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RtoP and Cultural Heritage

An analysis of the Responsibility to Protect Culture Heritage of an Outstanding Universal Value

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Introduction

The aim of this paper is to provide the reader with an overview of the emergent doctrine of the Responsibility to Protect populations from violations of humanitarian law, and to specifically analyze whether it exists a Responsibility to Protect Cultural Heritage. The First Chapter traces the history that brought to the adoption of this new concept through an analysis of all the relevant documents, underlines the efforts made by the international community to have this doctrine recognized, and eventually addresses the debates that have characterized the period following the adoption of the 2005 World Summit Outcome.

The Second Chapter assesses the existence of a responsibility to protect cultural heritage. Indeed, it is proved that violations of international law such as war crimes, crimes against humanity and genocide do encompass crimes against cultural heritage as well. Thus, when speaking of the obligation of States to protect their populations from the above mentioned crimes, it is meant that their cultural property and cultural heritage need to be protected as well. It is, in fact, inconceivable to consider cultural heritage of an outstanding universal value as something that is not in correlation with the human essence itself. From here, the acknowledgment that damage done to the cultural heritage of a country is a damage done to the humanity as a whole. The Chapter continues its analysis by examining the degree of implementation into domestic legal systems of the numerous international conventions signed and ratified by the international community. It is concluded that there exists a wide gap between the two levels, and it is due to this gap that many countries are not able to prosecute crimes made against their own cultural heritage. Such a case is presented by the ongoing Syrian conflict, where general and systematic attacks have been directed against the Syrian cultural property. On this regard, the Third Chapter seeks to assess whether international or national prosecution are

possible in cases where damage or destruction of cultural property have occurred. Given that the RtoP doctrine does not entail the criminalization of the failure by the State to protect its citizens from violations of humanitarian law, the question of who can be prosecuted for such acts arises. The solution that has been given and analyzed in the last part of the Chapter is to refer to individual criminal responsibility. In the Syrian case, criminal accountability can be achieved only on the grounds of the Antiquities Law, amended in 1999, and of the draft Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes signed in 2013. Any other international convention such as the 1954 Hague Convention proves inefficient. The Chapter concludes by stating that unfortunately neither international law nor domestic law fully provide for a clear and satisfactory solution to the accountability gap present when dealing with crimes committed against the common cultural heritage.

Chapter I - The Responsibility to Protect

To better understand the analysis of the specific situation of the Responsibility to Protect Cultural Heritage, this first chapter needs to go back to the roots of the norm: its emergence, definition, the main theoretical opinions about it and how they changed under the influence of different historical events. Everything that will be treated here will be useful to better comprehend the contemporary problem of ensuring protection of cultural property through the implementation of the Responsibility to Protect (from here on referred to as RtoP), a global political commitment that is now endorsed by the entire United Nations. As the Responsibility to Protect involves the State's obligation and responsibility under international law to protect its people from breaches of international humanitarian law, Chapter Two will also deal with the individual criminal responsibility for acts of destruction of cultural heritage.

1.1 The historical and legal emergence of the norm

Before analyzing the factors that brought to the rise of this new doctrine, we briefly need to recall the two basic principles enshrined in the United Nations Charter in order to fully understand the debate behind the use of the Responsibility to Protect as a reason of intervention. These two principles are namely the protection of human rights (art.1.3) and the prohibition of use of force (art.2.4). Article 2.4[1] excludes and prohibits the use of

[1] "4. All Members shall refrain in their international relations from 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." (UN Charter, San Francisco, 1945)

force in international relations to resolve disputes or achieve policy goals, and it is subject only to two exceptions: self-defence (art.51[2]), and collective security (art.39[3]). Chapter VII of the United Nations Charter, which includes the above-mentioned articles, sets out the UN Security Council's powers to maintain peace, and it allows the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to take military and nonmilitary action to "restore international peace and security". Therefore, the Council, and the Council only, is the main body in deciding whether to intervene or not in the internal affairs of a state by adopting a resolution. Chapter VII resolutions are often the first responses to a crisis which is demanded to end, and they may be followed by a subsequent resolution detailing the measures required to secure compliance with the first one in case peaceful measures prove to be insufficient. It is the case of the United Nations Security Council Resolution of 1950 on the invasion of South Korea by North Korea. In its Resolution 82, the Council demanded the Republic of North Korea to immediately end its incursion. Notwithstanding it, North Korea greatly ignored the document, a fact that brought the UN and the United States of America to take further action, setting the state for massive international involvement and the expansion of the Korean War. A more recent example of a coalition of states intervening for the sake of protecting civilians from abuses being perpetrated in their own country is the case of the armed intervention of 2011 in Libya undertaken by the NATO coalition.

[2] "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." (UN Charter, San Francisco, 1945)

[3] "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (UN Charter, San Francisco, 1945)

In applying Security Council resolution 1973[4] authorizing Member States to take "all necessary measures"[5] to protect civilians under threat, the coalition launched airstrikes against the forces of Gheddafi.

Both these cases prove that military intervention is always justified either by the right of self-defense and by general international law, by the consent of the state on whose territory atrocities are committed, or by the approval of the Security Council itself. However, when dealing with interfering with the sovereignty of another state on the only grounds of the "responsibility to protect" and on the necessity of safeguarding populations suffering a mortal danger, international law does not provide any help and remains silent. The UN Charter itself does not provide a clear-cut answer to the problem. Therefore, the question that needs to be addressed is to what extent, considering the prohibition of use of force on one hand and the protection of human rights on the other, can we conceive that a military intervention in order to stop mass violations of human rights is to be considered permitted under the current system of international law and under UN law.

The problem at stake can be addressed on a threefold basis. First, from the point of view of the Charter there are no exceptions to the prohibition of the use of force, except for those already explained (this school of thought is referred to as international legal positivism). Second, if it is decided to adopt a perspective which is different from the one of the UN Charter, one that instead looks at international law as it has developed outside the Charter, some argue that it has evolved towards accepting a limited resort to force when it is necessary to stop mass atrocities, given the always greater importance that human rights have come to acquire. We are thus here confronted with a divergence between the UN Charter, seen as a treaty system, and international law, seen as a set of customary rules and principles that may have a dynamic evolution outside the Charter (realist-constructivist theory). Lastly, more radical interpretations argue that any state

[4] *See* S/RES/1973 (2011)
[5] *See supra* note 4

becoming a massive violator of human rights is referred to as a "failed state", which therefore cannot invoke sovereignty any longer and should accept the military intervention to stop the human rights violations. This theory (generally known as natural law theory) is not a legal, but more a moral, political one that does not add much to the legal analysis of the intervention of force for humanitarian reasons[6].

1.1.1. From humanitarian intervention to the responsibility to protect

The question that arose among the international community after the massacres in Rwanda and the Balkans in the 1990s was how to effectively react when human rights are seriously and systemically being violated. The core dilemma is whether States have an unconditional sovereignty over their own affairs, or whether the international community has the right to intervene in a country for humanitarian reasons. While trying to address the problem, Article 39 of the Charter of the UN regarding the "threat to peace" began to be interpreted more broadly, as to encompass also the possibility of intervening in the internal affairs of a state in which there is not much of a threat to collective security,

[6] These approaches have been clearly explained in Francioni, F. and Bakker C., "Responsibility to Protect, Humanitarian Intervention and Human Rights: Lessons from Libya to Mali", *Transworld*, Working Paper 15, April 2013.

but rather a humanitarian crisis. This was the case, for example, of Somalia in 1992[7], or East Timor in 1999[8].

The issue became politically interesting and debated after the events of the Kosovo intervention in 1999, when a coalition of NATO states intervened in the conflict to stop the ethnic cleansing being perpetrated by the Milosevic government against Albanian rebels. At that time, the NATO intervention had not been authorized by the Security Council, despite all its efforts to pass a resolution that would allow humanitarian intervention. Indeed, the Council met the veto of the Russian Federation, which wanted to solve the conflict via diplomatic means. This event signaled the first time in which a military campaign was conducted without any kind of authorization nor legitimization by the United Nations. The driving force behind the NATO intervention was the principle of necessity, stating that the crimes being committed were so egregious that they were enough to render the incursion legal and legitimate. From here on the debate was kindled, and the doctrine of the responsibility to protect started to be treated as a new and progressive principle of international law.

[7] In 1991 a civil war broke out in Somalia, causing hunger and starvation to the population. On the 3rd December 1992, the Security Council, alarmed by the situation, passed Resolution 794, which created a Unitary Task Force (UNITAF) peace-keeping coalition under the directives of the United States, responsible for humanitarian aid and the restoration of peace in the country. The mandate provided for the use of "all the necessary means", including therefore also the use of force, in order to ensure the delivery of humanitarian aid.

[8] The East Timor crisis of 1999 took place during the occupation of the territory, wishing to get independence, by the Indonesian military forces. Violence spread quickly in the area, but after the International Force for East Timor (INTERFET), a multinational peacekeeping coalition established through Security Council Resolution 1264, deployed its military, Indonesia agreed to retreat and to allow an international administration, namely the United Nations Transitional Administration in East Timor (UNTAET) to rule Timor. The Resolution provided for the restoration of peace and security, allowing the multinational force to "take all the necessary measures to fulfill this mandate". UNTAET ruled for two years, at the end of which, on the 20th of May 2002, East Timor proclaimed its independence.

1.1.2. The theorization of the Responsibility to Protect

In the aftermath of these events, at the end of 1999, the UN Secretary General Kofi Annan stressed the need to focus the international attention on securing human rights globally, and on defining the limits of humanitarian intervention "as broadly as possible, to include actions along a wide continuum from the most pacific to the most coercive" (Annan, 1999). In his Millennium Report of 2000, the Secretary-General, recalling the failures of the Security Council to act in a decisive manner in Rwanda and the former Yugoslavia, put forward a challenge to Member States: "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violation of human rights that offend every precept of our common humanity?"[9] In response to Annan's query, the Canadian government established the International Commission on Intervention and State Sovereignty (ICISS) in 2000.

The Commission, in its report "The Responsibility to Protect", was the first body to introduce the expression "responsibility to protect". The report underlined that sovereignty does not only give the state the sole duty of controlling its own affairs, but it also puts on it a greater responsibility to protect the people inside its borders[10]. Moreover, it proposed that, when a state is no longer able to protect its own population, be it for lack of capacity or for lack of willingness, the responsibility shall be then taken on by the international community. It also outlined what the RtoP should entail, identifying three aspects: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild. The first one states that effective prevention must address "both the root causes and direct causes of internal conflict and other man-made crises putting populations at

[9] A/54/2000 (2000), sec. IV (C), para. 217.

[10] "State sovereignty implies responsibility, and the primary responsibility for the protection of people lies within the state itself." (Report of the ICISS, synopsis p. xi)

risk." (Synopsis, p. XI). On the other hand, the responsibility to react establishes a duty to "respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention" (Synopsis, p. XI). The last aspect of the RtoP is the responsibility to rebuild, aimed at providing, "particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert." (Synopsis, p. XI).
In 2004, the High-level Panel on Threats, Challenges and Change, set up by the Secretary-General Annan, approved the emergence of a norm of the responsibility to protect, stating that a collective international responsibility exists, exercisable by the Security Council, which allows military intervention as a last resort in cases of genocide, massacres, ethnic cleansing, and other grave breaches of international humanitarian law which sovereign governments have proven to be unwilling to prevent (Annan, 2004).

1.2. The World Summit Outcome, 2005

In 2005, the World Summit held in New York put together representatives of over 190 states to reflect on both the UN past successes and its future challenges. On that occasion, every Member State has formally accepted the responsibility of every country to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. More specifically, paragraph 138 of the World Summit Outcome document (A/RES/60/1) states that "each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity […] The international community should, as appropriate, encourage and help States to exercise this responsibility […]". Paragraph 139, moreover, adds that "the international

community, […], also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means to help protect populations […]" threatened by these crimes, specifying that when a state manifestly fails in its protection responsibilities, and peaceful means prove inadequate, the international community must take stronger measures, including the collective use of force authorized by the Security Council under Chapter VII "in a timely and decisive manner"[11].

Although these codifications seem to be an important step ahead regarding the implementation of RtoP, it needs to be stressed that the 2005 Summit Outcome has neither recognized a "right" of humanitarian intervention outside of the UN Charter, nor has it established a "duty" to do so within the Charter[12]. The novelty, however, lies in the possibility given to the United Nations, and particularly to the Security Council, of intervening militarily in situations of massive violations of human rights even if these do not constitute a threat or a breach of the peace. Under Chapter VII of the UN Charter, indeed, the Council is authorized to the use of force only in cases of a breach of peace.

From the outcome of the World Summit, many advancements have been made in the implementation of the RtoP doctrine. It is the case of two Security Council Resolutions addressing paragraphs 138-139 of the 2005 document, respectively S/RES/ 1674 (2006) on the protection of civilians in armed conflicts and S/RES/1706 (2006) authorizing the deployment of UN peacekeeping troops in Darfur. Regrettably, there have also been some impediments to the advancement of the RtoP agenda. Indeed, in 2007, the People's Republic of China and the Russian Federation vetoed a resolution on the situation of Burma, claiming that it did not pose a threat to international security and that the situation should have been referred to the Human Rights Council. This referral has posed some doubts about the underestimation by some of the Member States of the gravity of human

[11] *Ibid*

[12] Francioni, F. and Bakker C., "Responsibility to Protect, Humanitarian Intervention and Human Rights: Lessons from Libya to Mali", *Transworld*, Working Paper 15, April 2013

rights violations, as was also the case of great resistance by some countries to the adoption of Resolution 1769[13] on the deployment of a UN-AU force for Darfur. In the end, indeed, this resolution did not refer specifically to the Responsibility to Protect, with the great disappointment of the community of civil society and policymakers who had been working diligently to advance the norm.

1.3. UN General Assembly debates and dialogues on RtoP

1.3.1. *Implementing the Responsibility to Protect*, A/63/677 (2009)

In light of the difficulties and obstacles facing the implementation of the RtoP, it was clear that much work was still to be done in order to clarify and correctly interpret this new doctrine. In this regard, the UN Secretary-General Ban Ki-moon specifically held a speech called "Responsible Sovereignty: International Cooperation for a Changed World" in Berlin in July 2008, aimed at providing a "common understanding of what RtoP is and, just as importantly, of what it is not"[14], altogether with its challenges and his personal commitment to turn the doctrine into policy. Indeed, a few months later (January 2009) the Secretary released his first report on RtoP, namely "Implementing the Responsibility to Protect". In this document he conveys the historical, legal and political contexts of the mandate to implement the RtoP, and, basing his thought on paragraphs 138-139 of the 2005 World Summit Outcome, he delineates a strategy for advancing the UN agenda based on three fundamental pillars: the protection responsibilities of the state

[13] S/RES/ 1769 (2007)
[14] *Ibid*

(sect. II), international assistance and capacity-building (sect. III), and timely and decisive response to preventing breaches of human rights (sect. IV). More importantly, the Secretary-General urges the General Assembly to consider the strategy for implementing RtoP as prescribed in the report. In its section V the document also draws the attention to the role of early warning, and it makes suggestions regarding the way to proceed, hoping that the General Assembly may wish to consider them as part of its "continuing consideration" mandate under paragraph 139 of the World Summit Outcome. In defining the three-pillar strategy, Ban Ki-moon openly affirmed that they are of equal length and strength, and that there is no pre-established order which puts them into a sequence when the necessity to ensure an early and flexible response arises.

For the sake of clarity, it is necessary to dedicate a few paragraphs to each one of the three tenets. Pillar One stresses that States have the primary responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The Secretary General argues that this is the "bedrock" of the responsibility to protect, "the purpose of which is to build responsible sovereignty, not to undermine it."[15] One aspect of the responsible sovereignty is the so-called "politics of inclusion", where institutions, capacities and practices for the constructive management of the tensions are built. Being also the respect for human rights an essential element of responsible sovereignty, the Secretary-General invited Member States "to review what more they could do, individually and collectively, to implement their obligations under human rights law and to cooperate with the United Nations human rights mechanisms".[16] Pillar Two focuses on the commitment of the international community to provide assistance to states in building their own capacity to protect civilians from the crimes stated in paragraph 139 of the Summit Outcome, and to assist those "which are under stress before crises and

[15] Implementing the Responsibility to Protect, Report of the Secretary General - UN General Assembly, *Resolution 677 (2009) of 12 January 2009*, 12 January 2009, A/63/677, sect. II (13)
[16] *See supra* note 10, sect. II (16)

conflicts break out."[17] Four are the ways outlined by the Secretary-General in which assistance can be provided: encouraging States to meet their pillar one responsibilities; helping them to exercise those responsibilities; building the capacity of States to protect their populations from mass atrocities; and assisting States "under stress before crisis and conflict break out." While the first form of assistance implies persuading states to do what they should do, the other three suggest mutual commitment and an active partnership between the international community and the state.[18] As the first two sentences of paragraph 139 of the Summit Outcome[19] make unambiguously clear, Pillar Three is integral to the strategy of fulfilling the responsibility to protect. It is based on the ongoing and general responsibility of the international community to take action in a "timely and decisive manner" in cases where peaceful means are inadequate and "national authorities are manifestly failing to protect their population[20]". It is specified that this collective action be taken in accordance with the Security Council on a "case-by-case basis and in cooperation with relevant regional organizations as appropriate."[21] Pillar Three responses encompass pacific measures such as dialogue and peaceful persuasion, in addition to a wide range of non-coercive and non-violent responses under Chapters VI and VIII of the Charter. Should these prove inadequate, Chapter VII intervenes with coercive means.

[17] 2005 World Summit Outcome Document (UN A/RES/60/1, 24 October 2005), para.139
[18] Implementing the Responsibility to Protect, Report of the Secretary General - UN General Assembly, *Resolution 677 (2009) of 12 January 2009*, 12 January 2009, A/63/677, sec. II, para. 28
[19] "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 to 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 are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. […]", UN A/RES/60/1, para. 139
[20] *See supra* note 19
[21] *See supra* note 19

1.3.2. Further dialogues (2009-2015)

Subsequently to the issue of the "Implementing the Responsibility to Protect" Report, numerous debates and dialogues have been organized to establish ways of implementing the RtoP and to render it a policy to be introduced in national legislations, so as to not question its legal basis and significance anymore and easing its use in humanitarian crises. Taking note of Ban Ki-moon's report, the then President of the General Assembly, Dr. Ali Abdussalam Treki, organized a debate held on the 21, 23, 24 and 28 of July 2009. On the occasion, 92 Member States and 2 observers[22] spoke on RtoP, agreeing on the adoption of a resolution (A/RES/63/308, 2009) to continue the consideration of the norm. Perceiving the gaps in its development, between July 2010 and June 2011 the Secretary-General issued two reports on the RtoP, mainly dealing with the early warning and assessment and with the role of regional and sub-regional arrangements in the implementation of the Responsibility to Protect[23]. During his presidency, Ban Ki-moon released a total of seven reports about the doctrine, and each of them analyzed a different aspect of the matter. In 2012 the "Responsibility to Protect – Timely and Decisive Response" came out, focusing mainly on the third pillar of the RtoP. In 2013 the "State Responsibility and Prevention" was released, dealing with the responsibilities of states to protect their citizens by developing the necessary national capacity to build societies resilient to atrocity crimes. In 2014 the UN Secretary wrote a report on the second pillar of the responsibility to protect, namely "Fulfilling our collective responsibility: International Assistance and the Responsibility to Protect", where he highlighted various partnerships that could enhance the implementation of the RtoP. His last document, "A

[22] *See* http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/2493-general-assembly-debate-on-the-responsibility-to-protect-and-informal-interactive-dialogue- to view all the participants to the debate and their statements

[23] 2010 Report: *Early Warning, Assessment, and the Responsibility to Protect*; 2011 Report: *The Role of Regional and Sub-regional arrangements in Implementing the Responsibility to Protect*

Vital and Enduring Commitment: Implementing the Responsibility to Protect" published in 2015, dealt with the progression of the norm over the last ten years, identified core challenges and opportunities for implementation, and detailed six core priorities for the international community to undertake to fulfil the norm more effectively.

Much has been written on the subject, as it is shown by the chapters above. However, this does not have to induce the reader to think that there has been no practice at all of the implementation of the principle. There are, indeed, some Security Council Resolutions which need to be taken into account for the purpose of our analysis and in order to assess an emerging practice in intervening when human rights are in danger.

On 17 March 2011, the Council issued Resolution 1973[24] approving a no-fly zone above Libyan territory, calling for an immediate cease-fire and strengthening sanctions on the Muammar Qaddafi regime in the country. This resolution came after the Security Council Resolution in 1970[25] which had called upon Libya's "responsibility to protect" and referring the situation to the International Criminal Court, imposing initial financial sanctions as well as an arms embargo. Proven the inefficiency of these peaceful measures, the international community subsequently agreed to use "all necessary measures to protect civilians and civilian populated areas under threat or attack."[26] A few days later, being the internal situation of Côte d'Ivoire more and more dangerous, with the population suffering a greater escalation of violence after the presidential elections in 2010, the UN Security Council adopted with unanimity Resolution 1975 on the 30th of March[27]. The document solemnly condemned the grave breaches of human rights committed by supporters of the former and the present President, affirming "the primary responsibility

[24] S/RES/1973 (2011)
[25] S/RES/1970 (2011)
[26] S/RES/1973 (2011)
[27] S/RES/1975 (2011)

of each State to protect civilians"[28] and stressing "its full support given to the UNOCI[29], […], to use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence, […], including to prevent the use of heavy weapons against the civilian population.[30]"

An example of a resolution based on the second pillar of RtoP, rather than on the first or the third one as seen above, is Security Council Resolution 1996[31]. Welcoming the independence of South Sudan from Sudan on 9 July 2011, the Council established a UN peace mission in the country[32] with the aim of assisting the government in taking charge of the responsibility to protect civilians, stressing "the importance of institution-building as a critical component of peacebuilding."[33]

Chapter II - The Responsibility to Protect Cultural Heritage

Having addressed the issue of clearly defining what the Responsibility to Protect is, it is now time to further extend the topic to what regards the protection of cultural heritage. The following chapter will firstly spell out what cultural heritage is (or cultural property, as it will sometimes be referred to, depending on the context), it will subsequently acknowledge the problem of implementing international treaties into national legislations, and it will finally discuss the role of the State in the protection of its cultural heritage. State and individual criminal responsibility will be treated as well.

[28] S/RES/1975 (2011)
[29] United Nations Operation in Côte d'Ivoire
[30] *See supra* note 28
[31] S/RES/1996 (2011)
[32] United Nations Mission in the Republic of South Sudan (UNMISS)
[33] *See supra* note 31

2.1 Defining Cultural Heritage and promoting the need for its protection

Before outlining cultural heritage, it is necessary to acknowledge the difference between the latter and cultural property. There is no universally accepted definition of either of the two concepts. Scholars have written excellent studies on the differences between them[34], but besides the different views that might have been exposed, it is contented in this paper that cultural property of universal value falls within the broader concept of cultural heritage and deserves specific protection, also in terms of penal sanctions. The latter, in fact, reflects a more comprehensive understanding of the significance of culture for humanity as a whole, and it also places emphasis on its spiritual value as an element of cultural identity. It is therefore understood that the concept of cultural heritage does not only refer to tangible cultural property, but to intangible cultural heritage as well.

2.1.1. Tangible Cultural Heritage

According to Article 1 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, "cultural property" shall cover "moveable or immoveable property of great importance to the cultural heritage of every people […]; buildings whose main and effective purpose is to preserve or exhibit the moveable cultural property […]; centers containing a large amount of cultural property […]".
Two conceptions of cultural property can be identified: the "nationalistic" view sees cultural property as encompassing all objects located within the territory of a State. In

[34] *See* Frigo, "Cultural Property vs cultural heritage: A "battle of concepts" in international law?", 86 *IRRC* (2004) 367

both times of peace and war it is the state that retains the control over its own cultural goods. The second perspective, the "cosmopolitan" view, looks at cultural property not as an object but rather as a heritage of humankind, as living with an intangible living character.

Dealing with the nationalistic view, the first document containing a provision for the protection of cultural property was The Hague Convention (IV) of 1907 respecting the Laws and Customs of War on Land. Article 56 stated: "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."[35] Although being an important starting point, the above-mentioned article only lays the foundation for the protection of cultural property, for it does not give cultural goods immunity as such, but it rather groups them with hospitals and educational buildings, merely considering them as objects to be immune from acts of war. It is only subsequently, with the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict that cultural property came to acquire a special value under international law. This Convention was the result of the countless cases of theft, pillage and smuggling of works of art that characterized World War Two, and it is precisely on this occasion that the impetus of protecting cultural goods against the risk of disappearance and illicit traffic at international level gained strength. The Preamble to the 1954 Convention asserts: "Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world", it is necessary that this heritage receives international protection through both national and international

[35] Art. 56 thereto

measures.

Together with the Convention, two Protocols were signed in 1954 and 1999 respectively, the Second especially containing provisions for preventive measures to protect cultural heritage and to enhance that protection. This whole set of rules came to identify the duties of State Parties to adopt all those necessary measures to be taken during peacetime in order to safeguard cultural property in the event of an armed conflict. Examples of the measures stated in the Convention are the preparation of inventories, the removal arrangement of movable cultural property, and the designation of competent authorities responsible for its safeguarding. States Parties are asked to respect not only local cultural property, but also that which is located on the territory of other States Parties. Indeed, by specifying this, the Convention aimed at preventing the use of property and its immediate surroundings for those purposes that are likely to expose it to destruction or damage in the event of an armed conflict, as well as fostering to refrain from any act of hostility directed against such property.

With the purpose of strengthening this body of law, the international community subsequently met in Paris in 1970, and on the 14th of November of that year it adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. It encourages State Parties to undertake preventive measures against the illicit import and export of cultural properties, and it also calls them to compel with the restitution provisions thereby formulated. The signing of this Convention was initially opposed by the major market countries of the world for art (*see* Japan, USA, Netherlands, Germany, United Kingdom, for example), fearing the need to return objects that had been acquired and to fight the lucrative and prosperous underground market which stood behind the trafficking of cultural property items. It is, however, now ratified by 131 countries, and it specifically offers legal and political tools to be implemented in the national law as well as a broad and sustained international cooperation.

Subsequent treaties have followed since then, each of them addressing different aspects of the protection of cultural heritage and trying to bridge any gaps present in past documents. In 1995, for example, the UNIDROIT[36] Convention on Stolen or Illegally Exported Cultural Objects was adopted in Rome. Given that the Paris Convention of 1970 only dealt with public law and that it did not address the validity of ownership of a cultural object having been stolen or illegally exported, the 1995 Convention answers the private law issue. The question at stake there was what happens if a stolen cultural object is acquired in another country, and if the owner who has acquired it is innocently able to retain the title even if the good was stolen. Under Italian law, for instance, if a person in good faith acquires a stolen object and has a valid document that attests lawful acquisition, the good faith purchaser acquires the title[37]. It is however different in common law countries, where even the good faith purchaser is bound to return the object. The necessity of this Convention was, therefore, to establish some common rules for the acquisition of cultural objects, and one of its important principles is that every object illegally excavated is to be deemed as stolen if under the law of the land that illegal excavation is equated to theft.

The last important Convention for the protection of cultural property is the 2001 Underwater Cultural Heritage Convention, addressing the cultural property on sunken ships. However, for the purpose of this paper, the document will not be analyzed.

As has already been specified, cultural property does not only encompass moveable cultural objects, it also extends to those immoveable treasures such as monuments and historic centers located in a country. These kinds of goods are protected by the Convention concerning the Protection of the World Cultural and Natural Heritage,

[36] International Institute for the Unification of Private Law, an independent intergovernmental organization placed in Rome with the scope of modernizing, harmonizing and co-ordinating private and in particular commercial law among States, and at formulating uniform law instruments, principles and rules to achieve those objectives

[37] Italian Civil Code Art. 1153

adopted in Paris in November 1972. It is the most widely ratified convention on cultural property, since 191 countries are now party to it. It identifies a type of cultural property that is of outstanding universal importance[38], conveying the overcoming of national interests in the conservation and protection of cultural property. Indeed, the focus of the 1972 document moved towards a universalist perspective: it set up a system of cooperation which entailed the identification and presentation of sites which, given their esthetic, historical and artistic importance, are of such an outstanding universal value that they merit the inscription in the World Heritage List (UNESCO 1972, art. 11). Furthermore, it established a funding mechanism within UNESCO for the assistance and financing of programs, training, and conservation measures which all the parties are committed to keep, namely the World Heritage Fund (UNESCO 1972, art.15). What makes this convention very interesting is its bringing together both cultural and natural heritage, based on the assumption that nature and culture are not two separate planets in the human universe, but are rather two interacting concepts. In the World Heritage List, therefore, both cultural properties as well as natural heritages will be found.

The impetus that sparked the adoption of this Convention was very much due to some of the disasters which took place in some important cultural heritage centers. One of them was the Arno River flood in Florence in 1966, which killed hundreds of people and destroyed innumerable pieces of art and rare books. Same situation with the case of the Aswan High Dam completed in 1970 by Egypt, which flooded a large part of the area causing the relocation of over 100,000 people and the submersion of many archaeological sites. It is because of these events that the idea of organizing the protection of sites of cultural importance came about.

[38] "*Considering* that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole", Preamble to the 1972 Paris Convention

2.1.2. Intangible Cultural Heritage

After having done an overview of the treaties concerning tangible cultural heritage, it is desirable to also acknowledge the emergence of a new generation of rules for the protection of intangible cultural heritage. These rules are codified in the 2003 Convention for the Safeguarding of Intangible Cultural Heritage, where it is believed to have been moving from the Western idea of cultural heritage as material objects to the more Asian idea of the living expression of culture (i.e., dances, music, rituals, …). Article 2 thereto, indeed, defines intangible cultural heritage as "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage".

The Convention aims at working both at a national and international level. At the national level, State Parties are supposed to "take necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory[39]", and shall as well "endeavor to ensure the widest possible participation of communities, groups, and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management[40]". At the international level, it promotes international cooperation, including "the exchange of information and experience, joint initiatives, and the establishment of a mechanism of assistance" to other State Parties[41]. Furthermore, as artt. 16-17 thereby establish, the Committee of the Convention is responsible for the creation and the updating of two lists of intangible cultural heritage, namely the Representative List of the Intangible Cultural Heritage of Humanity, and the List of

[39] UNESCO 2003, art. 11
[40] UNESCO 2003, art. 15
[41] UNESCO 2003, art. 19

Intangible Cultural Heritage in Need of Urgent Safeguarding. Thereby it is possible to inscribe those traditions and cultural expressions that are of universal and significant importance to humanity[42]. An Intangible Cultural Heritage Fund was also set up[43], to which State Parties and the General Conference of UNESCO itself are asked to contribute.

Through this convention international cultural heritage protection becomes in close contact with international humanitarian law, for the safeguard of intangible cultural heritage now places a duty on states to ensure its viability[44]. A report on the right of access to, and enjoyment of, cultural heritage approved by the Human Rights Council in March 2011[45] provided, for the first time, an official endorsement of the notion that the cultural heritage is a proper subject for human rights. The report opens with the following statement: "As reflected in international law and practice, the need to preserve/safeguard cultural heritage is a human rights issue. Cultural heritage is important not only in itself, but also in relation to its human dimension, in particular its significance for individuals and communities and their identity and development process."[46] It is therefore important, in this process of merging cultural law with humanitarian law, that cultural communities get more involved in the various aspects of management, conservation and safeguarding of intangible cultural heritage.

In conclusion, it can safely be said that the *raison d'être* of the Convention is that the protection of intangible cultural heritage is not addressed to the safeguard of a national

[42] Italy, for example, among many others, has inscribed the art belonging to craftsmen in Cremona of making violins.
[43] UNESCO 2003, art. 25
[44] UNESCO 2003, art. 1
[45] Human Rights Council, *Report of the Independent Expert in the Field of Cultural Right, Farida Shaeed*, Human Rights Council Seventeenth Session Agenda item 3, 21 March 2011 (UN A/HR/C/17/38)
[46] *See supra* note 45, para 1

interest of each State, but rather to the conservation of a collective good of the international community taken as a whole[47].

2.2 The lack of implementation of the Conventions providing for its conservation

As it has been understood, international cultural heritage law is a newborn type of international law, and thus the way to enforce it and make it subject to domestic and international law is much more difficult than the traditional norms of other categories, such as human rights. The conclusion is that these norms remain extremely weak. It is the case of environmental law, where a variety of treaties has been signed but no international environmental court nor any specialized agency of the UN dealing with the environment have been established. The only authority which has been set up to delineate the global environmental agenda and to promote a coherent implementation of the environmental dimension of sustainable development within the United Nations system is the United Nations Environmental Program (UNEP), a product of the Stockholm UN conference[48]. Although being a motor of important treaties and providing the secretariat of important treaties, a big drawback of this program is its nature. Being only a program and not an established UN body, it depends on the funding of the United Nations. Whenever it will be decided to not contribute anymore to its activities, the program will die.
The fate of environmental law is also shared by international cultural heritage law, where a number of treaty systems that have been promoted by UNESCO but no *ad hoc*

[47] Francioni, F., "The Evolving Legal Framework for the Protection of Cultural Heritage in International Law", *Cultural Heritage, Cultural rights, Cultural diversity*, Borelli and Lenzerini eds. 1. Introduction Nijhoff publ. 2012
[48] United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972

mechanism of enforcement of norms and dispute settlement are established. Indeed, a general court does not exist which addresses issues related to cultural property and cultural heritage; they are redirected to the International Court of Justice (ICJ), which however has rarely had the opportunity of adjudicating such disputes. The lack of a specialized forum addressing the enforcement of cultural heritage norms and the paucity of cases brought before the ICJ is compensated by the so called "borrowed fora", meaning those dispute settlement mechanisms established for the implementation of other categories of international norms. Moreover, it needs to be underlined that national courts as well play a predominant role in accelerating the resolution of a cultural property dispute at the international or transnational level. However, aside from these small reparatory measures, the tragic events in areas such as the Balkans, Afghanistan, Iraq, Mali and, more recently, Syria, have proved the poor results of the efforts paid by the international community, especially UNESCO, to apply protective measures that would save cultural heritage from the violations of war.

The previously examined conventions lack an adequate sanction mechanism which encourages the implementation of their provisions. This is the case of the shelling of the World Heritage Site of Old Aleppo, despite Syria being a party to the 1954 Hague Convention. Besides this lack, we can list two other reasons that contribute to this problematic implementation. The first one refers to the politicizing of heritage, which has acquired great importance in conflicting political agendas aimed at making political, ethnic or religious gains. The second one corresponds to the "risk-avoiding" attitude usually adopted by UNESCO and its partners in their response to crises involving danger for cultural goods. The policy usually adopted is one that refrains from sending military-based commissions to the damaged areas in order to assess, evaluate and document the condition of the cultural assets. The International Council for the Blue Shield[49], indeed,

[49] Inspired by the 1954 Hague Convention, founded in 1996 to work for the protection of cultural heritage by coordinating preparations responding to emergency situations. The Second Protocol to the 1954

has rarely had the opportunity of intervening, and it was not able to interfere neither in Iraq nor in Syria.

In order to solve the problem at stake, a debate about the protection of cultural heritage in times of armed conflicts has been triggered, and calls for enforcing the protection of cultural heritage are increasing. However, these calls will be unheard if the international community, and UNESCO above all, will not step up to meet their responsibilities and regulate the protection of cultural heritage. This should be done without any political interference and acknowledging the failures of previous conventions, thus facilitating their overcoming. More specifically, the "risk-avoiding" attitude shall be dropped, and the role of the Blue Shield shall be strengthened through the establishment of fully equipped regional centers that are supported by trained teams. Most importantly, states parties to the above described conventions shall set new frameworks that will ensure the efficient protection of cultural heritage, since the only formulation of provisions does not provide *per se* for its protection.

2.3 Responsibility of the State and individual criminal responsibility

As it has been discussed in depth, the Responsibility to Protect consists of the obligation of States to protect their respective populations from genocide, war crimes, ethnic cleansing and crimes against humanity[50]. With regard to the destruction of cultural heritage, international law has recently established through a variety of treaties and

Convention refers to it as a nongovernmental organization with relative expertise to recommend specific cultural property to be included in the International List.

[50] A/RES/60/1 (2005), para 138

provisions that it may amount to war crimes, crimes against humanity, and to genocide as well.

According to the first perspective, Article 8(2) (b) (ix) of the 1998 Rome Statute of the International Criminal Court (ICC) defines "war crimes" as:

> "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."

In addition, Article 15 of the Second Protocol (1999) to the Hague Convention of 1954 agrees on defining a violation of the Convention any act which somehow damages cultural property[51]; eventually, the most recent acknowledgement in this perspective was the UN General Assembly Resolution of May 2015[52], affirming "that attacks intentionally directed against buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments, may amount to war crimes.[53]"

[51] Second Protocol to the Hague Convention of 1954, art.15: "1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:
a. making cultural property under enhanced protection the object of attack;
b. using cultural property under enhanced protection or its immediate surroundings in support of military action;
c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
d. making cultural property protected under the Convention and this Protocol the object of attack;
e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.
2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act."

[52] UN A/69/281 (2015)

[53] *Ibid*, para. 5

Moving to the second perspective, the International Criminal Tribunal for the former Yugoslavia (ICTY) sentenced that destruction of cultural heritage, "when perpetrated with the requisite discriminatory intent, amounts to an attack on the very (religious) identity of a people. As such, it manifests a nearly pure expression of the notion of "crimes against humanity", for all of humanity is indeed injured by the destruction of a unique (religious) culture and its concomitant cultural objects.[54]"

The third and last perspective relates destruction of cultural heritage to genocide when the former is perpetrated with the special intent of destroying in whole or in part a protected group[55] as such. As affirmed by the ICTY, such destruction may reveal the existence of the intent to commit genocide. Indeed, "attacks on the cultural and religious property and symbols of the targeted group […] may legitimately be considered as evidence of an intent to physically destroy the group"[56]. Therefore, in conclusion, acts of destruction of cultural heritage of a protected group amount to genocide when they are perpetrated with the clear special intent of destroying in whole or in part a protected group with respect to which the heritage concerned is an essential element of its identity.

Given these provisions, it can safely be said that the State's Responsibility to Protect its citizens from war crimes, crimes against humanity and genocide, also encompasses the responsibility to protect their cultural heritage.

It has already been argued in the previous chapter how the need to strengthen the scope and efficiency of the RtoP is preeminent to enforce such doctrine, but what are the concrete measures that a State may adopt to promote RtoP given its obligation? An excellent initiative would be that of establishing safe havens and protected cultural zones in those areas that would expose cultural heritage to attacks. Such a measure could be effectively implemented by the creation of the so-called "Cultural Blue Helmets", a

[54] ICTY, *Prosecutor v. Kordic & Cerkez*, Case IT-95-14/2-T, Trial Chamber, Judgement of 26 February 2001, para. 207

[55] Namely, national, religious, ethnical, racial (Rome Statute, art. 6)

[56] ICTY, *Prosecutor v. Krstic*, Case IT-98-33-T, Trial Chamber, Judgement of 2 August 2001, para. 508

proposal advanced by Italy and approved by UNESCO Executive Board in November 2015[57], which would allow those peace-keeping forces to work in culturally-damaged areas with tasks that are both operational and of training. Other operational measures may imply awareness-raising and education, prevention, training of experts and military personnel, creation of inventories and more.

Since the State's RtoP does not entail *per se* the penal responsibility in cases of failure to fulfill this obligation, the matter of criminalizing the wrongful act of destroying cultural heritage has always been addressed by referring to individual criminal responsibility. The paper will thus now expose the grounds on which an individual may be held criminally responsible for wrongful acts against cultural heritage. The question to be addressed is whether the individuals who performed the acts of destruction of cultural heritage may be held responsible under international law and, consequently, be prosecuted for those acts.

In order for those individuals to be processed under international law, two elements need to be satisfied: the "objective" element of the conduct leading to the internationally wrongful act, and the "subjective" element related to the conduct of that person to be held accountable under international law. As for the objective element, the destruction of cultural heritage must be considered an act for which individuals can be punishable under international law. Recalling the analysis made in the previous chapter, it was concluded that destruction of cultural property may amount to war crimes, crimes against humanity and genocide. For all these crimes against the peace and security of humankind, international law has set up norms punishing individuals responsible for such acts. It derives, therefore, that the deliberate destruction of cultural heritage of outstanding value is to be included among those crimes that trigger the international criminal liability of the individuals who commit them. As for the "subjective" element of the crime, the material

[57] UNESCO 197 EX/10, para. 52

executors of a crime which entails individual responsibility, are those primarily responsible for those acts under international law. In this respect, the role of UNESCO is fundamental in helping national and international courts, in particular the International Criminal Court (ICC), to the proper functioning of justice. The recent bringing of the Al Faqi case[58], still now pending, before the ICC is to be applauded. It regards the prosecution of an alleged member of Ansar Dine, the Islamist group which between June and July 2012 devastated the ancient city of Timbuktu in Mali, and the indicted person is specifically accused of war crimes, namely of intentionally directing attacks against historic monuments and/or buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, all of which are of invaluable cultural value.

It can be concluded that the mere doctrine of RtoP cultural heritage is still very weak, and feasible measures to protect such heritage have not yet been taken by countries. However, the criminalization and punishment of its damage and/or destruction can be considered as a valid starting point that may discourage future perpetrators. Indeed, prosecutions serve justice, and they help in building more solid documentation which will assist future trials. This set of new proceedings will then eventually help the protection of cultural heritage for future generations.

Chapter III - The case of Syria

Until now, the focus of this paper has been to analyze the theory behind the concept of the RtoP cultural heritage, but the aim of the present chapter will now be to specifically deal with Syria's world cultural heritage. In the past years, from the start of

[58] ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15

the conflict, the country has suffered major damages to five of its six world heritage sites, and extensive looting of several of its archeological sites inscribed in the Syrian Tentative List of World Heritage. Based on these grounds, the following chapter will examine the fate of Syria's heritage during the conflict, it will assess the country's obligations under international law and whether there have been any violations, and it will conclude by determining whether individuals responsible for wrongful acts against cultural heritage can be prosecuted and punished.

3.1 The conflict and its impact on cultural heritage

Syria has been the country of birth to many civilizations: the Arameans, the Phoenicians, the Romans, all of which remarkably left signs of their passage in the form of the now recognized "cultural heritage". Starting from its independence from France in 1946, the country has undergone long periods of political instability, and since 2000 it has been ruled by Bashar Al-Assad. Religious differences have since then characterized his leadership, given the Alawite majority of the government and the Sunni predominance of the population. However, it was not these religious counterparts that sparkled the conflict, it was rather the quest for political change advanced by young citizens that started the social uprisings in 2012 which then escalated into a non-international armed conflict. Restating that the country can be considered one of the most important states for the presence of invaluable cultural goods, when the conflict broke out the problem of protecting such a heritage came about.

Syria has six world heritage sites, all of them included in the List of World Heritage in Danger in 2013, and they are: the Ancient City of Damascus, the Ancient City of Bosra, the Site of Palmyra, the Ancient City of Aleppo, *Crac des Chevaliers* and *Qal'at Salah*

El-Din, as well as the Ancient Villages of Northern Syria. With the exception of Damascus, damages have been reported in all other five sites and to other twelve properties part of the Tentative List, including Ebla, Apamea, Dura Europos, and Mari Sites[59]. Because of these events, the UN Security Council has issued Resolution 2139 (2014) calling on all parties to the Syrian conflict to "save Syria's rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria's World Heritage Sites.[60]"

The Syrian conflict was initially of a political nature, thus the damages caused to its cultural property were mainly due to the heat of the battle and to the general breakdown of the rule of law. However, as time passed by, the conflict took a religious shape, with the Sunni extremists joining the rebels in opposing the secular regime of Bashar Al-Assad. Thereafter, the proclamation of an "Islamic State" spanning to Syria and Iraq.

Its aim is to establish a new caliphate based on religious authority where, among other things, the signs of the cultural and religious heritage of the so-called "infidels" will be erased. The destruction of cultural property, here, takes on a new meaning: that of an ideological destruction. It may be appropriate to define it as a phenomenon of "iconoclasm", where the destruction of specific religious and symbolic buildings for a religiously motivated purpose takes place (Cunliffe, 2016). It needs to be stressed that not only is such demolition of the traces of past cultures an important feature of the Islamic State, but an essential source of its income is also represented by the illicit trade of antiquities.

In conclusion, the total devastation of the cultural patrimony of the country is of a worrying dimension, and measures should be taken to prevent and protect those sites.

[59] *see* American Association for the Advancement of Science, "Ancient History, Modern Destruction: Assessing the Current Status of Syria's World Heritage Sites Using High-Resolution Satellite Imagery", Washington, D.C., September 2014

[60] UN S/RES/2139 (2014)

This is the reason why the following paragraph will analyze Syria's obligations under international and national law to protect its own cultural property.

3.2 Syria's obligations

3.2.1 International law

Syria has signed a number of international conventions regarding the protection of cultural property. According to the 1969 Vienna Convention on the Law of the Treaties, States Parties who sign, but do not ratify, a treaty have expressed their willingness to ratify it, and are therefore obliged to "refrain from acts which would defeat the object and purpose of the treaty[61]." If a State declares its intention to not becoming a party to the treaty in question, then its obligation ends. This is, though, not the case of Syria.

As discussed before, the main treaties concerning cultural property are the 1954 Hague Convention (ratified by Syria) with its additional 1954 First Protocol (ratified) and the 1999 Second Protocol (signed, but not ratified). Syria was, thus, already at the time of the conflict, a State party to the Hague Convention. Of other international relevance are the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (ratified), and the 1995 UNIDROIT Convention (unfortunately not signed).

Under the 1954 Convention, in the event of non-international conflicts such as the Syrian one, the signatories are bound to respect the obligations formulated in Article 4, namely refraining from using cultural property as well as its surrounding "for purposes which are likely to expose it to destruction or damage", and to refrain from "any act of hostility

[61] 1969 Vienna Convention, art. 18

directed against such property[62].” The same Article also invites the parties to the conflict to “prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.[63]” Given these set of rules, a number of acts are considered as violations of the “object and purpose” of such treaties. For example, the military use of strategic locations such as citadels, of high mosque minarets as sniper positions (such as the Abu Bakr Mosque in Daraa), and even the use of churches and museums as training camps and filed hospitals, amounts to acts of hostility directed against cultural property and to its exposure to damage and destruction, constituting a breach of the above mentioned Article.

Under the 1970 Convention, “the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit.[64]” To note is that the cultural objects at stake here are only the stolen inventoried objects. This provision renders harder the task of punishing the illicit export of Syrian antiquities not only because not all museum collections have been inventoried, but also because it is difficult to prove that objects have been pillaged from Syria.

Although ratified, these international conventions have not been implemented into national legislation, thus having no supporting state infrastructure.

3.2.2 National law

The following paragraph will assess whether Syrian national legislation is more accurate in protecting the cultural heritage of the country.

[62] Art. 4.1 thereto
[63] Art. 4.3 thereto
[64] Art. 11 thereto

Under Syrian domestic law, violations involving cultural property are tried under the 1963 Antiquities Law, amended in 1999. It is composed of six Chapters, dealing with moveable and immoveable objects, excavations and other general provisions. The ownership of such objects of cultural value belongs to the State[65], and it is thus the State that retains the right and duty to oversee the conservation. Under Article 7, "it is prohibited to destroy, transform, and damage movable and immovable antiquities by writing on them, engraving them, or changing their features, or removing parts of them.[66]" Sanctions are provided for those actions that go against cultural property and they range from fines to imprisonment. Moreover, unlike the Hague Convention, the Antiquities Law explicitly recognizes the crime of looting.

What is interesting about the Syrian Antiquities Law is the fact that it addresses a particular aspect of the protection of cultural property that has not been covered in any international convention: the massive displacement of people due to ongoing conflicts. Syria is now facing an enormous transmigration of people obliged to abandon entire villages, who, desperate for shelter, usually occupy ancient archeological sites, as well as underground tombs, adapting them to their lives. The result of this resettlement in such areas has led to the construction of new buildings that violate the protected landscape, to the removal of archeological material from these sites, to rubbish and looting. The most affected areas are those surrounding the city of Aleppo and Bosra (World Heritage Site), where "the residents found the right moment to push through illegal projects (construction in protected area), and it is difficult to assess today the extent of their illegal actions.[67]" Although no international document covers the topic, under Article 7 of the Antiquities Law destroying and transforming cultural sites is a crime that could be tried. However,

[65] Antiquities Law, art. 4
[66] Art. 7 thereto
[67] World Heritage Committee 2013, 115

given the lack of any alternatives for accommodation and shelter of these refugees, it is questionable whether these crimes will be prosecuted.

3.3 Prospects of criminal accountability

It has already been alleged that the failure by the State to protect its population from war crimes, crimes against humanity and genocide, encompassing also the responsibility to protect cultural heritage, does not entail any criminalization of the state. However, it has been shown that individuals can, indeed, be held accountable for destruction or damage to cultural heritage. This section will specifically analyze the grounds on which these wrongdoers may be tried for violations against Syria's world cultural heritage.
Pursuant to the 1954 Hague Convention,

> "the High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.[68]"

Although the above Article clearly specifies the necessity of introducing into national legislations provisions for the penalization of acts that defeat the purpose of the Convention, the lack of the mandatory establishment of universal jurisdiction over offenses of such document diminishes the prospects of holding criminals accountable. Indeed, Syria suffers a general lack of implementation of the above article into its own

[68] Art. 28 thereto

domestic legislation, which impedes national justice to prosecute perpetrators under the Hague Convention.

Given such an important failure, the International Criminal Court (ICC) could intervene, and indeed, in 2013, 58 countries asked the UN Security Council that the ICC begin an investigation into war crimes in Syria. However, the request was rejected by the veto of some Security Council permanent members who conveyed that the ICC intervention might have had jeopardized the chances for a peaceful solution in the country.

The core problem of involving the jurisprudence of the ICC is not only the fact that it is considered as a last resort, intervening only when national courts have failed, but also its lack of imposing criminal liability for acts which fall under the scope of Article 8 dealing with destruction of cultural property. Furthermore, although Syria has signed the Rome Statute in 2000, it has not ratified it. The only case, then, in which the ICC could impose its jurisdiction is whether Syria declares its acceptance or the UN Security Council refers the issue to the Court. However, given the divisions surrounding the Syrian situation at the Security Council, such action is unlikely. It was for this reason that on 27 August 2013 the Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes was signed, better known as the "Chautauqua Blueprint". Such Tribunal would have jurisdiction on war crimes consisting of:

> "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.[69]"

This Article, though, proves inefficient on three grounds. On the first one, its definition of objects of cultural value goes back to the 1907 IV Hague Regulations, thus not taking

[69] Art. 20 (d) (4) thereto

into account the progresses made since then in defining cultural property. Secondly, while the essence of all cultural property conventions has been to create a treatment for it that would be above that reserved for civilian objects, the Chautauqua Blueprint fails to acknowledge such a difference. In conclusion, the Statute lacks a complete list of acts defined as violations of cultural property. Indeed, crimes such as looting are not comprised in it.

For all that has been stated until now, it seems like international law fails to protect Syrian cultural heritage, but there is some degree of hope that domestic courts could bring justice under the Antiquities Law. Nonetheless, legitimate doubts arise that prosecution of crimes could be done under the "victor's justice", given that national courts will start again their functioning only once the conflict is over. And even if prosecution is made, it needs to be taken into account the difficulty in identifying the perpetrators. What should not be forgotten, indeed, is the extremely chaotic situation the country is facing, with a plurality of actors and groups involved in the conflict and with the state retaining few control over some specific areas.

This being the reality of facts, state cooperation would be essential, but it is highly unlikely that this would happen any soon.

Conclusions

The purpose of this paper has been to try to analyze the history of the new born concept of the Responsibility to Protect (RtoP), trying to extend it to the protection of cultural heritage while also attempting to understand how effective it is.

Ten year after its formal adoption, the doctrine of the RtoP still remains a vague and incomplete project. Indeed, within this period of continuous threats to international security, the international arena has hardly had the possibility or the willingness to take "all necessary measures" to protect civilians against war crimes, crimes against humanity and genocide. The disaster of the Kosovo war is a clear example of the failure of the international community, and namely of the UN Security Council, which has the power of deploying military personnel in cases where missions of peace keeping are required, to take action. Given the veto posed by Russia on the authorization of military intervention in the area, a humanitarian catastrophe was not avoided, and the NATO by itself resolved unilaterally to undertake a military campaign without the Security Council authorization in order to protect civilians who had been subject to massive violations of human rights.

The main problem at the heart of the RtoP is the possibility of the use of force should all other pacific measures prove to be void. The balance between the two fundamental principles of the UN Charter, namely the prohibition of the use of force and the protection of human rights, still has to be found, and, until that moment, the implementation of the Responsibility to Protect will be difficult to achieve.

After having retraced the various documents and resolutions concerning the RtoP, the paper has moved to the core topic of the responsibility to protect cultural heritage. Having defined destruction of cultural property as amounting to the war crimes, crimes against

humanity and genocide, the concept of RtoP consequently extends to the responsibility to protect cultural heritage. However, if with the broader doctrine of the RtoP problems and critiques about its implementation were in the forefront, the RtoP cultural heritage is even more difficult to be actualized. Indeed, if with the former the use of force has sometimes been authorized, with the latter it tends to be excluded since human lives are deemed to have more importance than cultural property. In this regard, it is only recently that UNESCO has approved a strategy[70] to include a cultural heritage component in UN peace-keeping forces' training and operations.

The gap of accountability with regards to the criminalization of acts of destruction against cultural heritage is one of the major issues addressed in the paper. Indeed, the RtoP only bears the duty of States to protect their populations from the crimes mentioned above, it does not entail criminal accountability, which should instead be specifically and clearly outlined in international and national systems. Indeed, it is unconceivable that perpetrators of crimes such as looting, illicitly excavating, damaging and destroying cultural heritage manage to not being prosecuted.

Having established that there are international grounds on which wrongdoers can be prosecuted for these acts, the paper has attempted to analyze the current Syrian conflict and the impact on its vast and invaluable cultural heritage. Unfortunately, criminal accountability for acts that go against the safeguard of Syrian cultural heritage can be achieved only through the domestic Antiquities Law and the Chautauqua Blueprint, given that all other relevant international conventions have either not been signed or not been ratified and implemented into national legislation. However, neither of the two sources of national law are capable of fully expressing the degree of the wrongful act or to deliver justice in a broader way.

[70] UNESCO 2015, 7, point 35

It is clear, then, that an accountability gap concerning acts of destruction of cultural heritage exists, and given the specific moment we are living, where extensive and systematic destruction, damage and looting of cultural objects has been taking place, this gap is perceived to having become wider. Within the particular case of Syria, where political opinions are very dissenting among the permanent members of the UN Security Council, it has been shown how cases cannot even be referred to the International Criminal Court (ICC), generally considered fully independent and the last resort for obtaining justice. Indeed, knowing that cases must either be referred to the ICC by Syrians or by the UN Security Council, and having acknowledged that both these alternatives are hardly feasible, a new path for the criminalization of the offences at stake must be drawn. Following this pattern, in 2013 the Chautauqua Blueprint was signed, a draft Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes. This *ad hoc* tribunal, similar to what the International Criminal Tribunal for the former Yugoslavia (ICTY) is, shall focus exclusively on the Syrian situation. However, many critiques have been addressed to this new body. Besides the problems in defining a new legal framework, recruiting personnel and ensuring state cooperation, its neutrality has been questioned. Indeed, not only would this Tribunal sit in Damascus, but it would also be presided by a majority of Syrian judges.

In order to counter the above mentioned accountability gap, it is common opinion that the idea of crimes against common cultural heritage should be re-introduced. Solutions to be taken for effectively establishing these crimes have been suggested by Lostal[71]. In her article, the Lecturer in International Law at the Hague University explains how the World Heritage Committee should include in its agenda the matter at stake and eventually adopt a broader definition of such crimes. Following the suggestions made by Francioni and

[71] Lostal M., "Syria's World Cultural Heritage and Individual Criminal Responsibility", *International Review of Law,* 2015:3 http://dx.doi.org/10.5339/irl.2015.3

Lenzerini in their article[72], Lostal also agrees on the adoption of a criminal universal jurisdiction which would allow states to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, and regardless of the accused's nationality. In this way, problems like those that have arisen in Syria would be overcome.

In concluding this paper, it needs to be strongly stressed and emphasized that offences against cultural property should not only be regarded in the context of the Syrian conflict, but they shall rather be seen as a threat the whole modern society is facing. Damage done to the cultural heritage of a country is indeed a damage done to the humanity as a whole, and efforts to protect such heritage and to try those responsible for its destruction should be therefore regarded as a humanitarian effort.

[72] Francioni, F. and Lenzerini F., "The Destruction of the Buddhas of Bamiyan and International Law", 14 Eur. J. Int'l L. 619, 621 (2003)

Italian summary

Negli ultimi anni, il patrimonio culturale di molti stati colpiti da conflitti interni o internazionali ha subito danni ingenti non solo per il carattere intrinseco di una guerra che prevede lo sgretolamento di ogni struttura legale, ma anche per l'intenzionale volontà di distruggere icone di valore culturale inestimabile per il solo motivo di eliminare la testimonianza di quella determinata civiltà. E' questo il caso della Siria, dove il suo immenso patrimonio culturale viene quotidianamente compromesso ormai da cinque anni da gruppi di estremisti religiosi facenti parte dell'auto proclamato Stato Islamico, rievocando l'antico concetto di iconoclastia (Cunliffe, 2016), ovvero la distruzione di specifiche opere, monumenti ed edifici sacri e simbolici per motivi politico-religiosi.
Per questa ragione, la presente Tesi si pone l'obiettivo di suscitare il reale interesse morale, culturale e politico verso la tutela del patrimonio artistico e monumentale quale ricchezza fondamento della civiltà contemporanea. Ci si baserà sulla teorizzazione della cosiddetta RtoP, *Responsibility to Protect*, sostenuta nel *World Summit Outcome* del Settembre 2005, nata dal riconoscimento del fallimento della comunità internazionale nel rispondere adeguatamente ai crimini più atroci che hanno caratterizzato gran parte degli anni Novanta, come il genocidio Ruandese e la guerra nei Balcani.
Successivamente a questi eventi, tutti gli attori della scena internazionale hanno iniziato a discutere seriamente su come reagire di fronte a violazioni sistematiche così gravi dei diritti umani. La questione al centro del dibattito era se gli Stati avessero una sovranità incondizionata sui propri affari interni, o se la comunità internazionale potesse, in caso di gravi infrazioni del diritto umanitario, intervenire in un paese per ristabilire i principi della legalità. Di fatto, la teoria della RtoP si pone tra i due elementi fondamentali della Carta delle Nazioni Unite, ovvero il rispetto per i diritti umani (art. 1.3) e il divieto

dell'uso della forza (art. 2.4). Trovare un equilibrio tra i due non è stato semplice, e tuttora rappresenta motivo di dissenso al momento di poter implementare questa dottrina. Tuttavia, attraverso una lunga serie di Rapporti dei Segretari Generali delle Nazioni Unite, Kofi Annan prima e Ban Ki-moon poi, e di conferenze internazionali, nel 2005 tutti i rappresentanti degli allora 191 Stati Membri delle Nazioni Unite si sono riuniti a New York per prendere posizione su temi importanti quali sviluppo, sicurezza, diritti umani e sulla riforma generale del sistema ONU. Durante questo Summit tutti i Paesi hanno formalmente accettato la definizione di *Responsibility to Protect*. Nello specifico, la RtoP è stata definita sulla base di tre principi (paragrafi 138-139). Il primo punto stabilisce la responsabilità primaria dello Stato di proteggere la popolazione da genocidio, crimini di guerra, pulizia etnica e crimini contro l'umanità. Il secondo, decreta il dovere della comunità internazionale di assistere gli altri Stati nell'attuare questo principio e, come terzo punto, qualora i mezzi diplomatici, umanitari e pacifici adottati risultassero vani, la comunità internazionale stessa deve essere preparata a intraprendere in "modo tempestivo e decisivo" misure più severe, quali anche l'utilizzo della forza. L'impiego di tali misure deve essere fatto in accordo con il Consiglio di Sicurezza dell'ONU e in conformità con la Carta delle Nazioni Unite.

E' necessario sottolineare che il vertice del 2005 non ha né riconosciuto un "diritto" di intervento umanitario al di fuori della Carta delle Nazioni Unite, né ne ha stabilito un "dovere". La novità tuttavia, sta nella possibilità data all'ONU, e in particolare al Consiglio di Sicurezza, di intervenire militarmente in situazioni di evidenti violazioni dei diritti umani, anche qualora questi non costituiscano una minaccia o una violazione della pace. Ai sensi del Capitolo VII della Carta delle Nazioni Unite, infatti, il Consiglio è autorizzato all'uso della forza solo in caso di tale violazione.

Dallo svolgimento di questo vertice mondiale, molti progressi sono stati compiuti nell'attuazione della teoria della RtoP. E' il caso di due risoluzioni del Consiglio di Sicurezza che si riferiscono ai paragrafi 138-139 del documento del 2005,

rispettivamente, S/RES/674 (2006) sulla protezione dei civili nei conflitti armati, e S/RES/1706 (2006) che autorizza il dispiegamento di truppe di pace ONU in Darfur. Purtroppo però, gli ostacoli alla sua implementazione non sono mancati. Nel 2007, infatti, la Repubblica Popolare Cinese e la Federazione Russa hanno posto il loro veto su una risoluzione riguardante la situazione in Birmania, sostenendo che essa non costituisse una minaccia per la sicurezza internazionale e che la situazione avrebbe dovuto essere rinviata al Consiglio dei Diritti Umani. Tale rinvio ha posto alcuni dubbi circa la sottovalutazione da parte di alcuni degli Stati Membri della gravità delle violazioni dei diritti umani, così come la grande resistenza da parte di alcuni paesi all'adozione della Risoluzione 1769 (2007) sul dispiegamento di una forza congiunta ONU-Unione Africana per il Darfur. Alla fine, infatti, la Risoluzione non fa riferimento specificamente alla *Responsibility to Protect*, creando grande disappunto tra la comunità della società civile e politica che aveva lavorato per far avanzare la norma.

Avendo affrontato la questione del definire con chiarezza ciò che la *Responsibility to Protect* è, la presente Tesi intende estendere ulteriormente l'argomento alla tutela del patrimonio culturale.

Numerose Convenzioni tutelano e stabiliscono la protezione del patrimonio culturale sia in tempo di pace che di guerra. Già nel 1907 la Convenzione dell'Aja (IV) su leggi e usi della guerra terrestre stabiliva, nel suo Articolo 56, che ogni sequestro, distruzione o danneggiamento intenzionale di istituti, monumenti storici, opere d'arte e di scienza, fosse proibito e dovesse essere punito. Ma è solo in seguito, con la Convenzione dell'Aja del 1954 sulla protezione dei beni culturali in caso di conflitto armato, che questi acquisiscono una priorità all'interno del diritto internazionale. Risultato di innumerevoli casi di furto, saccheggio e contrabbando di opere d'arte che hanno caratterizzato la Seconda Guerra Mondiale, questa Convenzione rappresenta lo slancio verso la protezione dei beni culturali contro il rischio di scomparsa e contro il loro traffico illecito a livello internazionale. Il suo Preambolo afferma: "I danni arrecati ai beni culturali, a qualsiasi

popolo essi appartengano, costituiscono danno al patrimonio culturale dell'umanità intera, poiché ogni popolo contribuisce alla cultura mondiale". A tale scopo, è necessario che questo patrimonio riceva protezione attraverso misure sia nazionali che internazionali. Esempi concreti indicati nella Convenzione sono la preparazione di inventari, la disposizione della rimozione dei beni culturali mobili, e la designazione delle autorità competenti responsabili per la sua salvaguardia.

Altre Convenzioni si sono succedute a quella del 1954, come la Convenzione concernente le misure da adottare per interdire e impedire l'illecita importazione, esportazione e trasferimento di proprietà di beni culturali del 1970, o quella del 1972 sulla protezione del patrimonio culturale e naturale dell'umanità che identifica un tipo di bene culturale che è di straordinaria importanza universale, trasmettendo il superamento degli interessi nazionali nella conservazione e tutela di tali beni. In effetti, l'attenzione del documento del 1972 si sposta verso una prospettiva universalistica, istituendo un sistema di cooperazione che comporta l'identificazione e la presentazione dei siti che, data la loro estetica, l'importanza storica e artistica, hanno un valore intrinseco così eccezionale da meritare l'iscrizione nella Lista del Patrimonio Mondiale (UNESCO 1972, art. 11). Stabilisce, inoltre, un meccanismo di finanziamento all'interno dell'UNESCO, il Fondo del Patrimonio Mondiale (UNESCO 1972 art.15), per l'assistenza e il finanziamento di programmi, formazione e misure di conservazione che tutte le parti si impegnano a mantenere. Ciò che rende questa Convenzione molto interessante è il suo riunire il patrimonio culturale e naturale, basandosi sul presupposto che la natura e la cultura non sono due aspetti distinti dell'universo umano, ma piuttosto due elementi che interagiscono tra loro.

A questa Convenzione segue quella dell'UNIDROIT del 1995 sul ritorno dei beni culturali rubati o illecitamente esportati, e nel 2001 viene riconosciuto come appartenente al patrimonio culturale anche quello subacqueo, conclamato attraverso la Convenzione sulla protezione del patrimonio culturale subacqueo. Il 2003 vede la consacrazione a

patrimonio culturale anche quello immateriale attraverso la Convenzione sulla sua protezione.

Da quanto si evince da questi documenti, il concetto di diritto internazionale riferito ai beni culturali è molto difficile da veicolare come parte integrante del diritto nazionale ed internazionale rispetto alle tradizionali categorie più riconosciute come i diritti umani. Pertanto queste norme rimangono poco efficaci, non essendo stato ancora nemmeno individuato un tribunale a cui potersi appellare per il loro riconoscimento e rispetto. Tale debolezza è da attribuire alla mancanza di un meccanismo sanzionatorio adeguato, non chiaramente stabilito in nessuna delle Convenzioni citate fino ad ora.

Avendo riconosciuto che esistono delle regole a tutela del patrimonio culturale (anche se non completamente acquisite all'interno dei sistemi legali domestici), e ritornando allo scopo principale di questa Tesi, si evidenzierà come sia opportuno parlare di una *Responsibility to Protect* il patrimonio culturale dell'umanità. Come è già stato discusso, la RtoP consiste nell'obbligo degli Stati di proteggere le loro rispettive popolazioni dal genocidio, crimini di guerra, pulizia etnica e crimini contro l'umanità. Per quanto riguarda la distruzione del patrimonio culturale, il diritto internazionale ha recentemente stabilito attraverso numerosi trattati e disposizioni che questa potrebbe equipararsi a crimini di guerra, crimini contro l'umanità, così come al genocidio.

Secondo la prima prospettiva, l'Articolo 8 (2) (b) (ix) dello Statuto di Roma del 1998 della Corte Penale Internazionale (CPI) definisce "crimini di guerra" come:

> "Dirigere intenzionalmente attacchi contro edifici dedicati al culto, all'educazione, all'arte, alla scienza o a scopi umanitari, a monumenti storici, a ospedali e luoghi dove sono riuniti i malati ed i feriti, purché tali edifici non siano utilizzati per fini militari."

Inoltre, l'Articolo 15 del Secondo Protocollo (1999) della Convenzione dell'Aja del 1954 è d'accordo nel definire come una violazione della Convenzione qualsiasi atto che in

qualche modo danneggi i beni culturali; infine, il più recente riconoscimento di questa prospettiva è stata la Risoluzione dell'Assemblea Generale dell'ONU di Giugno 2015 (UN A/69/281) che afferma che "gli attacchi intenzionalmente diretti contro edifici dedicati al culto, all'educazione, all'arte, alla scienza o a scopi umanitari, o monumenti storici, possono costituire crimini di guerra."

Passando al secondo punto di vista, il Tribunale Penale Internazionale per l'ex Jugoslavia (ICTY) ha dichiarato che la distruzione del patrimonio culturale, quando perpetrata con l'intento discriminatorio, è pari a un attacco all'identità di un popolo. Come tale, essa identifica il concetto puro di "crimini contro l'umanità", ovvero di persecuzione, poiché tutta l'umanità viene colpita dalla distruzione di una cultura e dei suoi beni culturali.

Il terzo ed ultimo punto di vista mette in relazione la distruzione di tale patrimonio con il genocidio nel caso in cui essa venga perpetrata con lo speciale intento di distruggere, in tutto o in parte, un gruppo protetto in quanto tale. Come afferma l'ICTY, questa distruzione può rivelare la reale intenzione di commettere genocidio. Infatti, gli attacchi mirati alla distruzione dei beni e dei simboli di tale gruppo, possono legittimamente essere considerati la prova di un intento di eliminare fisicamente il gruppo stesso. Pertanto, si può concludere che gli atti di distruzione del patrimonio culturale di un gruppo protetto corrispondono a genocidio quando perpetrati con l'intento speciale di distruggere in tutto o in parte un gruppo protetto rispetto al quale il patrimonio in questione è un elemento essenziale della sua identità. Alla luce di queste disposizioni, si può affermare che la responsabilità dello Stato di proteggere i suoi cittadini da crimini di guerra, crimini contro l'umanità e genocidio, comprende anche la responsabilità di proteggere il loro patrimonio culturale.

Dal momento che la RtoP dello Stato non comporta di per sé la responsabilità penale in caso di omissione di tale obbligo, la questione della criminalizzazione della distruzione illecita del patrimonio culturale è sempre stata affrontata con riferimento alla responsabilità penale individuale. Prendendo in considerazione il caso della Siria, si nota

come negli ultimi anni, dall'inizio del conflitto, il paese abbia subito gravi danni a cinque dei suoi sei siti riconosciuti quali patrimonio mondiale dell'UNESCO, e sia stato vittima di saccheggio in molti dei suoi siti archeologici iscritti nella Lista Propositiva del Patrimonio Mondiale. Purtroppo, la responsabilità penale per fatti che vanno contro la salvaguardia del patrimonio culturale della Siria può essere perseguita solo attraverso la Legge nazionale sulle Antichità e il "Chautauqua Blueprint", dato che tutte le altre convenzioni internazionali pertinenti non sono state firmate o non sono state ratificate e implementate nella legislazione nazionale. Tuttavia, nessuna delle due fonti di diritto domestico è in grado di esprimere pienamente il grado di atto illecito o di applicare giustizia in maniera più ampia. E' chiaro, quindi, che un vuoto di responsabilità per quanto riguarda gli atti di distruzione del patrimonio culturale esiste, e dato il momento particolare che stiamo vivendo, in cui una distruzione ampia e sistematica, danneggiamento e saccheggio dei beni culturali ha luogo, questo divario diventa più ampio. La situazione particolare della Siria, verso la quale le posizioni politiche sono molto discordanti all'interno degli stessi Membri Permanenti del Consiglio di Sicurezza delle Nazioni Unite, fa sì che i fatti non possano essere deferiti alla Corte Penale Internazionale (CPI). Stabilito che i casi debbano essere presentati dalla nazione coinvolta o dal Consiglio di Sicurezza, e riconoscendo che entrambe queste soluzioni sono difficilmente realizzabili, deve essere tracciato un nuovo percorso per il riconoscimento della natura criminale dei reati stessi.

A sostegno di questa idea, nel 2013 è stato firmato il cosiddetto "Chautauqua Blueprint", un progetto per la costituzione di un tribunale straordinario abilitato alla persecuzione di crimini atroci commessi in Siria. Molte critiche sono state rivolte a questo nuovo istituto. Oltre ai problemi di definizione di un nuovo quadro giuridico, del reclutamento di personale e della cooperazione degli Stati, è stata messa in discussione la sua intrinseca neutralità. Infatti, non solo questo tribunale dovrebbe aver sede a Damasco, ma verrebbe anche presieduto da una maggioranza di giudici siriani. Il vuoto di giurisdizione di cui

sopra, quindi, esiste, ed è opinione comune che l'idea di crimini contro il patrimonio culturale comune debba essere riconosciuta e rivalutata.

Sono state suggerite alcune soluzioni da adottare per perseguire in modo univoco questi crimini, come ad esempio l'inclusione nell'agenda del Comitato del Patrimonio Mondiale di tale questione e l'adozione di una definizione più ampia degli stessi. Una giurisprudenza universale penale, inoltre, andrebbe codificata, in modo che gli Stati siano in grado di procedere penalmente nei confronti dell'accusato indipendentemente dal luogo dove il reato è stato commesso e a prescindere dalla nazionalità dell'imputato. In questo modo, le criticità emerse nella gestione del problema siriano, sarebbero automaticamente superate.

In conclusione, è necessario evidenziare che i reati commessi contro il patrimonio culturale devono essere considerati una minaccia per l'intera società moderna. La distruzione della memoria storica di uno stato attraverso l'eliminazione dei suoi monumenti implica necessariamente il depauperamento di quella civiltà che si riconosce attraverso i simboli che nel tempo ha costruito. La distruzione dei siti lede il sentimento di sicurezza dei popoli che vedono aggredite in modo violento e irreversibile le loro memorie, e aumenta il loro senso di pericolo e di instabilità insinuando sentimenti inconsci di aggressività e di autodifesa. Un danno arrecato al patrimonio culturale di un paese è un danno arrecato alla umanità nel suo insieme, e gli sforzi per proteggere tale patrimonio e per processare i responsabili per la sua distruzione devono essere quindi considerati come uno sforzo umanitario.

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