210 It is estimated that over 300,000 people have been uprooted since the 2012 coup and alleged that numerous crimes have been committed against the Malian population. See generally UNESCO *SOC Report* (2012), above n 8; UNESCO *SOC Report* (2013), above n 8; and "Mali: Timbuktu's Cultural Heritage more Damaged than first Estimated, UN Agency Says", above n 28.

211 Bokova "Timbuktu Tomb", above n 31.

212 Bokova "Timbuktu Tomb", above n 31.

213 Fletcher, above n 24.

214 See Fletcher, above n 24.

215 See Baba Ahmed "Mali Islamists Pledge to Continue Destroying UNESCO Heritage Sites before Imposing Shariah" (1 July 2012) *The Associated Press* <<http://hosted.ap.org>>.

216 Bokova "Culture in the Cross Hairs", above n 12.

217 Petrovic *The Old Bridge*, above n 18, at 271.

Attacks like those that occurred in Timbuktu stress the need for perpetual vigilance and commitment to protect culture. That is where the United Nations Security Council should take a more active role. Just as with protective intervention for human protection purposes, the international community needs to strengthen global solidarity to protect precious cultural treasures. Mali's Minister for Culture and Tourism urged the United Nations to do exactly that: to take action to preserve her country's heritage, "pleading for the international community's solidarity".²¹⁸ Mali's neighbours sought United Nations backing for military intervention to stabilise this state.

While it needed more details on the mission planned by the Economic Community of West African States (ECOWAS), the African Union and the Transitional Authorities of Mali, by unanimously adopting its Resolution 2056 in 2012, the Security Council gave full support to such mission and expressed readiness to consider a United Nations mandate for ECOWAS' African-led International Support Mission to Mali (AFISMA).²¹⁹ In this Resolution, the Council urged all parties in Mali to, inter alia, ensure the protection of Mali's world heritage sites:²²⁰

Condemning strongly the desecration, damage and destruction of sites of holy, historic and cultural significance, especially but not exclusively those designated UNESCO World Heritage sites, including in the city of Timbuktu.

The explicit reference to Malian cultural heritage in this Resolution is of the utmost importance.

Equally, Security Council Resolution 2100 of 25 April 2013²²¹ makes direct reference to cultural property in Mali. It includes cultural property in the mandate of the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) "[t]o assist the transitional authorities of Mali, as necessary and feasible, in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO",²²² and authorises MINUSMA "to use all necessary means, within the limits of its capacities and areas of deployment, to carry out its mandate", including the protection of cultural property.²²³

218 See Serge Daniel "Timbuktu Shrine Destruction a 'War Crime': ICC Prosecutor" (2 July 2012) *Agence France Presse* <www.afp.com>.

219 SC Res 2056, above n 35, at [1] and [17]–[18].

220 Preamble at [14]. See also [16], where the Security Council stated that "attacks against buildings dedicated to religion or historic monuments can constitute violations of international law ... under Additional Protocol II ... and the Rome Statute" and urged that all parties "immediately take appropriate steps to ensure the protection of Mali's World Heritage sites".

221 SC Res 2100, above n 208 (establishing a peacekeeping force for Mali, the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), to take over the authority from the African-led International Support Mission to Mali (AFISMA), effective 1 July 2013).

222 At [16(f)].

223 At [17].

However, neither Resolution 2056 nor Resolution 2100 deals with the cultural crisis exclusively. The Security Council did not authorise protective intervention in Mali in order to save humanity's cultural treasures situated in this state prior to the attacks that occurred in 2012. Had the Security Council done so, humanity's cultural heritage would not have been deprived of the cultural treasures located in Timbuktu. Despite the fact that the international community knew that the treasures in Timbuktu were in danger, it did nothing more than listing them as a "World Heritage in Danger" sites, which allegedly ultimately provoked their destruction. Thus, although an important development in itself, Security Council Resolution 2100 was adopted too late to save a number of destroyed cultural architectural structures and thousands of lost precious manuscripts.

As discussed, presently, international law does not directly allow intervention into the domestic affairs of a state in order to prevent or stop destruction of cultural property without consent of the territorial state. The only way to circumvent art 2(7) of the United Nations Charter is through the involvement of the Security Council acting under Chapter VII powers. But even where state consent would not be an obstacle, as was the case with Mali, the reluctance of the Security Council to impose measures rapidly to save endangered cultural property poses an additional difficulty. If the scope of R2P is read more broadly to include protection of cultural property, then in situations of cultural disasters, actual or imminent, like in Mali in 2012, or in the former Yugoslavia in the 1990s, the international community would have the responsibility to protect.

Currently, R2P applies only to crimes against humanity, ethnic cleansing, war crimes and genocide, and protects civilians from such crimes. It is argued that cultural property could fall within the scope of this concept, at least where crimes against humanity, namely, crime of persecution and ethnic cleansing are concerned. It has been recognised through jurisprudence of international criminal tribunals that cultural property is inseparable from human beings where these crimes are concerned because crimes against humanity are "directed against civilian population".²²⁴ It would follow that where cultural property is attacked and such attack amounts to the crime of

224 ICTY Statute, above n 203, arts 5 (the chapeau) and 7(1) (the chapeau). See also *Prosecutor v Blaškić*, above n 120, at [233]:

... encompasses not only bodily and mental harm and infringements upon individual freedom but also acts ... such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community.

In the *Krajišnik* case, the ICTY Trial Chamber held that:

... an act of appropriation or plunder that has a severe impact on the victim, carried out on discriminatory grounds, and for which the general elements of crimes against humanity are fulfilled, constitutes the crime of persecution.

See *Prosecutor v Krajišnik (Judgment)* ICTY Trial Chamber I IT-00-39-T, 27 September 2006 at [711]. In the *Strugar* case, the ICTY Trial Chamber reasoned that "the victim of the offence [of destruction of cultural property] is to be understood broadly as a 'people', rather than any particular individual". See *Prosecutor v Strugar (Judgment)* ICTY Trial Chamber II IT-01-42-T, 31 January 2005 at [232].

persecution, it is always the people who are harmed by such attacks. Under the cultural patrimony argument, the victim would be the people most immediately concerned, those who have the closest identificatory link with a cultural object. Based on the internationalist or common heritage approach to cultural property, all humankind is the victim. Both approaches warrant a more expansive reading of R2P. Importantly, such reading would not advance any new category of crimes or violations to the application of the responsibility to protect concept.²²⁵

C How to Apply R2P to Cultural Property?

The R2P principle could be implemented in the cultural property context in terms of preventive and protective intervention (aimed at averting and halting the damage to cultural property), and responsive or reactive intervention, namely, by bringing to justice those responsible for the destruction of cultural property. The rebuilding of cultural property should not be a priority where protection of cultural property in the context of R2P is concerned as, generally, protection of cultural property puts an emphasis on the protection of the *original* and not on the rebuilding of replicas no matter how perfect they may be.²²⁶

In order to prevent cultural catastrophes, the Security Council would need to become interested in the matters involving cultural property in grave danger. It is essential that this takes place at the early stages and that the Council thus acts in a timely fashion. Involvement of the Security Council would reinforce the importance of cultural property. The application of R2P for cultural property protection purposes should not involve the use of force except in self-defence of personnel protecting cultural objects. It needs to be noted that the proposal here, on how to overcome state sovereignty and the principle of non-intervention barriers where cultural property is in grave danger and the territorial state is unable or unwilling to protect such property, needs to be distinguished from interventions such as the French intervention in Mali in January 2013. That intervention occurred at the request of the transitional authorities of Mali.²²⁷ The preventive and protective intervention under the umbrella of R2P would not require a territorial state's consent. Notwithstanding this, as with the French intervention, the Security Council's prior authorisation would be essential.

During the conflict, as well as prior to and after the conflict, that is, in the post-conflict state rebuilding, where deemed necessary, the United Nations could deploy troops to guard cultural treasures of outstanding importance to humanity's cultural heritage.²²⁸ This would need state

225 See Johnstone, above n 10, at 75

226 On the uniqueness of cultural objects, see Merryman "From Cultural Nationalism to a Common Cultural Heritage", above n 93, at 757; and *Prosecutor v Jokić*, above n 86, at [52].

227 See SC Res 2100, above n 208, preamble at [5].

228 One such example is the United Nations post-conflict guarding of cultural property of exceptional importance to Serbia's cultural heritage.

support as the United Nations does not have its own forces and is thus entirely reliant on troop-contributing nations. The guarding of cultural property would be in consonance with international law as international law already envisages this aspect of international protection of cultural property.²²⁹ The guarding has the potential to save millions of dollars spent on the rebuilding or restoring of cultural objects and to spare centuries of animosity between communities most immediately concerned.²³⁰ In addition to the United Nations "blue berets" (peacekeeping forces), the so-called "cultural berets" (like those formed of Italian forces in co-operation between UNESCO and Italy) could be tasked with guarding and looking after such treasures in times of crisis.²³¹ Similar "berets" could be formed at the regional level. In Africa specifically, ECOWAS and the African Union could consider such troops²³² or encourage a pro-active empowerment of local communities to care for and guard their heritage during conflict. UNESCO's assistance to local guards in Congo in 2001, to save world natural heritage sites there, could be used as a reassuring example.

In parallel with these measures, and as another way to implement R2P in the cultural property context, it is important that the perpetrators of crimes involving cultural property be prosecuted both domestically and by international tribunals. Bringing those responsible to justice sends a message to the would-be destroyers of mausoleums and shrines and other types of cultural property that impunity for these crimes will not be tolerated. As Security Council Resolution 2056 of 5 July 2012 stated in relation to the Mali crisis:²³³

... attacks against buildings dedicated to religion or historic monuments can constitute violations of international law which may fall under Additional Protocol II to the 1949 Geneva Convention [art 16]) and the Rome Statute of the International Criminal Court, to which Mali is a State Party [art 8].

229 See 1954 Convention, above n 19, art 8(4).

230 For a discussion on the need for more effective peacekeeping mandate, see Paliwal, above n 164; Victoria Holt, Glyn Taylor and Max Kelly *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges* (United Nations, New York, 2009). See also United Nations Security Council "Security Council Endorses Importance of 'Multidimensional' Approach to Peacekeeping Aimed at Facilitating Peacebuilding, Preventing Relapse into Conflict" (press release, 21 January 2013); SC Res 2086, above n 59; and United Nations Security Council "Security Council Says States Have Primary Responsibility for Protecting Civilians in Conflict, Reaffirms Peacekeeping Missions Need Protection Mandate, Resources", above n 59.

231 See UNESCO Bureau of Public Information "UNESCO–Italy Agreement on Emergency Actions to Protect Heritage" (press release, 28 October 2004).

232 The United Nations Secretary-General and the Security Council have been supportive of the efforts of the African Union and states in the region to help the government and people of Mali resolve the crisis through dialogue. See SC Res 2056, above n 35.

233 At [16].

Attacks against cultural property can also constitute violations of art 19 of the 1954 Convention. All these provisions cover attacks on cultural property in a non-international armed conflict, which thus makes them applicable to the Mali situation. Since attacks on cultural property can amount to a war crime, they can incur individual criminal responsibility.²³⁴

The International Criminal Court Prosecutor, Ms Fatou Bensouda, has characterised attacks on Timbuktu's cultural heritage as a "war crime" which her office has authority to fully investigate.²³⁵ As noted, Mali is a party to the Rome Statute, which in its art 8 prohibits deliberate attacks against undefended civilian buildings which are not military objectives. This includes attacks against historic monuments as well as destruction of buildings dedicated to religion. The UNESCO Director-General goes a step further and characterises these attacks as "an attack against humanity",²³⁶ arguing that the attacks on Timbuktu were "an attempt to isolate and exclude, to sever the ties that bind people together".²³⁷ Mali's government too has condemned the destruction of mausoleums and other objects of cultural property as being akin to "war crime" and, as discussed, referred the matter to the International Criminal Court.²³⁸ The fact that the International Criminal Court has decided to examine the situation in Mali, including the destruction of 14 Timbuktu's mausoleums of Muslim saints as well as the sacred entrance of an ancient mosque (UNESCO World Heritage sites), sends an important message to those planning and committing these crimes that they cannot act with impunity.²³⁹

However, the best way to prevent cultural disasters like that in Mali would be through constant vigilance and by intelligence gathering, vigorous dissemination of the relevant legal instruments among both civilians and the military sector, military training and strong educational programmes. It appears that Mali was not on anyone's watch list for cultural property-related crimes. Had the opposite been the case, the loss of this particular portion of humanity's cultural heritage might have been averted. As noted, by the time Timbuktu's treasures were placed on UNESCO's "World Heritage in Danger" List, it was too late to avoid the disaster. UNESCO should have taken this

234 See 1954 Convention, above n 19, art 28. See also Rome Statute, above n 74, arts 8 and 25.

235 See Daniel, above n 218. See also Frédéric Mégret "ICC, R2P, and the International Community's Evolving Interventionist Toolkit" (2010) 21 *FYBIL* 21.

236 Bokova "Timbuktu Tomb", above n 31.

237 Bokova "Timbuktu Tomb", above n 31.

238 See "Mali Refers Crimes Perpetrated in the North to the Prosecutor of the International Criminal Court" (20 July 2012) International Federation for Human Rights <www.fidh.org>.

239 See Letter from Malick Coulibaly (Minister of Justice, Republic of Mali) to Fatou Bensouda (Prosecutor of the International Criminal Court), above n 207; SC Res 2100, above n 208, preamble at [10]; "Mali: Timbuktu's Cultural Heritage more Damaged than first Estimated, UN Agency Says", above n 28; and International Criminal Court "Fatou Bensouda on the Malian State Referral of the Situation in Mali since January 2012" (press release, 18 July 2012).

action sooner and such action should have also been accompanied by other measures taken by the international community – measures that could have saved the mausoleums and other objects from physical destruction.

VIII CONCLUSION

The right to cultural property is a basic human right. It has been argued that this right cannot be overridden by religious rights exerted for attention-seeking. However, as Sarah Harding suggests, the rights approach to the protection of cultural property might entail conflict.²⁴⁰ Given the ambiguity of the concept of "people", it might be questionable whose rights exactly are sought to be protected. Because of its "dual" importance, namely being simultaneously cultural patrimony and part of the cultural heritage of all humankind, cultural property has a higher, universal value which transcends state borders. Given that it is precious to all humanity, this property has to be protected at all times. Where a state is unwilling or unable to protect cultural treasures situated within its borders, the international community has the responsibility to protect and thus should be allowed to step in. If applied appropriately, the R2P principle has the potential to ensure protection of cultural property efficiently. The United Nations Security Council should have a pro-active role in this regard. Protective intervention into the domestic jurisdiction of a state, for the purpose of protecting cultural property, should be limited to instances of massive violations of norms of international law governing cultural property or situations where such violations are imminent. It would be essential that protective intervention for cultural property protection purposes fall short of military force. The concept of R2P does not only entail physical protection of cultural property, but it also involves adjudication and other non-coercive means necessary to ensure preservation of the past embodied in tangible objects. These means should be considered seriously as humanity cannot afford ambivalence *à propos* its heritage.

Ultimately, the best solution to the questions of survival of cultural heritage in crisis situations lies not with the responsibility to react, but with how better to prevent such crisis.²⁴¹ Because cultural property belongs to everyone and to no one in particular, and because we are all only its custodians, the international community has the responsibility to protect it irrespective of state borders.

240 See Harding, above n 98, at 318, 325–326.

241 Chesterman, above n 137, at 200.

