PREVENTING CULTURAL HERITAGE DESTRUCTION AND THE RESPONSIBILITY TO PROTECT

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I. Introduction

Over the past two decades the international community has witnessed the unlawful destruction of cultural heritage. In response, the United Nations General Assembly has stated that it was *appalled* by the destruction of sites such as the Buddhas of Bamiyan,[1] *concerned* by the attack and the looting of the Iraqi Museum, and it even *unequivocally condemned*[2] the increasing frequency of horrifying terrorist attacks undertaken by the Islamic State.[3] Despite the United Nations General Assembly continually expressing its outrage after each incident, it was not until recently that the International Criminal Court ("ICC") took steps to hold those responsible for cultural heritage destruction accountable.

In September of 2016 the ICC, in *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, prosecuted Mr. Al Mahdi for war crimes,[4] finding

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[1] G.A. Res. 9858 (Mar. 9, 2001).

[2] S.C. Res. 2249, ¶1 (Nov. 20, 2015).

[3] *See, e.g.*, Marina Lostal, *The systematic destruction of cultural heritage at the hands of the Islamic State*, GLOBAL POLICY FORUM (Mar. 9, 2015), https://www.globalpolicy.org/component/content/article/144-bibliographies/ 52745 -the-systematic-destruction-of-cultural-heritage-at-the-hands-of-the-islamic-state. html (discussing the destruction of Hatra); Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, NAT'L GEOGRAPHIC, (Sept. 1, 2015), http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/ (discussing, inter alia, the destruction of the Temple of Baalshamin in Palmyra in 2015).

[4] Rome Statute of the International Criminal Court, art. 8(2)(e)(iv) U.N. Doc. A/CONF.183/9 (Jul. 17, 1998) [hereinafter *Rome Statute*] (entered into force Jul. 1, 2002):

that he had directed an attack on "buildings dedicated to religion, education, art, science or charitable purposes or historic monuments."[5] The ICC analyzed the scale, nature, manner and impact of these attacks finding that they "appear to [have] shocked the conscience of humanity"[6] and that "the attacked sites [are] 'part of the indivisible heritage of humanity.'"[7] This marked the first case in which the ICC sought to penalize the destruction of cultural heritage sites. In the process, the ICC demonstrated that the international community is willing to act in response to the targeted destruction of cultural heritage. However, there remains a lingering question, despite preventing impunity, at least in some cases: what could, or perhaps should, be done by the international community as a way to preserve cultural heritage *before* it is destroyed? More specifically, could some sort of intervention be a justifiable preventative measure?

> 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 the *Al Mahdi* Case, the ICC defined the elements of this crime this way:

> 1. The perpetrator directed an attack.
> 2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, *historic monuments*, hospitals or places where the sick and wounded are collected, which were not military objectives.
> 3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were *not military objectives, to be the object of the attack.*
> 4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
> 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment and Sentence, ¶13 (Sept. 27, 2016) (emphasis added).

[5] *Id*. at ¶109.

[6] *Id.* at ¶157.

[7] *Id.* at ¶159.

In late November 2015,[8] the United Nations Educational, Scientific and Cultural Organization ("UNESCO") met to discuss possible responses to cultural heritage destruction and strategies for preserving these sites recommending, in part, that the "Responsibility to Protect" ("R2P") doctrine could provide guidance and serve as a useful tool for States to apply to prevent further destruction of the world's cultural heritage. Drawing on this passing suggestion by UNESCO, this paper will seek to understand the practicability of this approach by analyzing the development of R2P, the legal validity of applying R2P to the destruction of cultural heritage, and provide some preliminary analysis on the potential benefits, and consequences, of using R2P to prevent cultural heritage destruction.

Part One will analyze the history of R2P both generally, by looking at its development and application within the U.N. System regarding humanitarian crises broadly, as well as with respect to how R2P has begun to enter UNESCO conversations.

Part Two will then turn to the feasibility of using R2P in the field of cultural heritage. This will proceed on two fronts: first, it will look at the text of R2P as incorporated into the U.N. System through General Assembly Resolution 60/1; and second, it will look to see if, even if it is reasonable to find cultural heritage destruction as one of the enumerated justifications for intervention, this incorporation really can be read as in line with the object and purpose of R2P.

Part Three will demonstrate why it is that current mechanisms for cultural heritage protection are insufficient preventative measures. It will then turn to the possible benefits and consequences of using R2P as a method of cultural heritage protection. To evaluate the potential implications of using R2P, this paper will look at three specific cases: the looting of the Iraqi Museum, the current attacks on cultural heritage in Syria by the Islamic State and the Taliban's destruction of the Bamiyan Buddhas in 2001. These three cases will help to show how R2P could be

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[8] U.N. EDUC., SCI. AND CULTURAL ORG. [UNESCO], EXPERT MEETING ON THE 'RESPONSIBILITY TO PROTECT': FINAL REPORT (Nov. 26-27, 2015), http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/meetings-and-conferences/november-expert-meeting-responsablity-to-protect/ [hereinafter *UNESCO Expert Meeting*].

applied, as well as demonstrate some of the possible negative consequences should R2P be used as the justification for intervention to protect cultural heritage sites.

Through these examples, this paper will seek to answer the question of what, if anything, could be gained by using R2P for cultural heritage protection. Furthermore, it will demonstrate some of the reasons why this expansion of R2P may be a useful tool not only for the revival of this doctrine within the United Nations, but also as a way to promote international cooperation to protect global or universal heritage sites in spaces that are frequently ignored until after the damage has already occurred.

II. Defining R2P

R2P was developed by the International Commission on Intervention and State Sovereignty ("ICISS") in December 2001[9] and finalized, in part, by the 2005 World Summit.[10] It was designed to protect populations from: genocide, war crimes, ethnic cleansing and crimes against humanity.[11] To accomplish this goal States are expected to take on the responsibility to prevent, react and to rebuild[12] through a process called the Three Pillar Structure.

Under Pillar One, every state has the responsibility to protect its own population from the four mass atrocity crimes; Pillar Two entrusts the international community with the responsibility to encourage and assist individual states to meet this responsibility; and under Pillar Three, if a State is manifestly failing to protect its population, the international community must be prepared to take appropriate collective action.

Despite this call for action, R2P, strictly speaking, does not modify the Article 2(4) U.N. Charter prohibition of the use of

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[9] International Commission on Intervention and State Sovereignty [ICISS], Responsibility to Protect (2001), http://responsibilitytoprotect.org/ICISS%20 Report.pdf (last visited Mar. 27, 2018) [hereinafter *ICISS R2P Project*].

[10] G.A. Res. 60/1 ¶¶138-139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

[11] *Id.* at ¶138.

[12] ICISS R2P Project, *supra* note 9.

force.[13] Nonetheless, as the Third Pillar notes, R2P does promote the idea that it may be necessary for States take on the responsibility to protect directly rather than only waiting for the U.N. Security Council.[14] This argument was made most strongly by the ICISS report where the Commission went so far as to argue that regional blocks of States should be able to intervene even absent Security Council authorization in the name of "collective self-defense." However, the final version of R2P adopted by the General Assembly Resolution still requires Security Council authorization for military intervention.[15]

It is important to remember that while the ICISS report is useful for guidance in understanding R2P, it does not in any way modify the binding nature of the U.N. Charter. As such, decisions to intervene pursuant to Chapter VII of the U.N. Charter still rest with the Security Council. However, R2P does introduce the idea that the international community, and States specifically, arguably also have an obligation to help not only their own populations, but also to prevent other populations from experiencing genocide, war crimes, ethnic cleansing and crimes against humanity when their home state is unable or unwilling to do so.[16] Whether this comes through making recommendations to the Security Council for intervention, or pushing for what has been argued as the "humanitarian exception" to Article 2(4), there may be a role for states to act directly in humanitarian circumstances.

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[13] U.N. Charter, art. 2 ¶ 4.

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[15] ICISS R2P Project, *supra* note 9, at VIII.

[16] G.A. Res. 60/1, *supra* note 10, at ¶139; *see also* ICISS R2P Project, *supra* note 9, at 47-56 (arguing more strongly that, consistent with the UN Charter, States and at the least regional organizations of States should have the capacity to intervene in instances where the criteria for R2P are met and the Security Council has failed to act).

A. The Relationship between R2P and Article 2(4)

There are, broadly speaking, two potential avenues for R2P to be applied in the context of cultural heritage preservation: (1) through the direct support of the United Nations, most likely through authorization by the Security Council; or (2) by states directly, either alone or acting as regional blocks. Because there is little question that U.N. Security Council authorization would be permissible,[17] this section will look to see what validity there is to the ICISS proposition that States, especially when acting as a regional block should be able to intervene, in special circumstances, pursuant to R2P.

One suggestion put forward by scholars is that, despite not being found expressly in the U.N. Charter, humanitarian intervention may nonetheless be an obligation *erga omnes partes*. To support this proposition, it may be useful to look to the International Court of Justice (ICJ) *Barcelona Traction* case which held that "such obligations derive . . . from the outlawing of acts of aggression, and of genocide as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[18] Thus, "[i]n the event of material breaches of such obligations, every other state may lawfully consider itself legally injured and is thus entitled to resort to countermeasures against the perpetrator."[19] The question remains: is it possible for cultural heritage destruction to fall into one of these *internationally wrongful acts*? And, if so, would intervention for protective means be an acceptable countermeasure?

The International Law Commission (ILC) in its commentaries to the Draft Articles on Responsibility for Internationally Wrongful Acts does not directly deal with the possibility of a legal humanitarian intervention; however, it does

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[17] *See, e.g.*, S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

[18] Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 33, ¶¶33-34 (Feb. 5).

[19] Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects,* 10 EUR. J. INT'L L. 1, 2 (1999).

discuss the possibility of whether a "legal regime of serious breaches [of peremptory norms] is itself in a state of development."[20] That said, this would require the destruction of a cultural heritage site being considered a *jus cogens* violation, which is unlikely. Article 26 of the Draft Articles provides a non-exhaustive list of *jus cogens* norms including "the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination."[21] Even though this list is expressly non-exhaustive, it is unlikely that, given the lack of state practice, or really even any clear development of criminal enforcement for cultural heritage destruction over the years that cultural heritage destruction *currently* could rise to a preemptory norm from which no derogation would be permissible.

Furthermore, the ICJ has continued to affirm that there is no authority for unilateral humanitarian intervention in customary international law or in the U.N. Charter[22] and so even if the destruction of cultural heritage could be considered a violation of *jus*

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[20] Int'l L. Comm'n, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts,* 53rd Sess., art 19 (2001), *reprinted in Report of the Internationally Law Commission on the Work of its Fifty-Third Session,* U.N. GAOR, 55th Sess., Supp. No. 10, U.N. Doc. A/56/10, at 292, (2001).

[21] *Report of the International Law Commission on the Work of its Sixty-Sixth Session*, U.N. GAOR, 66th Sess., Supp. No. 10, U.N. Doc. A/69/10, at 275, (2014).

[22] *See, e.g.*, Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 35, (Apr. 9) (stating that the "Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law." Intervention is "perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to preventing the administration of international justice itself."); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.CJ. 106, 202, 205 (June 27) (finding that "[t]he principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law" and that "[t]he principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States."); *see also* Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25 ETHICS & INT'L AFF. 293, 293 (2011) (discussing the simultaneous legality and illegality of an exception to article 2(4)).

cogens, it is nonetheless unlikely to independently justify intervention.[23]

As such, it is more likely that if there is a route to preventative intervention, it would need to be through a humanitarian exception to Article 2(4) of the U.N. Charter. This approach argues not that it is legal *per se* to intervene for humanitarian purposes, but rather that this would constitute an excusable breach.[24] Likewise, Harold Koh, former Legal Adviser of the U.S. Department of State, has argued that "under highly constrained circumstances . . . a nation could lawfully use or threaten force for genuinely humanitarian purposes, even absent authorization by a U.N. Security Council resolution."[25] This has been the line of thinking most frequently used to justify the Kosovo intervention in the late 1990s[26] and while useful, it leaves open the question of who determines when a breach should be excusable, and seems to risk establishing a post-hoc rule where intervention will be judged based on subsequent effectiveness rather than clearly identifiable preemptive factors.

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[23] *But c.f.* Daphné Richemond, *Normativity in International Law: The Case of Unilateral Humanitarian Intervention*, 6 YALE HUM. RTS. & DEV. J. 45, 48-50 (2003) (discussing the academic debate regarding the existence of a customary norm with respect to the legality of unilateral humanitarian intervention).

[24] *See, e.g.*, Legality of Use of Force (Yugoslavia v. Belgium), (*Provisional Measures*), pleadings of Belgium, May 1999, CR99/15 (indicating that States condoning the actions the intervention in Kosovo should not be understood as creating a precedent to condone intervention); SIMON CHESTERMAN, *Just War or Just Peace? Humanitarian Intervention, Inhumanitarian Non-Intervention, and other Peace Strategies, in* JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 219, 230 (2002) ("the circumstances in which the law may be violated are not themselves susceptible to legal regulation"); *cf.* Oona Hathaway et al., *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign*, 46 CORNELL INT'L L. J. 499, 523-527 (2013).

[25] Harold Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY, (Oct. 2, 2013). https://www.justsecurity.org/1506/koh-syria-part2/ (last visited Sept. 29, 2017).

[26] Alex Bellamy, *Ethics and Intervention: The 'Humanitarian Exception' and the Problem of Abuse in the Case of Iraq*, 41 J. PEACE RES., 131, 136-138 (2004); *see also* U.N. SOCR, 54th Sess., 3988th mtg. at 3, 12, 15-16, U.N. Doc. S/PV.3988 (Mar. 24 1999) (noting impressions of illegality by the Russian Federation, China, Belarus, India with respect to the NATO operation in Kosovo).

For example, had NATO intervention in Kosovo resulted in a complete collapse of the State, could it still be viewed as unlawful, but excusable? Or, is part of its "acceptability" perhaps tied to the ultimate success of the mission in stabilizing the region. Koh has argued that there must be some sort of exception in catastrophic humanitarian situations primarily because of the "systemic dysfunction that bars the U.N. from achieving its stated goals" (citing Syria as a particularly palpable example where the persistent Russian veto has prevented action).[27] This concept has also been supported by Louis Henkin who argues that there are four factors that should be used to determine if collective action is legal absent Security Council authorization namely: extreme gravity of the human rights situation; collective humanitarian action; prior Security Council unavailability, and subsequent Council monitoring.[28]

Following this logic, Koh has argued that it may be possible to read Article 2(4) of the U.N. Charter as not necessarily providing the Security Council with *exclusive* responsibility to authorize force, but with the *first* responsibility to act.[29] Under the criteria laid out in the three pillar structure of R2P and keeping in mind the ICISS framers intent, in cases where the Security Council then fails to act, it may be permissible in particular circumstances to allow for States to invoke R2P not so much as an instance of *lawful* intervention, but rather, States would claim an ex-post exception from legal wrongfulness.[30] While States may or may not adopt this approach independently in practice, understanding the role that R2P could play in the context of cultural heritage is nonetheless useful to determine whether or not the emerging push by UNESCO is one that should be lauded, or if it is more likely to be impracticable, either doctrinally speaking, or if used in practice, R2P could result in more harm than

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[27] Koh, *supra* note 26.

[28] *Id*.

[29] *Id*.; *see also* U.N. SOCR, 54th Sess., 3988th mtg. at 18-19, U.N. Doc. S/PV.3988 (Mar. 24 1999) (where Mr. Sacirbey of Bosnia and Herzegovina argues for the necessity defense with respect to military intervention in Kosovo stating that, while "[m]ilitary force is never a welcome option . . . it is sometimes the best [and] the only alternative among many bad options.").

[30] Koh, *supra* note 25.

good and should therefore not be supported by States.

Therefore, even though States may not use R2P absent U.N. Security Council authorization, the fact that UNESCO has begun to push for R2P to be on the table for the Security Council indicates that it may still be useful to determine if the tools of R2P could even be used, regardless of whether States could independently act alone or regionally. Furthermore, the fact that R2P has been frequently discussed by the U.N. General Assembly indicates that it is a tool that States are willing to consider when evaluating potential courses of action. Therefore, even if States are not interested in embracing a more expansive route for intervention, via either a humanitarian exception, or drawing on the ICISS attitude that R2P-based intervention could be independently legal, understanding the legitimacy of R2P in the field of cultural heritage protection remains a useful endeavor.

B. R2P and Its History with the United Nations

The U.N. has in many ways supported the use of R2P as a tool for determining when humanitarian intervention would be a justifiable encroachment on State sovereignty. Since 2005, when the U.N. first incorporated R2P via resolution 60/1, the U.N. has directly expanded the role States have with respect to R2P on several occasions. For example, in 2009 the Secretary General provided guidelines for implementing the responsibility to protect,[31] later issuing more express guidelines on state responsibility.[32] In 2016, the Secretary General went on to discuss how to best mobilize for collective action over the next decade, drawing on the principles of R2P.[33] These actions seem to support an emerging trend in accepting the use of force in the context of humanitarian crises; or, at the very least, point to a general desire by the international community to acknowledge that, at times, international intervention into a State's domestic affairs may be necessary to prevent or end some type of

[31] G.A. Res. 63/677 (Oct. 7, 2009).

[32] G.A. Res. 67/929-S/2013/399 (Jul. 9, 2013).

[33] G.A. Res. 70/999-S/2016/620 (Aug. 17, 2016).

human rights violation or other humanitarian catastrophe.

Despite the number of discussions regarding R2P in the General Assembly, there has only been one time that R2P was expressly invoked by the U.N. Here the Security Council supported the implementation of R2P to justify intervention into Libya in Resolution 1973.[34] Specifically the Security Council was "willing to authorize the use of force for human protection purposes…against the wishes of the host state."[35] NATO and several key allies, including Qatar and Jordan, interpreted Resolution 1973 "as providing the basis for a wide range of military activities," ultimately resulting in the overthrow of the Qaddafi regime.[36] While these actions were arguably permissible according to the plain meaning of Resolution 1973, they were nonetheless inconsistent with many of the principles embedded within R2P, such as proportional means,[37] and have been heavily criticized as demonstrating why the use of R2P could be dangerous for State sovereignty and general principles of non-intervention.

In the immediate aftermath of the Libyan intervention, R2P was gutted of much of its credibility.[38] Because many States found that NATO, and in particular the United States, overstretched

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[34] S.C. Res. 1973, ¶¶4-5 (Mar. 17, 2011)

[35] Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection?* 87 INT'L AFF. 837, 846 (2011).

[36] *Id.* at 845.

[37] ICISS R2P Project, *supra* note 9, at XII; *see also* James Pattison, *Perilous Noninterventions? The Counterfactual Assessment of Libya and the Need to be a Responsible Power*, 9 GLOBAL RESP. TO PROTECT 291, 224-225 (2017) (arguing that the failure of R2P in Libya was due, in part, to the lack of fully embracing the *rebuilding* prong of R2P);

[38] *See, e.g.*, David Rieff, *R2P, RIP,* N.Y. TIMES (Nov. 7, 2011), http://www.nytimes.com/2011/11/08/opinion/r2p-rip.html (last visited Sept. 29, 2017); Ed Cairns, *R2P RIP? Painful Reflections on a Decade of 'Responsibility to Protect'*, OXFAMBLOGS (Sept. 11, 2014) http://oxfamblogs.org/fp2p/r2p-rip-painful-reflections-on-a-decade-of-responsibility-to-protect/ (last visited Sept. 29, 2017); *but see* Kristen Ainley, *From Atrocity Crimes to Human Right: Expanding the Focus of the Responsibility to Protect*, 9 GLOBAL RESP. TO PROTECT 243, *246*-247 (2017) (arguing that the failure of R2P to motivate action does not indicate the end of the doctrine noting, e.g. the existence of R2P language in 50 U.N. Security Council resolutions).

permissible measures and assisted in regime change, R2P was branded as a tool to justify Western intervention for political purposes rather than humanitarian ones.[39] The consequence of this branding has been felt in the Syrian context where despite the ongoing humanitarian crisis the Security Council has not authorized humanitarian intervention nor has it even brought R2P or its principles into discussions on permissible international responses to this crisis.[40] Even without States expressly calling for the use of R2P, various actors within the U.N. System have continued to speak about the potential utility in using R2P as a doctrine to support humanitarian intervention.[41] In particular, UNESCO has expressly argued that R2P can, and should, be applied to the protection of cultural heritage in armed conflict.[42] Despite this policy push, UNESCO has yet to provide much analysis on whether or not this application of R2P would be legally sound nor does it address the potential shortcomings from R2P.

As such, the next section of this paper will analyze R2P as applied to cultural heritage preservation. Specifically, it will argue that the use of R2P in this field is legally sound both textually and in light of its object and purpose.

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[39] *Id.*; Sarah Brockmeier, Oliver Stuenkel & Marcos Tourino, *The Impact of the Libya Intervention Debates on Norms of Protection*, 30 GLOBAL SOC'Y 113, 114.

[40] Francesco Francioni & Christine Bakker, *Responsibility to Protect, Humanitarian Intervention and Human Rights: Lessons from Libya to Mali*, (Transworld, Working Paper No. 15, 2013), http://www.transworld-fp7.eu/?p=1138 (last visited Sept. 29, 2017).

[41] *See* G.A. Res 70/999-S/2016/620 (Aug. 17, 2016) (where the Secretary-General, as a follow-up to the outcome of the Millennium Summit outlined a 10-year working plan for the role that R2P can, and should, play in responding and preventing atrocities).

[42] UNESCO Expert Meeting, *supra* note 8.

III. R2P and Cultural Heritage

In applying R2P to instances of cultural heritage destruction there are two primary questions that should be addressed. First, is it even reasonable to apply R2P to push States to intervene on behalf of cultural heritage at risk of destruction? And second, even if there is not a textual inconsistency, is the expansion of R2P to include prevention of *all* war crimes too broad and thereby perhaps contrary to the intent either of initial drafters of R2P, or at the very least, contrary to what the States parties may have meant to agree to in General Assembly Resolution 60/1?

While R2P is housed within a U.N. resolution, as opposed to operating as a standalone treaty, it is nonetheless useful to apply tools of treaty interpretation in understanding the scope of the doctrine.[43] Article 31 of the Vienna Convention on the Law of Treaties provides that, as a general rule of interpretation, a treaty shall be interpreted "in good faith in accordance with the ordinary meaning … in their context and in the light of its object and purpose,"[44] as well as recognizing the importance of ensuring that "special meanings" of terms are maintained. R2P is enshrined within the U.N. System through its passage as a General Resolution during the 2005 World Summit. Paragraphs 138 and 139 of General Assembly Resolution 60/1 extrapolate on the "[r]esponsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[45]

A. Textual Analysis of R2P

The plain meaning of this text raises two issues. First, considering that the responsibility is directed at the protection of populations, is the application of R2P to cultural heritage one that

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[43] Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. U.N. L. 73, 85-95 (1998).

[44] Vienna Convention on the Law of Treaties, art. 31, ¶1, May 23, 1969, 1155 U.N.T.S. 331.

[45] G.A. Res. 60/1, *supra* note 10, at ¶¶138-139.

would no longer be protecting populations and instead focus on objects? And second, if the protection is for the population, is it possible to read the need to protect populations from "destruction of cultural heritage" as an instance of genocide, war crimes, ethnic cleansing and/or a crime against humanity?

One route for understanding the full meaning of *war crimes* would be to draw upon the Rome Statute of the ICC.[46] Specifically, considering that *war crimes* is a term of art, it would make the most sense to believe that Resolution 60/1 was designed to refer back to the definition found in the Rome Statute.[47] Likewise, the ICISS, in discussing the meaning of war crimes, points directly to the founding document of the ICC, stating that a more detailed explanation of *war crimes* could be found there.[48] While General Assembly Resolution 60/1 does not codify the ICISS report *per se*, given the fact that the concept of R2P was pulled directly from this report, it stands to reason that absent any evidence to the contrary, the full list provided by the Rome Statute is probably most instructive; however, it is nonetheless important to acknowledge that, unlike the Rome Statute, Resolution 60/1 seeks to protect *populations* from these actions, and so one must ask, does the protection and preservation of cultural heritage serve to protect populations? Or is it there merely to protect particular objects or sites?

Other portions of the ICISS Report do mention attacks against culture; however, that incorporation only ever occurs in

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[46] *See* Michael Contarino et al*., The International Criminal Court and Consolidation of the Responsibility to Protect as an International Norm*, 4 GLOBAL RESP. TO PROTECT 275, 298 (2012) (indicating that while the ICC does not expressly draw upon the doctrine of R2P, the ICC may have contributed to the advancement of a norm cascade and consolidation of R2P principles); Luis Moreno-Ocampo, Chief Prosecutor for the ICC, Keynote Address at the Responsibility to Protect: Engaging America (Nov. 16, 2006) (arguing that "the scheme envisioned by the Responsibility to Protect . . . is very much the scheme retained in [the Rome Statute] for the International Criminal Court.").

[47] Contarino, *supra* note 47, at 305 (discussing statements made by the Foreign Minister of Australia regarding the Libyan intervention in order to demonstrate that "the language used by actors while discussing R2P parallels the language used when referring a state to the [ICC].").

[48] ICISS Report, *supra* note 9, at ¶3.30.

passing. For example, the ICISS report mentions how non-intervention should be prioritized whenever possible in order to "protect peoples and cultures;"[49] however, when discussing the potential need for intervention under the Third Pillar, there is no mention of intervention as a strategy to protect culture, let alone cultural heritage.

In this way, the textual hook for using the Rome Statute to understand the meaning of *war crimes* that could warrant intervention becomes a bit more complicated. Given the consistent mentioning of the importance of protecting *populations*, as well as the absence of any discussion of cultural heritage or even the destruction of anything other than people directly, it is possible that there is some ambiguity as to whether or not the full list of war crimes from the Rome Statute really should be read into Resolution 60/1. It is therefore useful to also look at the object and purpose of the doctrine to help determine the scope of R2P, even if it is perhaps more expansive than what the original drafters, or even States, had contemplated.[50]

Furthermore, since arguing that "protecting populations" expressly includes protecting cultural heritage would be a rather absurd interpretation of the text, it is likely that a more useful approach to this analysis is to determine if, in light of the object and purpose of the Resolution and other international legal documents that use similar terminology, it would be reasonable to include protection of cultural heritage into the types of obligations that States agreed to in Resolution 60/1.

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[49] *Id.* at ¶4.11.

[50] While generally speaking, it may be useful to limit the scope of R2P to the types of crimes expressly contemplated either by the ICISS or by States in drafting the General Assembly Resolution, the recent application of the provisions of the Rome Statute addressing cultural heritage destruction as well as the increasing frequency that cultural heritage sites are being destroyed may justify a more dynamic form of interpretation where, in order to keep the doctrine consistent with contemporary developments, the scope of this principle should not be constrained to its original meaning, but rather, as long as not inconsistent, it should be able to expand to meet the needs of today's society.

B. Understanding the Object and Purpose of R2P

The Rome Statute and ICC jurisprudence are perhaps most useful in understanding the object and purpose of *war crimes* found in General Assembly Resolution 60/1.[51] As mentioned above, the ICISS indicates that in drafting the doctrine of R2P the Rome Statute provides the enumerated list of crimes that R2P is designed to prevent. Here, in Article 5, the Rome Statute expresses that "the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole" and that these include: the crime of genocide, crimes against humanity, war crimes and crimes of aggression (once provisions are adopted in accordance with articles 121 and 123).[52] Furthermore, Article 8(2)(e)(iv) defines War Crimes as including "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law . . . [including] . . . [i]ntentionally 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."[53]

This particular provision was applied in *the Prosecutor v. Ahmad Al Faqi Al Mahdi* to find that Al Mahdi, by intentionally destroying various cultural heritage sites, committed war crimes. Likewise, intentional destruction of cultural heritage is classified as a war crime through various international criminal tribunals.[54] For

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[51] In addition to the Court's jurisprudence, it may also be useful to note that the ICC Chief Prosecutor Luis Moreno-Ocampo stated, in his Keynote Address in 2006 that "[t]he International Criminal Court could add legitimacy to the Security Council's decision to apply the Responsibility to Protect concept." Moreno-Ocampo, *supra* note 47.

[52] Rome Statute, *supra* note 4, art. 5.

[53] *Id*. art. 8(2)(e)(iv).

[54] *See, e.g.*, U.N. S.C. Rep. of the Security Council, May 3, 1993, ¶ 44, U.N. Doc. S/25704 (deciding that the violations of the law or customs of war, in the context of the International Criminal Tribunal for the Former Yugoslavia; would include (d) "seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science"); Amended Cambodian Law on the Establishment of

example, the International Criminal Tribunal of the Former Yugoslavia (ICTY) "has plainly applied Art(3)(d) of its statute to cases of willful damage to, or destruction of, cultural heritage . . . including in the context of non-international armed conflicts."[55]

Furthermore, even when taking into account the fact that Resolution 60/1 speaks to the need to protect populations, intentional destruction of a people's cultural heritage has been argued to be one of the first steps that an actor may take in working towards the elimination of the population more broadly.[56] The ICTY has endorsed the ICJ's opinion that "destruction of cultural heritage…may legitimately be considered as evidence of an intent to physically destroy the group."[57] Likewise, an interpretation of R2P

Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Democratic Kampuchea, art. 7, NS/RKM/1004/006 (Oct. 27, 2004); *International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind*, [1996] 2 Y.B. INT'L L. COMM'N 15, 53, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2) (also discussing this articles relationship to the provisions in the Nürnberg Tribunal and the International Tribunal for the Former Yugoslavia, *id.* at 55).

[55] Federico Lenzerini, *Terrorism, Conflicts and the Responsibility to Protect Cultural Heritage*, 73 THE INT'L SPECTATOR 70, 73 (*citing* Prosecutor v. Brđanin, Case No. IT-99-36-T, ¶ 595, Judgment (Int'l Crim. Trib. for the Former Yogoslavia Sept. 1, 2004); Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶¶ 229, 230 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005); ICTY, Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 27, 98 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)).

[56] *Lenzerini supra* note 56, at 72; *see also* JOHN QUIGLEY, *Destroying a Group, in* THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS, 101, 104 (2006) (discussing the U.N.-appointed experts analysis regarding possible genocide charges against Khmer Rouge for attacks against Buddhist monkhood such as forcible disrobing); for a broader discussion of the importance of cultural rights, *see, e.g.,* Lindsey Kingston, *The Destruction of Identity: Cultural Genocide and Indigenous Peoples*, 14 J. HUM. RTS. 63, 63-65 (2015).

[57] Lenzerini, *supra* note 55, at 72 (making reference to ICJ 2007 Judgment Concerning the Case of the Application of the Convention on the Prevention and Punishment of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 40 (Feb. 26)); *see also* Prosecutor v. Krtić Case No. IT-98-33-T, Judgment, ¶580 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2002) (discussing the destruction of mosques and houses belonging to the Bosnian Muslim population as a precursor to broader genocidal acts towards the Bosnian Muslim population).

that constrains *war crimes* to a list that is more restrictive than that found within the Rome Statute risks designing a system where only certain kinds of war crimes warrant preventative measures. Since the Rome Statute does not establish any sort of hierarchy of *war crimes* there is not a well warranted reason to functionally create such a hierarchy in the context of R2P where only certain war crimes, despite their illegality, are worthy of potentially justifying outside intervention.

Therefore, considering that intentional destruction of cultural heritage is, by definition, a war crime and the fact that the purpose of R2P is to remind States of their obligation to prevent these kinds of atrocities within their own country, ask for assistance when necessary, and, if there are no other alternatives, intervene to prevent said crimes from occurring, it would be counterintuitive to not allow for cultural heritage protection to be considered a permissible form of intervention.

IV. Practical Benefits and Consequences in Applying R2P

This leaves open a remaining, and perhaps more important question, even if textually permissible, is there a practical benefit to using R2P for the protection of cultural heritage? Furthermore, given that there are other treaty regimes in place in the field of cultural heritage, it is possible that the extension of R2P is not necessary. Therefore, it is necessary to determine if the current safeguards are, or could be, sufficient and if there is any added benefit to expanding R2P to be one of the possible justifications for cultural heritage protection.

Furthermore, even if the current safeguards are insufficient, does the use of R2P in this field add anything, or is this doctrine one that would either fail to provide a tangible set of guidelines for states to use to justify intervention or, worse yet, could R2P in practice further cultural heritage destruction rather than protect it?[58]

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[58] While UNESCO also includes intangible heritage into the category of cultural heritage, this concept is both relatively new (beginning only in 2003 with

A. Current Alternatives to R2P[59]

1. The Existing Cultural Heritage Treaty Regime

The first treaty regarding the protection of cultural heritage was the *Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments* (Roerich Pact by American States) (1935). This treaty was discussed as a draft by the League of Nations; however, it ultimately remained an Inter-American convention with

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the Convention for the Safeguarding of the Intangible Cultural Heritage which only entered into force in 2006) and the full scope of intangible heritage is still relatively unknown. The variety of items on the intangible heritage list ranging from the *gastronomic meal of the French* to the *idea and practice of organizing shared interests in cooperatives* seems to indicate that there is a risk almost anything could fall into the scope of "intangible heritage" as such. Even though UNESCO is comfortable including these types of heritage into the concept of "cultural heritage," this paper proceeds from the idea that, in order for cultural heritage to be taken seriously by States and not become so broad that there is an unlimited scope of items, activities, and objects that fall under the umbrella of "cultural heritage," cultural heritage should be limited to physical property. This is in line with the concept of *noscitur a sociis* and we should interpret "cultural heritage" in line with the other types of things listed in the Rome Statute which focus in on physical things such as: *buildings*, military installations, towns, hospitals etc. The most appropriate reading of "cultural heritage" in this context both from a practical standpoint, but also from a textual standpoint, would require limiting "cultural heritage" to *tangible* cultural heritage. As such, this paper does not seek to justify R2P with respect to *intangible* cultural heritage, even if it is included on UNESCO's list. *Cf.* website of the Convention for the Safeguarding of the Intangible Cultural Heritage, https://ich.unesco.org/en/lists (last visited Sept. 29, 2017).

[59] While not discussed, there is also a treaty regime to deal with illicit trafficking of cultural heritage property, including the 1970 UNESCO Convention Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. These treaties help to establish a regime to return inventoried stolen cultural property through diplomatic channels and restitution for illicitly sold or traded property respectively. Likewise, some States have adopted local or regional frameworks to provide for compensation or return of cultural heritage property. For example, the EU has adopted regulations to facilitate the return of Iraqi cultural heritage property.

only 10 States parties making this treaty of little use.[60] Following the Roerich Pact, attempts were undertaken to acknowledge the importance of cultural property protection. As a result, UNESCO submitted its first proposal regarding the protection of cultural property, the Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, which was later used to draft the Convention of the Protection of Cultural Property in the Event of Armed Conflict (1954). While the 1954 Convention has 127 State parties, it provides little guidance of *how* cultural property is to be protected.[61] This Convention even goes so far as to simply require the protection of cultural property within one's own country[62] and therefore the 1954 Convention provides little to no guidance as to what could, or should, be done when a country is unable or unwilling to protect its cultural property or, worse yet, what can be done by the international community when the country where the cultural heritage site is housed is in fact the cause of the sites destruction. Moreover, the Convention does not establish any sort of adjudicative body to ensure compliance with the treaty regime. As such, there is not a way to legally find a State in violation of their obligations under the Convention nor is there an

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[60] Brazil, Chile, Colombia, Cuba, Dominican Republic, El Salvador, Guatemala, Mexico, United States of America, Venezuela. Interestingly, no State party provided a reservation to this treaty.

[61] *See, e.g.,* Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, art. 2, *opened for signature* May 14-Dec. 31, 1954, 3511 U.N.T.S. 2016 [hereinafter *the 1954 Convention*] (stating that: "[f]or the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property").

[62] *Id.* at art. 3 (stating that: "[t]he High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate."). Likewise, the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property has "postulated a national idea of cultural heritage based on sovereignty and property rights." Francesco Francioni, *The 1972 World Heritage Convention: An Introduction, in* THE 1972 WORLD HERITAGE CONVENTION: A COMMENTARY 3 (Francesco Francioni ed., 2008).

organ responsible for enforcing the cultural heritage regime.[63]

Therefore, despite this treaty regime designed to deal with the protection of cultural property, States have yet to commit themselves to a clearly defined mechanism to truly protect the global cultural heritage sites that they identify. The 1954 Convention and its two Protocols *should* in theory be able to provide some safeguards to protect cultural heritage. One hundred twenty-seven States parties have ratified the 1954 Convention, later supplemented by the First Protocol regarding the exportation of cultural property. The Second Protocol was designed to enhance the basic protections provided under the 1954 Convention and to increase enforcement by defining five serious violations which establish individual criminal responsibility, and it expanded the scope of the Convention to non-international armed conflicts. However, while the First Protocol has received almost as many signatures as the original Convention,[64] the Second Protocol has only 69 ratifications and 11 signatories. Several critical States are absent from this list, including both common intervening actors such as France, the United Kingdom and the United States. It also fails to include States who are currently experiencing some of the most pressing cultural heritage destruction by the Islamic State, namely Iraq and the Syrian Arab Republic.[65]

Thus, while the 1954 Convention and its protocols could in theory be useful in better preserving cultural heritage, unless additional States choose to ratify these conventions, it is hard to imagine how they will be able to work to either disincentivize cultural heritage destruction, or to serve as a means to actively promote protection of cultural heritage. Furthermore, the continued destruction of cultural heritage sites and the lack of international action serve to demonstrate that the current tools available to states

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[63] It is useful to note that the absence of an enforcement body is not necessarily problematic, insofar as generally speaking, treaties do not include an enforcement mechanism; however, unlike some treaties, the 1954 Convention does not come with an embedded committee such as the Human Rights Committee, an independent body of experts that monitors the implementation of the International Covenant on Civil and Political Rights by its States parties.

[64] 104 States parties.

[65] Syria is, however, a signatory to the Second Protocol.

are inadequate to prevent the destruction of cultural heritage sites.

That said, the 1954 Convention should not be considered useless for developing cultural heritage preservation. Meetings between the High Contracting Parties have helped to encourage dialogue between States and have resulted in discussions on the potential expansion of States' role in cultural heritage preservation. For example, at the Eleventh Meeting of the High Contracting Parties, the final report discusses the Secretariat's report on an expert meeting regarding the concept of the "Responsibility to Protect" as applied to cultural heritage production as well as UNESCO's action plan for the protection of cultural heritage in the event of armed conflict.[66] As such, perhaps rather than looking to the treaties themselves to provide an avenue for cultural heritage protection, it would seem as though this treaty regime might also provide some foundations for the use of R2P as a tool that States can rely upon, or at the least agree upon, considering that R2P received increasing support over the years, at least up until the recent Libyan intervention, whereas the States' willingness to join the Second Optional Protocol seems to have stalled.

In addition to the 1954 Convention, States adopted and ratified the 1972 World Heritage Convention with 193 members, which theoretically provides guidelines for the protection of World Cultural and Natural Heritage.[67] This convention includes a robust definition of cultural and national heritage,[68] and includes in Articles 4 and 5 an explanation of a State party's role in "ensuring the identification, protection, presentation and transmission to future generations of the cultural and natural heritage" while simultaneously acknowledging that this property "belongs primarily to [the] State."[69] This focus on State sovereignty seems to supersede

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[66] UNESCO, ELEVENTH MEETING OF THE HIGH CONTRACTING PARTIES: FINAL REPORT, ¶13, CLT-15/11.HCP/CONF.201/Report (Mar. 16, 2016).

[67] *See generally* BASIC TEXTS OF THE 1972 WORLD HERITAGE CONVENTION (2005), http://whc.unesco.org/uploads/activities/documents/activity-562-4.pdf.

[68] Convention Concerning the Protection of the World Cultural and Natural Heritage, arts. 1 & 2, Nov. 16, 1972, 15511 U.N.T.S. 152 [hereinafter *1972 Convention*].

[69] *Id*. at art 4

the global nature of heritage and does not provide a clear framework for how States, especially in the context of war, can work to help assist *other* States in protecting and preserving cultural heritage. In fact, the 1972 Convention defines international protection as "the establishment of international co-operation and assistance designed to support States Parties to the *Convention* in their efforts to conserve and identify [world cultural and natural heritage]."[70] This is particularly important considering that while pushing for cooperation, the 1972 Convention does not explain *how* States will accomplish this goal nor does it provide alternative mechanisms such as humanitarian intervention when a State is unable or unwilling to take the necessary measures to ensure that its cultural heritage sites are adequately protected.[71]

The absence of this discussion is due to the fact that, at the time of ratification, the primary concern for cultural heritage

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[70] *Id*. at art 7.

[71] Perhaps one could read Article 13(3) and (4) of the 1972 Convention as providing some guidance, insofar as it states that "[t]he committee shall decide on the action to be taken . . . [and] determine where appropriate, the nature and extent of its assistance, and authorize the conclusion, on its behalf, of the necessary arrangements with the government concerned. ". . . in so doing bear in mind the respective importance for the world cultural and natural heritage of the property requiring protection, the need to give international assistance to the property most representative of a natural environment or of the genius and the history of the peoples of the world, the urgency of the work to be done, the resources available to the States on whose territory the threatened property is situated and in particular the extent to which they are able to safeguard such property by their own means." *Id.* at arts. 13(3)-(4). However, considering that the 1972 Convention does not discuss issues such as the impact of war, violence or even inter- or intra-country violence, the 1972 Convention, despite its name, fails to provide a clear methodological framework for *how* protection of cultural heritage will be achieved. A State may request emergency assistance for things such as the safeguarding of property; however, this framework not only presupposes that the funds will be requested at the appropriate time (before February 1); that the Committee will approve of the funds; and the State where the cultural heritage property is located *requests* assistance. It does not take the additional and arguably necessary step of providing an affirmative obligation of *other States* to assist in the preservation of cultural heritage that is located on foreign soil. *See* Anne Lemaistre & Federico Lenzerini, *Part II Commentary, Art.19–26 International Assistance*, *in* THE 1972 WORLD HERITAGE CONVENTION: A COMMENTARY 305, 318 (Francesco Francioni ed., 2008).

destruction was primarily about State actions, such as industrialization, and traditional dangers such as flooding.[72] Thus, while the 1972 Convention's title seems to speak to the development of a new, or perhaps more broad, regime of cultural heritage protection it is primarily focused at States' internal obligations, establishing more robust monitoring protocols and periodic reporting on the status of cultural heritage sites.[73]

Due to the ambiguity of the language within the 1972 Convention, it is unclear where the Convention stands with regard to the "collective interest" in the protection of cultural heritage and its relationship with international law regimes.[74] Nonetheless, in practice States have not found this collective interest as synonymous with any sort of customary international legal duty for States to engage in protective measures for preserving cultural heritage sites.[75] Instead, the 1972 Convention and the consistent reference to the importance of cultural heritage and parallel condemnation of its destruction seems to point to the development of customary international law with respect to *diplomatic criticism* which ignores the question of if, and when, intervention could be permissible.[76] Interestingly, the consistent acceptance of this sort of diplomatic criticism, while likely insufficient to provide action in support of

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[72] Francesco Francioni, *Part II Commentary, The Preamble*, *in* THE 1972 WORLD HERITAGE CONVENTION: A COMMENTARY 305, 318 (Francesco Francioni ed., 2008).

[73] U.N. Educational, Scientific and Cultural Organization [UNESCO], *Operational Guidelines for the Implementation of the World Heritage Convention*, ¶¶ 96-119, 169-176, WHC.16/01 (Oct. 26, 2016); *see also* UNESCO World Heritage Centre, ¶¶ 96-119, 169-176, WHC.05/2 (Feb. 2, 2005); *see also* Guido Carducci, *Part II Commentary, Art.4–7 National and International Protection of the Cultural and Natural Heritage*, *in* THE 1972 WORLD HERITAGE CONVENTION: A COMMENTARY 103, 114 (Francesco Francioni ed., 2008) (noting that "[t]he content and implications of the term *protection* of heritage are not defined by this provision despite its importance for Chapter II—and actually for the whole Convention in view of its title. Indeed, Article 4 focuses on the entity concerned by this obligation, not on its content and scope" *Id.*).

[74] Guido Carducci, *supra* note 74, at 134.

[75] *See, e.g.*, Roger O'Keefe, *World Cultural Heritage: Obligations to the International Community*?, 53 INT'L & COMP. L.Q. 189, 205 (2004).

[76] *Id*. at 206.

intervention does help lay the groundwork for applying R2P in the cultural heritage context.[77]

Thus, considering that R2P is not an actual treaty, but is at best soft law, and more likely merely a principle to which States are not legally bound, it may have the potential to be more useful in influencing the way that binding treaties, such as the 1954 Convention and the 1972 Convention, are interpreted and applied.

2. Cultural Heritage Protection under the International Covenant on Economic, Social and Cultural Rights

In addition to the various conventions that exist expressly in the context of cultural heritage and cultural property, there are provisions within the International Covenant on Social and Economic Rights (ICESCR) that provide some potential basis for States' obligations to protect cultural property.[78] For example, The Committee on Economic, Social and Cultural Rights (CESCR), in its General Comment No. 21, found that Article 15(1)(a) of the ICESCR should be interpreted broadly providing that States parties are under an obligation to "[r]espect and protect cultural heritage in all its

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[77] It may be useful to note that as, or if, this diplomatic criticism further crystallizes, it may be possible for States to argue, in line with Article 48 of the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Conduct, that a State's failure to preserve and protect global cultural heritage results in a harm to *all States,* thus permitting proportionate countermeasures, including justifiable protective intervention. Int'l L. Comm'n, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts supra* note 20; *see also* Guido Carducci, *supra* note 74, at 140-143 for a further discussion of the applicability of ILC Art 48 in the context of cultural heritage protection.

[78] Article 27 of The International Covenant on Civil and Political Rights has also been invoked to support cultural heritage protection claims; however, as this article does not contain any reference to the right to *property*, a more in-depth discussion of the potential uses of this Article is not included. *See* ALESSANDRO CHECHI, *Foundational Issues, in* THE SETTLEMENT OF INTERNATIONAL CULTURAL HERITAGE DISPUTES 9, 11-12 (2014), (discussing several cases invoking Article 27 of the ICCPR in support of cultural heritage protection.)

forms, in times of war and peace, and natural disasters.[79]

This right, based in Article 15 of ICESCR, has also been supported by the United Nations Human Rights Council which stressed that "the destruction of or any other form of damage to cultural property may impair the enjoyment of cultural rights, in particular of Article 15 of the International Covenant on Economic, Social and Cultural Rights" and that "the protection of cultural property during armed conflicts can contribute to the full enjoyment of the right of everyone to take part in cultural life."[80]

Nonetheless, the ICESCR has been unable to serve as a mechanism for ensuring that cultural property and cultural heritage is actually protected. For example, the ICESCR has been described as "vague and programmatic"[81] and the rights contained within the ICESCR are expressly designed to be progressively realized.[82] The CESCR has called on States to improve their cultural heritage protection measures;[83] however, even if the ICESCR and the CESCR are able to instill a sense of necessity on behalf of States Parties to engage in cultural heritage protection, it does not provide a clear avenue for what to do when the cultural heritage property in need of protection is located in a State which is unable to effectively protect the property or in a State which is not a party to the ICESCR. Moreover, as the ICESCR merely speaks to a State Party's obligations internally, it fails to identify what obligations *other States*

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[79] U.N. Comm. on Economic, Social and Cultural Rights [CESCR], *General Comment No. 21: Right of everyone to take part in cultural life*, ¶50(a), U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009).

[80] H.R.C. Res. 6/1, ¶ 4, U.N. Doc. A/HRC/RES/6/1 (Sept. 27, 2007).

[81] CHECHI, *supra* note 79, at 29.

[82] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3, Art. 2(1).

[83] CHECHI, *supra* note 79, at 30 (citing to the CESCR's 1993 report calling on Italy to improve protection of national patrimony from vandalism and theft, the 1995 condemnation of Iraq's destruction of cultural assets belonging to religious communities and minorities after the 1991 uprisings; and the 2011 recommendation to Afghanistan to develop a "comprehensive national cultural policy that ensures respect for . . . cultural heritage and diversity" and to enhance "its current practice with regard to the registration and protection of historical monuments and archaeological sites." *Id.* at 31.)

may have in ensuring that cultural heritage property, as a part of the world's heritage, is protected. Thus, while the ICESCR is useful, insofar as it identifies a progressively realizable right that communities should be able to call upon their State in order to protect cultural heritage sites, it is unlikely to be able to serve as a tool to prevent destruction by outside actors.

As such, this paper proffers the use of R2P as an alternative approach considering that it provides an opportunity for transnational protection of cultural heritage. To better understand the potential benefits and consequences of using R2P in the context of cultural heritage preservation this paper will now engage in three different case studies to better understand how what using R2P in this field would look like.

B. Applying R2P to Cultural Heritage Preservation

To understand how R2P could be applied this paper will discuss three different instances of cultural heritage destruction that have drawn international attention. These cases help to demonstrate the role States could play to ensure that cultural heritage is preserved. First, this section will draw upon the looting of the Iraq Museum as a way to demonstrate the role that R2P could play in States' tactical decision-making in order to not only ensure that they live up to their UNESCO treaty obligations as well as general principles of international law to ensure the preservation of global cultural heritage.

Next, the current Syrian situation, in particular the expansion of the Islamic State into various portions of the country that threaten the destruction of various UNESCO world heritage sites will be analyzed in order to see how R2P could be used as a tool for intervention. While it is unlikely that there is international consensus regarding the legality of a regional block using R2P to permit intervention absent U.N. Security Council authorization, it is nonetheless useful to see how the Security Council could use R2P as a way to justify intervention in this particular context not strictly on behalf of Syrian civilians, but, instead on behalf of the endangered

cultural heritage sites.

Finally, to look at one of the potential drawbacks of expanding the international community's role in other States' domestic affairs, this section will focus on the destruction of the Bamiyan Buddhas and, in particular, the role that UNESCO and the international community may have had in the Taliban's ultimate decision to destroy this particular world heritage site. This will help to highlight whether or not such a prioritization of cultural heritage, even if done on behalf of the international community, would be interpreted in this light, or, if there is a risk that intervention on behalf of these sites might be perceived merely as a tool of Western intervention. Specifically, it will seek to understand if, in addition to the current criticism that R2P will be coopted by States to justify regime change, if R2P in the preservation context could be read as proof of the international community's apathy to a population in need of humanitarian assistance.

1. R2P and the Looting of the Iraq Museum

After the U.S. invasion of Iraq, there were growing concerns that it would be necessary to protect Iraq's archeological center and that there was a high risk that looting of its items of heritage may occur.[84] This included not only warnings on behalf of various NGOs but also international actors such as the International Council on Monuments and Sites as well as UNESCO calling on the United States to protect cultural heritage sites.

Despite these requests, U.S. forces failed to actively protect the Museum from looters and, while after international backlash to the lack of protection and recovery efforts for the Iraq Museum the U.S. began to investigate and develop a plan of action to prevent future reoccurrences, had the R2P doctrine been applied in this instance, it is possible that the looting would have been less likely to occur, or at the least, it would have been easier to hold U.S. forces

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[84] For a timeline of events, see, *e.g.*, Geoff Emberling, *Preface* to CATASTROPHE! 7, 11-12 (Geoff Emberling & Katharyn Hanson eds., 2008).

responsible for their inaction.

Under international law, the U.S. is responsible for the actions that occurred at the Iraq Museum. Despite being located physically in Iraq, after the U.S. invasion the U.S. assumed control both as an occupying force[85] but even more broadly, U.S. forces had effective control over the area and, as such, they assumed authority and responsibility for the persons and in this case, objects, within their control.[86]

As such, when applying R2P to this case, the first question becomes not what responsibilities Iraq had, but instead, what actions the U.S. needed to take to fulfil its obligations under the First Pillar of R2P: the responsibility to prevent. As envisioned by the International Commission on Intervention and State Sovereignty, this requires "address[ing] both the root causes and direct causes of international conflict and other man-made crises putting populations at risk."[87]

Arguably, the U.S. may have fulfilled this obligation with respect the lives of the local community, insofar as the military strategy likely took civilian safety into account; however, there was no clear strategy preventatively with respect to the Iraq Museum. This demonstrates a failure to address the potential looting that ultimately occurred. Because cultural heritage is, as explained above, arguably one of the listed crimes R2P is designed to prevent, to fully live up to its obligations, the U.S. arguably should have ensured not only the physical safety of persons, but also the cultural heritage items. Furthermore, it is important to recognize that what puts a population at risk is not just what could impact their physical safety, but this evaluation also requires looking at what impact actions could have on their culture, heritage, and livelihood more broadly since

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[85] *See, e.g.*, Cyprus v. Turkey, App. No. 25781/94, 2001-IV Eur. Ct. H.R. Rep. 1 (2001) (finding that Turkish occupation of Cyprus constituted an exercise of extraterritorial jurisdiction).

[86] *See, e.g.*, Al-Skeini v. UK, App. No. 55721/07, 2011-IV Eur. H.R. Rep. 99 (2011) (discussing how the UK's use of military facilities in Iraq places those areas under the effective control of the UK and therefore within the jurisdiction, and responsibility, of the UK).

[87] ICISS R2P Report, *supra* note 9, at XI.

destruction of cultural heritage may be an indicator of an intent to physically destroy a particular population.[88]

While this does not mean that the destruction of cultural heritage could trigger R2P under either the ethnic cleansing or genocide criteria, it does show how destruction of cultural heritage is not necessarily the end goal of the perpetrator. Instead, at times, it is useful to see how destruction of cultural heritage could be a gateway for larger endeavors and, as such, taking the destruction of cultural heritage more seriously could provide an avenue to prevent further destruction of a population itself before it occurs.

Furthermore, given that there was international knowledge of the risk of looting of the museum, as shown by the multiple international reports issued on the subject, as well as the statements from UNESCO specifically, one could argue that the international community had an obligation to assist the State in control, and, should that prove ineffective, the international community has an obligation to intervene, through the least intrusive means, to ensure that this failure was resolved.

Thus, rather than being the primary response of the international community both before the looting and after being fulfilled by statements and broad action plans through UNESCO meetings, R2P would provide for a positive obligation of the international community to take steps to resolve the issue. This does not necessarily require bringing the issue before the Security Council and calling for military intervention. For instance, in this case, given the existence of military forces already operating in Iraq, U.S. forces could, and under R2P arguably should have taken it upon themselves to actively develop a protection plan for the Iraq Museum as a part of the Iraq invasion. Alternatively, the U.N. General Assembly could have issued a resolution calling on the U.S. to develop an action plan for how to protect Iraqi cultural heritage sites.[89]

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[88] Lenzerini, *supra* note 56, at 72.

[89] While the General Assembly resolution would not have binding force, the effect of shaming and introducing the issue on a broader international scale could have been a sufficient stick to result in a change in U.S. military strategy considering that it would place the issue on the international agenda.

Even if these strategies would not have been effective in preventing the looting of the Iraq Museum, they demonstrate ways that the international community could use R2P to more effectively begin to live up to the principles that they claim to support under international law. Much like regional courts' willingness to find States responsible for failures to investigate human rights violations and failures to take reasonable steps to prevent human rights violations, States' failure to take the possible destruction of cultural heritage seriously is inconsistent with customary international law norms regarding the prohibition of genocide, war crimes and crimes against humanity.[90] If States want to truly live up to these obligations, R2P can be useful as a framework to contextualize State responsibilities and to justify international responses when a State fails to live up to their responsibilities.[91]

2. R2P as Applied to Syria and the Islamic State

The case of Syria is in many ways more complicated, considering that it would require R2P being applied to an independent intervention into an ongoing crisis. Since 2011, the Islamic State has been able to not only take control of various cultural heritage sites throughout Syria, but has also actively promoted looting, targeting and has even used these sites for military

[90] States have developed a regime to punish the persons responsible for looting. While this may serve as a deterrent, it does not include a mechanism to prevent looting from occurring in the first place. *See, e.g.*, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

[91] Practically speaking, this is perhaps an easier avenue to enhance obligations, considering that R2P is simply a principle adopted by the UN General Assembly and gives it some legitimacy without having the added hurdle of ratification. Thus, even though the U.S. or other States ratifying the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol would provide more teeth to U.S. obligations to protect cultural heritage sites, the difficulty in achieving ratification and the general aversion to treaty ratification that permeates U.S. policy makes justifying actions based on R2P a more palatable, and also, despite the lack of enforcement mechanisms, a more likely solution to this issue.

operations.[92] Unlike in the previous example of Iraq, the Islamic State is arguably the actor in control and, as a non-State actor, it is hard to imagine how the international community could hold the Islamic State responsible for protecting these monuments. Likewise, it is hard to argue that Syria has the capacity to respond to the Islamic State and control destruction of cultural heritage sites within the territorial reach of Syria, especially considering the government does not have consistent control over its territory.

As such, with respect to R2P, the Syrian case demonstrates an example of what kind of intervention might be permissible by third parties in order to prevent further destruction of cultural heritage. The ICC Prosecutor has already described the "wanton destruction of cultural property" as a war crime; however, unlike in the case of cultural heritage destruction found in Mali, Syria is not a party to the ICC and as such, the ICC does not have territorial jurisdiction over the parties preventing the crimes from being tried before the Court.[93] Therefore, Syria presents a case where unless Syria domestically punished the Islamic State for their attacks, it is almost guaranteed that these actions would occur with impunity. As such, it is a useful case to demonstrate how, if the international community truly believes that the destruction of cultural heritage is a criminal act and this particular case of destruction has already occurred, and will likely continue to occur, the international community should theoretically intervene.[94]

The fact that there is no recourse to the ICC adds to the importance of a response by the international community.[95] Cultural

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[92] Chiara De Cesari, *Post-Colonial Ruins: Archaeologies of Political Violence and IS*, 31 ANTHROPOLOGY TODAY 22, 22-26 (2015).

[93] Lenzerini, *supra* note 54, at 74.

[94] While perhaps a crude parallel, considering that cultural heritage is a crime, like other crimes, if the State has the knowledge of when and where the crime will occur, it would seem counterintuitive to simply wait for the crime to occur and only afterwards punish the offender. In this case, the Islamic State has stated an intent to destroy many cultural heritage sites and items, has demonstrated a willingness to do so, and so the question arises, if cultural heritage destruction is a crime, should the international community not treat this crime as it would view domestic ones and examine what permissible tools are available for intervention?

[95] At present, the only remedy is to seek reparations for the theft of cultural

heritage is being directly targeted by the Islamic State and it is important to recognize that these actions are not just destruction of property but "may disclose evidence of the existence of the intent to commit genocide," considering that these attacks are "on the cultural and religious property and symbols of the targeted group."[96]

Unlike the Iraqi case, this is clearly one that falls into the Third Pillar of R2P. Syria clearly cannot fulfil its responsibility to protect these sites (First Pillar) and no matter what kind of encouragement the international community provides, it is unlikely that absent tangible action, Syria could fulfil this responsibility (Second Pillar).[97] The international community would, under the framework of R2P "[be] 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 co-operation with relevant regional organizations as appropriate."[98]

Following the principles of R2P, the international community has a positive obligation to act either through the Security Council, or perhaps through regional organizations, or individually "to protect populations from intentional destruction of cultural heritage."[99] At the extreme end, this could include military force. It is irrelevant that the actor perpetrating the destruction in this case is a non-state actor considering that the U.N. Secretary General has even stressed that "[n]on-state actors, as well as States, can commit egregious crimes relating to the responsibility to protect. When they do, collective international military assistance may be the surest way to support the State in meeting its obligations relating to the responsibility to

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heritage property or to seize the persons and/or property being illegally transported. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property *supra* note 90, art. 13.

[96] Lenzerini, *supra* note 55, at 72.

[97] U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009).

[98] *Id*. ¶49.

[99] Lenzerini, *supra* note 55, at 80.

protect and, in extreme cases, to restore its effective sovereignty."[100]

That said, despite the possibility of military intervention in applying R2P, it is unlikely that this would be the most probably result. Under R2P States are likely still constrained by the Article 2(4) prohibition on the use of force absent consent through the Security Council, and it is unlikely that the Security Council would consent to force in this case both due to the general failure of the Libyan intervention, and also, considering that proposed military interventions in Syria have been met with extreme caution by the Security Council thus far.

That said, other more limited forms of humanitarian intervention may be possible in the Syrian context. This could include targeted operations aimed at establishing safe havens and protected cultural zones where force is used not against or on behalf of any particular party but rather on behalf of the cultural heritage site expressly. Additionally, some scholars have argued that the newly approved "cultural blue helmets" could be deployed in the Syrian context.[101] Generally speaking, this suggestion has been approved by UNESCO; however, as of yet the blue helmets have yet to be deployed to protect cultural heritage.

While getting parties on board with intervention in the Syrian context has been incredibly complicated to say the least, it is possible that by reframing the issue in terms of the responsibility to protect cultural heritage some of the politicized aspects could be limited. For example, should there be a greater push by States to apply R2P, the cultural blue helmets could be used. Unlike the Security Council authorizing NATO troops in Libya as the mechanism for implementing R2P, the use of cultural blue helmets could be perceived as more restrained and perhaps serve as a way to move past the Security Council's current standstill with respect to how to proceed in Syria. As such, R2P could become a useful tool to push States towards intervention in a way that operates in a limited

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[100] *Id.* (quoting U.N. Implementing the Responsibility to Protect).

[101] *Id.* at 82; *see also United Nations' Cultural Blue Helmets to protect world heritage sites from Islamic State attacks*, ABC (Oct. 17, 2015), http://www.abc.net.au/news/2015-10-18/un-blue-helmets-to-protect-world-heritage-from-is/6863482 (last visited Sept. 29, 2017).

capacity and avoids some of the sovereignty concerns that arise with other forms of intervention.

3. UNESCO and the Buddhas of Bamiyan

Despite the first two cases outlining the potential benefits of R2P, it is nonetheless equally important to recognize the potential drawbacks of not only R2P, but also the elevation of cultural heritage to something that could be used to justify an intervention into a State's territory. The Taliban's destruction of the Buddhas of Bamiyan can serve as a useful reminder of the potential negative consequences of using R2P to justify cultural heritage preservation, and more specifically, for cultural heritage intervention.

Often, the Taliban's destruction of these cultural heritage items is considered to be a result of an anachronistic view of Islam, attributable to the Taliban's desire to destroy what they consider idols or merely as a political reaction to their isolation by the world community.[102] However, by looking at the regional Pakistani and Afghani press surrounding these events it is possible that one of the driving factors in the Taliban's ultimate decision to destroy this site was the appearance that the international community valued these stones over the living beings in Afghanistan.

While many of the English-language papers condemned the Taliban's actions, discussing a variety of reasons ranging from the importance of global heritage preservation to the fact that these actions would both make the world think Muslims were backward and provide a justification for others to victimize Muslims, there were nonetheless several letters that describe ambivalence regarding this issue noting, in particular, "the hypocrisy of the international community's concern for dead stone in a country suffering a severe drought and a widening famine."[103] Moreover, the Urdu press provided extensive coverage of Taliban statements and reactions of Muslim clerics, including some who supported the Taliban. Much of

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[102] Jamal Elias, *(Un)making Idolatry: From Mecca to Bamiyan*, 4 FUTURE ANTERIOR 13, 14 (2007).

[103] *Id.* at 22.

the daily *Jang*'s coverage discussed Western hypocrisy and noted the fact that States and international organizations were simultaneously willing to offer money to save the statutes while maintaining sanctions over the Afghani people.[104]

This argument was even at times stretched so far as to argue that this constituted a valuing of the Buddhas over the citizens is what transformed the artifacts into idols seeing as "they were now being venerated more than human lives and this reverence necessitated their destruction."[105] Likewise, *Nawa-I waqt*, an openly pro-Taliban paper ran an issue devoted to how "the suffering of children failed to move the West, while the earthen statues brought out their 'humanity.'"[106]

It remains unknown if a more balanced approach from the West that, for example, coupled a desire to protect the Buddhas with food assistance to the civilian population, could have done anything to change the ultimate fate of this cultural heritage site. Nonetheless, this case helps to demonstrate how the overt valuing of items of cultural heritage can serve as a justification for the site's destruction in a way that is viewed as perhaps palatable to the public. For example, despite the potential positive justifications for R2P intervention in Syria discussed above, there may be a real risk that international intervention on behalf of these cultural heritage sites, even if done in the name of the Syrian people, would create a perception that the international community values the preservation of these items more than it values the civilian populations who are also being exposed to war crimes, such as the use of chemical weapons against civilian populations.[107]

Thus, it is important to consider whether by invoking R2P and elevating the international community's response to threats against cultural heritage sites could result in more harm than good? Considering that the mere willingness of UNESCO and the

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[104] *Id.* at 23.

[105] *Id*.

[106] *Id.* at 25.

[107] *Syria chemical 'attack': What we know,* BBC (Apr. 26, 2017) http://www.bbc.com/news/world-middle-east-39500947 (last visited Sept. 29, 2017).

international community to provide funding and protection for these icons was used by the Taliban leadership as a tool to create opposition against the West, it is unlikely that a forcible intervention to protect cultural heritage sites when the local government is unable or unwilling to do so, especially when *not* coupled with protection of the civilian population, would be viewed as reasonable to the local community. If anything, it would seem to be more likely to be used by actors, such as the Islamic State, to support propositions that the international community, and the West in particular, has little interest in protecting vulnerable populations.

Should States individually, regionally, or even through the Security Council choose to intervene on behalf of cultural heritage preservation but not to prevent other enumerated crimes, there is a real risk in creating the perception that the West values these objects more highly than the at-risk populations in the same area. This way, the Bamiyan Buddhas can serve as a reminder of one of the potential risks of an application of R2P. Thus, despite the potential positive benefits of R2P in Syria, this type of intervention is not without its drawbacks.

V. Concluding Observations

While it is possible that R2P has already been too much discarded by the Security Council and States and is unlikely to be revived, UNESCO's insistence on the uses of R2P and the theoretical benefits of this doctrine make understanding how R2P interacts with cultural heritage a useful exercise. These cases help to demonstrate how R2P could be developed as a slightly less political doctrine both to hold States accountable when they fail to protect cultural heritage and to justify intervention when States are unable or unwilling to protect cultural heritage objects. However, as the Bamiyan Buddhas case shows, even if intervention may be possible or even effective at preventing cultural heritage destruction in any individual case, there is a real risk that R2P could backfire and cause subsequent destruction of heritage items, or even just a general distrust in the international community's motives, especially if R2P is being invoked as a justification for intervention, rather than as a

justification to ensure that a particular State lives up to its responsibilities regarding its own cultural heritage sites.

Nonetheless, despite the high risk of drawbacks, it is beneficial to see how R2P could evolve to fit within the needs of today's society and perhaps serve as an interim measure for intervention. For example, while States may not be able to agree on the appropriate level of force to use to protect a population, they may be able to agree on how to protect specific sites which could serve as a building block for a more cooperative intervention on behalf of an effected population. The expansion of the scope of R2P could even be a useful way to revive the doctrine post-Libya. A restrained application of R2P may be necessary before States would be willing to push for a Security Council resolution calling for intervention to prevent more "population-based" measures such as intervention to prevent or halt an ongoing genocide.

Alternatively, R2P could operate as a way for States to depoliticize their interventions by changing the focus from intervention on behalf of a particular side to intervention on behalf of humanity *for objects* that are, according to the UNESCO World Heritage criteria valuable for all. It could even help to further the development of specialized forces, such as the cultural blue helmets, so that the actors involved in cultural heritage preservation are representative of the global community rather than an individual State or regional block. In this way, the universalizing nature of R2P seems to be in line with the concept of an international value to cultural heritage and, as such, it seems only logical that if the international community is willing to prosecute those who destroy these objects, the international community should take seriously its commitment to protect these sites before their destruction.