WORLD CULTURAL HERITAGE: OBLIGATIONS TO THE INTERNATIONAL COMMUNITY AS A WHOLE?

I. INTRODUCTION

The preamble to the Convention concerning the Protection of the World Cultural and Natural Heritage 1972 (the ‘World Heritage Convention’),¹ adopted 30 years ago, testifies to the conviction of the States Parties ‘that deterioration or disappearance of any item of the cultural . . . heritage constitutes a harmful impoverishment of the heritage of all the nations of the world’.² It speaks of the recognized ‘importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong’³ and declares ‘that parts of the cultural . . . heritage . . . of outstanding interest . . . need to be preserved as part of the world heritage of mankind as a whole’.⁴

Motivated by this awareness of a universal interest in ‘the conservation and protection of the world’s heritage’,⁵ each State Party to the Convention, by virtue of Article 4, recognizes its ‘duty of ensuring the identification, protection, conservation, presentation and transmission to future generations’⁶ of cultural heritage situated on its territory, ‘cultural heritage’ being defined as monuments, groups of buildings and sites ‘of outstanding universal value’.⁷ It undertakes to ‘do all it can to this end, to the utmost

¹ 16 Nov 1972, 1037 UNTS 151 ['WHC'].
² WHC, preamble, second recital.
³ Ibid, fifth recital.
⁴ Ibid, sixth recital. Contrary perhaps to common assumption, the phrase ‘the world heritage of mankind as a whole’ found in this preambular recital refers to all cultural and natural heritage covered by the Convention, and not merely to those select properties inscribed on the so-called ‘World Heritage List’ pursuant to Art 11 (2). Cf, for example, Art 6 (1), where the term ‘world heritage’ is used to denote ‘the cultural and natural heritage mentioned in Articles 1 and 2’ (viz all heritage protected by the Convention), as distinct from ‘the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11’ (viz only heritage included in the World Heritage List and the ‘List of World Heritage in Danger’ respectively), as found in Arts 6 (2) and 12. See, in this regard, Richardson v Forestry Commission (1987–8) 77 ALR 237/90 ILR 58, High Court of Australia, at 242/63, per Mason CJ and Brennan J.
⁵ WHC, fourth recital.
⁷ Ibid, Art 1. The obligation imposed by Art 4 arises regardless of whether the cultural heritage in question is inscribed on the World Heritage List. Art 4—like Arts 6 (1) and 6 (3)—speaks of ‘the cultural and natural heritage referred to in Articles 1 and 2’, rather than ‘the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11’, as used in Arts 6 (2) and 12; and Art 12 makes it clear that ‘[t]he fact that a property belonging to the cultural or natural heritage has not been included in [the World Heritage List] shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in [the List].’ In practical terms, the obligation laid down in Art 4 applies to all cultural and natural heritage either inscribed on the World Heritage List, included in a so-called ‘tentative list’ submitted by the State Party on whose territory it is situated in accordance with Art 11 (1), or otherwise identified and delineated by that State Party in accordance with Art 3. See, eg, Queensland v Commonwealth of Australia (1989) 86 ALR 519/90 ILR 115 at 524–6/129–31, per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ, and especially at 134/528, per Dawson J; see also Richardson v Forestry Commission, above, n 4, where a conclusion to this effect is implicit in the various judgments.

of its own resources and, where appropriate, with any international assistance and cooperation... it may be able to obtain'.

By virtue of its non-synallagmatic nature, and of the Convention’s express textual references to a universal interest in the preservation of the cultural heritage in question, the obligation laid down in Article 4 is an obligation owed to all States Parties to the Convention and ‘established for the protection of a collective interest of the group’, in the words of Article 48 (1)(a) of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts. It is an obligation erga omnes partes, to use the traditional terminology. As such, it is an obligation enforceable, in principle, by all of those Parties: in the event that a State Party fails to fulfil it, each of the other States Parties, jointly or severally, enjoys the right to compel performance—or, in the words of Article 48 (2)(a) of the ILC’s Articles, to claim ‘cessation of the internationally wrongful act’—ultimately by way of judicial proceedings, where possible, or perhaps even countermeasures.

But what about States not party to the Convention? Is it not the case that the monuments, groups of buildings and sites protected by the Convention are expressly characterized in its preamble as ‘the world heritage of mankind as a whole’? And are not States Parties and non-States Parties together the legal representatives on the international

8 WHC, Art 4. In fulfilment of Art 4’s general duty, each State Party subscribes in Art 5 to a set of specific obligations in respect of cultural heritage situated on its territory, ‘in so far as possible, and as appropriate for each country’ (ibid, Art 5, chapeau). Additionally, States Parties recognize in Art 6 (1) that ‘such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate’, and undertake in Art 6 (3) ‘not to take any deliberate measures which might damage directly or indirectly the cultural... heritage... situated on the territory of other States Parties to [the] Convention’.

9 Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA res 56/83, 12 Dec 2001 [‘ARSIWA’]. The States Parties to the WHC obviously constitute ‘a group of States’ within the meaning of Art 48 (1)(a). See also International Law Commission [‘ILC’], Report on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001), UN Doc A/56/10, commentary to ARSIWA Art 48, paras (6) & (7), 320–1. The obligations falling within the scope of Art 48 (1)(a) ‘are not limited to arrangements established only in the interest of the member States but would extend to agreements established by a group of States in some wider common interest’: ibid, para (7), 320–1; see also J Crawford, The International Law Commission’s Articles on State Responsibility. Introduction, Text and Commentaries (Cambridge University Press 2002) 43.

10 The lawfulness of countermeasures by non-injured States is an open question: see Conclusion, below n 117, for more. In addition, both countermeasures and judicial proceedings face formidable obstacles in practice, and not just those considered in the Conclusion, below. For a start, it is not always easy to identify a breach of the Convention. The obligations laid down by Art 4 are couched in terms (‘all it can do’, ‘to the utmost of its own resources’, ‘where appropriate’) which allow State Parties such a measure of implementing discretion as to make ‘second guessing’ tricky for other States; and while conventional discretions of this nature must, in the final analysis, be subject to the requirement of application in good faith (see Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331 [‘VCLT’], Art 26, as declaratory of general international law, and Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Rep 1997, 7, at para 142), it is understandable and proper that other States should be reluctant to substitute their appreciation of the possibility and appropriateness of action for that of the state on which Art 4 is incumbent. In practice, formal invocation of responsibility is only foreseeable (and only then with a strong dose of optimism) in flagrant cases of deliberate destruction. A similar hurdle is posed, mutatis mutandis, by the fact that the characterization of property as being ‘of outstanding universal value’ within the meaning of Art 1, and hence covered by the Convention in the first place, falls by virtue of Art 3 to the state on whose territory the property is situated.
plane of ‘mankind as a whole’? As such, is it not possible to argue that the obligation imposed by Article 4 of the Convention is owed not merely to States Parties but to ‘the international community as a whole’, as the term is used in Article 48 (1)(b) of the ILC’s Articles,11 with the result that any State, regardless of whether it is party to the Convention, has the right—whether individually or in concert with other States—to compel a State Party’s performance?

II. THE CONVENTION AND THE PACTA TERTIIS RULE

Despite its invocation of the interest of ‘mankind as a whole’ in the protection of the world’s cultural heritage, the Convention is still a treaty. And, as a general rule, treaties do not create rights for third States:12 pacta tertiis nec prosunt nec nocent. In this light, the right to invoke a State Party’s responsibility for breach of the duty imposed by Article 4 is prima facie a right enjoyed by the other States Parties alone.13 The obligation arising from this provision might be explicitly for the benefit of all humanity; but, on the face of it, only States Parties are entitled to compel its performance.

It is, of course, possible for a treaty to create third-party rights with the consent of those third parties.14 Such rights can be accorded to a single State, or to a group of States, or—as is relevant here—to all States.15 While there is no indication that the non-States Parties to the Convention have in fact consented to the according of such rights, assent would be presumed as long as the contrary is not indicated, given the absence of any conventional provision otherwise.16

But a treaty can only accord third-party rights if the States Parties intend this to be the case,17 and there is no sign that the States Parties to the Convention so intended. No operative provision of the Convention indicates such an intention, and the unspecific implications of the preamble are insufficient in this regard.18

11 See also Barcelona Traction, Light and Power Company, Limited, Second Phase, ICI Rep 1970 3, at para 33, which also refers synonymously to ‘obligations erga omnes’. ‘All States are by definition members of the international community as a whole . . .’: ILC, above, n 9, commentary to ARSIWA Art 48, para (10), 322. Note that the identical term ‘the international community as a whole’ is found in WHC, Art 6 (1). Needless to say, neither ‘the international community as a whole’ nor, for that matter, ‘mankind as a whole’ enjoys international legal personality in its own right; see, eg, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICI Rep 1971, 16, diss op Fitzmaurice at para 33; J Crawford, ‘Responsibility to the International Community as a Whole’, in J Crawford, International Law as an Open System. Selected Essays (London 2002) 341 et seq, at 344.

12 See VCLT, Art 34, as declaratory of general international law on point. An exception appears to exist as regards treaties establishing an international status or regime: see, generally, R Jennings and A Watts (eds) Oppenheim’s International Law. Volume I. Peace (9th edn London 1996), parts 2–4, 1205–6; A McNair, The Law of Treaties (Oxford Oxford University Press 1961), 265–71; P Cahier, ‘Le problème des effets des traités à l’égard des Etats tiers’, 143 RCADI (1974–III) 589 at 660–77. Despite the superficial attraction of the argument, however, the WHC is not such a treaty.

13 Strictly speaking, it is breach of the Convention, not the Convention itself, which would create the right to invoke responsibility. But it is reasonable, for present purposes, to assimilate the former to the latter.

14 See VCLT, Arts 34 and 36.

15 See ibid, Art 36 (1).

16 See ibid.

17 See ibid.

18 Moreover, it seems inequitable that non-States Parties, in their capacity as members of ‘the international community as a whole’, should benefit from the right enjoyed by States Parties to compel performance of the Convention without sharing the duty imposed on the same
By way of aside, the same tension between the language of universal interest and the *pacta tertiis* rule is manifest in the obligation to preserve cultural heritage situated on its territory imposed on a State Party to the International Covenant on Economic, Social and Cultural Rights by Article 15 (1)(a)—the right to take part in cultural life—of the Covenant. The Committee on Economic, Social, and Cultural Rights speaks of States Parties’ duty of ‘[p]reservation and presentation of mankind’s cultural heritage’; and, for example, the Special Representative of the Secretary-General on the situation of human rights in Cambodia, characterizing the vandalism and looting of the Khmer temple complex at Angkor Wat as an issue going to Article 15 of the ICESCR, has written that ‘Angkor and Angkorian artefacts must be preserved and protected for all Cambodians, and the world’. But the obligations imposed by Article 15 (1)(a) of the ICESCR, while owed *erga omnes partes*, are not obligations *erga omnes simpliciter*, as it were. Although reference is made to ‘mankind’s’ cultural heritage, the Covenant is nonetheless a treaty, and can have no third-party effect unless this is clearly intended by States Parties and consented to by third States. Neither is the case here.

‘international community as a whole’, by Art 6 (1), to cooperate in the protection of the world cultural and natural heritage: see, in this light, *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark: Federal Republic of Germany/Netherlands), ICJ Rep 1969 3, at para 28; and a third party’s consent to the incurring of a treaty obligation must be express and expressed in writing; see VCLT, Art 35. No such written assent has been given by any of the non-State Parties to the WHC. (As it is, there is no indication that the States Parties intended to create third-party obligations anyway.)

19 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 [hereafter, ‘ICESCR’]. Art 15 provides in relevant part:

1. The States Parties to the present Covenant recognize the right of everyone:
   (a) To take part in cultural life . . .

See also General Discussion on the Right to Take Part in Cultural Life as recognized in Article 15 of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/1993/22, Chap VII [hereafter, ‘General Discussion’]. Article 15 of the ICESCR embodies in binding treaty form ‘the right freely to participate in the cultural life of the community’ recognized by Art 27 of the Universal Declaration of Human Rights, GA res 217 A (III), 10 Dec 1948. As interpreted by the Committee on Economic, Social and Cultural Rights, in an illustration of the wider normative influence of the WHC, Art 15 (1)(a) of the ICESCR encompasses a positive duty to preserve the physical state of cultural heritage: see, eg, the Committee’s comments at UN Docs E/1991/23, para 79; E/1992/23, paras 310, 312; E/1993/22, para 186. This duty encompasses an obligation to protect such heritage from vandalism and theft (see E/1993/22, para 186), as well as a prohibition on its deliberate destruction (see E/1995/22, para 136).


22 Ibid, para 120. The UN Commission on Human Rights took note of the Special Representative’s report, and his recommendations and conclusions, ‘with interest’—‘in particular the identification of priority areas requiring urgent attention’: Commission on Human Rights res 1994/61, 4 Mar 1994, para 8, chapeau. The first of these priority areas was ‘[t]he devotion of proper resources . . . for [inter alia] the defence of cultural treasures, especially Angkor Wat’: ibid, para 8 (a).
III. THE CONVENTION’S CORE OBLIGATION AND GENERAL INTERNATIONAL LAW

A. Overview

Might it be said, however, that the core obligation of protection, conservation, and transmission to future generations incumbent on a State Party to the World Heritage Convention in respect of monuments, groups of buildings and sites of outstanding universal value situated on its territory is now an obligation recognized by general international law, with the result that its performance may be compelled not just by other States Parties, but by any or all of the international community as a whole?23 The question calls for a review of relevant State practice.24

B. Outline of the Evidence

1. ‘Soft’ law

Several non-binding standard-setting instruments adopted by States in the context of the General Conference of UNESCO embody norms relevant to States’ putative customary obligations in respect of cultural heritage situated on their territory.25

On the same day it adopted the World Heritage Convention, the General Conference of UNESCO also adopted the Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage.26 Considering ‘that . . . the cultural and natural heritage . . . constitute[s] an essential feature of mankind’s heritage’27 and ‘that every country in whose territory there are components of the cultural and natural heritage has an obligation to safeguard this part of mankind’s heritage and to ensure that it is handed down to future generations’,28 the General

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23 If they were to exist, such obligations would, of course, arise whether or not a State was a Party to the WHC. That is, they would be owed not simply to but also by all States.

24 Note that it is the practice of States alone that is relevant to the formation of a customary international rule, at least in this context. As such, the diplomatic activity and statements of the UN Secretary-General and of the Director-General of UNESCO in relation to the Buddhas of Bamiyan, as well as the statement made by the Chairperson of the World Heritage Committee in this regard, can—for strict legal purposes—be ignored. The same goes for statements made about the Buddhas by various non-governmental organisations. Note also that the extremely widespread and representative participation of states in the World Heritage Convention itself (a treaty which, when drafted, was clearly not declaratory of existing custom) does not, in itself, indicate that the obligations embodied therein have emerged as rules of general international law: see RR Baxter, ‘Treaties and Custom’, 129 RCADI (1970) 25 at 64 and 73.


26 Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, 16 Nov 1972, reproduced in Conventions and Recommendations of Unesco concerning the protection of the cultural heritage (Paris 1985).

27 Ibid, preamble, third recital.

28 Ibid, preamble, fifth recital.
Conference enunciated norms and principles applicable to cultural heritage, defined as monuments, groups of buildings and sites ‘of special value’.29 The most fundamental of the Recommendation’s general principles is that ‘the protection, conservation and presentation of [the cultural heritage] impose responsibilities on the States in whose territory it is situated, both vis-à-vis their own nationals and vis-à-vis the international community as a whole’, in fulfilment of which ‘Member States should take such action as may be necessary . . .’.30

Four years later, the General Conference of UNESCO adopted the Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It.31 Recalling, inter alia, Article 27 of the Universal Declaration of Human Rights (viz the right to take part in cultural life, as embodied in binding form in Article 15 (1)(a) of the ICESCR),32 this instrument recommends that Member States ‘adopt legislation or regulations . . . in order to . . . protect and enhance the heritage of the past, and particularly ancient monuments . . .’.33

In 1997, ‘[c]onvinced of the will of the peoples . . . to safeguard the values and principles enshrined in the Universal Declaration of Human Rights, and all other relevant instruments of international law’,34 ‘[c]onsidering the provisions of [inter alia] the International Covenant on Economic, Social and Cultural Rights . . .’,35 and ‘[c]onvinced that there is a moral obligation to formulate behavioural guidelines for the present generations within a broad, future-oriented perspective’,36 the General Conference adopted the Declaration on the Responsibilities of the Present Generations Towards Future Generations. Article 7 of the Declaration states in part that ‘[t]he present generations have the responsibility to identify, protect and safeguard the tangible . . . cultural heritage and to transmit this common heritage to future generations.’

Finally, in 2001, the General Conference adopted the UNESCO Universal Declaration on Cultural Diversity.37 The preamble to the Declaration declares the General Conference to be ‘[c]ommitted to the full implementation of the human rights . . . proclaimed in the Universal Declaration of Human Rights and other universally recognized legal instruments, such as the two International Covenants of 1966 . . .’,38 and it ‘[r]efers to the provisions relating to cultural diversity and the exercise of cultural rights in the international instruments enacted by UNESCO’,39 citing by way of footnote the World Heritage Convention, among others.40 Article 7 of the Declaration states that ‘heritage in all its forms must be preserved, enhanced and handed on to future generations . . .’.

29 Ibid, Art 1.
32 Ibid, preamble, first recital. Art 27 (1) of the Universal Declaration of Human Rights, GA res 217 A (III), 10 Dec 1948, states: ‘Everyone has the right freely to participate in the cultural life of the community . . .’. 33 Recommendation on Participation in Cultural Life, above, n 31, Art 4, chapeau and subsection (q)(i).
36 Ibid, preamble, twelfth recital.
38 Ibid, preamble, first recital.
39 Ibid, preamble, fourth recital.
40 See ibid, n 1.
2. State practice in relation to the Buddhas of Bamiyan

(a) Preface

A solid body of relevant practice comes in the form of reactions by States, jointly and severally, to the damage inflicted in 1998 and 1999 on the great statues of the Buddha at Bamiyan in Afghanistan by the country’s then-Taliban government, as well as—more tellingly—to the Taliban’s destruction of the Buddhas in 2001. In this regard, it should be borne in mind that the Taliban’s treatment of the Buddhas was not governed by the laws of armed conflict. While sporadic warfare continued in the far north-east of Afghanistan, the Bamiyan valley and the rest of the country were, at all relevant times, free of hostilities and securely under the Taliban government’s control—in other words, the Buddhas were not destroyed in the fighting. Nor is there a legal state of belligerent occupation in non-international armed conflict. It is also worth noting by way of aside that the Taliban’s acts constituted flagrant violations of the World Heritage Convention itself, even if many States and commentators were confused as to the applicability of the Convention to the facts.

41 For a chronology of the events in question, and some of the international reaction to them, see UNESCO Doc WHC-01/CONF.208/23, 4–11.

42 See also T Georgopoulos, ‘Avez-vous bien dit “crime contre la culture”? La protection internationale des monuments historiques’ (2001) 54 RHDI 459 at 471–2. For this reason, it is impossible to agree with Francioni and Lenzerini’s assertion that the laws of armed conflict were applicable to the situation: see F Francioni and F Lenzerini, The Destruction of the Buddhas of Bamiyan and International Law (2002), copy on file with author, 23–5, 28–30.

43 The apparent assertion to the contrary by the Director of UNESCO’s Division of Cultural Heritage, Sector for Culture (Bureau of the World Heritage Committee, Twenty-Fifth Session, 25–30 June 2001, Report of the Rapporteur, UNESCO Doc WHC-2001/CONF.205/10 para 1.9) is without merit. The reality is that, while Art 19 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240, gives the Convention limited applicability during armed conflicts not of an international character, the concept of belligerent occupation is limited to the occupation of foreign territory during international armed conflict.

44 Afghanistan ratified the Convention on 20 Mar 1979. On 21 Dec 1981, it nominated the monuments of the Bamiyan valley for inclusion in the World Heritage List. The nomination was received by the Sector for Culture of the Division of Cultural Heritage of UNESCO on 14 Apr 1982. See UNESCO Doc WHC-01/CONF.208/23, 2. This nomination had the legal effect of rendering the Convention applicable to the Buddhas of Bamiyan (see above, n 7), and the wilful damage and eventual destruction of the Buddhas were clear breaches of the obligation imposed by Art 4.

45 It was suggested by the Director of UNESCO’s Division of Cultural Heritage, Sector for Culture that the Convention ‘does not apply to civil conflicts’: Bureau of the World Heritage Committee, Twenty-Fifth Session, 25–30 June 2001, Report of the Rapporteur, above n 43 para 1.9. It is true that, in the context of hostilities, the international humanitarian law applicable to non-international armed conflicts serves as lex specialis to the lex generalis of the World Heritage Convention. But no provision of the Convention states that it does not apply as such in the event of armed conflict. Moreover, as stated above, there were no hostilities in Bamiyan at the times in question; and if the Convention were inapplicable whenever there is a non-international armed conflict somewhere on the territory of a State Party, it would not have applied to Westminster Abbey during the Troubles in Northern Ireland or to the historic areas of Istanbul during the fighting in the Kurdish regions of Turkey—an absurd proposition. As for the legal effect of the absence of the Buddhas from the World Heritage List, see above, ns 7 and 44. Finally, pace the Director of UNESCO’s Division of Cultural Heritage, Sector for Culture (ibid), the fact that the Taliban remained unrecognized as the Government of Afghanistan by all but three states and was not the government accredited to the UN is irrelevant to the State responsibility of Afghanistan: see also Francioni and Lenzerini, above n 42, 19–20.
(b) General Assembly of States Parties to the World Heritage Convention

Several months after the demolition of the Buddhas in March 2001, the General Assembly of the States Parties to the World Heritage Convention adopted a resolution on the protection of the cultural heritage of Afghanistan.46 Noting, in the preamble, the various international legal instruments on the protection of the cultural heritage adopted under the aegis of UNESCO and UNIDROIT respectively, the resolution ‘[c]ondemn[ed] the wilful destruction of the cultural heritage of Afghanistan by the Taliban forces, particularly the statues of Bamiyan, as “crime[s] against the common heritage of humanity”’. It went on to appeal to States Parties to the Convention to become party, where they had not already done so, to the other conventions noted in the preamble; to invite the World Heritage Committee to consider ways and means by which the implementation of the Convention could be reinforced, ‘especially in relation to the other relevant UNESCO Conventions for the protection of the cultural heritage’; and to invite the Director-General of UNESCO ‘to inform the Secretary-General of the United Nations when the common heritage of humanity is threatened with wilful destruction so that he/she may propose necessary actions to protect this heritage’.

(c) General Conference of UNESCO

A few days later, at its thirty-first session and the first after the destruction of the Buddhas, the General Conference of UNESCO adopted a resolution entitled ‘Acts constituting a crime against the common heritage of humanity’.47 Calling on all Member States of the Organization ‘and all other States of the world’ to become parties to the cultural heritage conventions adopted under the aegis of UNESCO and UNIDROIT respectively ‘in order to maximize the protection of the cultural heritage of humanity, . . . in particular, against destructive acts’,48 the General Conference noted and reiterated ‘the fundamental principles included in these instruments to prevent the destruction of the cultural heritage . . .’.49 The resolution concluded by inviting the Director-General of UNESCO to formulate, on the basis of these principles, ‘a Draft Declaration concerning the Intentional Destruction of Cultural Heritage’.50

(d) United Nations organs

In late 1998, after the Taliban’s first attack on the Buddhas,51 the General Assembly of

48 Ibid, paras 2 and 3. Such destruction was declared to include looting and illicit excavations.
49 Ibid, para 4.
50 Ibid, para 4.
51 As well as expressing its concern over the vandalism and destruction of Afghan monuments, the General Assembly addressed the looting of Afghanistan’s cultural heritage. It ‘call[ed] upon all Afghan parties, in particular the Taliban, to protect the cultural and historic relics . . . of Afghanistan from acts of . . . theft, and request[ed] all Member States to take appropriate measures to prevent the looting of cultural artifacts and to ensure their return to Afghanistan’: see GA res 53/203-A, 18 Dec 1998, para 21; GA res 54/189-A, 17 Dec 1999, para 30; and GA res 55/174-A, 19 Dec 2000, para 30. Similarly, it ‘[e]xpresse[d] its deep concern at reports of . . . looting of cultural artifacts in Afghanistan’ and once again ‘request[ed] all Member States to take appropriate measures to prevent the looting of cultural artifacts and to ensure their return to Afghanistan’: see
the United Nations—a resolution headed ‘Situation of human rights in Afghanistan’—expressed its deep concern at reports of attacks on cultural artifacts in Afghanistan and emphasizes that all parties share the responsibility to protect their common heritage. These statements were repeated verbatim in further resolutions adopted in 1999 and 2000 under the heading ‘Question of human rights in Afghanistan’. All three resolutions, adopted without a vote, made preambular reference to the Universal Declaration of Human Rights and to the International Covenants on Human Rights. Precisely the same preambular and operative formulae were used by the Commission on Human Rights in a resolution of 2000 entitled ‘Situation of human rights in Afghanistan’. Earlier resolutions adopted by the Commission under the same rubric, also referring to the Universal Declaration and to the Covenants, [n]oted with deep concern reports of the destruction of the cultural and historic heritage of Afghanistan and [a]ppealed to Member States and to the international community to take urgent measures to prevent the demolition of cultural artefacts. The Commission adopted all three resolutions without a vote.

Similarly, in another resolution of late 1998, the General Assembly reiterated that the cultural and historic relics and monuments of Afghanistan belong to the common heritage of mankind and called upon all Afghan parties, in particular the Taliban, to protect the cultural and historic relics and monuments of Afghanistan from acts of vandalism and damage. It repeated this verbatim in resolutions of 1999 and 2000. Finally, on 9 March 2001, before the destruction of the Buddhas of Bamiyan had been confirmed, the General Assembly adopted Resolution 55/243, entitled ‘The destruction of relics and monuments in Afghanistan’. ‘Bearing in mind the International Covenant on Economic, Social and Cultural Rights and the need to respect the common heritage of humankind’, deeply concerned and appalled by the Taliban edict of 26 February 2001, ordering the destruction of all statues and non-Islamic shrines in Afghanistan, and by the deliberate ongoing destruction of these relics...


In parallel with the General Assembly’s activities, the Security Council—which Member States, in accordance with Art 24 (1) of the Charter, recognize as acting on their behalf—reaffirmed in the preamble to SC res 1214 (1998) ‘its respect for [Afghanistan’s] cultural and historical heritage’. It repeated this reaffirmation in the respective preambles to SC res 1267 (1999) and SC res 1333 (2000).

4 GA res 54/185, 17 Dec 1999 (adopted without a vote), para 16.
5 GA res 55/119, 4 Dec 2000 (adopted without a vote), para 19.
6 See the first recital of each respective preamble.

Commission on Human Rights res 1998/70, para 2, chapeau and subpara (g).
1 Commission on Human Rights res 1999/9, para 12, chapeau and subpara (e).
and monuments which belong to the common heritage of humankind’; and ‘[n]oting that the destruction of the statues in Afghanistan, in particular of the unique Buddhist sculptures in Bamiyan, would be an irreparable loss for humanity as a whole’, 66 the General Assembly

1. **Strongly call[ed] upon** the Taliban to abide by their previous commitments to protect the cultural heritage of Afghanistan from all acts of vandalism, damage and theft;
2. **Strongly urge[d] the** Taliban to review their edict of 26 February 2001 and to stop its implementation;
3. **Also strongly urge[d] the** Taliban to take immediate action to prevent the further destruction of the irreplaceable relics, monuments or artefacts of the cultural heritage of Afghanistan...

The resolution’s final paragraph ‘[c]all[ed] upon Member States to help, through appropriate technical measures, to safeguard the sculptures, including, if necessary, their temporary relocation or removal from public view’.

All the above resolutions were adopted without a vote. Not a single preambular or other reference was made in any of the resolutions to Afghanistan’s obligations under the World Heritage Convention, the mention of the Taliban’s ‘previous commitments to protect the cultural heritage of Afghanistan’ being a reference to unilateral statements by the regime. 67 In the debate in the General Assembly before the adoption of resolution 55/243, Ukraine was alone in characterising the Buddhas’s destruction as a breach of the Convention. 68

**(e) Regional groupings**

At the regional level, the Presidency of the European Union, speaking on behalf of EU Member States, reacted with ‘dismay and shock’ to news of the Taliban edict ordering the destruction of all statues and non-Islamic shrines in Afghanistan, describing ‘Afghanistan’s rich cultural heritage’ as being ‘of priceless historic value’ and ‘of vital importance not only to Afghanistan but to the world as a whole’. The EU ‘strongly urge[d] the’ Taliban leadership not to implement its decision. 69 Cyprus, Malta, Turkey, and the Central and Eastern European countries associated with the European Union, along with the EFTA States Members of the European Economic Area, aligned themselves with the EU declaration. 70 Similarly, the Secretary General of the Council of Europe, referring to ‘respect for human rights . . . and awareness of our common cultural heritage . . .’, ‘expressed his dismay’ at the ensuing destruction, declaring that ‘[n]o political or religious power has the right to deliberately destroy cultural property

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66 See ibid, preamble, second, fourth, and sixth recitals respectively.
68 See UN GAOR, Fifty-fifth Session, 94th Plenary Meeting, 9 Mar 2001, UN Doc A/55/PV.94, 12. It is possible that the Ukrainian ambassador to the General Assembly was using the phrase ‘in particular’ in the sense of ‘specifically’.
69 Declaration by the Presidency on behalf of the European Union on destruction of all statues in Afghanistan, Brussels, 1 Mar 2001 <http://www.eu2001.se.eu2001/news/news_read.asp?informationID=12480>. This statement was repeated verbatim by the Swedish ambassador to the UN General Assembly, speaking on behalf of the EU: see UN GAOR, above, n 68, 2–3.
70 Declaration by the Presidency on behalf of the European Union, ibid. In addition, in the UN General Assembly, Ukraine aligned itself with the EU’s statement: see UN GAOR, ibid, 11–12.
that belongs to humankind, or to deprive future generations of a heritage which is simply not the prerogative of a single group, ideology or faith”’. He invited international organisations and institutions ‘to take concerted action with a view to safeguarding this common heritage . .’.71

For their part, the Ambassadors to UNESCO of the fifty-four Member States of the Organization of the Islamic Conference ‘unanimously came together’ at the time of the destruction of the Buddhas ‘in vigorous condemnation of these unacceptable attacks on humanity’s common heritage’, ‘determined to join [UNESCO] in taking concrete action’.72 The Arab Group of countries represented at UNESCO condemned the destruction, which ‘represent[ed] the Heritage of humanity as a whole’, and demanded its immediate cessation, calling for concrete international action to protect these ‘inestimable treasures of the universal Heritage’.73 The Asia Pacific Group of countries represented at the Organization, characterizing Afghanistan’s cultural heritage as ‘of exceptional universal value’, ‘expressed[d] its strong condemnation’ of what it called ‘an inadmissible attack on . . . an irreplaceable civilisational inheritance of all mankind’. It called upon the Taliban ‘immediately [to] stop the destruction and vandalism of all cultural and historic monuments and relics of Afghanistan, including in particular the ancient statues of Buddha in Bamiyan’, and ‘strongly endorse[d]’ the action taken by the UNESCO Director-General to protect this heritage.74

Again, no mention was made in any of these statements of Afghanistan’s obligations under the World Heritage Convention.

(f) Individual States

Finally, at the bilateral level, the United States of America, numbering the Buddhas ‘among the world’s great cultural treasures’, joined the UN and other States ‘in urging the Taliban to halt [the] desecration of Afghanistan’s cultural heritage’.75 In the event, it ‘strongly condem[ned] this destruction of the irreplaceable world heritage’, with the Secretary of State calling it ‘a crime against humankind’.76 Russia was said to be ‘seriously concerned’ at the Taliban’s ‘encroachment on the cultural-historic heritage of not only the Afghan people, but all world civilization’; it expressed the hope that the regime would heed worldwide appeals ‘to rescind [its] odious edict’, and appealed to the international community ‘to do all it [could] in the name of the preservation of the unique monuments of the past, the destruction of which would cause irreparable damage to all humankind’.77 France called on the Taliban to renounce its decision,

which ‘would endanger . . . part of the world’s cultural heritage’, and President Chirac endorsed UNESCO’s efforts to mobilize the international community to prevent the execution of the Taliban’s edict. The French government ‘solemnly condemn[ed]’ the Buddha’s eventual destruction. The German Foreign Minister declared his government to be ‘horrified by the wanton destruction of irreplaceable cultural artifacts in Afghanistan’, noting that damage to the Buddha in particular ‘would be an irreparable loss for humanity’; he emphasized that Afghanistan ‘[bore] great responsibility for preserving the world cultural heritage on its territory’, and ‘strongly support[ed]’ calls to the Taliban ‘not to damage, [let alone] destroy, Afghanistan’s cultural heritage’. For its part, Australia urged the Taliban to heed international calls to ensure the safety of the Buddha, which were ‘of outstanding cultural . . . significance, not just for Afghanistan, but for the international community as a whole’.

States with significant Buddhist populations were especially vocal in their condemnation of the Taliban’s acts. The Indian Minister of External Affairs, referring to the Buddha of Bamiyan as ‘incomparable and unique,’ called for a halt to ‘the destruction of these precious manifestations of the cultural heritage of humankind’, describing it as ‘a grave wrong, indeed, a sacrilege to humanity, to the civilisational and cultural inheritance of all mankind . . . ‘; and in a joint resolution of both Houses, the Indian Parliament ‘unanimously condemn[ed] . . . in the strongest possible terms’ what it described as ‘an appalling act of cultural vandalisms against ‘one of the greatest examples of human creativity’, expressing the hope that ‘the world community and especially the United Nations’ would ‘prevail upon the Taliban regime in Afghanistan to desist from this senseless, destructive act’. Japan ‘express[e] its deepest concern’

83 ‘ External Affairs Minister, Shri Jaswant Singh’s Statement in Parliament on March 2, 2001’, Ministry of External Affairs of India, Press Release, New Delhi, 2 Mar 2001 <http://www.meadev.nic.in/news/official/20010302/official.htm>. The Minister concluded: ‘If the Taliban do not wish to retain this inheritance, India would be happy to arrange for the transfer of all these artifacts to India where they would be kept safely and preserved for all mankind, in the full knowledge and clear understanding that they are, in the first place and above all, treasures of the Afghan people themselves’. The above phrases were repeated verbatim and elaborated on by the Indian representative to the UN General Assembly; see UN GAOR, above, n 68, 6–8.
over the Taliban edict, considering it ‘internationally recognized that [the Buddhas] should be preserved’, and ‘preserved as common heritages [sic] of . . . Humanity’.85 It urged the Taliban to review the edict and to take ‘proper measures for the preservation of cultural treasures’.86 Nepal too condemned the destruction and ‘call[ed] upon the international community to join hands to preserve and safeguard the Buddhist monuments’.87 Thailand and Sri Lanka each expressed their alarm,88 and appealed to the Taliban to halt the demolition.89 The latter described the statues as ‘of universal cultural and artistic value’, and their preservation as ‘of interest not only to the Buddhist countries but to the world at large’.90

Nor were Islamic States silent. Iran condemned the Taliban’s decision,91 stating that the Buddhas were part of Afghanistan’s ‘cultural and national heritage and belong[ed] to the history of the region’s civilization in which all humanity has a share’.92 Even

official.htm>. Similarly, the Indian Prime Minister—writing to the leaders of Japan, South Korea, Cambodia, Sri Lanka, Bhutan, Thailand, Laos, Cambodia, Myanmar, USA, UK, France, Russia, and China, as well as to the UN Secretary-General—spoke of the Taliban decree as ‘an assault . . . upon an irreplaceable civilisational inheritance of all mankind’, and urged that the matter be taken ‘with those countries that ha[d] influence with the Taliban, so that they, too, could intervene to seek the withdrawal of the decree’: Ministry of External Affairs of India, Press Release (Untitled), New Delhi, 2 Mar 2001 <http://www.meadev.nic.in/news/official/20010302/official.htm>.

86 ‘Japan’s Response to Taliban’s Edict to Destroy Statues’, Ministry of Foreign Affairs of Japan, Press Release, Tokyo, 7 Mar 2001 <http://www.mofa.go.jp/announce/announce/2001/3/0307.html>. For further measures taken by Japan, see ibid. In the UN General Assembly, Japan ‘deplore[d] the destruction of the historical statues and monuments of Afghanistan’, which were ‘truly the common heritage of all humankind’: UN GAOR, above, n 68. 4. Similarly, the South Korean representative to the General Assembly characterized the Buddhas as ‘an irreplaceable part of the cultural heritage of mankind’, and affirmed that his country ‘would fully participate in the efforts of the international community to protect the common heritage of mankind’: ibid, 9.
87 ‘Taliban Fire Mortars at Afghan Buddha Statues’, Reuters, Kabul, 2 Mar 2001. The Nepalese ambassador to the UN General Assembly described the Buddhas as ‘invaluable treasures of [the] world cultural heritage’: UN GAOR, ibid, 12.
90 ‘Foreign Minister Expresses Concern on [sic] the Threat to the World Famous Buddha Statues in Afghanistan’, Ministry of Foreign Affairs of Sri Lanka, Sri Lanka News Update, 2 Mar 2001 <http://www.lanka.net/lankaupdate/02%20March%202001.html#1kupdate2>. Similarly, in the UN General Assembly, Thailand called the Buddhas ‘an invaluable part of Afghanistan’s rich cultural heritage, and indeed of the common cultural heritage of mankind’: UN GAOR, above, n 68, 11; Bhutan, ‘strongly condemn[ing] their destruction,’ consider[ed] the unique Buddha statues of Bamiyan to be not only a priceless heritage of the Afghan people but also a common heritage of mankind’: ibid, 6; and Cambodia decried the destruction of the Buddhas as ‘a great loss to Afghanistan [and] an irreparable loss to humanity as a whole’, since they were ‘the cultural heritage of mankind’: ibid, 13.
92 ‘Museums Interested in Plan to Save Afghan Art’, Reuters, New York, 2 Mar 2001. In the UN General Assembly, the Iranian representative described the Buddhas as ‘part of the cultural heritage of humanity’, which should be ‘preserved for the benefit of present and future generations’: UN GAOR, above, n 68, 10 and 11 respectively. Similarly, the Egyptian ambassador to the
Pakistan, the Taliban’s closest ally, ‘appeal[ed] to the Afghan Government to take measures to fully protect Afghanistan’s rich historical monuments, sites and artifacts which are part of [the] world’s cultural heritage’. 93 The Pakistani Minister of the Interior was dispatched to Afghanistan in a vain attempt to dissuade the Taliban leader, Mullah Omar, from destroying the Buddhas.94

Once more, not every State that condemned the Taliban’s acts was a Party to the World Heritage Convention. Nor was any explicit reference was made to Afghanistan’s conventional obligations.

C. Analysis of the evidence

Each of the elements of State practice outlined above calls for separate analysis before general conclusions can be drawn as to the law.

Starting with the four non-binding standard-setting instruments adopted by the General Conference of UNESCO, none of these affords compelling evidence of customary rules regarding states’ obligations in respect of cultural heritage situated on their territory. The terminology and other language employed denies them the fundamentally norm-creating character that is a prerequisite for the formation of a rule of general international law,95 although this is less unequivocally so in the case of the Universal Declaration on Cultural Diversity.96 As regards both the Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage and the Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, the designation ‘Recommendation’, the hortatory language used in the relevant provisions97 and their express applicability only to the Member States of UNESCO98 (rather than to States generally) all indicate that neither instrument reflects a belief on the part of its adopters that the norms it embodies are customary rules of law. Both the former Recommendation and the Declaration on the Responsibilities of

General Assembly expressed the conviction that ‘the historical heritage of the various civilizations belongs to all humanity, which should seek to safeguard and to ensure its continuity . . .’: ibid. 9.  


95 See North Sea Continental Shelf Cases, above, n 18, at para 72.

96 Rather than the hortatory ‘. . . should . . .’ or ‘It is recommended that . . .’, Art 7 of the Declaration on Cultural Diversity, above, n 37, uses the mandatory ‘must’ (even if ‘. . . shall . . .’ is more unambiguously legal). At the same time, it employs the passive construction ‘heritage . . . must be preserved’, rather than the more typical active construction ‘States have a duty . . .’ or the like, suggesting an effort on the part of the General Conference to avoid the phraseology of law.

97 See Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, above, n 26, Art 4 (‘should’); Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, above, n 31, Art 4 (‘It is recommended that . . .’).

98 See Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, ibid, Art 4; Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, ibid, Art 4.
the Present Generations Towards Future Generations speak of a ‘responsibility’ towards the cultural heritage, a subtle but significant avoidance of the formal legal terms ‘obligation’ and ‘duty’, and a semantic ploy common to diplomatic drafting. The fact that the responsibilities asserted by the latter instrument are incumbent on ‘the present generations’, as opposed to States, further implies that the General Conference was not declaring what it saw as existing international law; indeed, the preamble to the Declaration refers to its provisions as ‘behavioural guidelines’.

Turning to the reactions of States to the destruction of the Buddhas of Bamiyan, the resolution adopted by the General Assembly of the States Parties to the World Heritage Convention provides very little support for the existence of customary obligations in respect of cultural heritage situated on a state’s territory. The quotation marks around the phrase ‘“crimes against the common heritage of humanity” ’ immediately suggest that the use of this term to condemn the wilful destruction of the statues was intended by way of rhetorical device, rather than formal legal characterization. And in the unlikely event that it was, in fact, intended as a statement of law, the phrase is too vague and ambiguous to give rise to a rule, since it is unclear whether the term ‘crime’ was intended to denote State or individual responsibility. The former intention is unlikely, in light of the well-publicized omission (at least eo nomine) of the very concept of State criminal responsibility from the Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in August 2001, prior to the adoption of the resolution in question—unless, that is, the notion of a ‘State crime’ was inaccurately conflated with the breach of a delictual obligation owed to the international community as a whole. Alternatively, if individual criminal responsibility were intended, the assertion of this is without prejudice, and hence irrelevant, to the question of Afghanistan’s putative (delictual) responsibility for demolishing the Buddhas. Either way, the opaque phrase ‘“crimes against the common heritage of humanity” ’ lacks the fundamental norm-creating quality required of a rule of general international law.

As for the resolution of the General Conference of UNESCO on ‘Acts constituting

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99 See Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, ibid, Art 4; Declaration on the Responsibilities of the Present Generations Towards Future Generations, above, n 34, Art 7.

100 In international legal terms, ‘responsibility’ is the result of breaching an ‘obligation’. It is not the obligation itself.


102 The two are unhelpfully confused in Georgopoulos, above n 42, at 468–9 and 474–5. The fact that neither is plausible as a statement of custom contemporaneous with the Taliban’s acts increases, in turn, the probability that the States Parties’ intention was purely rhetorical. Nor, given the general principle of criminal law expressed in the maxim nullum crimen sine lege, is it probable that the General Assembly of States Parties was positing ex post facto a novel customary rule to the effect that the wilful destruction of at least certain monuments in peacetime gives rise either to State or individual criminal responsibility.

103 See above, n 9. It is conceded that this point might assume too much by way of international legal expertise of the delegates to the General Assembly of the States Parties to the Convention.

a crime against the common heritage of humanity’, this does no more than note and reiterate ‘the fundamental principles’ of a range of cultural heritage conventions, and invite the Director-General of UNESCO to formulate a ‘Draft Declaration concerning the Intentional Destruction of Cultural Heritage’. It does not expressly characterize the destruction of the Buddhas of Bamiyan as such a crime, whatever that might mean.

For their part, even if their lack of reference to the World Heritage Convention is conducive to this, the various resolutions of the UN General Assembly and Commission on Human Rights evidence no clearer a belief in the existence of States’ customary obligations in respect of cultural heritage situated in their territory than do the resolutions and standard-setting instruments already discussed. The resolutions on the situation of human rights in Afghanistan eschew legal idiom: the talk is again of ‘responsibility’, rather than ‘obligation’ or ‘duty’. Similarly, the preamble to General Assembly Resolution 55/243 refers merely to the ‘need’ to respect the common heritage of humankind. As for paragraph 1 of the latter, it stresses the Taliban’s previous unilateral undertakings to preserve the Buddhas, rather than any putative obligation under general international law. Moreover, in debate prior to the adoption of the resolution, only the representative of Ukraine characterized the destruction of the Buddhas as a violation of international law, and even then he added the ambiguous rider ‘in particular of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention Concerning the Protection of the World Cultural and Natural Heritage’. Nor does the plethora of statements by regional groupings and individual States in response to the Taliban’s acts furnish any clear opinio juris to the effect that Afghanistan was obliged by customary international law to spare the Buddhas of Bamiyan. While an impressive array of States jointly and severally condemned the Taliban’s actions, none of them unambiguously characterized it as a violation of a legal obligation, let alone a customary one. The US Secretary of State’s ambiguous reference to a ‘crime against humankind’ was almost certainly wholly rhetorical. India’s mention of a ‘grave wrong’ is opaque, and any legal content it might conceivably have is undermined by the obviously rhetorical words that follow. Japan, for its part, did think it ‘internationally recognized’ that the Buddhas ‘should be preserved . . . as common heritages [sic] of . . . Humanity . . .’; but it is uncertain, given the hortatory ‘should’, whether this posits a legal duty and, if so, whether it refers to customary international law or to Afghanistan’s obligations under the World Heritage Convention. Germany’s statement that Afghanistan ‘[bore] great

105 That this Draft Declaration is not intended to assert a customary prohibition on the peacetime destruction of cultural heritage is foreshadowed in the background paper to the resolution: see UNESCO Doc 31 C/46, 12 Sept 2001, para 6 (c).
106 See UN GAOR, above, n 68, 12. The rider is ambiguous to the extent that the phrase ‘in particular’ can be used to mean ‘specifically’.
107 It is highly unlikely that it was intended as a formal reference to State criminal responsibility, for the reasons outlined above and in light of the US’s consistent opposition to the concept of State criminal responsibility. It is equally unlikely that individual criminal responsibility was being suggested, again for reasons already discussed and given the semantically significant divergence between the chosen phrase ‘crime against humankind’ and the legal term of art ‘crime against humanity’.
108 ‘. . . indeed, a sacrilege to humanity, to the civilisational and cultural inheritance of all mankind . . .’.
responsibility for preserving the world cultural heritage on its territory' is not dissimilar.\textsuperscript{109}

Finally, it should be noted that the consistent endorsement, in the above resolutions and statements, of cultural heritage as a common heritage of humankind is not to be equated with the assertion of a customary obligation to preserve this heritage. Such an obligation might be suggested by way of corollary. But a corollary is insufficiently norm-creating in itself to form the basis of a rule of law.

All in all, the relevant State practice attests to a remarkable universal consensus that the destruction of the Buddhas of Bamiyan was condemnable as a matter of policy, being harmful to the interests of the Afghan people and of humanity as a whole. But none of it supports the conclusion that a State is presently under a customary legal obligation, in time of peace, to protect, conserve and transmit to future generations cultural heritage situated on its territory, either straightforwardly or as a function of a human right. The requisite \textit{opinio juris} is just not evident.

This does not mean, however, that the evidence supports no legal conclusions whatsoever.

While it may not suggest customary legal duties on the part of the State on whose territory cultural heritage is situated, the above evidence provides cogent and conclusive support for the view that—as a matter of general international law—diplomatic condemnation\textsuperscript{110} of a State’s mistreatment of at least certain monuments situated on its territory, along with diplomatic efforts to prevent or halt it, does not amount to an impermissible interference in that State’s domestic affairs.\textsuperscript{111} Every State and regional grouping quoted above clearly felt legally entitled to intervene diplomatically in

\textsuperscript{109} Two things suggest a rhetorical import. First, in formal legal terms Afghanistan would bear responsibility not ‘for preserving the world cultural heritage on its territory’ but for failing to do so. Secondly one does not speak of ‘great’ State responsibility: a State is responsible or it is not, regardless of the extent of reparation owed. (Nor is it irrelevant that the German representative in the UN General Assembly, in ‘strongly condemn[ing]’ the Taliban’s deeds, characterized them merely as ‘irresponsible acts of religious intolerance’ and as ‘barbarism’: see UN GAOR, above, n 68, 1 and 2 respectively.) Moreover, even if a legal meaning was intended, it is unclear whether the responsibility asserted is referable to custom or to the Convention. The use of the phrase ‘world cultural heritage’ would perhaps imply the latter.

\textsuperscript{110} Note that, even where an international obligation is implicated, protest and other forms of diplomatic censure do not amount to the invocation of State responsibility, so that even States not entitled to invoke such responsibility under either Art 42 or Art 48 of the ILC’s Articles are nonetheless entitled to have their say, as it were: see ILC, above, n 9, commentary to ARSIWA Art 42, para (2), 294–5; and Crawford, above, n 9, 42. \textit{A fortiori} if, as here, no international obligation is involved.

\textsuperscript{111} For the prohibition on intervention, 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), 21 Dec 1965; Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, GA res 2625 (XXV), 24 Oct 1970, third section; Declaration on the Strengthening of International Security, GA res 2734 (XXV), 16 Dec 1970, paras 2, 4, and 5; Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, GA res 36/103, 9 Dec 1981. The prohibition on intervention, a corollary of the sovereign equality of States, was held to be a rule of general international law in \textit{Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)}, Merits, Judgment, ICJ Rep 1986, 14, at para 202. In the context of the UN, see UN Charter, Art 2 (?) and, as specifically regards UNESCO, see Constitution of the United Nations Educational, Scientific and Cultural Organization, Art 1 (3).
defence of the Buddhas of Bamiyan. Although the relevant practice derives from a single incident, it is extensive and virtually uniform, and could be said to manifest customary international law. Additionally, in the specific context of UN organs such as the General Assembly and the Commission on Human Rights, the practice reveals unequivocally that criticism by these organs of a State’s conduct towards at least certain monuments, and their mobilisation to influence it for the better, is not to be considered an impermissible intervention ‘in matters which are essentially within the domestic jurisdiction of [that] State’, within the meaning of Article 2 (7) of the UN Charter. Moreover, insofar as the ‘target’ State in question was a Member of the General Conference of UNESCO when the latter adopted, without a vote in each case, the Recommendations and Declarations cited above, it could be said to have acknowledged by its conduct that cultural heritage situated on its territory is a proper subject of international concern; a fortiori where that State is a party to the World Heritage Convention.

This leaves open the question of the scope of application ratione materiae of these rights of intervention. Specifically, just how culturally significant must given heritage be before States and the UN can intervene? In this regard, it will be recalled that General Assembly Resolution 55/243 spoke of the Buddhas of Bamiyan as ‘unique’ and ‘irreplaceable’; the European Union described them as ‘of priceless historic value’ and ‘of vital importance . . . to the world as a whole’; the US placed them ‘among the world’s great cultural treasures’; Australia characterized them as ‘of outstanding cultural . . . significance, not just for Afghanistan, but for the international community as a whole’; and India referred to them as ‘one of the greatest examples of human creativity’. At the same time, there is no indication that these epithets were invoked as formal criteria, let alone legal minima for intervention. For its part, the Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage defines as ‘cultural heritage’ monuments, groups of buildings and sites ‘of special value’. The Declaration on the Responsibilities of the Present Generations Towards Future Generations speaks simply of ‘cultural heritage’, without elaborating, and the Universal Declaration on Cultural Diversity refers similarly to ‘heritage’.

In the end, however, it is not actually necessary to specify a priori the degree of cultural significance demanded before a given monument, building or site is considered cultural heritage in respect of which States and the UN are entitled to intervene. It need

112 See North Sea Continental Shelf Cases, above, n 18, at para 74.
113 As for UNESCO, a UN specialized agency, it is clear that the constitutional prohibition on its intervention ‘in matters which are essentially within [a Member State’s] domestic jurisdiction’ (Constitution of the United Nations Educational, Scientific and Cultural Organization, Art I (3)) does not prevent it from intervening to ‘assur[e] the conservation and protection of the world’s inheritance of . . . works of art and monuments of history’, in accordance with the mandate accorded it by Art I (2)(c) of its Constitution. In cases involving non-States Members of the Organization, the general permissive rule discussed in the text would still permit such intervention.
114 In the words of Baxter, once a matter has become the subject of even a ‘soft’ international norm, it ‘can no longer be asserted to be one within the reserved domain or domestic jurisdiction of the State’; RR Baxter, ‘International Law in “Her Infinite Variety”’ (1980) 29 ICLQ 549, at 565.
115 The Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, above, n 31, Art 4, chapeau and subsection (q)(i), limits itself to ‘the heritage of the past, and particularly ancient monuments’, excluding the architectural and artistic heritage.
simply be stated by way of a rule that States and the organs of the United Nations are not prevented by the prohibition on interference in the domestic affairs of a State from intervening diplomatically in defence of ‘cultural heritage’, as such, situated on that State’s territory. The threshold of cultural value demanded before a given monument, group of buildings or site is considered ‘cultural heritage’ for the purposes of the rule can be left as a matter of appreciation in each case. It is not fatal to the requisite norm-creating character of a rule that its applicability be a matter of judgment. Such is the case with countless rules; indeed, such is the case with the ‘outstanding universal value’ required by the World Heritage Convention.

The upshot is that, although it cannot be concluded that a State currently owes obligations to the international community as a whole in respect of cultural heritage situated on its territory, the international community as a whole, jointly and severally, is permitted by general international law to subject a State’s peacetime treatment of such heritage to scrutiny, comment and, where appropriate, criticism.

IV. CONCLUSION

In the event, then, all States—whether singly, in regional fora, or in the context of UNESCO or of UN organs—may intervene diplomatically if another State fails in time of peace to protect, conserve and transmit to future generations cultural heritage situated on its territory, regardless of whether they, or that State, are Parties to the World Heritage Convention. They may call on that State to care for this heritage, and protest if it fails to do so. They may not, however, compel preservation through judicial proceedings or countermeasures. The world’s cultural heritage is the proper concern of the international community as a whole but it is not yet, in peacetime, the object of obligations owed to that community.

The practical consequences of the distinction are, however, slight. As it is, the law of State responsibility is, in practice, an unlikely and ill-adapted mechanism for compelling a State to preserve cultural heritage situated on its territory. Jurisdictional hurdles make judicial proceedings notoriously difficult. As for countermeasures, it is unresolved whether they are available at all to those States invoking responsibility solely under Article 48 of the ILC’s Articles;\(^{116}\) and even if this were so, assessing proportionality\(^ {117}\) might pose a bar, given that simple reciprocity,\(^ {118}\) in the form of damage by other States to cultural heritage found on their respective territories, would be preposterous and possibly impermissible.\(^ {119}\) Finally,

\(^{116}\) See ARSIWA, Art 54 and ILC, above, n 9, commentary to ARSIWA Art 54, 350–5; Crawford, above, n 9, 54–6; M Koskenniemi, ‘Solidarity Measures: State Responsibility as a New International Order?’ (2001) 72 BYIL 337.

\(^{117}\) See ARSIWA, Art 51: ‘Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.’

\(^{118}\) Proportionality does not necessarily equate with reciprocity. That is, countermeasures need not involve the breach of an identical obligation. At the same time, reciprocity obviously makes the assessment of proportionality more straightforward.

\(^{119}\) Recall that deliberate damage by a state to cultural heritage situated on its territory constitutes a violation of the right to take part in cultural life recognized in Art 27 of the Universal Declaration and Art 15 of the ICESCR. In this light, depending on the interpretation of the word ‘fundamental’, countermeasures involving damage to cultural heritage might—although, it has to be said, probably would not—fall foul of the stipulation in ARSIWA, Art 50 (1)(b) that
and perhaps most saliently, a State’s responsibility can only be invoked once it has breached the relevant international obligation, and by then, in most cases of damage to or destruction of cultural heritage, it is too late.\textsuperscript{120} In light of all this, in the great majority of cases, diplomatic pressure would be the only practicable option. As such, given that States not party to the World Heritage Convention are, it appears, permitted to intervene diplomatically if another State fails, in time of peace, to preserve elements of the world’s cultural heritage situated on its territory, it scarcely matters in practice that they are not entitled to compel preservation through the invocation of State responsibility. Indeed, in practice, since diplomatic coercion is the only realistic course of action, it is perhaps immaterial that States which are Parties to the World Heritage Convention may, in principle, invoke another’s responsibility for failing to preserve this heritage.

\textbf{POSTSCRIPT}

At its 32nd session (29 September–17 October 2003), the General Conference of UNESCO adopted the Declaration concerning the Intentional Destruction of Cultural Heritage,\textsuperscript{121} as foreshadowed in its resolution of 2001 entitled ‘Acts constituting a crime against the common heritage of humanity’.\textsuperscript{122} Recalling both ‘the tragic destruction of the Buddhas of Bamiyan that affected the international community as a whole’ and ‘the principles of all UNESCO’s conventions, recommendations [and] declarations . . . for the protection of cultural heritage’; mindful ‘that . . . intentional destruction [of cultural heritage] may have adverse consequences on human dignity and human rights’; and mindful ‘of the development of rules of customary international law . . . related to the protection of cultural heritage in peacetime . . .’, the General Conference resolves in paragraph III (1) that States ‘should take all appropriate measures to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage, wherever such heritage is located’. It declares in paragraph VI that ‘[a] State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization, bears the responsibility for such destruction, to the extent provided for by international law’. The phrase ‘crimes against the common heritage of humanity’ is not founded in the text, although paragraph VII recommends that States ‘should’, in accordance with international law, provide for individual criminal responsibility in respect of the relevant acts. The Declaration’s hortatory language and Article VI’s use, in the light of the \textit{travaux préparatoires},\textsuperscript{123} of the phrase ‘to the extent provided for by international

\[\text{\textsuperscript{120}}\text{Although perhaps not too late to stop damage becoming destruction, in cases of deterioration or piecemeal harm.}\]

\[\text{\textsuperscript{121}}\text{Text on file with author.}\]

\[\text{\textsuperscript{122}}\text{See above, at 180.}\]

\[\text{\textsuperscript{123}}\text{See the resolution ‘Acts constituting a crime against the common heritage of humanity’, above at 180. More specifically, UNESCO Doc 31 C/46, para 6 (c) states that the Declaration ‘would not be intended to create obligations for States, but would restate the fundamental principles of the existing legal instruments . . .’.}\]
law’ make it clear that the General Conference is not suggesting that States currently owe customary peacetime obligations in respect of cultural heritage situated on their territory; rather, the Declaration is a restatement of the conventional droit acquis (as well as a resounding affirmation of an emergent political consensus). At the same time, by calling on States—and not just Member States—to prevent and stop intentional destruction of cultural heritage ‘wherever such heritage is located’, the Declaration recognizes that diplomatic mobilization for the benefit heritage threatened in a given State does not amount to unlawful intervention in that State’s domestic affairs.124

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124 In support of UNESCO’s own right to intervene, the preamble (third recital) to the Declaration cites Art I (2)(c) of the Organization’s Constitution.

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